

**ASSUMING THE RISK AFTER HUBNER: NEW
JERSEY SUPREME COURT OPINION SPURS
REVISION OF THE EQUESTRIAN ACTIVITIES
LIABILITY ACT**

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I. INTRODUCTION AND BACKGROUND

“A horse is dangerous at both ends and uncomfortable in the middle.”

– Ian Fleming

“Riding is the art of keeping a horse between you and the ground.”

– Author Unknown

In July 2010, the New Jersey Supreme Court denied a plaintiff horseback rider’s injury claim in *Hubner v. Spring Valley Equestrian Center*, and in the process, brought to light a “latent ambiguity in the overall meaning of” the Equestrian Activities Liability Act (“Equine Act”).¹ The New Jersey Law Revision Commission (“NJLRC”) thus began a project to review the law and determine whether the Equine Act’s ambiguity issue could be resolved through revision of its wording or structure. The Commission eventually released a Final Report recommending enactment of a set of proposed revisions to the Equine Act.²

NJLRC is an independent legislative commission serving the State of New Jersey and its citizens by identifying areas of New Jersey law that can be improved by changes to the New Jersey statutes and by preparing and recommending changes to the Legislature.³ The NJLRC’s statutory mandate is to “promote and encourage the clarification and simplification of the law of New Jersey and its better adaptation to social needs, secure the better administration of justice[,] and carry on scholarly legal research and work.”⁴ The NJLRC is charged with conducting a continuous review of the general and permanent statutes of the state, judicial decisions construing those statutes, and recommendations from other learned bodies such as the Uniform Law Commission (“ULC”) and submitting to the legislature bills designed to remedy defects, reconcile the conflicting provisions found in the law, clarify confusing provisions, and excise

¹ N.J. STAT. ANN. §§ 5:15-1–11 (West 2013); *Hubner v. Spring Valley Equestrian Ctr.*, 203 N.J. 184 (2010).

² N.J. STAT. ANN. §§ 5:15-1–11.

³ 27 N.J. LAW REVISION COMM’N ANNUAL REPORT 9 (2013), *available at* <https://dspace.njstatelib.org/xmlui/bitstream/handle/10929/30877/NJLRC%202013%20Annual%20Report.pdf?sequence=1> (last visited Sept. 6, 2014).

⁴ N.J. STAT. ANN. § 1:12A-8 (West 2013).

redundancies.⁵

New Jersey's highest court's statutory interpretation in *Hubner*, coupled with the NJLRC's charter of clarifying state law, presented a seemingly paradigmatic case for a Commission project.⁶

During the course of its work in this area, the Commission became aware of the significant role the New Jersey equine industry plays in the State.⁷ According to the Rutgers Equine Science Center,

[t]he New Jersey equine industry, which is home to 42,500 horses, is valued at \$4 billion . . . producing an annual economic impact of approximately \$1.1 billion . . . and 13,000 jobs. Horses are found on 7,200 facilities in every county . . . which maintain open space of 176,000 acres, [providing] an enhanced quality of life for New Jersey residents. 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.⁸

Horses are potentially dangerous and injuries often arise from participation in equine-related activities.⁹ According to the Hughston Clinic, horseback riding in the United States carries a higher injury rate than motorcycle riding.¹⁰ Forty-six states have passed equine liability legislation to encourage equine activities and to protect operators from civil liability.¹¹ Because horse farms preserve open space, attract large numbers of residents, provide equine animal activities to many citizens

⁵ *Id.* In compliance with its statutory obligation to conduct a continuous review of the general and permanent statutes of the state and the judicial decisions construing those statutes, the New Jersey Law Review Commission ("NJLRC") considers recommendations from the American Law Institute, the Uniform Law Commission ("ULC") (formerly the National Conference of Commissioners on Uniform State Laws), "other learned bodies, and from judges, public officials, bar associations, members of the bar and from the public generally." *Id.*

⁶ *Hubner*, 203 N.J. at 184.

⁷ Loren Speziale, Comment, *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. SPORT L. 65, 67 (2002).

⁸ Press Release, Rutgers Equine Sci. Ctr., A Call for a Unified Voice: The Viability and Vitality of the Equine Industry in the Garden State Depends Upon It (Aug. 17, 2007), http://esc.rutgers.edu/news_more/press_release/unified_voice.htm.

