

**To: Commission**  
**From: Vito J. Petitti**  
**Re: Equine Activities Liability Act**  
**Date: April 7, 2014**

After the release of the Revised Tentative Report (RTR), as directed at the January 2014 Commission meeting, several commenters provided feedback, some of it substantive and in opposition to the language in the RTR.

For ease of review, excerpts of the draft statute below depict the latest version released by the Commission, modified to indicate commenters' feedback and proposed revisions (shown with italicized underlining for proposed additions and italicized strikeout for proposed deletions).

### **Proposed Revision 1**

A member of the New Jersey Horse Council and practicing equine law attorney suggests that the project's title, "Equine Activities Liability Act," be made to conform with the title of N.J.S. 5:15-1 et seq., "Equestrian Activities Liability Act." Of note, in the first paragraph of the opinion, the *Hubner* court refers to the legislation as "The Equine Activities Liability Act."<sup>1</sup>

Staff comment: Staff does not oppose this proposed change to the project's title.

### **Proposed Revision 2**

A representative of the Rutgers Equine Science Center providing updated statistics for and recommends replacement of Paragraph 2 of the Introduction to the RTR, as follows:

#### **I. Introduction**

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~~*The New Jersey equine industry plays a significant role in the state.<sup>2</sup> According to the American Horse Council, there are 83,000 horses in New Jersey, over 80 percent of which are involved in showing and recreation. Almost 60,000 New Jerseyans are involved in the equine industry as horse owners, service providers, employees, and volunteers. Even more participate as spectators. Little wonder that Equus caballus — the horse — is the New Jersey State Animal.*~~

*According to the Rutgers Equine Science Center, the New Jersey equine industry, home to 42,500 horses, is valued at \$4 billion, producing an annual*

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<sup>1</sup> Hubner v. Spring Valley Equestrian Center, 203 N.J. 184 at 188 (2010)

<sup>2</sup> Walking Through the New Jersey Equine Activity Statute: A Look at Judicial Statutory Interpretations in Jurisdictions with Similar Limited Liability Laws, 12 Seton Hall J. Sports L. 65 at p. 67.

economic impact of approximately \$1.1 billion and 13,000 jobs. Horses are found on 7,200 facilities in every county statewide which maintain 176,000 acres of open space. Horse operations tend to be more sustainable than other types of agricultural businesses, making the horse industry critical to the growth and land-use strategy of the state.

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Staff comment: Staff has no objection to replacing Paragraph 2 as proposed by the commenter.

### **Proposed Revision 3**

An attorney who submitted a brief in *Hubner* has suggested that the proposed revisions in the RTR are “more formal than substantive” and do not go far enough to resolve the latent ambiguity issue raised by the New Jersey Supreme Court in that decision.

This commenter suggests adding language to N.J.S. 5:15-1 Legislative findings and declarations, as follows:

#### **5:15-1. Legislative findings and declarations**

The Legislature finds and declares that equine animal activities are practiced by a large number of citizens of this State; that equine animal activities attract large numbers of nonresidents to the State; that those activities significantly contribute to the economy of this State; and that horse farms are a major land use which preserves open space.

The Legislature further finds and declares that equine animal activities involve risks that are essentially impractical or impossible for the operator to eliminate; and that those risks must be borne by those who engage in those activities.

The Legislature therefore determines that the allocation of the risks and costs of equine animal activities is an important matter of public policy and it is appropriate to state in law those risks that the participant voluntarily assumes for which there can be no recovery- and that operators of equine animal facilities shall be liable only for their acts and omissions in accordance with the responsibilities of operators established herein.<sup>3</sup>

Staff comment: Historically, Legislative findings and declarations have been deemed outside of the scope of proposed revisions recommended by the NJLRC.<sup>4</sup>

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<sup>3</sup> See N.J.S. 59:1-2, the Legislative declaration section of the Jersey Tort Claims Act, which refers to the “public policy of this State that public entities shall only be liable for their negligence within the limitations of this act.”

