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Not Necessarily the Best Seat in the House: A Comment on the Assumption of Risk by Spectators at Major Auto Racing Events

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COMMENTS

NOT NECESSARILY THE BEST SEAT IN THE HOUSE: A COMMENT ON THE ASSUMPTION OF RISK BY SPECTATORS AT MAJOR AUTO RACING EVENTS

I. INTRODUCTION

Gentlemen, start your engines!

These timeless words, recognized as “the most famous” in all of motor sports,¹ unmistakably signify that a race is about to begin. Fans numbering in the millions, at race tracks and in living rooms across the land, rise excitedly to their feet in anticipation of the green flag. Race fans are passionate people.² At no time is this passion more apparent than during the issuance of the famous command to drivers, just moments before the sporting world’s “rocket ship[s] on wheels”³ are unleashed. From local dirt tracks to ultramodern super-speedways, adrenalin courses through the veins of everyone in attendance: drivers, crews and spectators alike. No one is spared the intoxicating effect of the moment.

Gentlemen, guard your pocketbooks!

Behind the scenes, however, race-day excitement is necessarily tempered. As key players in a tantalizingly lucrative business,⁴ track owners should be seeing green. Instead, faced with complex questions of liability arising out of spectator safety,⁵ the only color that anyone can see is red. Through nervous eyes in the owner’s luxury suite, from a vantage high above the track, the start of a race represents the perilous

1. See ROBERT G. HAGSTROM, *THE NASCAR WAY* 190 (1998).

2. See *id.* at 147 (“[Y]ou are either a passionate fan or not a fan at all. Indifference is not a category.”).

3. *Id.* at 6.

4. See generally HAGSTROM, *supra* note 1.

5. See Joshua E. Kastenber, *A Three Dimensional Model of Stadium Owner Liability in Spectator Injury Cases*, 7 MARQ. SPORTS L.J. 187, 209 (noting that negligence actions in spectator injury cases form an “unnerving fabric through which to sift.”).

uncorking of a bottomless bottle of potential liability. Only after the checkered flag flies, when engines have fallen silent and grandstands have emptied, can the cork be replaced, amidst fervent hope that none of the bottle's contents have spilled, that none of this sport's deadly potential has been realized.

Fortunately, spectator injuries at major American auto races are infrequent events.⁶ Deaths are an even rarer occurrence. One need only consider the unrivaled history and legacy of the Indianapolis Motor Speedway: in ninety years of racing at the much celebrated 'Brickyard,' only ten spectator fatalities have been reported.⁷

In stark contrast to the relative calm of years past, the racing industry recently witnessed a pair of tragedies, separated by only nine months. These tragedies threaten to permanently alter the perception of fan safety at America's racetracks. In a single incident on July 26, 1998, three spectators died at Michigan International Speedway in Brooklyn.⁸ A similar tragedy played out on a stage several hundred miles away when, on May 1, 1999, three more lives were claimed at Lowe's Motor Speedway near Charlotte, North Carolina.⁹

These deaths, the first at major U.S. events since a 1987 fatality at the Indianapolis 500,¹⁰ can only be skeptically viewed as giving rise to an alarming trend. This spate, however, may be just loud enough to serve as a legal wake-up call. The ultimate ramifications of the Michigan and Charlotte tragedies are not yet clear. If, and when, litigation does arise, the imposition of civil liability will provide some guidance. In the meantime, there is arguably an open invitation (and perhaps even a mandate) to examine the relevant law.

II. GETTING STARTED—A PRIMER ON SPECTATOR LIABILITY

In the unlikely event that an injury or death does occur, observant fans are likely to see an unexpected race from the grandstand to the courtroom. The transformation of race fans from spectator to plaintiffs is facilitated by a legal question that eighty plus years of jurisprudence has failed to settle.¹¹ From the perspective of track proprietors, litigation is an intimidating prospect. Notwithstanding substantial investments in safety devices and innovative upgrades¹² often made at the expense of profits to keep ticket prices down, owners face an uphill, if not insurmountable, battle

6. See generally Robin Miller, *Auto Racing Fortunate Fatalities Not Common*, THE INDIANAPOLIS STAR, July 28, 1998, at D1 (pointing out that injuries do not occur every time a car hits the wall).

7. See *Deaths at the Speedway*, THE INDIANAPOLIS STAR, May 18, 1996, at B2.

8. See *Officials Defend Tracks After Fatal Crash*, ST. PETERSBURG TIMES, July 28, 1998, at 3C.

9. See Curt Cavin, *Black Night for Racing: Spectators' deaths raise safety questions that might not have answers*, AUTOWEEK, May 10, 1999, at 51.