⁹ Speziale, *supra* note 7, at 69.

¹⁰ Gloria M. Beim, *Horseback Riding Injuries and Safety Tips*, HUGHSTON CLINIC, <http://www.hughston.com/a-horse.aspx> (last visited Sept. 17, 2014).

¹¹ All states except California, Maryland, Nevada, and New York have passed equine liability statutes. *E.g.*, *Equine Activity Statutes—Fact and Fiction*, EQUINE LEGAL SOLUTIONS, <http://www.equinelegalsolutions.com/EquineActivityStatutes.html> (last visited May 8, 2014).

of New Jersey, and significantly contribute to the economy of this State, the New Jersey Legislature enacted equine liability legislation in 1998.¹² The Legislature recognized, however, “that equine animal activities involve risks that are impractical or impossible for an operator to eliminate.”¹³

On appeal, the plaintiff in *Hubner*, for example, was injured after being thrown from a horse when it tripped over wooden rails, known as cavaletti, placed on the ground in the area of the defendant’s riding ring for training purposes.¹⁴ The injured rider then brought an action against the equestrian facility operator for negligence.¹⁵ The trial court granted the motion for summary judgment filed by the operator, concluding that the incident “was one of the inherent risks of equine activity and plaintiff’s claim was therefore barred by the Equine Act” and “the statutory exception to immunity if the facility knowingly provides equipment or tack that is faulty, New Jersey statute section 5:15-9(a), was not applicable, because the cavaletti were not faulty, but were simply part of the riding ring.”¹⁶

The appellate division reversed the trial court’s grant of summary judgment and focused its analysis on the provisions of the Equine Act that create exceptions to the protection afforded to equine facility operators, instead of on the statutory definition of inherent and assumed risk.¹⁷ The appellate division concluded that, “[t]he placement of equipment in a position that creates an unnecessary risk of personal injury may constitute negligent disregard for the participant’s safety notwithstanding the assumption of risks for collisions and the conditions of tracks and rings.”¹⁸

On appeal, the New Jersey Supreme Court began its analysis by “determining and effectuating the Legislature’s intent.”¹⁹ “In considering the Legislature’s intent when the dispute between the parties rests on multiple parts of a single statute,” as here, the court also strives “to read and understand all of the provisions in harmony and as parts of a unitary

¹² N.J. STAT. ANN. § 5:15-1 (West 2013).

¹³ *Id.*

¹⁴ *Hubner v. Spring Valley Equestrian Ctr.*, 203 N.J. 184, 189–90 (2010).

¹⁵ *Id.* at 190.

¹⁶ *Id.* at 190–91.

¹⁷ *Id.* at 191.

¹⁸ *Id.*

¹⁹ *Id.* at 193.

enactment.”²⁰ The court noted the Legislature’s enhanced concern for preserving and protecting equine operations and facilities. These concerns demonstrated the Legislature’s intent for the provisions expressing the scope of the assumed risks to be read broadly, in favor of the operations, while the operators’ obligations would be narrowly construed if the two sections of the statute appear to conflict.²¹

The court determined that the broadly written risk assumption provision did indeed conflict with the Equine Act’s exception to limitations on operator liability provisions, thus revealing a latent ambiguity in the statute.²² Similarly, a member of the New Jersey Bar commenting on the Commission’s Final Report stated, “[T]he words that define the risks assumed and the words that bar claims resulting from any of those risks are broadly preclusive, but the words chosen to delineate the exceptions to that bar also appear to be broad.”²³ The statute’s current language imposing liability on operators is as follows:

Notwithstanding [other] provisions of . . . this act 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.²⁴

According to the court, narrowly reading the Equine Act exceptions to the protections allows the statute to function similarly to the provisions

²⁰ *Hubner*, 203 N.J. at 193.

²¹ *Id.* at 203–04.

²² *Id.* at 197.

²³ Letter to author (Mar. 14, 2014) (on file with author).