<sup>4</sup> The Minutes of the January 17, 2013 Commission meeting, for example, make reference to a discussion of this issue in the context of the Pejorative Terms project regarding physical disabilities as follows:

The tradition of the Commission has been not to make any revisions to legislative findings.

Chairman Gagliardi said that although the Commission has not previously suggested revision to

#### **Proposed Revision 4**

Although this commenter agrees with the Commission's recommendation to relocate the language regarding inherent risks from N.J.S. 5:15-2 to 5:15-3 regarding assumed risks, a further revision is suggested by this commenter regarding N.J.S. 5:15-3, by adding a subsection c. as follows:

##### **5:15-3. Assumption of inherent risks**

a. A participant and spectator are deemed to assume the inherent risks of equine animal activities, meaning those dangers that are an integral part of equine activity, including:

(1) The propensity of an equine animal to behave in ways that result in injury, harm or death to nearby persons;

(2) The unpredictability of an equine animal's reaction to such phenomena as sounds, sudden movement and unfamiliar objects, persons or other animals;

(3) Risks created by weather or certain natural hazards, such as surface or subsurface ground conditions;

(4) Collisions with other equine animals or with objects; and

(5) The potential of a participant or other person to act in a negligent manner that may contribute to injury to the participant or others, including but not limited to failing to maintain control over the equine animal or not acting within the participant's ability.

b. Each participant is assumed to know the range of his ability and it shall be the duty of each participant to conduct himself within the limits of such ability to maintain control of his equine animal and to refrain from acting in a manner which may cause or contribute to the injury of himself or others, loss or damage to person or property, or death which results from participation in an equine animal activity.

c. This section shall be liberally construed to protect and promote equine activities and to limit liability in accordance with the purposes of this act.

Staff comment: Proposed revisions 4 and 5 recommend changes to statutory language that specifically identifies inherent risks deemed to be assumed by a participant and spectator in equestrian activities. Since the proposed language includes a more general statement regarding

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legislative findings, it could bring the issue to the attention of the Legislature. Commissioner Bunn said that he thought the Commission can include language that would suggest to the Legislature that findings should be updated, while not actually recommending specific updates.

the interpretation and application of the law, if the Commission considers modifying the draft in response to these recommendations, it may be most appropriate to include the language in N.J.S. 5:15-5, which contains broader language and already makes reference to the assumption of risk provisions in N.J.S. 5:15-3 and discusses the manner in which they should be applied in a litigation context.

### **Proposed Revision 5**

In the alternative to adding subsection c. to N.J.S. 5:15-3, above, this commenter suggested that the Commission may want to consider adding a separate section stating:

*This act shall be deemed to be remedial and its provisions relating to assumption of inherent risks of equine animal activities shall be liberally construed in furtherance of public policy to protect and promote equine activities in this State.*<sup>5</sup>

Staff comment: See comment to Proposed Revision 4, above.

### **Proposed Revision 6**

This commenter also suggested that the first sentence of N.J.S. 5:15-5 should be revised as follows:

#### **5:15-5. Assumption of risk as bar to suit or complete defense**

The assumption of risk set forth in section 3 of this act shall be a complete bar of suit and shall serve as a complete defense to a suit against an operator by a participant for injuries resulting from the assumed risks, notwithstanding the provisions of P.L.1973, c. 146 (C.2A:15-5.1 et seq.) relating to comparative negligence. ~~*Failure of a participant to conduct himself within the limits of his abilities as provided in section 3 of this act shall bar suit against an operator to compensate for injuries resulting from equine animal activities, where such failure is found to be a contributory factor in the resulting injury, unless an operator's violation of his responsibilities under this act caused the participant's injuries, in which case the provisions of P.L.1973, c. 146 shall apply.*~~

Staff comment: This suggestion would result in language more similar to that found in the Ski Act and the Roller Skating Act. The language shown below is excerpted from the December 2013 Memorandum regarding this project. In that Memorandum, Staff briefly noted the differences in the three Acts' assumption of risk provisions. While the Ski Act and Roller Skating Act each contain provisions discussing an operator's violation of duties, the Equine Act provisions make no such reference, as shown below. That older Memorandum indicated that Staff had not yet determined whether modifying the Equine Act assumption of risk provision might be of assistance in clarifying the duties and responsibilities of the parties.