10. See David Poole, *Safety on the Speedway: Tracks Make Changes After Three Spectator Deaths*, ST. LOUIS POST-DISPATCH, August 16, 1998, at F4.

11. See, e.g., Kastenberg, *supra* note 5 at 209.

12. See generally HAGSTROM, *supra* note 1, at 30 (noting that NASCAR set early precedent for track safety with stringent requirements); see generally Terry Hutchens et al., *Safety is a top priority, not a guarantee, at races; With Brickyard 400 near, Speedway officials say completely preventing fan injuries is impossible*, THE INDIANAPOLIS STAR, July 28, 1998, at A1 (reporting that the Indianapolis Motor Speedway has "taken every reasonable precaution to keep debris out of the grandstand areas").

in court.

A sizeable body of case law¹³ involving spectator injuries at professional motor sports events exists, dating back to the sport's infancy. Notably absent, however, is a steadfast rule.¹⁴ Assumption of risk, perhaps the racing industry's best conceptual defense and bar to negligence claims altogether, is theoretically available in every jurisdiction,¹⁵ but has yielded mixed results. Simultaneously, there is a trend toward the enforcement of certain releases exempting owners from liability. This trend, however, is not absolute and thus raises concerns about the ultimate effectiveness of such agreements. Corrective legislation is one potential solution that should be examined with respect to either dilemma.

On inspection, legislatures are reluctant to come to the aid of track operators, despite the favorable socioeconomic impact that major events have been shown to have on communities.¹⁶ New York flatly declared in 1976 that any attempt by owners of recreational facilities to limit liability for negligence is "void . . . and wholly unenforceable" against claims by injured users.¹⁷ In *Gaskey v. Vollertsen*,¹⁸ the court expressly held that for purposes of enforcing the statute, race spectators "clearly" qualified as users of such facilities,¹⁹ while the court in *Thomas v. Dundee Raceway*

13. This is a partial list, not meant to be exclusive: *Haines v. St. Charles Speedway Inc.*, 874 F.2d 572 (8th Cir. 1989); *McPherson v. Sunset Speedway Inc.*, 594 F.2d 711 (8th Cir. 1979); *Barrett v. Faltico*, 117 F. Supp. 95 (E.D. Wash. 1953); *Thomas v. Dundee Raceway Park, Inc.*, 882 F. Supp. 34 (N.D.N.Y. 1995); *Valley Nat'l Bank v. NASCAR*, 736 P.2d 1186 (Ariz. Ct. App. 1987); *Celli v. Sports Car Club of Am.*, 105 Cal. Rptr. 904 (Cal. Ct. App. 1972); *Goade v. Benevolent and Protective Order of Elks*, 28 Cal. Rptr. 669 (Cal. Ct. App. 1963); *Morton v. California Sports Car Club*, 329 P.2d 967 (Cal. Ct. App. 1958); *Barker v. Colorado Region-Sports Car Club of Am.*, 532 P.2d 372 (Colo. Ct. App. 1974); *DiUlio v. Goulet*, 483 A.2d 1099 (Conn. App. Ct. 1984); *DeBoer v. Florida Offroaders Driver's Ass'n*, 622 So. 2d 1134 (Fla. Dist. Ct. App. 1993); *LaFrenz v. Lake County Fair Bd.*, 360 N.E.2d 605 (Ind. Ct. App. 1977); *Huber v. Hovey*, 501 N.W.2d 53 (Iowa 1993); *Gibson v. Shelby County Fair Ass'n*, 65 N.W.2d 433 (Iowa 1954); *Capital Raceway Promotions, Inc., v. Smith*, 322 A.2d 238 (Md. Ct. Spec. App. 1974); *Lee v. Allied Sports Assoc.*, 209 N.E.2d 329 (Mass. 1965); *Alden v. Norwood Arena, Inc.*, 124 N.E.2d 505 (Mass. 1954); *Rieger v. Zackoski*, 321 N.W.2d 16 (Minn. 1982); *Gilkeson v. Five Mile Point Speedway, Inc.*, 648 N.Y.S.2d 844 (N.Y. App. Div. 1996); *Smith v. Lebanon Valley Auto Racing Inc.*, 598 N.Y.S.2d 858 (N.Y. App. Div. 1993); *Gaskey v. Vollertsen*, 488 N.Y.S.2d 922 (N.Y. App. Div. 1985); *Kotary v. Spencer Speedway, Inc.*, 365 N.Y.S.2d 87 (N.Y. App. Div. 1975); *Arnold v. State*, 148 N.Y.S. 479 (N.Y. App. Div. 1914); *Saari v. State*, 119 N.Y.S.2d 507 (N.Y. Ct. Cl. 1953); *Lane v. Eastern Carolina Drivers Ass'n*, 117 S.E.2d 737 (N.C. 1961); *Williams v. Strickland*, 112 S.E.2d 533 (N.C. 1960); *Harsh v. Lorain County Speedway Inc.*, 675 N.E.2d 885 (Ohio Ct. App. 1996); *Guysinger v. K.C. Raceway, Inc.*, 560 N.E.2d 584 (Ohio Ct. App. 1990); *Toth v. Toledo Speedway*, 583 N.E.2d 357 (Ohio Ct. App. 1989); *Hine v. Dayton Speedway Corp.*, 252 N.E.2d 648 (Ohio Ct. App. 1969); *Shula v. Warren*, 150 A.2d 341 (Pa. 1959); *Blake v. Fried*, 95 A.2d 360 (Pa. Super. Ct. 1953); *Fitchett v. Buchanan*, 472 P.2d 623 (Wash. Ct. App. 1970); *Kaiser v. Cook*, 227 N.W.2d 50 (Wis. 1975); *Eder v. Lake Geneva Raceway, Inc.*, 523 N.W.2d 429 (Wis. Ct. App. 1994).

