RUNNING SCARED: NEGLIGENCE AND THE RUNNING BOOM

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I. INTRODUCTION

The history of tort jurisprudence demonstrates that law adapts and responds to societal changes and expectations.[1] For example, technological innovations such as automobiles, airplanes, and computers have forced us to rethink and adjust tort doctrine. Changes in contemporary attitudes towards manufacturers have transformed the law of products liability. Similarly, today's altered societal norms have wrought changes in tort law as diverse as the dissolution of interspousal immunity in some jurisdictions[2] and a general recognition of liability for negligent infliction of emotional harm in others.[3]

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1. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 3, at 15-20 (5th ed. 1984).

2. *See, e.g.*, Rousey v. Rousey, 528 A.2d. 416, 417 n.1 (D.C. 1987) (noting the District of Columbia has rejected interspousal immunity statutorily); Hill v. Giordano, 447 So. 2d 164, 167 (Ala. 1984) (explaining that Alabama refuses to recognize interspousal immunity).

3. *See, e.g.*, Johnson v. Ruark Obstetrics & Gynecology Assoc., P.A., 395 S.E.2d 85, 89

America has experienced a tremendous boom in jogging and running during the past twenty years.[4] The number of runners has mushroomed to more than twenty-five million.[5] President Clinton was highlighted in *Runner's World* magazine shortly before his election,[6] and he had a special track constructed on the White House grounds for his workouts.[7] The rest of us — those who cannot snap our fingers and have a personal track built for us — do most of our running on the streets, highways, sidewalks, school tracks, golf courses, and in forests and parks across the country.

Obviously, runners have suffered many accidents. In addition to the ordinary muscle pulls and twisted ankles, however, runners have been injured by automobiles, dangerous terrain, attacking dogs, and negligent hunters.

This Article will examine the case law and legal theory relating to runners' accidents. Specifically, this Article concentrates on cases involving two types of injuries to runners: (1) injuries involving automobiles; and (2) injuries involving property that, allegedly, has been maintained negligently.[8] An analysis of the cases suggests

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(N.C. 1990) (acknowledging North Carolina's long history of providing recovery for negligent infliction of emotional distress); Williams v. City of Minneola, 575 So. 2d 683, 693 (Fla. Dist. Ct. App. 1991) (noting that Florida recognized the tort of negligent infliction of emotional distress).

4. *See, e.g.*, BOB GLOVER & PETE SCHUDER, THE NEW COMPETITIVE RUNNER'S HANDBOOK 1-7 (1988); MARC BLOOM, THE MARATHON 4-9 (1981); JAMES F. FIXX, JIM FIXX'S SECOND BOOK OF RUNNING 1-12 (1980).

5. GLOVER & SCHUDER, *supra* note 4, at 3. Some estimates put the number of runners at over 40 million. The statistics vary depending upon what questions the statisticians ask. Susan Kalish at American Running and Fitness Association reports that in the early 1980s there were approximately 34 million runners. She thinks, however, that was the peak, and that there has been a slow but gradual decline during the past 13 years. Telephone Interview with Susan Kalish, Executive Director, American Running and Fitness Association (Nov. 23, 1993).

6. Bob Plunkett, *The Front Runner*, RUNNER'S WORLD, Aug. 1992, at 41.

7. *See* Michael Blowen, *Bill's Other Running Mate*, BOSTON GLOBE, Mar. 2, 1993, at 56.

8. With respect to motorist liability, one study published in 1980 examined 60 instances of runner-motor vehicle collisions. According to the report, which was based on newspaper accounts of accidents, 30 of the 65 runners who were hit died and 19 others were seriously or critically injured. Allen F. Williams, *When Motor Vehicles Hit Joggers: Analysis of 60 Cases*, Oct. 1980 (preliminary report). This preliminary report is on file with the author of this article as well as at the office of the *Seton Hall Journal of Sport Law*. The report was also published in *Public Health Reports* in 1981.

I have consciously omitted cases concerning dogs, hunters, and rapists. Such cases and issues could certainly merit a separate article. *See* State of North Carolina v. Powell, 426 S.E.2d 91 (N.C. Ct. App. 1993) (convicting a dog owner of involuntary manslaughter when his pet rottweilers attacked and killed "an avid jogger"); Jean McMillan, *Lassie, Go Home*, RUNNER'S WORLD, June 1991, at 25 (discussing safety tips in case of a dog attack); Linda

that courts are slowly acknowledging the unique place of runners in our society. In some cases, courts treat runners merely like ordinary walking pedestrians. In other cases, courts have been sensitive to a number of the factors that make runners materially different from walkers, such as their faster pace, greater mobility, and unpredictable movements.

Part II of this Article reviews the elements of a negligence cause of action. Part III considers motorists' liability to runners and sets forth the two means of proving liability on the part of the driver. Part IV discusses property owners' liability to runners. This section examines the traditional trespasser, licensee, and invitee status and how such classification can affect a case. In part V, the Article explores the liability of public entities for injuries occurring on public property. Part VI evaluates the affirmative defenses available to defendants in cases involving injured joggers. The Article concludes in part VII suggesting that courts can still do more to consider the factors that make runners unique and different from walking pedestrians.

II. PREFACE: A NEGLIGENCE PRIMER

A cause of action for negligence is separated into four separate elements: duty; breach; causation (cause in fact and proximate cause); and injury.[9] In *Eddings v. Dundee Township*,[10] a case where a runner was injured by a car on a narrow road, the Illinois Court of Appeals stated the elements succinctly: "In an action for negligent conduct, the plaintiff must establish the existence of a duty of care owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately resulting from that breach."[11] Unfortunately, however, these elements are not easily defined. There are aspects of the duty element, for example, which may also be probative of both breach of duty and proximate cause.[12]

Miller, *Crime Watch*, RUNNER'S WORLD, Oct. 1991, at 15 (discussing efforts to combat assaults on female runners).

9. KEETON et al., *supra* note 1, § 30, at 164-65.

10. 478 N.E.2d 888 (Ill. App. Ct. 1985).

11. *Id.* at 893. *See also, e.g.*, Bacon v. Mussaw, 563 N.Y.S.2d 854, 855 (N.Y. App. Div. 1990) (involving a runner who sued a municipality for negligence and the court stated that "before a defendant may be found liable for its negligence, a duty must exist, the breach of which is the proximate cause of the plaintiff's injury") (citing Palsgraf v. Long Is. R.R. Co., 162 N.E. 99 (N.Y. 1928)).

12. KEETON et al., *supra* note 1, § 42, at 272-80.

Recognizing at the outset that definitions of these elements are inherently imprecise, it is possible, nevertheless, to analyze a basic negligence cause of action as follows. First, a defendant ordinarily owes a duty to a plaintiff, either when a legal relationship between the two creates a duty,[13] or when the defendant's conduct creates a foreseeable risk to the plaintiff.[14] Second, a defendant breaches a duty when the defendant fails to act like a reasonable person under the circumstances of the duty.[15] Third, generally speaking, a defendant's breach of duty is the actual cause of a plaintiff's injury if the plaintiff's injury would not have occurred "but for" the defendant's breach of duty.[16] Additionally, a defendant's breach of duty is considered a proximate cause of a plaintiff's injury if, in addition to being an actual cause, the plaintiff's injury is a foreseeable consequence of the defendant's breach of duty.[17] Lastly, injury includes both physical and mental injury.[18] A plaintiff must prove each of these elements by a preponderance of the evidence in order to win her case. Thus, in cases involving runners injured by cars or dangerous terrain, courts must inspect and dissect each of these elements.

III. MOTORIST LIABILITY

Do automobile drivers owe a duty of reasonable care to runners? As noted above, persons generally owe a duty of reasonable care to another when their conduct creates a foreseeable risk to the other person.[19] In many respects this issue is reminiscent of the pivotal issue in the famous case *Palsgraf v. Long Island Railroad Co.*[20] In

13. In *Ehlinger v. Board of Educ. of New Hartford Central Sch. Dist.*, the court held that, where a student was injured while running during a fitness test in gym class, "[t]here [was] no question that defendant owed a duty to [the plaintiff]. A school has the duty to exercise the same degree of care toward its students as would a reasonably prudent parent under comparable circumstances." Ehlinger v. Board of Educ. of New Hartford Central Sch. Dist., 465 N.Y.S.2d 378, 379 (1983).

14. RESTATEMENT (SECOND) OF TORTS § 284 (1965). *See also* Turner v. Rush Medical College, 537 N.E.2d 890 (Ill. App. Ct. 1989). In *Turner*, a student was injured as a result of a timed, one mile run. The court stated that the existence of a legal duty required the occurrence to have been reasonably foreseeable rather than simply foreseeable. *Id.* at 891.

15. KEETON et al., *supra* note 1, § 30, at 164. *See also* RESTATEMENT, *supra* note 14, § 283.

16. KEETON et al., *supra* note 1, § 41, at 265-68.

17. *Id.* § 42, at 272-300.

18. *See id.* § 30, at 165.

19. *See supra* text accompanying note 14.

20. 162 N.E. 99 (N.Y. 1928).

that case, Judge Cardozo analyzed the questions of negligence and foreseeable risk in terms of duty, noting that the question of proximate cause was inapplicable in that situation.[21] In the *Palsgraf* case, railroad personnel pushed and pulled a passenger aboard a departing train, dislodging the passenger's wrapped explosives. The explosives detonated and purportedly "caused" the plaintiff's injury when a scale fell and hit her. Judge Cardozo refused to impose liability for negligence on the railroad.[22] He stated:

> The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest . . . . If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to someone else.[23]

Foreseeability of risk, then, is the touchstone of liability for negligence, regardless of whether one analyzes foreseeability of risk as a component of duty or of proximate cause.