²⁴ *See* N.J. STAT. ANN. § 5:15-9 (West 2013).

of the New Jersey Ski Statute (“Ski Act”) or those of the Roller Skating Rink Safety and Fair Liability Act (“Roller Skating Rink Act”) by separating the risks that are assumed from the facility’s operator’s statutorily defined duties of care owed to the participants.²⁵ However, while both the Ski Act and the Roller Skating Rink Act, like the Equine Act, address inherent risks and limitations on operator liability, both are structurally different from the Equine Act.²⁶

New Jersey statute section 5:14-4 of the Roller Skating Rink Act, for example, delineates numerous specific responsibilities for roller rink operators.²⁷ Exemplary of these responsibilities are posting the duties of roller skaters and spectators in conspicuous places, keeping a floor guard on duty, maintaining the skating surface in reasonably safe condition and inspecting it before each session, installing and inspecting fire extinguishers, checking to ensure rental skates are in good mechanical condition, prohibiting the sale or use of alcoholic beverages, and complying with applicable safety codes.²⁸

Similarly, the Ski Act delineates a set of responsibilities—that is, duties—ski hill operators owe to their patrons.²⁹ As applied, section 9 of the Equine Act serves the same function as section 3 of the Ski Act, but the Ski Act lists the operator responsibilities with far more specificity.³⁰ Exemplary of these operator responsibilities are identifying and designating the relative difficulties of slopes and trails, providing trail maps and reports to skiers, and informing skiers of daily slope and trail conditions.³¹ This section of the Ski Act also limits the operators’ responsibility in cases, such as abrupt weather changes, hazards normally associated with varying snow conditions, and the location of man-made facilities and equipment necessary for ordinary operations.³²

These various provisions of the three acts are perhaps more impactful when presented in table form.³³ It is instructive to consider the descriptions of the specific duties of operators under the Ski Act and Roller Skating Rink Act compared to the Equine Act’s list of exceptions

²⁵ See N.J. STAT. ANN. §§ 5:13-1–11, 5:14-1–7 (West 2013); *Hubner*, 203 N.J. at 206.

²⁶ N.J. STAT. ANN. §§ 5:15-1–11 (West 2013).

²⁷ N.J. STAT. ANN. § 5:14-4.

²⁸ *Id.*

²⁹ See N.J. STAT. ANN. § 5:13-3a.

³⁰ N.J. STAT. ANN. §§ 5:13-3, 15-9.

³¹ N.J. STAT. ANN. § 5:15-9.

³² N.J. STAT. ANN. § 5:13-3b.

³³ See *infra* pp. 8–10.

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to operator liability limitations. Note also that while the stated public policies of all three acts refer to allocation of risks and costs, as well as to each activity's respective significant contribution to the economy, the Equine Act alone articulates a concern with open space preservation.³⁴ The *Hubner* court addressed this point and the fact that only the drafters of the Ski Act and Roller Skating Rink Act mentioned the affordability of insurance, stating:

The omission of a reference to insurance availability suggests that the Legislature had an enhanced concern for preserving and protecting these particular operations or facilities. Moreover, that expression of a protective policy goal demonstrates that the Legislature intended that the provisions expressing the scope of the risks assumed would be read broadly in favor of the operators, while the obligations of the operators would be narrowly construed if the two sections of the statute appear to conflict.³⁵

³⁴ N.J. STAT. ANN. § 5:15-1 (West 2013).

³⁵ N.J. STAT. ANN. §§ 5:13-1, 14-2 (West 2013); *Hubner v. Spring Valley Equestrian Ctr.*, 203 N.J. 184, 184 (2010).

Statutory Provisions	Equine Act N.J.S. §§ 5:15-1-11	Ski Act N.J.S. §§ 5:13-1-12	Roller Skating Rink Act N.J.S. §§ 15:14-1-7
Public policy concerns	Allocation of risks and costs, contribution to economy, preservation of open space.	Allocation of risks and costs, contribution to economy, affordable insurance.	Allocation of risks and costs, contribution to economy, affordable insurance.
Assumption of inherent risks	Participant and spectator are deemed to assume the inherent risks.	Skier is deemed to assume inherent risks of skiing, know limits of own ability.	Skaters and spectators are deemed to assume inherent risks of roller-skating.
Duty placed on participants	<ul style="list-style-type: none"> • Stay within limits of own ability • Refrain from acting in manner which may cause or contribute to injury of self or others 	<ul style="list-style-type: none"> • Stay within limits of ability • Shall not act in manner to contribute to others' injury • No boarding, dismounting unless at designated area • No throwing objects from lifts, etc. • No acting contrary to posted rules while riding lifts, etc. • No skiing or frolicking which injures others • No crossing uphill track of J-bar, etc. • Maintain control of speed and course; stay clear of equipment • Shall judge own abilities; shall not attempt to ski outside own abilities • No use of lifts, etc., without sufficient knowledge • No skiing in other than designated areas • Using lifts, or other equipment, without authority or without consideration is trespassing 	<ul style="list-style-type: none"> • Shall maintain reasonable control of speed and course • Heed all posted signs and warnings • Maintain proper outlook to avoid other skaters and objects • Accept responsibility for knowing range of own ability • Refrain from acting in manner that may cause injury to self and others