14. Roughly one half of the cases listed in note 13, *supra*, resulted in decisions favorable to track owners, while the other half sustained damages awards to injured spectators.

15. See generally *Kastenber*, *supra* note 5 at 196-200 (differentiating between primary assumption of risk in jurisdictions recognizing a contributory negligence scheme, and secondary assumption of risk in comparative negligence jurisdictions).

16. See *HAGSTROM*, *supra* note 1, at 117 (examining local economic impact of NASCAR races on two representative communities; Charlotte, N.C. and Darlington, S.C., estimated at \$70 million and \$52 million, respectively).

17. N.Y. GEN. OBLIG. LAW § 5-326 (McKinney 1998).

18. 488 N.Y.S.2d 922, 923 (N.Y. App. Div. 1985).

19. *Id.* See also *Gilkeson v. Five Mile Point Speedway, Inc.*, 648 N.Y.S.2d 844, 845 (N.Y. App. Div. 1996) ("[P]laintiff did not, as a matter of law, assume the risk and . . . although plaintiff signed a written release, he was a 'user' within General Obligations Law § 5-326.").

Park, Inc.,²⁰ distinguished users from participants. In Wisconsin, a “safe place” statute burdens race track owners with “a higher duty of safety” than strict reasonableness.²¹ Florida has enacted legislation validating most liability releases signed at motor sport facilities, but its scope is limited to those executed by “nonspectators.”²² Georgia,²³ Maine,²⁴ New Jersey,²⁵ and Vermont²⁶ each have general safety statutes pertaining to motor vehicle racing. Protective legislation that limits the liability of track owners, however, has yet to be identified.

This is not to suggest the call to protect certain parties from spectator liability at more narrowly defined sporting events has gone completely unheeded. Several jurisdictions have responded to fan injuries at baseball games with legislative action severely limiting recovery against ballpark owners.²⁷ Colorado is a noteworthy example. Its law, which imposes assumption of risk on spectators, is prefaced on a theory that attendance ought to be encouraged for social and economic reasons that supersede the public’s interest in legal redress.²⁸ Replete with its own, unique brand of “wholesome, family” entertainment and substantial “economic benefit” to the state,²⁹ racing merits the type of protection heretofore reserved to America’s pastime. Race tracks must be afforded similar statutory protection.

III. IT’S FAN-TASTIC³⁰—RACING IS AMERICA’S HOTTEST SPECTATOR SPORT

Why devote so much attention to auto racing? The answer is simple: the sport is hot, and getting hotter. According to The Goodyear Tire & Rubber Company’s annual racing attendance report, 1998 witnessed a 1.3% increase in attendance across twelve different racing series, pushing the total beyond 17 million.³¹ This modest gain comes on the heels of a 1997 surge in which the attendance mark grew by 9.3% over that of 1996.³² Further evidencing this trend, the 15,400,000 figure in 1996 was some 3.7% higher than the previous year.³³ According to the National Association for Stock Car Auto Racing (NASCAR), nine of the ten largest crowds at American

20. 882 F. Supp. 34, 37 (N.D.N.Y. 1995) (holding that releases executed by users are void, but those signed by participants are protected).