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<sup>5</sup> See The Joint Tortfeasors Contribution Law, at N.J.S. 2A:53A-10. The commenter suggested that the Supreme Court opinion in *Hubner* supports a "remedial" interpretation of the Act with "broad" construction of its provisions regarding assumption of inherent risks. See 203 N.J. at 195, 203-204.

### **Ski Act – N.J.S. 5:13-6:**

The assumption of risk set forth in section 5 shall be a complete bar of suit and shall serve as a complete defense to a suit against an operator by a skier for injuries resulting from the assumed risks, notwithstanding the provisions of P.L.1973, c. 146 (C. 2A:15-5.1 et seq.), relating to comparative negligence, *unless an operator has violated his duties or responsibilities under this act, in which case* the provisions of P.L.1973, c. 146 shall apply. Failure to adhere to the duties set out in sections 4 and 5 shall bar suit against an operator to compensate for injuries resulting from skiing activities, where such failure is found to be a contributory factor in the resulting injury, *unless the operator has violated his duties or responsibilities under the act, in which case* the provisions of P.L.1973, c. 146 shall apply. [emphasis added]

### **Roller Skating Act – 5:14-7:**

The assumption of risk set forth in section 61 of this act shall be a complete bar of suit and shall serve as a complete defense to a suit against an operator by a roller skater or spectator for injuries resulting from the assumed risks, notwithstanding the provisions of P.L.1973, c. 146 (C.2A:15-5.1 et seq.), relating to comparative negligence, *unless an operator has violated his duties or responsibilities under this act, in which case* the provisions of P.L.1973, c. 146 shall apply. Failure to adhere to the duties set out in sections 52 and 6 of this act shall bar suit against an operator to compensate for injuries resulting from roller skating activities, where such failure is found to be a contributory factor in the resulting injury, *unless the operator has violated his duties or responsibilities under the act, in which case* the provisions of P.L.1973, c. 146 shall apply. [emphasis added]

### **Equine Act – 5:15-5:**

The assumption of risk set forth in section 3 of this act shall be a complete bar of suit and shall serve as a complete defense to a suit against an operator by a participant for injuries resulting from the assumed risks, notwithstanding the provisions of P.L.1973, c. 146 (C.2A:15-5.1 et seq.) relating to comparative negligence. Failure of a participant to conduct himself within the limits of his abilities as provided in section 3 of this act shall bar suit against an operator to compensate for injuries resulting from equine animal activities, where such failure is found to be a contributory factor in the resulting injury.

Staff seeks guidance from the Commission regarding whether a change to this statutory section to make it more similar to the language of the other two acts could help to clarify the statute and achieve the goals of the project.

## **Proposed Revision 7**

This commenter suggested that the title of N.J.S. 5:15-9 should be limited to “Responsibilities of operators,” indicating that the reference to “Exceptions to limitations on operator liability” is confusing and ambiguous. According to this commenter, it is inaccurate to describe or refer to operators’ responsibilities as “exceptions” to the assumed risks – they are not.

In addition, subsection a. (5) should be reworded as indicated below.

Also, in this commenter’s opinion, subsection b. is unnecessary, at best, and reintroduces confusion with respect to the relationship between assumed risks and risks caused by an operator’s breach of his or her responsibilities as stated above. The commenter would instead reiterate the basic point that the risk assumption provisions should be broadly construed and the “exceptions” narrowly construed by replacing subsection b. as indicated below, suggesting that this is more consistent with the approach approved by the Supreme Court in *Hubner* and best reflects the legislative intent.