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Statutory Provisions	Equine Act N.J.S. §§ 5:15-1-11	Ski Act N.J.S. §§ 5:13-1-12	Roller Skating Rink Act N.J.S. §§ 15:14-1-7
Participation under the influence.	Shall not engage in, attempt to engage in, or interfere with equine animal activity		
Prevention of under-the-influence participation	Operator may prevent a participant . . . under the influence of drugs or alcohol.		
Assumption of risk as a bar	Assumption of risk is a complete defense.	Assumption of risk is a complete bar of suit unless operator violates his duties.	Assumption of risk is a complete bar unless operator violates his duties.
Written injury report	As soon as possible within 180 days.		
Statute of limitations	2 years to bring a claim.	2 years to bring a claim.	
Injuries to minors	2 year time limit begins to run at age of majority.	2 year time limit begins to run at age of majority.	
Exception to limitations on operator liability	<ul style="list-style-type: none"> • Knowingly providing faulty tack or equipment • Failure to make prudent efforts to determine participant abilities • Participant is injured by known dangerous latent condition on the property • Act or omission constituting negligent disregard for safety • Intentional injuries 		

Statutory Provisions	Equine Act N.J.S. §§ 5:15-1-11	Ski Act N.J.S. §§ 5:13-1-12	Roller Skating Rink Act N.J.S. §§ 15:14-1-7
Posting of notices and warnings	Shall post and maintain signs and make them visible.		Post duties of skaters conspicuously.
Operator responsibilities		<ul style="list-style-type: none"> • Identify and categorize slopes • Report daily conditions • Remove obvious, man-made hazards • No responsibility for changes in weather • No responsibility for varying snow conditions • No responsibility for placement of necessary equipment • Grooming at operator’s discretion • No liability unless knowing or unreasonable failure to comply with duties 	<ul style="list-style-type: none"> • Maintain all signs and posted notices • Have at least one guard on duty when rink is open • Maintain safe skating conditions • Maintain equipment • Install fire extinguishers • Provide reasonable security in parking areas during operation • Inspect emergency lighting • Check safety of rental gear • Prohibit sale or use of alcoholic beverages • Comply with all state and local safety codes
Severability		One phrase, clause, sentence, or provision does not invalidate the remainder.	
Protective gear		Persons under 18 must wear helmet; penalties for parents and guardians who fail to ensure compliance.	

To address the ambiguity in the Equine Act, identified by the New Jersey Supreme Court, the Commission's Final Report consists of a limited structural redrafting of the Equine Act accompanied by limited changes to the language of the statute.³⁶ The Commission's goal was to remedy the potential confusion created by the conflicts between the broad language of the inherent risks, identified in New Jersey statute section 5:15-3, and the broad language used to describe the acts on the part of the operator that can result in the imposition of liability pursuant to New Jersey statute section 5:15-9. Specifically, the proposed revisions would make the Equine Act more structurally similar to the Ski Act and Roller Skating Rink Act, which appear less subject to misinterpretation.

In order to determine whether a proposed set of revisions is appropriate for adoption in New Jersey, the Commission provides draft language to, and solicits recommendations from, various experts and members of the public. In this case, the Commission hoped to encourage feedback on the appropriateness of adding more obligations to section 9, in light of the more detailed identification of responsibilities found in the other two acts. Whether, for instance, operators should be given an affirmative duty, based on their knowledge of a horse's behavior, to give notice of that horse's peculiarities in order to enable riders to make better informed decisions regarding whether to ride that horse. This obligation would be in addition to the obligation currently in law for the operator to match the horse with the patron's ability.³⁷