Today the prevalence of runners along the sides of city streets and country roads is well known. The sheer number of runners effectively puts drivers on notice.[24] Thus, drivers' conduct creates foreseeable risks to runners. Apparently, therefore, drivers owe a duty of reasonable care to runners. In fact, this proposition is so obvious that a number of courts have not even bothered to address the issue of duty in their decisions. For example, in *Leonard v. Bleser*,[25] the evidence was undisputed that a motorist ran her vehicle off the road and struck a runner while the motorist's eyes were diverted from the road.[26] There was no evidence that suggested that the accident was proximately caused by anything other than

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21. *Id.* at 101.
22. *Id.* at 99, 101.
23. *Id.* at 99.
24. *See supra* text accompanying notes 4-5 (discussing the prevalence of runners).
25. 362 S.E.2d 68 (Ga. Ct. App. 1976).
26. *Id.* at 69. The motorist was fumbling for a pack of cigarettes when she ran off the road. *Id.*

negligence. The *Leonard* court held that the runner was entitled to partial summary judgment on the issue of liability.[27]

Similarly, in *Parker v. Windbourne*,[28] the defendant's vehicle struck a runner while the runner was attempting to cross a highway. The court stated that "[t]he fact that she drove the automobile into the plaintiff on the highway while the visibility was clear is some evidence that she did not keep a proper lookout or keep the vehicle under control and bring it to a halt so as to avoid a collision. This is evidence of negligence."[29] In another case[30] involving a car-runner accident, the Supreme Court of Alabama openly stated that "drivers have the duty to travel at a safe and appropriate speed, especially when special hazards exist with respect to pedestrians."[31] The court emphasized that "drivers have the duty to take due care to avoid colliding with any pedestrian and shall give warning by sounding the horn of their cars or taking other precautions to warn of the danger of collision."[32]

How can a court determine whether a driver breaches the duty of reasonable care owed to a runner? The general rule is that a person breaches the duty of reasonable care when he fails to act like a reasonable person under the circumstances.[33] In order to determine the reasonableness of conduct, courts usually consider the risks involved as well as the utility of the conduct.[34] Such ab-

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27. *Id.*

28. 273 S.E.2d 750 (N.C. Ct. App. 1981).

29. *Id.* at 751.

30. Hunnicutt v. Walker, 589 So. 2d 726 (Ala. Civ. App. 1991).

31. *Id.* at 728 (citing ALA. CODE § 32-5A-170 (1975)).

32. *Id.* (citing ALA. CODE § 32-5A-213 (1975)).

33. KEETON et al., *supra* note 1, § 30, at 164. *See also Hunnicutt*, 589 So. 2d at 727 (stating that "[t]he Alabama Supreme Court has defined negligence as the failure to do what a reasonably prudent person would have done under the same or similar circumstances, or the doing of something a normally prudent person would not have done under the same or similar circumstances").

34. RESTATEMENT, *supra* note 14, § 291. The Restatement section entitled "Unreasonableness; How Determined; Magnitude of Risk and Utility of Conduct" provides as follows:

> Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

Id. The Restatement section entitled "Factors Considered in Determining Utility of Actor's Conduct" provides as follows:

> In determining what the law regards as the utility of the actor's conduct for the purpose of determining whether the actor is negligent, the following factors are important:

stract considerations are not, however, always enlightening.[35]

In the case of a driver hitting a runner, there is another more concrete way to analyze breach of duty. In many instances when a driver hits a runner, the driver has violated a traffic law, and that violation causes or exacerbates the runner's injury. For example, a driver may exceed the speed limit, drive into a jogging/bike lane, drive off of the road, run a stop sign or stop light, or fail to stop before turning right on red. Most American jurisdictions recognize some version of the theory of negligence per se.[36] The theory of negligence per se is relatively simple. If a defendant violates a statute such as a typical traffic violation, that violation constitutes breach of a duty of reasonable care.[37] In theory, by establishing a traffic statute, the legislative body imposes a duty on drivers and defines the breach of that duty as well.[38]

A well known Connecticut case[39] states the basic rule of negligence per se and adds two important limiting factors:

> "Where a statute is designed to protect persons against injury, one who has, as a result of its violation, suffered such an injury as the statute was intended to guard against has a good ground of recovery." That principle of law sets forth two conditions which must coexist be-

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(a) the social value which the law attaches to the interest which is to be advanced or protected by the conduct;

(b) the extent of the chance that this interest will be advanced or protected by the particular course of conduct;

(c) the extent of the chance that such interest can be adequately advanced or protected by another less dangerous course of conduct.

Id. § 292.

35. *See supra* text accompanying notes 25-32 for cases where courts have found sufficient evidence that drivers have breached their duty of reasonable care to runners. Of course there are also a number of cases where courts have determined that drivers did not breach their duty of reasonable care. *See, e.g.*, Fieldy v. Weimer, 564 N.Y.S.2d 645 (N.Y. App. Div. 1991). In *Fieldy*, a pedestrian who was struck by a motorist's automobile brought an action against the motorist. The trial court entered judgment in favor of the motorist, and the pedestrian appealed. The appellate court affirmed, holding that the evidence was sufficient to support a verdict in favor of the motorist. *Id.* at 646.

36. KEETON et al., *supra* note 1, § 36, at 220-33.

37. *See generally id.*

38. Consider the jurisdiction where it is codified that making a right turn at a red light is permitted unless the intersection is marked with a "NO TURN ON RED" road sign. By turning right on red at an intersection where a sign clearly states "NO TURN ON RED," a driver is subject to liability under a theory of negligence per se if he hits a runner while making such an unauthorized turn. The statute, in effect, establishes that turning at a red light at an intersection marked "NO TURN ON RED" constitutes a breach of a driver's duty of reasonable care.

39. Wright v. Brown, 356 A.2d 176 (Conn. 1975).

> fore statutory negligence can be actionable. First, the plaintiff must be within the class of persons protected by the statute. Second, the injury must be of the type which the statute was intended to prevent.[40]

Arguably, most standard traffic statutes are intended to protect both walking and running pedestrians. Similarly, most traffic statutes are intended, at least in part, to prevent vehicles from striking pedestrians. Therefore, the theory of negligence per se is likely to be applicable to many cases where drivers hit and injure runners.[41]

In *Jones v. Southwestern Newspapers*,[42] the Texas Supreme Court explicitly recognized the applicability of the doctrine of negligence per se where a newspaper delivery driver struck and injured a runner. The driver was driving on the left-hand side of the street in order to better throw newspapers out of the driver's side window. The court noted that the "statutorily imposed standard of conduct is that a 'vehicle shall be driven upon the right half of the roadway.'"[43] Furthermore, the court concluded that an "unexcused violation of this statute constitutes negligence per se."[44]

In many car-runner accidents, the issues of actual and proximate cause are not necessarily difficult. In *Knipe v. Rector*,[45] the defendant driver admitted having drunk both beer, and scotch whiskey during the three hours immediately prior to the accident and was driving between sixty and sixty-five miles per hour when he struck a runner, literally knocking his body into the next county.

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40. *Id.* at 179 (quoting Knybel v. Cramer, 29 A.2d 576, 577 (Conn. 1942)) (citations omitted).
41. *See, e.g.*, Parker v. Windborne, 273 S.E.2d 750 (N.C. Ct. App. 1981).
42. 694 S.W.2d 455 (Tex. 1985).
43. *Id.* at 458 (citing TEX. REV. CIV. STAT. ANN. art. 6701d, § 52(a)).
44. *Id.*
45. 463 S.W.2d 769 (Tex. Civ. App. 1971).

The court had little trouble finding that the defendant "was negligent . . . in failing to keep a proper lookout and also in driving his car at an excessive rate of speed and that such negligent acts or omissions each proximately caused the collision with the death of [the runner]."[46]

Automobile cases that sometimes stretch the bounds of proximate causation often involve the theory of negligent entrustment.[47] *Salamone v. Riczker*[48] involved the negligent entrustment of a car and an accident which injured a runner.[49] In *Salamone*, a teenager stole keys to his family car, hid them, and allowed two of his friends (neither of whom was old enough to have a driver's license) to drive the car while his parents were away. One of the youths lost control of the car and struck a runner on the side of the road. The court recognized that the teenager could be held liable for the runner's injuries under a theory of negligent entrustment because "[t]hrough those keys he controlled the use of the car and claimed the right to decide who else might drive it."[50] The court supported its decision stating:

> We think the better view is to think of control for purposes of negligent entrustment in terms of the ability to determine whether another may use the potentially dangerous instrumentality. To hold otherwise would produce the paradox that a person who comes into unauthorized physical control of a car, such as a car thief, would be less subject to civil liability for negligent entrustment than someone authorized to have physical control, such as an owner.[51]

Salamone teaches that liability can extend far beyond the actual driver herself. In certain circumstances, an injured runner can recover against a party who negligently permits another to drive a vehicle.[52]

These cases suggest that, in a typical scenario where a motorist hits and injures a runner, the runner stands a fairly good chance of getting to a jury with a prima facie case of negligence either based

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46. *Id.* at 773. *See also* Leonard v. Bleser, 362 S.E.2d 68, 69 (Ga. Ct. App. 1976) (stating that "there is no evidence of record which suggests that the accident was the proximate result of anything other than [defendant's] negligence").

47. KEETON et al., *supra* note 1, § 33, at 197-203.

48. 590 N.E.2d 698 (Mass. App. Ct. 1992).

49. *Id.* at 699.

50. *Id.*

51. *Id.* at 699-700 (citations omitted).

52. *See id.*

upon the traditional elements duty, breach, causation, and injury or based upon a theory of negligence per se.[53]

IV. PRIVATE PROPERTY OWNERS[54]

When a private property owner's negligence injures a runner, common sense dictates that the runner should have a viable cause of action against that property owner. A runner injured on property, however, must overcome myriad obstacles to recover for damages.