21. Kastenber, *supra* note 5, at 204.

22. See FLA. STAT. ANN. § 549.09 (West Supp. 1998).

23. See GA. CODE ANN. §§ 43-25-8, -9 (West 1998).

24. See ME. REV. STAT. ANN. tit. 8, § 562 (West 1997).

25. See N.J. STAT. ANN. § 5:7-10 (West 1997).

26. See VT. STAT. ANN. tit. 31 § 310 (1997).

27. See, e.g., COLO. REV. STAT. ANN. § 13-21-120 (West 1998). See also 745 ILL. COMP. STAT. ANN. 38/10 (West 1998).

28. See COLO. REV. STAT. ANN. § 13-21-120 (para. 2) (West 1998).

29. *Id.* (para. 2).

30. Phrase attributed to Major League Baseball, in various television advertisements.

31. See *Competition 2.8.99*, AUTOWEEK, Feb 8, 1999, at 46 (summarizing the 1998 Goodyear Racing Attendance Report, a survey of comprehensive attendance figures for 1998).

32. See *1997 Goodyear Racing Attendance Report: Statistics Compiled by the Goodyear Tire & Rubber Company*, PR NEWSWIRE, Jan. 15, 1998, available in WESTLAW, Art, Entertainment & Sports News (publishing detailed attendance figures, concluding that “[a]uto racing attendance in North America continued its meteoric rise in 1997.”).

33. See *id.*

sporting events in 1997 were recorded at stock car races.³⁴

As turnstiles continue to click at a feverish pace, television ratings serve as a separate barometer to confirm what the racing community already knew. For example, the Winston Cup Series, NASCAR's highest level of competition, boasted more than 148 million viewers in 1996.³⁵ That figure represents an increase over 1990 ratings of 22% for races broadcast by CBS, 23% higher for ABC, and an astonishing 50% increase at cable network ESPN.³⁶ Further, ESPN has found stock car racing to be one of its highest rated sporting programs, second only to National Football League games.³⁷ Observers note that this increase in ratings occurred at a time when other sports experienced a ratings decline.³⁸

Increased demand for tickets has resulted in unprecedented development of new, larger tracks³⁹ and the ongoing expansion of existing facilities.⁴⁰ Tracks that once boasted a single set of bleachers along one stretch are now completely encircled with high-capacity grandstands.⁴¹ Tracks not yet enclosed may be soon. As tracks add seating to accommodate more spectators and the expectancy of filling those seats remains high, the legal consequences that flow to facility management must be considered.

A quasi-mathematical formula may be applied to quantitate risk. Assume a fixed likelihood that during the course of a race, incidents will occur involving mechanical failure or driver error, or the collision of a car with a retaining wall, or another car, or both. Following any such incident, assume a second fixed value for the likelihood that debris will leave the racing surface. Finally, assume a third likelihood that airborne debris will pass over or through the fencing that lines many racetracks. Multiply the three and the resulting probability, however remote, can be viewed as a base value for risk to spectators, regardless of location around the track or crowd density.

A number of significant analyses flow from this theoretical calculation of risk. One necessary inference from the rising popularity of racing is that as existing grandstands fill to capacity, the overall likelihood that airborne debris near spectator areas may strike someone is greatly increased.⁴² Likewise, as vacant fields that once surrounded tracks are being filled with new grandstands which are subsequently filled by spectators, debris which has traditionally fallen out of harm's way now poses a

34. See *Seat Selection*, AUTOWEEK, Oct. 19, 1998, at 55.

35. See HAGSTROM, *supra* note 1, at 81.

36. See *id.*

37. See *id.* at 82.

38. See *id.* (citing Michael Hiestand, *Big Picture: Many Factors Create Decline*, USA TODAY, January 28, 1997, at C1).

39. See generally *id.* at 191 (discussing development of newer tracks, including those recently completed and those currently in the planning stages).

40. See 1997 *Goodyear Racing Attendance Report*, *supra* note 32 (indicating that 12 of 19 Winston Cup facilities reported to be adding thousands of additional seats); see generally HAGSTROM, *supra* note 1, at 191 (noting that tracks are adding seats at blistering pace).

41. See generally HAGSTROM, *supra* note 1, at 191.

42. But see Miller, *supra* note 6 (revealing that at Michigan on Jul. 26, 1998, half of the 112,000 grandstand seats were empty, underscoring the improbability of the tragedy that claimed 3 lives).

substantial threat.⁴³ Fan attentiveness, or more accurately the lack thereof, introduces yet another variable into the discussion.⁴⁴ In summary, racing's surge in popularity exposes track owners to substantially greater liability.