The Commission also noted that the Equine Act language did not impose any obligation on an operator to regularly check to ensure equipment was in good repair and not faulty. In contrast, the Roller Skating Rink Act contains such an obligation.³⁸ The Commission reasoned that it might be possible to add language specifying that it is the operator's responsibility, to the extent possible, to check equipment to make sure it is in good mechanical working order. Also, the Roller Skating Rink Act contains a provision that requires posting the obligations of both the operator and the person who uses the equipment.³⁹ Although section 10 of the Equine Act contains a warning requirement,

³⁶ Final Report Relating to Equestrian Activities Liability Act, N.J. LAW REVISION COMM'N (May 22, 2014), *available at* <http://lawrev.state.nj.us/Equine%20Act/equineFR052214.pdf> [hereinafter Final Report].

³⁷ N.J. STAT. ANN. § 5:15-9b (West 2013).

³⁸ N.J. STAT. ANN. § 5:14-4 (West 2013).

³⁹ *Id.*

it is very broad, requiring signs indicating that the operator was not responsible for someone's death because of the inherent risks of equine activity.⁴⁰ The Commission recognized that it may be unclear to a participant in equestrian activities exactly what is inherent and what is not. Because section 3 of the statute defines inherent risk, the idea of incorporating that language into the warning requirement was considered appropriate.⁴¹

II. PROPOSED REVISIONS

The Commission's proposed revisions to the Equestrian Activities Liability Act are in four key areas: 1) definitions, 2) assumption of inherent risk, 3) operators' duties, and 4) the posting of warning signs.

Among the several sections of the Equine Act to which there are no recommended changes are (in order of their respective section headings): 1) Legislative findings and declarations, 2) Participation in equestrian activities under the influence of alcohol or drugs, 3) Written injury report; submission to operator as precondition to suit, 4) Limitations of action, 5) Limitations; injuries to minors, 6) Additional defenses; public entities or employees, and 7) Exception; horse racing.⁴²

Following the project's outreach period, one commenter recommended a revision of the statute's legislative findings and declaration section specifying that operators of equine animal facilities shall be liable only for their acts and omissions in accordance with the responsibilities of operators established within the statute.⁴³ The Commission explained that, historically, legislative findings and declarations have been deemed outside the scope of proposed revisions recommended by the NJLRC.⁴⁴ Occasionally, the Commission will include language that would suggest to the Legislature that updating findings might be helpful to the reader of the statute, while not actually recommending specific updates. In this case, the Commission neither proposed nor recommended revisions.⁴⁵

⁴⁰ N.J. STAT. ANN. § 5:15-10 (West 2013).

⁴¹ N.J. STAT. ANN. § 5:15-3 (West 2013).

⁴² N.J. STAT. ANN. §§ 5:15-1, 15-4, 15-6, 15-7, 15-8, 15-11, 15-12 (West 2013).

⁴³ Minutes of Commission Meeting, N.J. LAW REVISION COMM'N, 1 (Apr. 17, 2014) (on file with author) [hereinafter April 17, 2014 Meeting Minutes].

⁴⁴ *Id.* at 2.

⁴⁵ *Id.*

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A. Definitions

The current section 2 of the Equestrian Activities Liability Act provides a list of relevant definitions and also addresses inherent risks of equine activity, as follows:

5:15-2. Definitions

As used in this act:

“Equestrian area” means all of the real and personal property under the control of the operator or on the premises of the operator which are being occupied, by license, lease, fee simple or otherwise, including but not limited to designated trail areas, designated easements or rights-of-way for access to trails, and other areas utilized for equine animal activities.

“Equine animal” means a horse, pony, mule or donkey.

“Equine animal activity” means any activity that involves the use of an equine animal and shall include selling equipment and tack; transportation, including the loading and off-loading for travel to or from a horse show or trail system; inspecting, or evaluating an equine animal belonging to another person whether or not the person has received compensation; placing or replacing shoes on an equine animal; and veterinary treatment on an equine animal.

“Inherent risk or risks of an equine animal activity” means those dangers which are an integral part of equine animal activity, which shall include but need not be limited to:

- a. The propensity of an equine animal to behave in ways that result in injury, harm, or death to nearby persons;
- b. The unpredictability of an equine animal’s reaction to such phenomena as sounds, sudden movement and unfamiliar objects, persons or other animals;
- c. Certain natural hazards, such as surface or subsurface ground conditions;
- d. Collisions with other equine animals or with objects; and
- e. The potential of a participant 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.