Traditionally, the common law has categorized plaintiffs who were injured on another's property into three distinct categories: trespassers; licensees; and invitees.[55] A trespasser is "a person who enters or remains upon land in the possession of another without a privilege to do so."[56] "A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent."[57] An invitee, on the other hand is,

> either a public invitee or a business visitor .... A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public .... A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of land.[58]

As a general rule, a recreational runner who is out for her regular run and enters the property of another is probably either a trespasser or a licensee.[59] Even if a property owner has notice that the runner routinely runs on his property, that notice does not elevate the runner to the status of an invitee. This is because "[o]ne whose presence upon the land is solely for his own purposes, in which the possessor has no interest, and to whom the privilege of entering is extended . . . by . . . tacit consent or as a matter of gen-

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53. This does not, however, necessarily mean that the runner will win her case. For specific problems with duty and affirmative defenses, *see infra* parts IV., V., and VI.

54. For convenience I refer to owners, occupiers, possessors, and lessees as "owners."

55. KEETON et al., *supra* note 1, §§ 58-61, at 393-432.

56. RESTATEMENT, *supra* note 14, § 329.

57. *Id.* § 330.

58. *Id.* § 332.

59. *See supra* notes 55-58 and accompanying text (discussing trespasser, licensee, and invitee status).

eral or local custom [is a licensee]."[60]

The classification of runners as trespassers, licensees, or invitees may be pivotal in any analysis of negligence on the part of the property owner. A property owner is said to owe different levels of duty to a person on his property, depending upon the person's classification.[61] Generally speaking, a land owner owes almost no duty to a trespasser, he owes only a duty of ordinary care to a licensee, and he owes a heightened duty to an invitee.[62] A property owner "is not liable for injury to trespassers caused by his failure to exercise reasonable care to put his land in a safe condition for them, or to carry on his activities in a manner which does not endanger them."[63] One exception, potentially important for runners to this lack of duty owed to trespassers, exists in circumstances where "trespassers in substantial number are in the habit of entering [a property owner's land] at a particular point, or of traversing an area of small size."[64] In such circumstances, a property owner may have "a duty of reasonable care to discover and protect them in the course of activities which the defendant carries on."[65] This exception could, for example, apply where a school cross country team habitually runs through a field or parking lot.

The only factor that distinguishes a licensee from a trespasser is that a licensee has the owner's consent.[66] Traditionally, a licensee has not fared much better than a trespasser. The standard position of the common law is that a licensee "has no right to demand that the land be made safe for [him], and he must in general assume the risk of whatever he may encounter."[67] An owner, however, owes a far greater duty to an invitee. To an invitee, an owner

> must not only use care not to injure the visitor by negligent activities, and warn him of hidden dangers known to the occupier, but he must also act reasonably to inspect the premises to discover possible dangerous conditions of which he does not know, and take reasonable precau-

60. RESTATEMENT, *supra* note 14, § 330 cmt. h.1.

61. Analytically, it may be more accurate to say that the definition of breach (*i.e.*, the threshold of what constitutes reasonable conduct) changes according to the classification of the entrant.

62. *See* KEETON et al., *supra* note 1, §§ 58-61, at 393-432.

63. *Id.* § 58, at 393-94.

64. *Id.* § 58, at 395-96.

65. *Id.* § 58, at 396.

66. *Id.* § 60, at 412.

67. *Id.*

> tions to protect the invitee from dangers which are foreseeable from the arrangement or use of the property.[68]

To the extent that a jurisdiction still recognizes these common law classifications and respective "levels of duty," these categories can have a significant impact on a runner's negligence cause of action against an owner of private property Nevertheless, these conventional categories and their respective "levels of duty" are probably not as critical today as they once were. One modern trend is to replace the traditional scheme and to impose, instead, one basic standard of reasonable care across the board.[69]

Interestingly, the cases that have addressed the issue of liability of property owners, when runners have been injured on their land, have generally not paid particular attention to the traditional classifications of trespasser, licensee, and invitee. Rather, the cases illustrate just how difficult it can be for a runner to prove the basic elements of negligence against a property owner. For example, it is not unusual for runners to trip and fall on uneven sidewalks. One might assume that a property owner should be responsible for maintaining safe and level sidewalks in front of their residences. Nevertheless, as the case of *Thiede v. Tambone*[70] demonstrates, courts are reluctant to hold a property owner liable for injuries caused by a poorly maintained sidewalk.

In *Thiede*, the plaintiff, who was running late at night, tripped and fell on crumbled pavement that was part of the defendant's sidewalk and driveway.[71] The Appellate Court of Illinois stated that "[t]he issue presented on appeal is whether the record establishes that the defendants owe a duty of care, statutory or otherwise, to plaintiff with regard to the maintenance, repair and/or use

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68. *Id.* § 61, at 425-26 (footnotes omitted).

69. *See, e.g.*, Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968), JOSEPH A. PAGE, THE LAW OF PREMISES LIABILITY § 6.4 (1976) (discussing the effect of *Rowland v. Christian*). Recreational use statutes have also significantly eroded this status-based analysis. *See generally*, John C. Barrett, *Good Sports and Bad Lands: The Application of Washington's Recreational Use Statute Limiting Landowner Liability*, 53 WASH. L. REV. 1 (1977); Dean P. Laing, Comment, *Wisconsin's Recreational Use Statute: A Critical Analysis*, 66 MARQ. L. REV. 312 (1983). These statutes provide general immunity for landowners in the absence of gross negligence or willful or wanton misconduct for recreational activities like running. *See* Barrett, *supra*, at 7. The prevalence of recreational use statutes severely restricts the potential liability of landowners to runners across most jurisdictions. *Id.* at 2 n.10.

70. 553 N.E.2d 817 (Ill. App. Ct. 1990).

71. *Id.* at 818. The plaintiff's "left toe caught the lip of the sidewalk where the pavement resumed." *Id.*

of the public sidewalk which abuts their property."[72] The condition of the driveway was not at issue because the record clearly reflected that the driveway was in a severe state of disrepair.[73]

After considering a city ordinance which the plaintiff argued imposed a statutory duty of maintenance, the *Thiede* court rejected duty on statutory grounds, holding that the ordinance was "not a public safety measure and does not impose liability on defendant for injuries resulting from their alleged violations of its terms."[74] Next, the court considered whether the defendant owed a duty based on common law principles. At the outset of this discussion, the court drew several firm lines in the sand. First, it noted that "[a] plaintiff's mere allegation of a landowner's duty is inadequate to support a negligence cause of action; plaintiff must allege sufficient facts from which the law will raise a duty."[75] Second, the court asserted that there is a "general principle that a landowner or occupier has no duty to maintain or repair public sidewalks abutting his property."[76]

Nevertheless, the court did acknowledge that this general rule "gives way when [the owner] appropriates the use of the sidewalk for a business purpose."[77] In fact, in this case, the defendant had leased the property for a business purpose. The *Thiede* court observed, however, that an earlier Illinois case, established "that in order for the duty to apply, the landowner or occupier had to take an affirmative step to appropriate the public walkway, such as blocking the walk, parking on it, using it to display goods, or other-

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72. *Id.* at 820.

73. *Id.* at 818.

> Photographs contained in the record established that at this intersection the public walk has disintegrated and appears to be comprised of crumbled pavement or gravel. The portion of the driveway to the east of the walk, leading onto the property, appears to be similarly deteriorated and composed of a similar texture, while the portion of the driveway to the west of the walk, leading to the street, appears to be somewhat intact. On the northerly and southerly edges of the driveway, the sidewalk surface resumes, thus forming a lip or slightly raised portion of pavement.

Id.

74. *Id.* at 821.

75. *Id.* The *Thiede* court noted that "'[w]hether the facts presented in a particular situation establish a relationship between two individuals such that the law will impose a duty upon one for the other's benefit is an issue of law to be determined by the court.'" *Id.* at 821-22 (quoting Ziemba v. Mierzwa, 549 N.E.2d 1384, 1386 (Ill. App. Ct. 1990), *rev'd on other grounds*, 566 N.E.2d 1365 (Ill. 1991)).

76. *Id.* at 822.

77. *Id.* (citing Dodd v. Cavett Rexall Drugs, Inc., 533 N.E.2d 486 (1988)).

wise preventing the public from using the walkway in its ordinary manner."[78] Thus, the court held that "the defendants did not appropriate the public sidewalk for a special use or business purpose,"[79] and it refused to impose a duty on the defendants because "the record [did] not establish that defendants affirmatively appropriated or assumed a special use of the sidewalk."[80]

Lastly, the *Thiede* court acknowledged that there was another viable exception to what it characterized as "[t]he general rule of a landowner's or occupier's nonliability for repairs to a public sidewalk."[81] The court explained that a landowner may owe a duty of reasonable care to sidewalk pedestrians "for 'personal injuries sustained as a proximate result of the dangerous condition of a sidewalk adjoining his property *when the dangerous condition was directly occasioned by him.*'"[82] The court in *Thiede* stated further that "[t]he appellate court has recognized an abutting owner's duty to exercise ordinary care *not to create an unsafe condition* which would interfere with the customary and regular use of the walk."[83] Using this exception, the *Thiede* case maintained that the record contained sufficient evidence to infer that the lessees, "with the defendants' knowledge and permission," damaged the walkway on which the runner had tripped.[84]

In sum, the *Thiede* court held that, "the facts and the record . . . support the conclusion that the defendants owed a duty to plaintiff to refrain from causing a defective condition in the sidewalk and to repair such defects; further, [that] defendants liability to plaintiff for his injuries resulting from damage occasioned by defendants may similarly be inferred."[85] Thus, the only reason that the court was willing to consider imposing liability on the property owner was because the owner knew that the constant driving by the lessees over the sidewalk had damaged it, and the owner had permit-

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78. *Id.* (citing *Dodd*, 533 N.E.2d at 486).