It is not necessary to critically explore how or why racing has become America's fastest growing spectator sport. Suffice it to say, two of the qualities that make the sport so popular with fans (speed and danger) are the very ones which animate the specter of the tragedies track owners hope to prevent. As one writer notes, auto racing is "a sport where high speeds and sharp curves leave crowds on the edge of their seats."⁴⁵ Another observes that "[d]efying death certainly sells tickets."⁴⁶ Charlotte Observer writer Tom Sorensen has perhaps best captured race-day excitement:

[Fans] want to watch fast cars, cheer for the guys [they] like and boo the guys [they] don't. [They] want to be part of something, and tell tales about it later . . . and at work again Monday. For some, [a day] at a superspeedway is one of life's joys. Fans buy their tickets early and show up early and, for several hours, there is no place, not the beach nor the basketball game, they'd rather be. They bring their favorite people, their buddies and spouses and children, many wearing a shirt or jacket that bears the name of their favorite driver or car. Some sit in the same seats every year.⁴⁷

The sport's innate simplicity says nothing, however, about the level of sophistication it has achieved. Gone are the days when rowdy, beer-chugging good ol' boys ruled the grandstands.⁴⁸ The uninitiated would be wise to dispel any ill-gotten myths⁴⁹ about racing's demographics,⁵⁰ since "[t]oday's stock car races are family events."⁵¹

Understanding spectator liability requires a brief lesson on the anatomy of a race track. On average, 191,000 people attended Winston Cup races in 1998.⁵² This begs the question, where are the tracks putting the spectators? There are generally four types of accommodations at most facilities: luxury suites, grandstands, infield,

43. See, e.g., *id.* (recalling that in 1964, an errant wheel fell onto a grassy area along the perimeter of the Indianapolis Motor Speedway; what once was that grassy area is now the site of additional grandstand seating).

44. See *id.* (observing that fans often nap, read newspapers, and walk around, especially during longer races such as 500 milers).

45. *How Safe are Auto Races?*, USA TODAY, May 1, 1997, at 8.

46. Bruce Wallace, *Eyes on the Prize: Jacques Villeneuve talks about life, fear and his return to Montreal*, MACLEAN'S, June 16, 1997.

47. Tom Sorensen, *A Tragic Finish at Speedway: Horror Silences Track as Onlookers Try to Comprehend*, CHARLOTTE OBSERVER, May 2, 1999, at 1H.

48. See HAGSTROM, *supra* note 1, at 190.

49. See, e.g., Wallace, *supra* note 46 (reporting that North American race fans are commonly perceived as "beer-guzzling gearheads").

50. See generally HAGSTROM, *supra* note 1, at xi-xii.

51. *Id.* at 10.

52. See *Competition 2.8.99*, *supra* note 31. See also *1997 Goodyear Racing Attendance Report*, *supra* note 32 (reporting that the average attendance at NASCAR Winston Cup in 1997 was 190,355).

and pit area.⁵³ A survey of incidents giving rise to case law and media reports suggest that an inquiry into spectator liability will focus on the attendees in the grandstands, infield and pit areas.⁵⁴ Occupants of luxury suites are not reasonably exposed to the risks inherent in and associated with auto racing.

Grandstands are the seating of choice for fans who either do not own a recreational vehicle or do not have close ties to a racing team or corporate sponsor. Seating is typically reserved, and at many tracks, higher rows which afford superior visibility sell at premium prices.⁵⁵ Any notion that certain areas of a grandstand are safer than others, however, can be laid to rest by comparing a 1987 Indianapolis tragedy (man killed by airborne tire while standing atop a speedway vista) to a recent incident in Michigan (victims killed by tire while seated in rows 8 through 10).⁵⁶ Grandstand seating is generally the closest to the action, as fans in lower rows are separated from the track by relatively short distances.⁵⁷ Incidentally, Lowe's Speedway at Charlotte does not allow patrons to sit in the first several rows of the main grandstand during certain types of events.⁵⁸

The infield, or the portion of a race facility confined by the track itself, has long been a destination of race fans who arrive with an recreational vehicle in tow for a

53. See HAGSTROM, *supra* note 1, at 112 ("Fans have their choice of watching a race from a seat in the grandstands, from high above the track in luxurious air-conditioned suites, or from atop a recreational vehicle parked in the infield.").