“Operator” means a person or entity who owns, manages, controls or directs the operation of an area where individuals engage in equine animal activities whether or not compensation is paid. “Operator” shall also include an agency of this State, political subdivisions thereof or instrumentality of said entities, or any individual or entity acting on behalf of an operator for all or part of such activities.

“Participant” means any person, whether an amateur or professional, engaging in an equine animal activity, whether or not a fee is paid to engage in the equine animal activity or, if a minor, the natural guardian, or trainer of that person standing in loco parentis, and shall include anyone accompanying the participant, or any person coming onto the property of the provider of equine animal activities or equestrian area whether or not an invitee or person pays consideration.

“Spectator” means a person who is present in an equestrian area for the purpose of observing equine animal activities whether or not an invitee.⁴⁶

Because some of the language in the Equine Act’s definitions section, detailing the inherent risks of an equine activity, was substantive in nature, the Commission proposed moving it to section 3, the “assumption of inherent risks” portion of the Act. This change would put all of the listed inherent risks of equine activity in one section to enhance internal cohesiveness. The revised language is as follows:

5:15-2. Definitions

As used in this act:

“Equestrian area” means all of the real and personal property under the control of the operator or on the premises of the operator which are being occupied, by license, lease, fee simple or otherwise, including but not limited to designated trail areas, designated easements or rights-of-way for access to trails, and other areas utilized for equine animal activities.

“Equine animal” means a horse, pony, mule or donkey.

“Equine animal activity” means any activity that involves the use of

⁴⁶ N.J. STAT. ANN. § 5:15-2 (West 2013).

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an equine animal and shall include selling equipment and tack; transportation, including the loading and off-loading for travel to or from a horse show or trail system; inspecting, or evaluating an equine animal belonging to another person whether or not the person has received compensation; placing or replacing shoes on an equine animal; and veterinary treatment on an equine animal.

“Operator” means a person or entity who owns, manages, controls or directs the operation of an area where individuals engage in equine animal activities whether or not compensation is paid. The term “operator” shall also include an agency of this State, political subdivisions thereof or instrumentality of said entities, or any individual or entity acting on behalf of an operator for all or part of such activities.

“Participant” means any person, whether an amateur or professional, engaging in an equine animal activity, whether or not a fee is paid to engage in the equine animal activity or, if a minor, the natural guardian, or trainer of that person standing in loco parentis, and shall include anyone accompanying the participant, or any person coming onto the property of the provider of equine animal activities or equestrian area whether or not an invitee or person pays consideration.

“Spectator” means a person who is present in an equestrian area for the purpose of observing animal equine activities whether or not an invitee.⁴⁷

B. Assumption of Inherent Risk

The legal doctrine of assumption of risk is addressed in two separate sections of the Equine Act.⁴⁸ The current section 3 puts participants on notice of the dangerous propensities of equestrian activities and the duty to know their range of abilities:

5:15-3. Assumption of inherent risks

A participant and spectator are deemed to assume the inherent risks of equine animal activities created by equine animals, weather conditions, conditions of trails, riding rings, training tracks, equestrians, and all other inherent conditions. Each participant is assumed to know the range of his ability and it shall be the duty of

⁴⁷ *Id.*

⁴⁸ N.J. STAT. ANN. §§ 5:15-3, 15-5 (West 2013).

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.⁴⁹

While section 3 provides guidance to participants by identifying the potential dangers, the current section 5 informs participants of the legal effect of being made aware of these risks and participating anyway, when that participation results in injury:

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.⁵⁰

The inherent risks initially included among the definitions in section 2, discussed above, have been inserted in the revised version of section 3, below, to provide a more clear and comprehensive list of the dangers participants in equine activities and spectators assume.⁵¹ The phrase “that are an integral part of equine activity, including” is meant to clarify that the list, while not exhaustive, reflects the most common and likely hazards associated with equine activities.⁵² Note that subsection a(3), below, combines terminology relating to weather and ground conditions found in pre-revision sections 2 and 3.⁵³ This draft reflects the Commission’s decision to avoid adding detailed requirements not found in the current law that might increase the difficulty associated with the distinction between risks participants assume and duties operators owe. Subsection (4) is identical to its original counterpart, subsection d, under section 2.⁵⁴

⁴⁹ N.J. STAT. ANN. § 5:15-3.