### **5:15-9. Responsibilities of operators; ~~Exception to limitations on operator liability~~**

a. It shall be the responsibility of the operator, to the extent practicable, to:

~~Notwithstanding any provisions of sections 3 and 4 of this act<sup>1</sup> to the contrary, the following actions or lack thereof on the part of operators shall be exceptions to the limitation on liability for operators:~~

- ~~a. Knowingly providing equipment or tack that is faulty to the extent that it causes or contributes to injury.~~
- ~~b. Failure to make reasonable and prudent efforts to determine the participant's ability to safely manage the particular equine animal, based on the participant's representation of his ability, or the representation of the guardian, or trainer of that person standing in loco parentis, if a minor.~~
- ~~c. A case in which the participant is injured or killed by a known dangerous latent condition on property owned or controlled by the equine animal activity operator and for which warning signs have not been posted.~~
- ~~d. An act or omission on the part of the operator that constitutes negligent disregard for the participant's safety, which act or omission causes the injury, and~~
- ~~e. Intentional injuries to the participant caused by the operator.~~

(1) Maintain in good condition all equipment and tack used in equine animal activities;

(2) Inspect all equipment and tack on a regular basis to insure the equipment and tack are in good condition;

(3) Make reasonable and prudent efforts to determine the participant's ability to manage the particular equine animal, based on the participant's representation of his ability, or the representation of the guardian, or trainer of that person standing in loco parentis, if a minor;

(4) Make reasonable inspections of the property owned, controlled, or used by the equine animal activity operator for equine animal activity, in order to: discover dangerous conditions on that property, eliminate the dangerous conditions or post warnings signs when elimination is not practicable, maintain the property in a reasonably safe condition, and refrain from creating conditions that would render the property unsafe;

(5) Refrain from ~~any act or omission that would constitute a negligent disregard for the participant's safety and causes injury; and acts and omissions in violation of a recognized duty of reasonable care owed to participants that causes injury.~~<sup>6</sup>

(6) Refrain from causing intentional injuries to the participant.

b. ~~Nothing in N.J.S. 5:15-3 and N.J.S. 5:15-4 should be read to insulate an operator from any of the obligations imposed upon the operator by this section. Nothing contained in this section should be read to impose liability upon an operator for injuries caused by risks voluntarily assumed by participants as set forth in N.J.S. 5:15-3 and N.J.S. 5:15-4.~~

Staff comment: First, although statutory section headings are not enacted, and are technically not under the control of the Legislature<sup>7</sup>, it does not appear to do any harm to include proposed language that could improve the readability of the heading. The argument can legitimately be made that including a new section heading, and keeping the old one, after changing the manner in which the statute itself is framed (and eliminating the phrase “shall be exceptions to the limit on liability for operators”), could be a source of confusion.

With regard to the proposed changes to subsection a.(5), the commenter on this subsection proposes switching the language from focusing on acts or omissions that “constitute a

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<sup>6</sup> See *Hubner*, supra, at 206.

<sup>7</sup> See, for example, *Aragon v. Estate of Snyder*, 314 N.J. Super. 635, 639 (Ch. Div. 1998) (“Historically, the headnotes to our statutes were added by the printer after enactment by the Legislature and, thus, have not traditionally been used to interpret even the most ambiguous of statutes. While the title to an act provided by the Legislature may aid in construction, the headings or labels attached by the printer are not considered part of the statute and are not of intrinsic assistance in understanding the meaning of a statute.”)



negligent<sup>8</sup> disregard for the participant's safety" to focusing on those that are "in violation of a recognized duty of reasonable care".<sup>9</sup>

In the statutes, "negligent disregard" appears only in the Equestrian Activities Liability Act ("Act"). Of the six cases in which it appears after 1944, it appears once in a DYFS case<sup>10</sup>, three times in cases involving the Act, and in two other cases in which the term is used by one of the parties, but not by the Court itself.<sup>11</sup>

"Duty of reasonable care", on the other hand, while it does not appear in any statute, appears in more than 300 cases since 1944. Most recently, for example, the Court in *Mejicanos v. Haddad Plumbing & Heating, Inc.*, 2014 WL 996246 (App. Div. Mar. 17, 2014), explained that "[t]o prove negligence, the evidence must establish that the 'defendant breached a duty of reasonable care, which constituted a proximate cause of the plaintiff's injuries.'" *Szalontai v. Yazbo's Sports Café*, 183 N.J. 386, 398 (2005) (quoting *Brown v. Racquet Club of Bricktown*, 95 N.J. 280, 288 (1984)).