79. *Id.*

80. *Id.* The *Thiede* court stated that "[t]here is no evidence to suggest that defendants prevented the general public from using the sidewalk in any way, or that defendants obstructed the sidewalk, parked on the sidewalk or conducted business thereon." *Id.*

81. *Id.*

82. *Id.* (quoting 9 ILL. L. & PRAC., CITIES, VILLAGES & OTHER MUNICIPAL CORPORATIONS § 536, at 127-28 (1954)) (emphasis added).

83. *Id.* (citing Schuman v. Pekin House Restaurant & Lounge, 430 N.E.2d 145, 146 (1981)) (emphasis added).

84. *Id.* at 824.

85. *Id.*

ted that activity. Only by indirectly causing the damages (by knowing and permitting the lessees to ruin the sidewalk over time) did the property owner become subject to liability. The *Thiede* court's imposition of a duty on a property owner to maintain his sidewalk is, therefore, a thin imposition indeed. The runner was injured when he tripped and fell on a deteriorated sidewalk abutting the owner's property. Yet, *merely failing to repair damage alone* would, apparently, be insufficient to impose a duty on a property owner.[86]

Therefore, *Thiede* represents a case where a court completely ignored the unique characteristics of runners. A crumbling sidewalk is decidedly more dangerous to a runner moving at, say seven and one-half miles per hour, than to a slowly moving pedestrian. The probability of injury — foreseeability of risk — to a runner is simply greater. Similarly, the severity of the potential injury to a runner is far greater. Yet, the *Thiede* court never broached the subject of a higher degree of risk or the increased severity of potential injury to a runner. Had the court considered the greater foreseeability of risk and severity of injury to a runner, as opposed to a walker, perhaps it could have more easily found a duty of reasonable care on the part of the owner.

Bentley v. Amsterdam[87] presents several of the same issues raised in *Thiede*.[88] The plaintiff in *Bentley* sued a cemetery claiming that it had negligently maintained a sidewalk which was adjacent to the cemetery. The cemetery successfully argued that "the evidence presented was insufficient to establish ownership of the sidewalk where the plaintiff fell so as to give rise to a duty of care."[89] Furthermore, echoing the reasoning in *Thiede*, the *Bentley* court held that "[i]n the absence of proof of ownership, defendant merely has the status of an abutting property owner which, without more, will not cast it in liability."[90] The *Bentley* court also rejected the plaintiff's argument that "by performing various acts of maintenance on the sidewalk in the past, [the cemetery] undertook a duty to continue doing so in a careful manner."[91] The court explained that "[a]n abutting property owner cannot be held liable for negli-

86. *See id.* at 823-24.

87. 565 N.Y.S.2d 533 (App. Div. 1991).

88. In *Bentley*, a runner fell while running on a sidewalk adjacent to the Greenhill Cemetery in Amsterdam, New York. *Id.* at 534.

89. *Id.*

90. *Id.*

91. *Id.*

gent maintenance without a showing, absent here, that the sidewalk was constructed in a special manner for the benefit of such owner."[92] Finally, echoing the opinion in *Thiede*, the *Bentley* court noted that the plaintiff had not alleged that the defendant's maintenance (last performed six years prior to the accident) had "created the allegedly defective condition which caused the plaintiff's injury."[93]

Tidwell v. Southland Corp.[94] is another case that raises duty issues similar to those raised in both *Thiede* and *Bentley*. In *Tidwell*, a minor sued a corporation seeking damages for injuries he suffered when he tripped and fell into a ditch while jogging on a path on the corporation's property.[95] The trial court entered summary judgment in favor of the corporation, and the plaintiff appealed. The Florida District Court of Appeal reversed, holding that material issues of genuine fact existed as to the condition of the path itself and sufficiency of the lighting.[96] Here, the court was apparently willing to entertain the possibility that the corporation had negligently maintained its path. Unlike *Thiede* and *Bentley*, however, the running accident actually occurred on the defendant's property, not merely on its adjacent sidewalk.[97]

One particularly compelling case of owner liability is *Fritscher v. Chateau Golf and Country Club*.[98] In *Fritscher*, the plaintiff was injured while running at night on a private golf course where he was a member. The country club permitted members to jog on the course but only at night. Fritscher suffered serious spinal and other

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92. *Id.*

93. *Id.* at 535.

94. 417 So. 2d 315 (Fla. Dist. Ct. App. 1982).

95. *Id.*

96. *Id.*

97. *See also* Daily v. University of Wis., Whitewater, 429 N.W.2d 83 (1988). In *Daily*, a student who hurt his foot while jogging on a university foot path brought a civil damage action against the university, its Board of Regents, and the university official responsible for maintenance of the campus. *Id.* at 83-84. The trial court granted defendants' motion to dismiss, and the student appealed. The appellate court reversed, holding that the student "substantially complied" with notice requirements for bringing suit against the university official responsible for maintaining the foot path, though notice of claim did not identify the official by name. *Id.* at 85.

98. 453 So. 2d 964 (La. Ct. App.), *writ denied*, 460 So. 2d 604 (La. 1984). This case is "compelling" for at least 3 reasons: (1) its large demand award; (2) its detailed medical chronology and description which was very graphic — it really makes the case interesting; and (3) the careful (almost painstaking) organization and analysis contained in the opinion which lays out elements and law clearly (even charting damages).

injuries when he tripped on an uncovered drain hole. Apparently, the runner had known about the existence of the uncovered drain but he had become accustomed to identifying its location by tall grass that surrounded it.[99] Country club personnel had cut the tall grass just before the accident and the runner failed to recognize the hazard without the grass as an indicator. Fritscher ultimately recovered nearly $700,000.00 in damages from the country club for its negligence.[100] Although the court did not consider Fritscher's status, because he was a paying member who had express permission to run on the golf course at night, he easily would have qualified as an invitee to whom the owner owed the greatest care.

The *Fritscher* decision implicitly reflects an appreciation of the differences between runners and walkers. It is likely that hundreds of golfers had walked by the drain hole between the time that the grass was cut and when Fritscher fell onto it. Those walking by it in the daylight probably could see the drain and avoid it. Fritscher, on the other hand, running at night, (the only time that the club permitted running out on the course) had a greater risk of injury than walking golfers because he was moving faster and in the darkness. Thus, presumably, it was more foreseeable that he would risk injury than people walking on the course.

Another case involving a running trip and fall accident is *Nuckley v. Cox Cable New Orleans, Inc.*[101] This case, however, involves an accident that occurred on a public sidewalk, not on the defendant's real estate. The runner sued because of an injury caused by the defendant's chattel, a television cable, which belonged to the defendant cable company.[102] According to the plaintiff, the wire had not been there on the previous day.[103] The trial judge held that the cable company was 100% at fault causing the runner's injuries.[104] The Louisiana Court of Appeals affirmed,

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99. *Id.* at 967.

100. *Id.* at 974.

101. 527 So. 2d 414 (La. Ct. App.), *writ denied*, 532 So. 2d 115 (La. 1988).

102. *Id.* at 415. The plaintiff tripped over a black wire extending from a curbside metal box (part of Cox's cable television system) to a nearby apartment building. The plaintiff was running at about 8:30 on a summer evening along a route that he ran daily. *Id.* at 415-16.

103. *Id.* at 416. This aspect of the defendant's negligence is similar to the Chateau Golf & Country Club's negligence in *Fritscher* where the dangerous instrumentality had been altered shortly before the runner's accident. *Fritscher*, 453 So. 2d at 967.

104. *Nuckley*, 527 So. 2d at 416. The cable company admitted that the wire had been installed improperly ("such wires being properly buried underground") but argued, unsuccessfully, that it had not installed the wire in the first place. *Id.* at 416-17.

asserting that the cable company's contention that someone else had positioned the wire "challenges the inference of fault drawn from facts which were not in dispute."[105]

As suggested above, it may be relevant that this case is somewhat different from the garden variety property case because the accident did not actually occur on the defendant's realty, but rather was caused by the defendant's chattel. Nevertheless, the case suggests that parties, who are responsible for chattels, fixtures, improvements, and the like, in areas where runners are foreseeable (like sidewalks), owe a duty of reasonable care to runners.[106] Also, the case recommends that owners breach that duty when they fail to install or maintain such chattels, fixtures, and improvements in a manner that is reasonable with respect to runners.[107]

These cases show that courts have, up to this point, rarely concerned themselves with the status of runners as trespassers, licensees, or invitees. This lack of concern probably reflects the modern trend in many jurisdictions to abrogate the traditional status-based categories.[108] More significantly, however, the cases expose just how important it can be for a court to take into account the faster speed of runners. Because runners move at a pace faster than walkers do, defective terrain poses an increased risk. Runners simply have less time to react to uneven surfaces and obstacles than walkers. Presumably, if a property owner has notice of a runner's presence, (as in *Fritscher*), a reasonable property owner would take precautions to ensure that his land is free of defects and obstacles that pose risks that are greater to runners than to walking pedestrians.

V. THE FEDERAL GOVERNMENT, STATES, AND MUNICIPALITIES

Many runners run on roads, in parks, or on other federal government, state, or city-owned property. Such areas that are open to the public may or may not be covered by recreational use statutes.[109] However, runners injured while running on property

105. *Id.* at 416.
106. *See id.* at 417.
107. *Id.*
108. *See supra* note 69 and accompanying text (discussing the trend toward the abrogation of the traditional status categories of trespasser, licensee, and invitee).
109. *See supra* note 69 (discussing recreational use statutes). *See also* Monteville v. Terrebonne Parish Consol. Gov't, 567 So. 2d 1097 (La. 1990) (holding that the recreational

owned by the federal government, states, or municipalities have special concerns.

Traditional common law held that state and the federal government were immune from tort liability.[110] This same concept has applied to municipal governments as well.[111] Hence, at common law, private citizens were unable to recover against these entities.