⁵⁰ N.J. STAT. ANN. § 5:15-5.

⁵¹ N.J. STAT. ANN. § 5:15-2 (West 2013).

⁵² *Id.*

⁵³ N.J. STAT. ANN. §§ 5:15-2–3.

⁵⁴ N.J. STAT. ANN. § 5:15-2d.

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The language of the new subsection (5), almost identical to the current subsection e under section 2, was the subject of extensive deliberation, which resulted in the addition of the phrase “or other person” to recognize the possibility of nonparticipants acting thoughtlessly or negligently in the context of equine activities that could contribute to injury to participants or others.⁵⁵ The Commission considered many possible types of troublesome conduct involving sights or sounds that might potentially startle a horse. The proposed revision to section 3 reads 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

⁵⁵ N.J. STAT. ANN. § 5:15-2e.

death which results from participation in an equine animal activity.⁵⁶

The proposed revision of section 5 contains additional language borrowed from the Ski Act and Roller Skating Rink Act to more closely align the Equine Act's assumption of risk provision with those of the other two Title 5 statutes.⁵⁷ As discussed in *Hubner*, although the expressed policy in the Equine Act differs from that of the Ski Act and Roller Skating Rink Act, "all three statutes reflect an effort to protect operators of these recreational facilities from liability by maintaining an assumption of risk defense against injuries resulting from inherent conditions of the activity or the facility."⁵⁸ As with the corresponding sections of the Ski Act and Roller Skating Rink Act, the new language would trigger the application of comparative negligence principles in a case where an operator breaches a duty.⁵⁹ The proposed revision to section 5 reads 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, 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 of a participant to conduct himself within the limits of his abilities as provided in section 3 of this act, and failure to adhere to the duties set out in section 3, 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 the operator has violated his duties or responsibilities under this act, in which case the provisions of P.L.1973, c. 146 shall apply.⁶⁰

⁵⁶ N.J. STAT. ANN. § 5:15-3.

⁵⁷ N.J. STAT. ANN. §§ 5:13-6, 14-7 (West 2013).

⁵⁸ See *Hubner v. Spring Valley Equestrian Ctr.*, 203 N.J. 184, 202-03 (2010).

⁵⁹ See N.J. STAT. ANN. §§ 5:13-6, 14-7 (containing identical language specifying that, when an "operator has violated his duties or responsibilities under this act . . . the [comparative negligence] provisions of P.L.1973, c. 146 shall apply").

⁶⁰ N.J. STAT. ANN. § 5:15-5 (West 2013).

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C. Operators' Duties

As discussed above, the current section 9 of the Equine Act pertains to actions that if taken by operators, could have the legal effect of exposing them to liability, even when a participant has knowingly assumed the inherent risks of equestrian activity:

5:15-9. Exception to limitations on operator liability

Notwithstanding any provisions of sections 3 and 4 of this act 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.⁶¹

The content and title of revised section 9 are intended to reflect the addition of affirmative operator responsibilities; the Ski Act and Roller Skating Rink Act each contain a section with a similarly descriptive title.⁶² The commenter proposing the title revision argued persuasively that the continued reference to “[e]xceptions to limitations on operator liability” would be confusing and ambiguous and that the operators’

⁶¹ N.J. STAT. ANN. § 5:15-9 (West 2013).

⁶² N.J. STAT. ANN. §§ 5:13-3, 14-4 (West 2013).

responsibilities described in revised section 9 could no longer accurately be described as “exceptions” to the assumed risks.⁶³ Although statutory section headings are not enacted, and are not technically under the control of the Legislature, the Commission determined that incorporating the proposed language would improve the readability of the heading and avoid a potential source of confusion.⁶⁴