Since the statutory subsection in question frames the issue in terms of negligence, it may serve as an aid to statutory interpretation to do so in more commonly used negligence terms. If the Commission is inclined to consider modifying the relevant language, Staff will need to confirm with the Commission whether the goal is to change the substance of the provision. For example, the inclusion of "recognized" before "duty of reasonable care", as proposed by the commenter, is of concern because it might be said to change the substance by raising the question - "recognized by whom?"

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<sup>8</sup> "The fundamental elements of a negligence claim are a duty of care owed by the defendant to the plaintiff, a breach of that duty by the defendant, injury to the plaintiff proximately caused by the breach, and damages. *Jersey Cent. Power & Light Co. v. Melcar Util. Co.*, 212 N.J. 576, 594...(2013); *Weinberg v. Dinger*, 106 N.J. 469, 484...(1987). The issues of whether a defendant owes a legal duty to another and the scope of that duty are generally questions of law for the court to decide. *Carvalho v. Toll Bros. & Developers*, 143 N.J. 565, 572...(1996); *Kelly v. Gwinnell*, 96 N.J. 538, 552...(1984)." *Robinson v. Vivirito*, 2014 WL 1225514 (N.J. S.Ct, Mar. 26, 2014).

<sup>9</sup> This subsection was the subject of Commission consideration in December 2013. Commissioner Bunn had, at that time, proposed changes to that subsection as follows (his proposed changes are in bold type): "(5) Refrain from any act or omission that would constitute a negligent disregard for the participant's safety and causes injury **except as to the risks assumed under N.J.S. 5:15-3**". Commissioner Long and Commissioner Bell expressed concern that such a change would alter the balance that had been struck between the protections provided for operators and the risks assumed by the participants.

<sup>10</sup> "The evidence amply demonstrated that mother exposed son to a serious risk, and that she exhibited at least grossly negligent disregard for his emotional and physical well-being." *New Jersey Div. of Youth & Family Servs. v. W.R.*, 2012 WL 5869559 ( App. Div. Nov. 21, 2012).

<sup>11</sup> "Negligent disregard" appears once in a defamation case, although it is not used by the Court, but rather the plaintiff. "Plaintiff alleged that the statements were defamatory per se in that the use of the words 'stealing,' 'stolen funds,' and 'taken' imputed criminal conduct to him; that the trustee's assertions were baseless and unsupported; that defendants republished them 'intentionally, maliciously, and with reckless and/or negligent disregard of the truth'; and that defendants 'knew or should have known of their falsity.'" *Salzano v. N. Jersey Media Grp. Inc.*, 201 N.J. 500, 509-10 (2010). It also appears in a Sec. 1983 action, although again, not by the Court but by the plaintiff. "Kirk claimed that in causing him to be arrested without probable cause, the defendants acted with a malicious, reckless, and negligent disregard of his constitutional rights. Before trial, the complaint was dismissed as to all defendants except Cardillo." *Kirk v. City of Newark*, 109 N.J. 173, 177 (1988).



