

COURT OF APPEALS ADOPTS NARROW INTERPRETATION
OF ASSUMPTION OF RISK DOCTRINE

TRUPIA V. LAKE GEORGE CENT. SCHOOL DIST.
(COURT OF APPEALS, APRIL 6, 2010)

In this personal injury action alleging negligent supervision, the Lake George Central School District sought to amend its answer to assert the assumption of risk doctrine in a case where a 12-year-old student was seriously injured when he fell while sliding down a banister. Discovery in the case revealed that the youngster had slid down the banister on earlier occasions.

The Court of Appeals refused to recognize the doctrine of assumption of risk as a defense against liability for injuries suffered by a child during "horseplay." The court concluded that the defense of assumption of risk should be used only to further the public policy goal of encouraging participation in athletics and other recreational activities.

Chief Judge Jonathan Lippman wrote that allowing the amendment would take the state back to a time when a plaintiff's contributory negligence was widely invoked by defendants to bar liability for injuries. After the court's decision in *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143 (1972), the Legislature abolished contributory negligence and assumption of

risk as absolute defenses. Instead, it adopted a "comparative causation" approach under which the amount of damages are apportioned according to the culpable conduct of the parties.

The court noted that assumption of the risk is applicable to bar recovery for organized sports and recreational activities where participants freely engage in a known risk, negating the duty of defendants.

The Chief Judge added that "no suitably compelling policy justification" has been advanced to invoke the assumption of risk as a defense against suits stemming from activity not worthy of protection, like the "horseplay" described in this case. Furthermore, allowing the defense that children in like situations had consented to the risk of injury would leave "little ... of an educational institution's obligation [to] adequately supervise the children in its charge." Judge Lippman wrote:

Children often act impulsively or without good judgment – that is part of being a child; they

do not thereby consent to assume the consequently arising dangers, and it would not be a prudent rule of law that would broadly permit the conclusion that they had done so. If the infant plaintiff's harm is attributable in some measure to his own conduct, and not to negligence on the defendants' part, that would be appropriately taken account of within the comparative fault allocation; it is not a predicate upon which an assumption of risk should be permitted to be applied.

In Judge Smith's concurring opinion he highlighted one major issue that the majority made no attempt to answer. What exactly is "athletic or recreative" activity? Moreover, why was the infant plaintiff's activity – sliding down a banister – not considered to be "recreative?"

In an effort to resolve an issue that has divided the Appellate Division courts, the Court of Appeals has opened the doors for determining what activities constitute "athletic or recreative."

THIRD DEPARTMENT MAKES THE "RIGHT CALL" ON CELL PHONE RECORDS

DETRAGLIA V. GRANT, JR.
(THIRD JUDICIAL DEPARTMENT, DECEMBER 10, 2009)

In *Detraglia*, the Appellate Division, Third Judicial Department, affirmed the lower court's ruling that a defendant's cell phone records were discoverable, despite the defendant's denial of use.

Grant was driving a company car owned by Hawkeye, his employer. His vehicle collided with a car driven by co-defendant *Detraglia*, in which the infant plaintiff, *Stephanie Detraglia*, was a passenger. The plaintiff demanded that Grant and Hawkeye "produce billing records for all three of Grant's cellular telephones and the Verizon wireless air card for his company-issued laptop computer for the date of the accident. The defendants refused and a motion to compel followed. Although Grant testified during his deposition that he was not using his cell phone or computer at the time of the accident, the tow

truck driver at the scene submitted an affidavit stating that he saw the laptop on the vehicle's computer desk, with the screen flipped up and turned on indicating recent use. Given the conflicting testimony from Grant and the tow truck driver the court ruled the records should be disclosed.

The defendants appealed and the 3rd Dept. affirmed finding that "conflicting evidence raised questions as to whether Grant used any technological devices while driving, rendering the records relevant to the question of negligence." The practitioner seeking disclosure of phone records should endeavor to establish a basis for such a demand early in discovery through witness (and party) statements and observations, lest they rely on the serendipitous presence of a tow truck driver.

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POTENTIAL LIABILITY TO LANDLORD FOR "OFF-PREMISES" DOG BITE

Champ-Doran v. Lewis
(Third Judicial Department,
January 14, 2010)

The Third Department held that an issue of fact existed regarding the defendant landlord's liability for injuries the infant plaintiff sustained. The plaintiff's son was attacked by one of the two dogs owned by the defendant's tenants on the plaintiff's own front porch. The plaintiff stated in his bill of particulars that the defendant was aware of the vicious propensities of his tenant's dogs; he also alleged that the defendant had actual and constructive notice that the fence surrounding the landlord's property was "broken or otherwise defective."