The current language in subsection a creates operator liability when equipment or tack provided to participants is found to be faulty and results in injury.⁶⁵ The new language in subsection a(1) pertains to all equipment and tack used in equine activities (as opposed to only what is provided to participants) and provides an affirmative operator responsibility similar to that found in the corresponding section 4 of the Roller Skating Rink Act.⁶⁶ Subsection a(2) mandates that equine operators be required to not only maintain all equipment and tack in good condition, but also to inspect equipment in order to limit the possible injuries that may result from faulty equipment.⁶⁷ Subsection a(3) comports with the intent of the Legislature by creating an affirmative duty on the part of the operator to make reasonable and prudent efforts to determine a participant’s ability to manage a particular equine animal.⁶⁸ Subsection a(4) “takes into consideration that there may be hazards that cannot be removed and that some hazards are not obvious or man-made.”⁶⁹ In response to the concerns expressed by the court in *Hubner*, this language was redrafted in an effort to clarify the legal standard.⁷⁰ The language is based on New Jersey tort law regarding the standard of care generally owed by proprietors to invitees.⁷¹ Subsections a(5) and a(6) are identical to current subsections d and e, respectively, in section 9 of the

⁶³ April 17, 2014 Meeting Minutes, *supra* note 43.

⁶⁴ *See, e.g.*, *Aragon v. Estate of Snyder*, 314 N.J. Super. 635, 639 (N.J. Super. Ct. 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.”).

⁶⁵ N.J. STAT. ANN. § 5:15-9a.

⁶⁶ N.J. STAT. ANN. § 5:14-4.

⁶⁷ Final Report, *supra* note 36.

⁶⁸ Final Report, *supra* note 36; *see* N.J. STAT. ANN. § 5:15-1 (West 2013) (statement by the Senate Senior Citizens, Veterans’ Affairs and Agriculture Committee).

⁶⁹ Final Report, *supra* note 36.

⁷⁰ Final Report, *supra* note 36; *see* *Hubner v. Spring Valley Equestrian Ctr.*, 203 N.J. 184, 184 (2010).

⁷¹ *See* N.J. STAT. ANN. § 2A:42A-3 (West 2013).

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Equine Act.⁷²

Section b reflects less complicated language than the language that is found in the current statute. Although it does not impact the standards imposed on operators or to the protections afforded to them, removing it entirely could inadvertently signal a change to the standards and balance of liability intended by the legislature.⁷³

5:15-9. Duties and responsibilities of operators

a. It shall be the responsibility of the operator to:

- (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
- (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

⁷² N.J. STAT. ANN. §§ 5:15-9d, e (West 2013); Final Report, *supra* note 36.

⁷³ Final Report, *supra* note 36.

an operator from any of the obligations imposed upon the operator by this section.⁷⁴

D. Posting of Warning Signs

Section 10 of the Equestrian Activities Liability Act, like its counterpart in the Roller Skating Rink Act, contains a requirement for operators to post warning signs on the premises:

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.)”

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.⁷⁵

The revised version of section 10 is identical to the current one, with an additional requirement that operators list the duties of participants, spectators, and operators beneath the capitalized print.⁷⁶ The passage following the capitalized warning is derived from section 4a 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.”⁷⁷ Adopting similar language here is intended to clearly notify all participants what qualifies as an inherent risk. Despite one commenter’s concern that specifically identifying the duties of operators and participants on warning signs could promote litigation, the Commission opted to follow the guidance provided by the Ski Act and

⁷⁴ Final Report, *supra* note 36.

⁷⁵ N.J. STAT. ANN. § 5:15-10 (West 2013).

⁷⁶ Final Report, *supra* note 36.

⁷⁷ N.J. STAT. ANN. § 5:14-4a (West 2013).

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Roller Skating Rink Act and specifically enumerated the duties and responsibilities of operators already recognized by the law.⁷⁸ Revised section 10 of the Equine Act provides:

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.⁷⁹

III. CONCLUSION

The Commission’s recommended modifications to the Equestrian Activities Liability Act are intended to address the issue of latent ambiguity, which the New Jersey Supreme Court raised in *Hubner* with restructuring and inserting new statutory language emphasizing affirmative duties and responsibilities of equestrian activities operators and participants.⁸⁰ Consistent with the practice of the NJLRC, the release of the Final Report will be followed by outreach to identify state lawmakers who may be interested in sponsoring legislation in this area.

⁷⁸ *Id.*; Minutes of Commission Meeting, N.J. LAW REVISION COMM’N (Dec. 20, 2012) (on file with author).

⁷⁹ Final Report, *supra* note 36.

⁸⁰ N.J. STAT. ANN. §§ 5:15-1–11 (West 2013); *Hubner v. Spring Valley Equestrian Ctr.*, 203 N.J. 184, 197 (2010).