Nevertheless, in 1946, Congress abolished a great deal of the traditional tort immunity for the federal government by enacting the Federal Tort Claims Act (FTCA).[112] There are, however, several exceptions to the types of torts covered by the FTCA.[113] In fact, in a case where a serviceman *intentionally* drove his truck into a runner, the United States District Court of the District of South Carolina held that the runner could not recover under the FTCA because the injury was caused by an intentional tort not negligence.[114]

Furthermore, the FTCA merely provides a plaintiff access to the federal courts.[115] A state's substantive tort law still controls.[116] Thus, if state law sharply curbs government liability, a runner's case can be more difficult. For example, in *Spires v. United States,*[117] a runner fell into a ditch at a storm sewer outfall while running on a beach at night.[118] The United States Government

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use statute is not applicable to property owned by a public entity). *Compare* Riksem v. City of Seattle, 736 P.2d 275 (Wash. Ct. App. 1987) (holding that a recreational use statute is applicable to the city where a cyclist was injured on a bike trail); Sega v. State, 456 N.E.2d 1174 (N.Y. App. Div. 1983) (holding that the relevant recreational use statute is applicable to the state).

110. *See generally* RESTATEMENT, *supra* note 14, §§ 895A-C; KEETON et al., *supra* note 1, §§ 131-32, at 1032-69.

111. KEETON et al., *supra* note 1, § 131, at 1043, 1051.

112. 28 U.S.C. §§ 1346(b), 2671-2680 (1988). For example, one key code provision states: "The United States shall be liable . . . relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 2674.

113. Injuries sustained by armed forces personnel during combat, injuries sustained as a result of mail delivery, and a number of intentional torts such as assault, battery, and false imprisonment are not covered by the Tort Claims Act. 28 U.S.C. § 2680.

114. Martinez v. United States, 740 F. Supp. 399, 403 (D.S.C. 1990).

115. 28 U.S.C. § 1346(b).

116. Concerning state substantive law and the FTCA, see James A. Shapiro, *Choice of Law Under The Federal Tort Claims Act:* Richards *and Renvoi Revisited,* 70 N.C. L. REV. 641, 641-42, 642 n.3 (1992) (stating that "[o]ne of the many limitations on this waiver is that the liability of the United States be determined 'in accordance with the law of the place where the act or omission occurred'").

117. 805 F.2d 832 (9th Cir. 1986).

118. *Id.* at 833. Ditches of this sort resulted periodically from heavy rainfall "although . . .

owned the beach property since it was part of the Golden Gate National Recreational Area. The plaintiff brought suit against the United States under the FTCA.[119] The applicable California statute provided that "the government is liable as a land owner only for 'wilful or malicious failure to guard or warn against a dangerous condition, use, structure or activity.'"[120] The trial court ruled in favor of the runner, holding that the federal government knew about the ditch, knew that people walked and ran along the beach at night, knew that such persons were likely to sustain injuries, and "consciously failed to guard or warn against probable injury."[121]

On appeal, however, the United States Court of Appeals for the Ninth Circuit looked carefully at the California definition of "wilful misconduct" and reversed, concluding that the trial court erred in determining that the federal government's conduct was "wilful."[122] Thus, vestiges of the common law rules relating to liability for property owners[123] may remain as an obstacle to runners injured on United States property. It seems, the private property owner standard most analogous is the duty owed to trespassers. The *Spires* court found that the government's action did no rise to "wilful or malicious."[124] This level seems closest to the standard of care owed to trespassers.[125]

Just as the FTCA has abolished much of the federal government's tort immunity, today most jurisdictions have either

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ditches formed in the past were smaller and therefore less dangerous than the ditch into which Spires fell." *Id.* Spires broke his hip when he fell. *Id.*

119. *Id.*

120. *Id.* at 834 (quoting CAL. CIV. CODE § 846 (West 1980)).

121. *Id.* at 833.

122. *Id.* at 834. The Ninth Circuit stated:

> To be liable for wilful or malicious failure to warn, the Government must have had actual or constructive knowledge of the peril to be apprehended and actual or constructive knowledge that injury was a probable result of that peril. The trial court's findings of fact fail to support its conclusion that the Government had actual or constructive knowledge of the ditch into which Spires fell. We recognize that the court's findings of fact establish that the Government knew of the infrequent, unpredictable occurrence of ditches smaller than the one that formed suddenly on September 24, 1981. More was required to meet the legal standard [of wilful misconduct].

Id.

123. *See supra* text accompanying notes 55-58.

124. *Spires*, 805 F.2d at 834.

125. *See supra* text accompanying note 62 (discussing the lack of duty with respect to trespassers).

abolished or stripped away portions of the traditional state and local government immunities.[126] Thus, where runners are injured because of negligence, like defective conditions on state or municipal property, the general abolition of state and local government immunity for torts may provide them with a means for recovery. The ability to recover, however, may depend, in part, on the specific conduct that causes a runner's injury.

Municipalities, for instance, ordinarily have remained immune when the conduct at issue involves "basic policy."[127] "For example, courts have immunized negligently made street plans and designs on the ground that this involved 'planning' . . . ."[128] Nevertheless, "[m]ost jurisdictions do . . . agree that the construction and maintenance of streets and public ways is not within the immunity, either because for wholly inexplicable reasons this is considered 'proprietary,' or because, for equally inexplicable reasons it is considered an independent exception to the immunity."[129] The government generally will be held liable only for injuries which arise from faulty conditions, however, and not for those caused by "active operations" on or around public ways.[130] Indeed, most cases in which runners have sued state and local governments have involved allegations of negligent maintenance.[131] Therefore, the many runners injured because of negligently maintained sidewalks and pedestrian pathways probably have viable claims. On the other hand, a runner is unlikely to be able to recover against a municipality on the theory that the *design* or *plan* of a pedestrian pathway was negligent.[132]

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126. KEETON et al., *supra* note 1, § 131, at 1044, 1052-53. *See also, e.g.*, Bernadine v. City of N.Y., 62 N.E.2d 604 (N.Y. 1945). *See also* William H. Baker, *Injuries to College Athletes: Rights & Responsibilities*, 97 DICK. L. REV. 655, 657-60 (1993).

127. KEETON et al., *supra* note 1, § 131, at 1052.

128. *Id.* § 131, at 1052-53.

129. *Id.* § 131, at 1054.

130. *Id.*

131. *See, e.g.*, Pate v. Michigan Dep't of Transp., 339 N.W.2d 3 (Mich. Ct. App. 1983).

132. On December 29, 1989 a college student in Florida was hit by a truck (hit-and-run) and severely injured. He sued the city of Delray Beach arguing that the shoulder of the road was too soft "making it easy for cars to lose control," that there was insufficient lighting on the road, that there was no yellow stripe on the road, and no warning signs. A mediator determined that the city would probably prevail. Thus Delray Beach agreed to pay the runner $7,500 for college expenses and $1,500 for expert witnesses. The suit had originally asked for $22.5 million. Frank Cerabino, *When Medical Bills Mount, No One Is Safe from Blame*, PALM BEACH POST, Jan. 23, 1994, at B1. In December of 1993, the injured runner, Robert Rollinson, sued Sony and the retail store where he bought the Sony Walkman that he

In *Pate v. Michigan Department of Transportation*,[133] a runner was injured when he stepped on a stake protruding three to four inches above the ground.[134] The trial court held that the doctrine of government immunity barred the runner's claim because the portion of the signpost stake at issue was located on the grass outside of the travel portion of the road.[135] A Michigan statute provided that the government's liability and duty to maintain roadways extended only to "the improved portion of the highway designed for vehicular travel and . . . shall not include sidewalks, crosswalks or any other installation outside of the improved portion of the highway designed for vehicular travel."[136] The Court of Appeals of Michigan, however, reversed, holding that "[t]he state's affirmative obligation to maintain highways in reasonable repair has consistently been held to include the duty to maintain traffic control signs once erected."[137] The Court of Appeals of Michigan reasoned that traffic signs, once installed, "become[] a part of the improved portion of the highway and that thereafter the statute imposes a duty upon the state to maintain such a sign in proper repair."[138] Thus, government immunity was not a bar to the runner's claim.

In *Eddings v. Dundee Township*,[139] a runner was seriously injured when he was struck by a car. The plaintiff alleged that the township had negligently maintained the roadway by failing to trim bordering foliage.[140] The runner also argued that the township should have "construct[ed] and maintain[ed] the pavement and the shoulder of the road of sufficient widths to allow safe passage of vehicles and 'pedestrians' using the road."[141] Lastly, the plaintiff

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was wearing the night of his accident. Rollinson's argument is that Sony should put a warning on the Walkman telling runners not to use it, especially at night. *Id.*

133. 339 N.W.2d 3 (Mich. Ct. App. 1983).

134. *Id.* at 4. "[T]he stake was what remained of a traffic control sign which had been installed by defendant[, Michigan Department of Transportation]." *Id.* The runner argued that the Department of Transportation had been negligent in failing to remove that dangerous part of the signpost when it took the sign down. *Id.* at 4-5.

135. *Id.* at 5.

136. *Id.* (quoting MICH. COMP. LAWS § 691.1402; MICH. STAT. ANN. § 3.996(102)).

137. *Id.*

138. *Id.* at 6.

139. 478 N.E.2d 888 (Ill. App. Ct. 1985).

140. *Id.* at 892. The failure of the defendant to maintain the foliage on the side of the road caused "intermittent shadows and create[d] a 'tunnel effect' thereby blinding and confusing [the motorist] who was unable to see." *Id.*

This claim, one for negligent maintenance, is the type of claim to which courts have traditionally been receptive. *See supra* notes 130-131 and accompanying text.