54. Grandstand injuries, *see* Alden v. Norwood Arena, Inc., 124 N.E.2d 505 (Mass. 1955); Blake v. Fried, 95 A.2d 360 (Pa. Super. Ct. 1953); Fitchett v. Buchanan, 472 P.2d 623 (Wash. Ct. App. 1970); Rob DeWolf, *Auto Racing*, THE COURIER-JOURNAL (Louisville, KY), Sept. 6, 1993; *An Allison Wrecks, an Allison Wins*, THE WASHINGTON POST, May 4, 1987; *Two Die of Injuries After Muffler Hits Them at Auto Race*, STAR-TRIBUNE (Minneapolis-St. Paul, MN), May 10, 1993. Track side injuries, *see* Barrett v. Faltico, 117 F. Supp. 95 (E.D. Wash. 1953); Goade v. Benevolent and Protective Order of Elks, 28 Cal. Rptr. 669 (Cal. Ct. App. 1963); Morton v. California Sports Car Club, 329 P.2d 967 (Cal. Ct. App. 1958); Gibson v. Shelby County Fair Ass'n, 65 N.W.2d 433 (Iowa 1954); Arnold v. State, 148 N.Y.S. 479 (N.Y. App. Div. 1914); Saari v. State, 119 N.Y.S.2d 507 (N.Y. Ct. Cl. 1953); Lane v. Eastern Carolina Drivers Ass'n, 117 S.E.2d 737 (N.C. 1961); Williams v. Strickland, 112 S.E.2d 533 (N.C. 1960); Kaiser v. Cook, 227 N.W.2d 50 (Wis. 1975); Eder v. Lake Geneva Raceway, Inc., 523 N.W.2d 429 (Wis. Ct. App. 1994); *Death of 2 Spectators Mars Monte Carlo Rally*, THE WASHINGTON POST, Jan. 24, 1989; *Auto Racing*, THE WASHINGTON POST, Mar. 7, 1988; *For the Record*, THE WASHINGTON POST, Nov. 9, 1986. Pit or garage areas, infield and on-track injuries, *see* McPherson v. Sunset Speedway, Inc., 594 F.2d 711 (8th Cir. 1979); Thomas v. Dundee Raceway Park, Inc., 882 F. Supp. 34 (N.D.N.Y. 1995); Valley Nat'l Bank v. NASCAR, 736 P.2d 1186 (Ariz. Ct. App. 1987); Celli v. Sports Car Club of Am., Inc., 105 Cal. Rptr. 904 (Cal. Ct. App. 1972); Barker v. Colorado Region-Sports Car Club of Am., 532 P.2d 372 (Colo. Ct. App. 1974); DiIulio v. Goulet, 483 A.2d 1099 (Conn. App. Ct. 1984); DeBoer v. Florida Offroaders Driver's Ass'n, 622 So. 2d 1134 (Fla. Dist. Ct. 1993); LaFrenz v. Lake County Fair Bd., 360 N.E.2d 605 (Ind. Ct. App. 1977); Capital Raceway Promotions, Inc. v. Smith, 322 A.2d 238 (Md. Ct. Spec. App. 1974); Lee v. Allied Sports Assoc., 209 N.E.2d 329 (Mass. 1965); Rieger v. Zackoski, 321 N.W.2d 16 (Minn. 1982); Gilkeson v. Five Mile Point Speedway, Inc., 648 N.Y.S.2d 844 (N.Y. App. Div. 1996); Smith v. Lebanon Valley Auto Racing, Inc., 598 N.Y.S.2d 858 (N.Y. App. Div. 1993); Gaskey v. Vollertsen, 488 N.Y.S.2d 922 (N.Y. App. Div. 1985); Kotary v. Spencer Speedway, Inc., 365 N.Y.S.2d 87 (N.Y. App. Div. 1975); Harsh v. Lorain County Speedway, Inc., 675 N.E.2d 885 (Ohio Ct. App. 1996); Toth v. Toledo Speedway, 583 N.E.2d 357 (Ohio Ct. App. 1989); Hine v. Dayton Speedway Corp., 252 N.E.2d 648 (Ohio Ct. App. 1969); Shula v. Warren, 150 A.2d 341 (Pa. 1959); *Sports Briefs, Auto Racing*, THE COURIER-JOURNAL (Louisville, KY), Mar. 25, 1996 at 5D.

55. *See, e.g.*, Las Vegas Motor Speedway 1999 Spectator Guide and 2000 Winston Cup Ticket Order Form (offering Section Two season ticket packages for rows 1-10 @ \$225.00, 11-27 @ \$245.00, 28-48 @ \$270.00).

56. *See* Hutchens et al., *supra* note 12.