The lower court denied the defendant landlord's summary judgment motion. The defendant landlord argued that he was not liable because the incident did not occur on his property.

The Third Department agreed with the lower court, stating that the defendant had knowledge of the dog's vicious propensities and he had an adequate opportunity to control the premises and confine the dogs. The defendant admitted during his deposition that soon after he rented the property to the tenant he became aware of the dogs and received a complaint from a neighbor about loud barking. He also admitted that he was aware of prior occasions where the dogs escaped from the property and told the tenant that the dogs would have to go. Affidavits prepared by several neighbors indicated that they complained to the defendant about the dogs' vicious behavior, such as continually barking, and lunging at people through holes in defendant's fence.

The court recognized that a landlord generally does not owe a duty of care to persons injured from a tenant's dog where the injury occurs off the landlord's property. However, the court noted that liability can nevertheless be imposed where it is established that the defendant knew of the dog's presence on the premises and its vicious propensities, and the defendant had control of the premises or otherwise had the ability to remove or confine the dog.

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SECOND DEPARTMENT REVIEWS A SCHOOL'S DUTY TO SUPERVISE

Armellino v. Thomase, et al.
(Second Judicial Department, April 20, 2010)

In an action to recover damages for personal injuries, the plaintiff appealed from an order of the trial court, which granted the summary judgment motion of the defendant Oceanside Union Free School District (Oceanside) dismissing the complaint against it. The Appellate Division reversed and reinstated the plaintiff's complaint against Oceanside.

The plaintiff, a third grader, and some fellow classmates were outside during recess and permitted to separate from their other classmates. There were no organized recreational activities provided. The plaintiff testified that he and his classmates began throwing pieces of asphalt from a nearby track at each other. The teacher assigned to supervise did not observe nor halt this prohibited behavior. The incident escalated and the infant plaintiff pulled another boy's shirt over his head. The plaintiff fled and was chased down by the boy who pushed the plaintiff to the ground. The plaintiff sustained a broken leg that required multiple surgeries.

In reversing the trial court, the Appellate Division noted schools have a duty to "adequately supervise the students in their charge" and may be subject to liability for

"foreseeable injuries proximately related to the absence of adequate supervision." However, the Court also took time to note that schools are not "the insurers of safety of their students", that "perfection in supervision" is not required and schools are not liable for "every thoughtless or careless act by which one pupil may injure another." Although a school must "take energetic steps to intervene...if dangerous play comes to its notice while children are within the area of responsibility" "school personnel cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place among students daily." Thus, a student's injury that is caused by "the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act."

The Appellate Division was clearly troubled by not only the hurling of rocks by third-graders, but also the lack of supervision that allowed the activity to take place in the first instance. Accordingly, a jury would have to decide what occurred and whether that conduct was reasonable.

POSSIBLE CONSTRUCTIVE NOTICE OF DEFECTIVE CONDITION IN SLIP AND FALL SAVES LEGAL MALPRACTICE ACTION AGAINST PLAINTIFF'S FORMER LAW FIRM

Teodorescu v. Resnick & Binder, P.C.
(Court of Appeals, March 25, 2010)

The plaintiff slipped on ice on a public sidewalk in front of the George Washington Housing Project in Manhattan, which is owned by the New York City Housing Authority (NYCHA). The defendant law firm was retained by the plaintiff approximately three weeks after the accident for "purposes of investigation." The defendant served an untimely notice of claim upon NYCHA on behalf of the plaintiff, and her complaint against NYCHA was dismissed upon the denial of her motion for leave to serve a late notice of claim. The plaintiff then commenced this legal malpractice action.

The defendant moved for summary judgment dismissing the complaint, arguing that the legal malpractice action should be dismissed because the plaintiff could not have prevailed in the underlying slip and fall action. The

Supreme Court denied the motion, as it concluded that the evidence was sufficient to raise a triable issue of fact as to whether the NYCHA could have been found liable to the plaintiff on a theory of constructive notice. The Appellate Division reversed and dismissed the complaint, finding that the plaintiff could not establish constructive notice on the basis of her deposition testimony, in which she testified that she did not recall seeing the ice the night before and could not point out the exact location where she fell, other than that it was in the middle of the block.

The Court of Appeals reversed the Appellate Division and denied the defendant's motion holding that the plaintiff raised issues of fact regarding whether she could have prevailed on a theory of constructive notice.

BUFFALO	AMHERST	ROCHESTER
1600 Liberty Building Buffalo, New York 14202 Telephone 716.854.3400	2495 Kensington Avenue Amherst, New York 14226 Telephone 716.362.0991	3300 Monroe Ave., Suite 312 Rochester, New York 14618 Telephone 585.381.3400