141. *Eddings*, 478 N.E.2d at 892. This is also a negligent maintenance claim, and thus,

contended that the township should have "place[d] and maintain[ed] traffic control devices" to warn oncoming traffic of the dangerous conditions on the road.[142]

The Appellate Court of Illinois[143] interpreted the relevant Illinois statute[144] to impose a duty on the township to maintain roadways only for "those persons by whom the local government intended the property to be used."[145] The court reasoned that the township owed no duty to pedestrians along the road in question because the township had not built sidewalks next to the road.[146] The Appellate Court of Illinois interpreted the absence of sidewalks as evidence that the township had not intended pedestrians to travel next to the road.[147] Since the township did not intend pedestrians to use the road, the township owed no duty to pedestrians who used the road.[148] Thus, since the township owed no duty, there could be no prima facie case of negligence.[149] As was the case in *Spires v. United States*,[150] due to the court's narrow interpretation of the applicable statute that created and defined the government's duty, the runner was unable to recover against a governmental entity.

The *Eddings* court completely overlooked the distinction between runners and walking pedestrians. The court opined that

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qualifies as the sort of claim that courts have been willing to entertain against state and local governments. *See supra* note 130-131 and accompanying text.

142. *Eddings*, 478 N.E.2d at 892. The dangerous condition of the road stemmed from the narrowness of the road and the confusing tunnel effect caused by the light and shadows. *Id.*

To the extent that the plaintiff alleged that the municipality should have *placed* warning signs, this may have failed (had the court ever reached the issue substantively) because this is arguably a *planning* decision not one of maintenance. *See supra* text accompanying notes 127-130.

143. The trial court dismissed the action as to the county and granted summary judgment as to the township. *Eddings*, 478 N.E.2d at 889.

144. ILL. REV. STAT. ch. 85, para. 3-102(a) (1983). The statute provided in pertinent part:

> [A] local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used ....

Id., *cited in Eddings*, 478 N.E.2d at 893.

145. *Eddings*, 478 N.E.2d at 893.

146. *Id.* at 894.

147. *Id.*

148. *Id.*

149. *Id.*

150. 805 F.2d 832 (9th Cir. 1986). *See also supra* notes 117-124 and accompanying text (discussing the *Spires* case).

the township had not intended that pedestrians travel next to the road *because there was no sidewalk.*[151] Runners do not confine their running to sidewalks and bike lanes. To begin with, the concrete surface of most sidewalks is considerably less forgiving and more damaging to a runner's body. Furthermore, in many residential and rural areas, developers have designed communities with car travel in mind. Nevertheless, runners routinely travel five to ten miles and cannot be expected to seek out sidewalks on which to run. Thus, running on the side of roads is logical. Clearly, running next to a road is foreseeable.

It is common for runners to run in all sorts of weather.[152] One clear danger of running in the snow is that a runner's normal running routes will be impassible. Sidewalks and bike paths can be covered with snow and ice. When that happens, many runners brave the edges of the roadways. If a runner is then injured by a car on the road, is the municipality liable for failing to clear the sidewalks or bike paths?

One case that addressed this very question and answered it in the negative was *Bacon v. Mussaw.*[153] In *Bacon*, the plaintiff was hit by a motorist while running on the road surface.[154] Plaintiff sued the city on the theory that the city was negligent for failing to clear the snow from the "Bike/Hike Trail" that the city leased from the state.[155] The Appellate Division of New York reasoned that the city's duty was analogous to that of "any other owner or occupier of land."[156] As such, New York City's only duty was to exercise "reasonable care under the circumstances" in order to prevent injury to people who came onto the property.[157] Even though the city had occasionally cleared snow from the trail, the court held that the city had no duty to clear snow and ice from it during the winter months.[158] Apparently, the court was persuaded by the fact that people did not ordinarily use the trail during the winter months

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151. *Eddings*, 478 N.E.2d at 894.

152. Running books and magazines are full of advice to runners regarding the hazards of running in hot, cold, wet, windy, and snowy weather. *See, e.g.*, GLOVER & SCHUDER, *supra* note 4, at 37, 48, 59-60, 112-14, 273, 392, 463-68, 507.

153. 563 N.Y.S.2d 854 (N.Y. App. Div. 1990).

154. *Id.* at 855.

155. *Id.* On a February day in Plattsburgh, New York, Bacon went for a run. Because the "Bike/Hike Trail" was still covered with snow, she decided to run in the road instead. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 856.

and because it concluded that it was not reasonably foreseeable that joggers would use the trail during the winter.[159] The court also noted that the city's charter required that, in order to prevail, a plaintiff must give the city prior written notice of the dangerous condition.[160] Since the plaintiff had failed to give notice, the court held that the runner's suit was barred.[161] Thus, in *Bacon*, the runner lost on two accounts. First, because as a matter of substantive tort law, the city had no duty to maintain the "Bike/Hike Trail" during the winter.[162] Second, the runner failed to comply with the procedural requirement of giving the city notice that the snow on the trail was a hazardous condition.[163]

One technicality that can stand in the way of a runner's negligence claim against a government is a type of notice requirement different from that discussed in *Bacon*. In *Bacon*, the notice at issue was intended to make public officials aware of the problem and to permit the municipality time to remedy the hazard.[164] A separate kind of notice is notice of intent to file a lawsuit.

Many state and municipal governments require that a plaintiff give notice of intent to file a claim within a certain period of time after an injury.[165] The *Hatcher v. Galveston*[166] case illustrates how a notice requirement like this can prevent a runner from succeeding in a negligence claim against a municipality. Hatcher fell into a hole in a city street while running, however, he failed to give the city of Galveston notice of his claim within forty-five days of his accident and was therefore barred from suit.[167] The court was not persuaded by the plaintiff's argument that he was unable to comply with the notice requirement due to his hospitalization.[168]

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159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *See id.*
165. *See* KEETON et al, *supra* note 1, § 131, at 1045-46. Prosser and Keeton state:

> This is often a trap for the unwary citizen and even the attorney. It has been argued that these notice provisions violate the equal protection clause in that they treat the victim of the public tort differently from the victim of the private tort. Although a few courts have agreed with this argument and have struck down the special notice requirements, others have upheld these statutes. Varied technical details of this order require careful attention to the local statute in each case.

Id. § 131, at 1046 (footnotes omitted).
166. 775 S.W.2d 37 (Tex. Ct. App. 1989).
167. *Id.* at 39.
168. *Id.* at 38-39. The plaintiff in *Hatcher* sustained very serious injuries and underwent

These cases show that runners have significant hurdles to leap if they hope to successfully sue a government entity for negligence. *Spires v. United States*,[169] *Eddings v. Dundee Township*,[170] and *Bacon v. Mussaw*[171] show just how difficult it can be to prove that a government owes a duty of reasonable care to runners. *Bacon* and *Eddings* implicitly reject the notion that runners are intended or welcome users of roadsides (unless there is a sidewalk) and bike paths (at least during the winter months in climates where snow is likely).[172] These courts either reject or ignore the concept that runners are so prevalent that they could be considered foreseeable plaintiffs along any road, street, or highway and, therefore should be treated differently than walking pedestrians.[173]

VI. AFFIRMATIVE DEFENSES

Although a runner who is injured either by a motorist or by a defective condition on land may have a viable prima facie case against drivers, property owners, or government entities, these defendants may have powerful affirmative defenses to combat a runner's claims. The three most potent defenses against a plaintiff runner are contributory negligence, comparative negligence, and assumption of the risk.[174]

Traditional common law principles of contributory negligence barred a plaintiff's recovery if his own negligence had contributed even one iota to his injury.[175] In theory, courts held that a plaintiff ought not be permitted to recover if he was at fault too. In time, courts carved numerous exceptions to this seemingly harsh "all-or-nothing" rule.[176] Ultimately, courts began adopting the theory of comparative negligence. The basic idea of comparative negligence is to mitigate or soften the severe effects of the "all-or-nothing" contributory negligence approach. Many believed that it was manifestly unjust to prohibit recovery completely to a plaintiff in a case

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at least nine knee operations in an effort to correct his problems. *Id.* at 38.

169. 805 F.2d 832 (9th Cir. 1986)

170. 478 N.E.2d 888 (Ill. App. Ct. 1985).

171. 563 N.Y.S.2d 854 (N.Y. App. Ct. 1990).

172. *See Bacon*, 563 N.Y.S.2d at 856; *Eddings*, 478 N.E.2d at 894.

173. *See supra* text accompanying notes 4-5 (discussing the prevalence of runners).

174. There is some movement in tort law to treat these three defenses as one common concept. *See, e.g.*, Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90 (1959).

175. KEETON et al., *supra* note 1, § 65, at 452.

176. *Id.* § 66, at 462-68.

where the plaintiff was only slightly negligent. The theory of contributory negligence would bar, for example, a plaintiff who was only one percent negligent. On the other hand, comparative negligence permits a plaintiff to recover against a defendant on a pro rata percentage basis.[177]

There are actually three distinct schemes of comparative negligence: (1) pure comparative negligence; (2) equal fault bar; and (3) greater fault bar.[178] Pure comparative negligence allows a plaintiff to recover on a complete sliding scale.[179] Thus, in theory, in a situation where a plaintiff is ninety-nine percent negligent and a defendant is only one percent negligent, the plaintiff can still recover one percent of his damages from the defendant. In *Torres-Troche v. Municipality of Yauco*,[180] a runner was struck and killed by a city-owned ambulance. The jury returned a verdict for $84,000 against the municipality, but also found that the runner was seventy-five percent negligent.[181] Consequently, the municipality paid only twenty-five percent, $21,000, to the plaintiffs.[182]

Another case involving a contributory negligence argument is *Nuckley v. Cox Cable New Orleans, Inc.*[183] In *Nuckley*, the defendant argued that the plaintiff was contributorily negligent and that his damages should be reduced according to his percentage of fault.[184] The Louisiana Court of Appeals upheld the trial judge's determination that the runner was not contributorily negligent for running at such a fast pace at night.[185]

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177. *Id.* § 67, at 468-79.

178. *See generally id.*

179. *Id.* § 67, at 471-73.

180. 873 F.2d 499 (1st Cir. 1989).

181. *Id.* at 500.