57. *See* Sorensen, *supra* note 47 ("The seats in the Fourth Turn Terrace [at Lowe's Speedway in Charlotte] are some of the speedway's best. You're separated from the action only by a fence and a walkway. It's like sitting at courtside or ringside, a place where serious fans congregate.").

58. *See, e.g.*, Jim Utter, *A Tragic Finish at Speedway, 3 Fans Die, At Least 8 Hurt by IRL Crash Debris*, CHARLOTTE OBSERVER, May 2, 1999, at 1H.

long weekend of track side camping.⁵⁹ Usually separated from the racing surface by a wall or series of walls, the infield provides a safe and nontraditional alternative to grandstand seating. Several areas of the infield, accessible only through underground tunnels or across the track, are restricted to emergency and rescue personnel, track officials and the media. A substantial portion of the infield is set aside as the pit and garage area, where race teams service their vehicles before races and during "pit stops."

Spectators are generally not allowed in the pit or garage areas at major racing events. Exceptions are routinely granted for guests of the team and corporate sponsors, who are allowed to move about the garage.⁶⁰ The actual pit stalls, "considered [a] desirable [location] for those interested more in the preparations for a race than in its conclusion,"⁶¹ are generally restricted during races. Special pit passes are available to the public for access during some pre-race practice sessions and time trials.⁶² Admission to the pit and garage areas usually requires the execution of a separate release of liability, unlike tickets for grandstand seating which may or may not contain exculpatory language.⁶³

IV. PREVENTIVE MEDICINE—SAFETY PRECAUTIONS TAKEN BY TRACK OWNERS

With so much potential liability haunting America's number one spectator sport, track owners would be ill-advised to adopt a passive approach towards fan safety. To this end, while advocating the strengths and underlying purpose of assumption of risk and carefully drafted releases, this comment neither endorses nor encourages their use as shields to bar recovery where the conduct of the track fails to meet a suggested standard of utmost care to be taken in the prevention of spectator injuries. Future legislation, if drafted, must embody this belief. The previously discussed Wisconsin safe place statute is remarkably well-adapted to an utmost care standard, differing only in its posture as a protective device for the public.⁶⁴

Naturally, physical barriers that separate race cars from race fans shall be the primary focus of any inquiry into due care.⁶⁵ Rising several feet from the track surface, spanning its perimeter, is a concrete retaining wall. Most out-of-control race cars make some degree of contact with the wall, which in turn absorbs much of the car's energy. The remainder is dissipated through the car's structure, specifically designed to protect drivers at the expense of the car itself.⁶⁶ Disintegrating cars, of

59. See HAGSTROM, *supra* note 1 at 11.

60. See *generally id.* at 148 (discussing fan access to pits and garage areas).

61. *Capital Raceway Promotions, Inc. v. Smith*, 322 A.2d 238, 240 (Md. Ct. Spec. App. 1974).

62. See *generally id.*

63. Compare reverse side of admission tickets: Pocono International Raceway (PA), Las Vegas Motor Speedway (NV), Texas Motor Speedway (TX) (containing express liability releases) with *Officials Defend Tracks after Fatal Crash*, *supra* note 8 (revealing that Michigan International Speedway does not print a waiver on its tickets).

64. See Kastenber, *supra* note 5, at 202-03 (discussing Wisconsin statute as burden on race track owners).

65. See H.D. Warren, Annotation, *Liability of Owner or Operator of Auto Race Track for Injury to Patron*, 37 A.L.R.2d 391, 394 (1954).

66. See Miller, *supra* note 6.

course, tend to result in a "shower" of parts.⁶⁷ Thus the need for additional protection is established.

Mounted directly atop the wall is a complex structure of steel and high-tension cable, that serves as an umbrella against the "shower" of debris.⁶⁸ This "catch fence" reaches several feet into the air, turning inward over the track for several feet to aid in the containment of debris.⁶⁹ Designed to keep 3200-pound stock cars from leaving the track, the catch fencing is remarkably successful at preventing larger pieces of debris from reaching spectator areas.⁷⁰

The barrier's third and final element serves an equally critical purpose. Tracks have installed rigid netting, with a mesh small enough to stop a lug nut, behind the catch fence at spectator areas.⁷¹ Technological advancements in material strength and net design continue to pave the way for more effective barriers and an increasingly smaller mesh.⁷² In concert, these three barrier components act to minimize the risk of injuries to spectators.⁷³

Implementation of this indispensable measure is a critical element of the proposed standard of utmost care. NASCAR, which sanctions races at large and small tracks across the country, has strictly enforced wall requirements throughout its 50-year history.⁷⁴ For 1998, the National Hot Rod Association (NHRA) implemented rule changes mandating full-length concrete walls at its drag-racing facilities.⁷⁵ The Sports Car Club of America (SCCA) insists on "the highest standard of safety."⁷⁶ Merely having the wall in place will not suffice if it is not properly maintained or if reasonable improvements are not in place as they become feasible or necessary.