With regard to the proposed change to subsection b., it is noted that the Commission has previously considered changing the language of this subsection, most recently in December 2013. An excerpt from the December 2013 Minutes regarding that provision follows:

The Commission then considered 5:15-9 subsection b., which had been proposed for removal by Commissioner Bunn. Justice Long disagreed with the removal of the section, but proposed it be changed to read “Nothing in N.J.S. 5:15-3 and N.J.S. 5:15-4 should be read to insulate an operator from any of the obligations imposed upon the operator by this section.” Chairman Gagliardi said that if the Commission were writing this statute from the beginning, the section might not be included, but noted that in light of the general provisions regarding statutory interpretation, taking it out could send a signal that the standards and balance are being entirely changed, which is not the intention of the Commission. Commissioner Burstein agreed, but noted that this change – and the others made to the Report – should be explained in the commentary. In light of prior Commission discussions, the question was raised about how the revised language would work in a situation in which a proprietor hires an employee known to have prior convictions for disturbing the peace, who is known to bring an air horn to the stable, and who then blows the air horn near a horse, frightening the horse and injuring its rider. Mr. Petitti noted that under this version, that behavior would likely be considered negligent disregard. Justice Long agreed. Ms. Tharney noted that if the language “except as to risk assumed” discussed earlier had been added to the statute, that would change the balance of assumption of risks and the liabilities imposed on operators.

Before the release of the RTR in January 2014, the January Minutes reflect an ongoing difference of opinion between the members of the Commission regarding whether this provision could override the assumption of risk doctrine, or whether it accurately reflected the balance drawn between protections and risks.

Staff seeks guidance regarding whether the Commission would like to see the language of the subsection in question shifted *from* (paraphrasing):

“risks assumed by the participant do not protect the operator from obligations imposed by this section”;

*to* (paraphrasing):

“this section does not impose liability on an operator for [injuries caused by] risks assumed by the participant”.

### **Proposed Revision 8**

The RTR added a new provision in N.J.S. 5:15-10 that requires operators to list the duties of participants, spectators, and operators beneath the capitalized print. One commenter, the aforementioned member of the New Jersey Horse Council and equine law attorney, expressed

concern that requiring such a list would result in more lawsuits against equestrian activities operators, and that inadvertently omitting a particular duty or responsibility could cause more harm to the equine industry than having no list at all.

The additional passage derived from section 4(a) of the Roller Skating Rink Act, which requires operators to “post the duties of roller skaters and spectators and the duties, obligations, and liabilities of the operator.” Adopting similar language here was intended to clearly notify all participants as to what qualifies as an inherent risk.

The commenter argues that “there is not enough room on any sign to list all of the possibilities.” For instance, roller rinks are very similar to each other but equestrian facilities vary in terms of acreage, terrain, the presence of ponds, etc., and it would be impossible to list every form of risky behavior exhibited at equestrian events, such as walking too closely behind horses with baby strollers. The same commenter notes that spectators are already covered by existing business invitee law.

The commenter’s proposed revision is as follows:

#### **5:15-10. Posting of warning signs**

All operators shall post and maintain signs on all lands owned or leased thereby and used for equine activities, which signs shall be posted in a manner that makes them visible to all participants and which shall contain the following notice in large capitalized print:

“WARNING: UNDER NEW JERSEY LAW, AN EQUESTRIAN AREA OPERATOR IS NOT LIABLE FOR AN INJURY TO OR THE DEATH OF A PARTICIPANT IN EQUINE ANIMAL ACTIVITIES RESULTING FROM THE INHERENT RISKS OF EQUINE ANIMAL ACTIVITIES, PURSUANT TO P.L.1997, c.287 (C.5:15-1 et seq.).”

~~*All such signs shall, underneath the capitalized print, list the duties of participants and spectators and the duties and obligations of the operator as set forth in N.J.S. 5:15-3 and N.J.S. 5:15-9.*~~

~~*Individuals or entities providing equine animal activities on behalf of an operator, and not the operator, shall be required to post and maintain signs required by this section.*~~

Staff comment: Staff is seeking guidance from the Commission regarding whether the requirement of listing duties and obligations of the parties should be removed from the statute. Since the language in question only requires that the duties included in the two statutory sections be shown on the signs, doing so may not be as onerous as anticipated by the commenter. The last sentence shown above in italics and underlining is included in the statute currently, and does not represent a change to the existing law.