182. *Id.*

183. 527 So. 2d 414 (La. Ct. App. 1988). *See also supra* notes 101-107 and accompanying text (discussing the *Nuckley* case). In *Nuckley*, the plaintiff was running at about a seven-minutes-per-mile pace on a sidewalk at night. He admitted that when he ran his eyes wandered and were not always fixed in front of him. *Nuckley*, 527 So. 2d at 416.

184. *Nuckley*, 527 So. 2d at 416. Louisiana has adopted a pure comparative negligence scheme. LA. CIV. CODE ANN. art. 2323 (West Supp. 1994).

185. *Nuckley*, 527 So. 2d at 416. In so deciding, the court examined the problem as follows:

> A pedestrian has a duty to see that which should have been seen. He is not required to look for hidden dangers, but he is bound to observe his course to see if his pathway is clear. A pedestrian is held to have seen those obstructions in his pathway which would be discovered by a reasonably prudent person exercising ordinary care under the circumstances. Whether the obstruction is an obvious hazard which a pedestrian should observe and avoid, or whether the obstruction is a

In the *Nuckley* case, although the runner was running relatively fast and at night, the court held that he was not contributorily negligent because he was running on a route that he ran daily; the sidewalks on his route were generally flat and unobstructed; he encountered the obstruction that caused his injury for the first time on that very occasion; and the obstruction was a black cable less than one inch in diameter.[186] Thus, neither a runner's speed nor the fact that she runs in the dark necessarily constitute contributory/comparative negligence.[187] Apparently, the *Nuckley* case did consider the special circumstances of the runner. Perhaps a walking pedestrian could have seen the cable and easily avoided it. The circumstances of running alter the calculus of contributory/comparative negligence.

The two modified comparative negligence approaches are far more limited. Both the equal fault bar and greater fault bar systems have a fifty percent threshold. The difference depends upon which side of the fifty percent dividing line the plaintiff falls.[188] Equal fault bar jurisdictions prevent a plaintiff from recovery if the finder of fact determines that the plaintiff was at least fifty percent negligent.[189] If a plaintiff is at least half responsible for his injury, then, so the theory goes, we ought not allow him to recover damages against a defendant who is, *ipso facto,* less than or equal to fifty percent responsible for the plaintiff's injury. In essence, a tie goes to the defendant. Greater fault bar jurisdictions hold that a plaintiff may not recover any damages if he was fifty-one percent or more negligent.[190] These jurisdictions take the position that a plaintiff ought not be permitted recompense if he is more than half responsi-

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> hazard which a pedestrian exercising due care would not see unless posted with proper warning devices, depends upon all surrounding circumstances. Factors to consider include the time of day, the nature of the pathway, distractions to the attention, familiarity with the obstruction, and the size, situation and color of the obstruction.

Id. (quoting Dunaway v. Rester Refrigeration Serv., Inc., 428 So. 2d 1064, 1067 (La. Ct. App.), *writ denied,* 433 So. 2d 1056, 1057 (La. 1983)).

186. *Id.*

187. *But see* Fieldy v. Weimer, 564 N.Y.S.2d 645 (N.Y. App. Div. 1991) In *Fieldy,* the plaintiff, who had been drinking alcohol for several hours before deciding to jog home on the edge of the road, wore a dark coat, blue jeans, and brown shoes, was listening to a portable radio with headphones, and tripped toward the roadway just prior to the accident. *Id.* at 646. The plaintiff was unable to recover against the motorist who's car struck him. *Id.*

188. No pun intended.

189. KEETON et al., *supra* note 1, § 67, at 473.

190. *Id.*

ble for his injury. Here, a tie goes to the plaintiff. Greater fault bar jurisdictions are willing to allow plaintiffs to recover something even when they are adjudged fifty percent responsible for their own injuries. Given human nature, and our general willingness to say "yea, I guess it's about half and half," the choice of adopting a greater fault bar or an equal fault bar can often determine a plaintiff's ability to recover.

Of course, if the runner is well over either fifty percent or fifty-one percent negligent and the case is not close, a plaintiff will be unable to recover at all in either type of modified comparative negligence jurisdiction. For instance, in *Berk v. Matthews*,[191] a runner was hit by a car as she crossed at an intersection.[192] The jury found that the runner was eighty percent negligent and the driver twenty percent.[193] The Ohio comparative negligence statute formulates a greater fault bar system.[194] Thus, the injured runner was unable to recover anything, since the jury found her to be fifty-one percent or more at fault.[195]

Today many runners are minors. Popular books and magazines on running often devote special chapters and articles to young runners.[196] The determination of contributory or comparative negligence for minors is different than the standard for adults.[197] For a minor, "the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person *of like age, intelligence, and experience under like circumstances*."[198] Often, however, courts persist in holding minors to an adult standard of care if the activity that they are engaging in is either an adult activity[199] or an activity that can be characterized as "inherently dangerous."[200]

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191. 559 N.E.2d 1301 (Ohio 1990).

192. *Id.* at 1302. The driver of the car that struck her was in the process of turning right on red. *Id.*

193. *Id.* at 1307.

194. Under Ohio statutory law, a plaintiff's recovery is denied when the plaintiff's negligence is greater than 50%. OHIO REV. CODE ANN. § 2315.19(A)(2) (Anderson 1991).

195. *Id.* at 1309.

196. *See, e.g.*, GLOVER & SCHUDER, *supra* note 4, at 16-18, 76, 243-44, 479. JAMES F. FIXX, THE COMPLETE BOOK OF RUNNING 117-24 (1977).

197. *See* RESTATEMENT, *supra* note 14, §§ 475, 285, 283A.

198. *Id.* § 283A (emphasis added).

199. *Id.* § 283A cmt. c.

200. *See, e.g.*, Robinson v. Lindsay, 598 P.2d 392, 394 (Wash. 1979) (*en banc*) (holding that operation of a snowmobile is inherently dangerous, thus triggering an adult standard of care for a minor driving a snowmobile).

In *Campbell v. Morine*,[201] a car struck and killed a fifteen year-old high school cross country runner who was running in the middle of a road just next to the center line.[202] While there was significant indication that the motorist was negligent,[203] the trial judge explained that the runner was obviously comparatively negligent because "the evidence plainly shows that the decedent was jogging down the highway in the defendant's lane somewhere between the middle of the lane and the center line of the highway contrary to the law that pedestrians should be not only off the highway if possible but on the side of the oncoming traffic."[204] Nevertheless, the trial judge also recognized the rule that a minor is not held to the same negligence standard as an adult, stating that "a minor . . . is held to the degree of care which a reasonably careful minor of the age, mental capacity and experience . . . would use under circumstances similar to those shown by the evidence, and the same rule applies when a minor decedent is charged with having violated a statute."[205] The trial court found the runner thirty-five percent negligent.[206]

On appeal, the defendant argued that a runner who is almost sixteen years-old running on a public highway should be held to an adult standard of care for his own safety.[207] The Appellate Court of Illinois disagreed and affirmed the trial court's application of the lesser, minor's standard.[208] *Campbell* implicitly, then, suggests that running is neither an "adult activity" nor "inherently dangerous."[209] Therefore, minors who are injured while running will be held to a reduced, minor's standard of care, not an adult standard.[210]

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201. 585 N.E.2d 1198 (Ill. App. Ct. 1992).

202. *Id.* at 1199. The accident occurred at approximately 8:30 p.m. in late February, so it was dark. The jogger was wearing light colored clothing, running with a friend, and both he and his friend periodically looked back over their shoulders to check to see whether any cars were coming. *Id.* at 1199-200.

203. *Id.* at 1200. The car's headlights were broken so that only the bright lights worked. Consequently, the defendant driver had secured duct tape over the two outside lights "so that he could drive at night with his high beams on constantly." *Id.* Another motorist passed the runners just prior to the accident and testified that he could see them with no problem. *Id.*

204. *Id.* at 1201 (quoting the trial judge's memorandum of opinion).

205. *Id.* (quoting the trial judge's memorandum of opinion).

206. *Id.* Based on the plaintiff's negligence the trial court reduced the damage award of $250,000 to $162,500. *Id.*

207. *Id.* at 1202.

208. *Id.*

209. *See id.*

210. *See id. See also* Krause v. Henker, 284 N.E.2d 300, 303-04 (Ill. App. Ct. 1972). *Krau-*

The modern views of assumption of risk differ markedly from views in the early part of the twentieth century. Today jurisdictions tend to fall into one of three camps. Some follow a traditional common law approach to assumption of risk.[211] Others treat assumption of risk as a type of comparative negligence, essentially collapsing assumption of risk into comparative fault.[212] The remaining jurisdictions have expressly abandoned the doctrine, and consider the facts that courts traditionally viewed as evidence of assumption of risk, instead, as facts tending to either prove or disprove the existence of duty. No matter which approach a jurisdiction takes, the elements of traditional common law assumption of risk are still relevant. Thus, it is instructive to examine the traditional elements briefly.

First, there are, broadly speaking, two kinds of risk assumption: express and implied. One can expressly assume a risk either verbally or in writing. Presumably, one can even expressly assume a risk by means of nonverbal gestures. Commonly, however, express assumption of risk occurs in writing.[213] Implied assumption of risk occurs when a person's noncommunicative conduct demonstrates that she has assumed a risk.[214]

When runners sign waiver of liability agreements when registering for a road race, it is not uncommon to see the waiver couched in terms of a "contract" with the runner's participation character-

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se involved a ten year-old girl who was struck by a car on a misty February evening. *Id.* at 301. The jury instructions that a minor's standard of care is different from an adult's and that one must consider the "care which a reasonably careful person of the age, mental capacity, and experience . . . would use under the circumstances" were not in error. *Id.* at 303-04.

211. RESTATEMENT, *supra* note 14, § 496A cmt. c. *See also* Benitez v. New York City Bd. of Ed., 541 N.E.2d 29, 32 (N.Y. 1989) (holding that a football player assumes the risk except for concealed, unassumed, or unreasonably increased risks); Smollett v. Skayting Development Corp., 793 F.2d 547, 549 (3d Cir. 1986) (holding that a skater who was injured while swerving to avoid another skater assumed the risk).

212. RESTATEMENT, *supra* note 14, §§ 466 cmt. d, 496A cmt. d; Mazzeo v. City of Sebastian, 550 So. 2d 1113, 1115 (Fla. 1989) (holding that where assumption of the risk merges into comparative negligence, fault must be apportioned on a comparative basis). *See also* National Marine Serv., Inc. v. Petroleum Serv. Corp., 736 F.2d 272, 276 (5th Cir. 1984) (holding that where fault is shared in a comparative negligence jurisdiction liability should be apportioned).

213. Runners routinely sign waivers of liability when they participate in road races. These waivers are designed to protect race sponsors and officials and are intended to provide documentary proof that the race participant has expressly assumed the risks involved with the race.

214. It is arguable that an adult runner who runs barefoot on a beach assumes the risk of stepping on sea shells.

ized as "consideration."[215] At common law courts usually consider four specific factors to determine whether a waiver provision of a written contract, the so-called "exculpatory clause," can operate as an enforceable express assumption of risk.[216] First, one must consider whether the party seeking protection from the exculpatory clause has a duty to the public.[217] For example, medical clinics and hospitals have public duties that are fairly obvious. Road race sponsors probably do not have the same duty. Second, one must consider the nature of the service that the party seeking the protection of the exculpatory clause performs.[218] This factor is generally closely allied to the first. Again, medical services are clearly more necessary than the privilege of running in a ten kilometer race. These two factors basically relate to the enterprise that is the subject of the agreement. Courts commonly inquire as to whether the services are recreational or a necessity.[219] Although many runners might consider running an essential part of their lives — a virtual necessity — in legal terms it is not.

The third and fourth factors look to the nature of the writing. One must determine whether the plaintiff, who was seeking to invalidate the waiver provision, entered into the contract fairly or whether the contract was unconscionable or an adhesion contract.[220] Lastly, the contract must express the intention of the party seeking to invalidate the waiver in clear and unambiguous language.[221]

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215. *See, e.g.*, ROAD RACE MANAGEMENT, Oct. 1993, at 7. (providing an example of a medical consent form and race liability waiver). The waiver form states, "Having read this consent and waiver form and *in consideration* of your accepting . . . the undersigned . . . waive[s] and release[s] . . . event directors, sponsors, volunteers, their representatives, successors or assigns from all claims or liabilities of any kind . . . ." *Id.* (emphasis added).

216. *See, e.g.*, Jones v. Dressel, 623 P.2d 370, 376 (Colo. 1981) (setting forth and discussing the four factors of express risk assumption in the context of a recreational sky-diving accident). *See also* Baker, *supra* note 126, at 667-69.

217. *Jones*, 623 P.2d at 376.

218. *Id.*

219. *Id.* at 377.

220. *Id.*

221. *Id.* In *Ricky v Houston Health Club, Inc.*, the Court of Appeals of Texas held that a runner, who was injured when he tripped and fell on defendant's astroturf indoor jogging track was entitled to a reversal of summary judgment, notwithstanding the language of the exculpatory clause in his health club contract. Ricky v. Houston Health Club, Inc., 863 S.W.2d 148, 150-52 (Tex. Ct. App. 1993). The waiver of liability provision stated that the runner agreed to "assume all risk of injury", and "to waive any claims or rights [the runner] might otherwise have to sue the health club." *Id.* at 150. The court held that because the waiver did "not expressly list negligence as a claim being relinquished" the runner was not

In the absence of an express assumption of risk, persons can still impliedly assume risks when they know that a risk exists, appreciate the scope of the risk, and yet voluntarily continue with an activity in the face of such knowledge and appreciation.[222] In *Vanek v. Prohaska*,[223] a fourteen year-old girl was killed when a pickup truck hit her while she was running at twilight on the right-hand side of the road. The court stated the rule that "[t]he defense of assumption of risk presupposes that the decedent had some actual knowledge of the danger, that she understood and appreciated the risk therefrom, and that she voluntarily exposed herself to such risk."[224] It was undisputed that the decedent ran the same route approximately four times a week, that her parents had warned her of the dangers of running on the right side of the road, and that a state statute required pedestrians to use the left side of the road when there was no sidewalk or shoulder.[225] Nevertheless, the court concluded that the doctrine of assumption of risk involved a subjective test regarding the actual knowledge of the teenage runner.[226] Thus, the court ruled that, in this case, the runner running on the right side of the road had not assumed the risk.[227]

Participation in all sports involves certain risks. Athletes must expect and anticipate the possibility of risks inherent in any sport.[228] Baseball players must know that they might be struck by a baseball, whereas football and hockey players know that they risk bruises and broken bones as part of the extraordinarily violent nature of their contest. Even noncontact sports such as gymnastics involve a significant risk of serious injury. The same is true with

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barred from suit. *Id.*

222. RESTATEMENT, *supra* note 14, § 496 cmt. b. *See also* Fritscher v. Chateau Golf & Country Club, 453 So. 2d 964, 967 (La. Ct. App. 1984) (stating that "[t]he elements of the defense of assumption of the risk are: (1) that the plaintiff had knowledge of the danger; (2) that he understood and appreciated the risk therefrom; and (3) that he voluntarily exposed himself to such risk"); Vanek v. Prohaska, 448 N.W.2d 573, 576 (Neb. 1989).

223. 448 N.W.2d 573 (Neb. 1989).

224. *Id.* at 575.

225. *Id.* (citing NEB. REV. STAT. § 39-646(3) (Reissue 1988)).

226. *Id.* at 576. *See also Fritscher*, 453 So. 2d at 968 (holding that a runner who "'may' have known that the tall grass [that marked the location of an open storm drain] had been cut prior to his run" did not assume the risk because "there [was] not sufficient evidence to indicate that he understood and appreciated the risk therefrom").

227. *Vanek*, 448 N.W.2d at 576.

228. *See* Cathy Hansen and Steve Duerr, *Recreational Injuries & Inherent Risks: Wyoming's Recreation Safety Act*, 28 LAND & WATER LAW. REV. 149 (1993) (discussing, *inter alia*, assumption of risk while downhill skiing).

running. Certainly, runners anticipate the possibility of strained muscles, an occasional turned ankle, and occasional cuts or scrapes as they brush by bushes. Arguably, runners also are aware of many other significant potential threats. Because the doctrine of assumption of the risk bars a plaintiff from recovery when he voluntarily encounters known dangers, a runner's awareness of potential risks is an important and relevant factor in any negligence analysis.[229] Certainly, the doctrine has been applied routinely to many sports participants.[230]

Arguably, a runner who runs on a highway or even a city street either assumes the risk of injury or is contributorily or comparatively negligent to some degree. Runners may assume the risk that a sidewalk or path will not be completely smooth and regular. Runners may also be responsible if they fail to wear reflective clothing when running at night or in the early morning when visibility is poor.[231] Indeed, the list of ways that runners can be said to be either contributorily or comparatively negligent or can be deemed to have assumed the risk is very long.[232] Most runners are well aware of the potential dangers that face them when they step out of their doors.

VII. CONCLUSION

Many of the injuries that runners have suffered at the hands of motorists and negligent property owners have been severe. Clearly, these injuries are likely to continue into the twenty-first century. Runners, for their part, must use extreme caution to avoid accidents. Drivers and property owners, however, must also recognize the role that runners play in modern life.

The popularity of running today places drivers and property

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229. KEETON et al., *supra* note 1, § 68, at 480-98.

230. *Id. See also, e.g.*, Turcotte v. Fell, 502 N.E.2d 964 (N.Y. App. Div. 1986) (involving injuries to a jockey); Sunday v. Stratton Corp., 390 A.2d 398 (Vt. 1978) (involving an injured skier); Gauvin v. Clark, 537 N.E.2d 94 (Mass. 1989) (involving injuries to a hockey player).

231. *See* GLOVER & SCHUDER, *supra* note 4, at 37 (stating that runners should "[b]e sure to run wearing reflectorized materials, run where it is well lit, keep as far away from cars as possible, and run in groups if possible"). FIXX, *supra* note 196, at 140-41 (stating that a runner should "put a white T-shirt on over everything else, or get a reflective vest . . . [and that] [s]ome runners attach strips of reflective tape to their shoes to attract the attention of motorists").

232. *See Accidents Can Happen*, RUNNER'S WORLD, Apr. 1994, at 19. In this article, Adam Bean, Editor of Healthwatch in *Runner's World*, provides general advice for avoiding cars.

owners on notice that runners are likely to be on city streets, sidewalks, and recreational areas. Consequently, drivers and property owners must take special precautions. With some exceptions, courts have generally failed to consider the factors that make runners materially different from walking pedestrians, such as their faster pace, unpredictable movements, and greater numbers. Courts have also been reluctant to hold that private property owners and governments owe a duty of reasonable care to runners that is different from the duty owed to the walking pedestrian.

Arguably, it is time for courts to modify their application of negligence principles in order to respond to the expanded role that running plays in contemporary American society. For example, it is unreasonable for drivers to regard runners as they do walking pedestrians. Similarly, when governments and property owners know that runners use their property, it is unreasonable for them to maintain it in such a way that is hazardous to runners. Perhaps an owner's care should include a duty to remove hidden obstructions, to keep the surface more level than if it were used only by walkers.[233] Furthermore, driving that may be reasonable in the vicinity of walkers may be unreasonable around runners. Property maintenance that may be reasonable to protect walkers, may be unreasonable given the increased speed of runners. Thus far, the majority of courts that have considered the matter have not expressly taken into account the factors that distinguish runners from walkers. It is time for our negligence law to respond to runners. Runners encounter different kinds and degrees of risks than walkers, and consequently, should be treated differently for the purposes of negligence analysis.

233. Perhaps, too, owners should take extraordinary care of dogs and other animals likely to harm runners.