In light of the 1998 incident at Michigan, where a tire and wheel assembly from a damaged race car flew over the existing fence and into a grandstand,⁷⁷ the very issue of sufficiency was discussed. On July 26, 1998, Michigan's fence was fourteen and one-half feet high.⁷⁸ Indianapolis, by comparison, has maintained a nineteen and two-thirds foot barrier since 1993,⁷⁹ when it replaced one very similar to Michigan's (i.e. more than five feet shorter). Lowe's Motor Speedway, the site of the recent North Carolina tragedy, which involved airborne tire and wheel hardware,⁸⁰ boasted

67. *See id.*

68. *See id.*

69. *See, e.g.,* Hutchens et al., *supra* note 12 (stating that the highest four feet of catch fence turned inward at a 45 degree angle).

70. *See generally* Stephen Mraz, *New Technology Makes Racetracks Safer*, MACHINE DESIGN, Oct. 24, 1996.

71. *See* Poole, *supra* note 10.

72. *See id.*

73. *See generally* Mraz, *supra* note 70 (discussing at length modern barriers capable of protecting spectators as well as drivers).

74. *See* HAGSTROM, *supra* note 1, at 30.

75. *See* Mark Vaughn, *Smart Guys Finish First: It's the Crew Chiefs Who Make Champions*, AUTOWEEK, Feb. 23, 1998.

76. *Celli v. Sports Car Club of Am., Inc.*, 105 Cal. Rptr. 904, 907 (Cal. Ct. App. 1972).

77. *See* Poole, *supra* note 10.

78. *See, e.g.,* Loren Mooney, *Haunting Victories: CART Driver Adrian Fernandez Races in the Shadow of Death*, SPORTS ILLUSTRATED, Sept. 14, 1998.

79. *See* Hutchens et al., *supra* note 12.

80. *See, e.g.,* Cavin, *supra* note 9.

a nineteen foot wall.⁸¹

Utilizing the willingness of tracks to make necessary improvements as a measure of compliance involves significantly more than unsubstantiated rhetoric. In fact, the two facilities most intimately and inseparably connected with the discussion are among those pioneering aggressive fan safety initiatives. When big league racing returned to Michigan in August of 1998,⁸² a four foot extension was in place atop the existing catch fence.⁸³ The Charlotte track, for its part, had increased its fencing by two feet in 1997 (two years before the accident), and a considerable amount of discussion ensued in the aftermath of the fatalities regarding additional upgrades.⁸⁴

Notably absent from the surveyed literature are critical attacks and half-hearted accusations of too little, too late. Notwithstanding one commentator's emphatic call for an end to open-wheel racing at Lowe's Motor Speedway,⁸⁵ the media tends to be largely supportive of the racing industry and its approach toward fan safety.⁸⁶ The justification for this treatment may rest in the following statement by an Indianapolis Motor Speedway spokesman, who effectively trivializes the differences in height: "We had a 14-foot fence there [in 1987], but it wouldn't have mattered if the fence were 50 or 75 feet tall."⁸⁷

By no means are walls the only source of spectator (and driver) protection at racing facilities. Often found in conjunction with such walls are tire barriers (hundreds of tires fastened together, forming a semi-rigid cushion along the outer wall);⁸⁸ barrels filled with sand and water (simple but effective energy-absorbing devices);⁸⁹ and with increasing frequency, high tech, energy-absorbing panels.⁹⁰ Gravel pits, which help bring errant cars to a stop, can be found between the track and either wall on certain race courses. Each of these measures is designed and put into place for the intended purpose of preventing or minimizing impact at walls behind which spectators are seated, to the benefit of fans and drivers alike.

Industry experts agree that even exercising the utmost care in protecting spectators will not totally eliminate the risk that an injury will occur. One commentator concludes that "there is no safe seat when speed and competition collide."⁹¹ A representative from Indianapolis Motor Speedway concurs, "[n]o matter how you

81. See Poole, *supra* note 10.

82. NASCAR Winston Cup's Pepsi 400, Aug. 16, 1998.

83. See, e.g., Poole, *supra* note 10.

84. See Steve Herman, *Spectator Deaths are Tragic but Rare*, ASSOCIATED PRESS NEWSWIREs, May 4, 1999, available in WESTLAW. ("[O]fficials are looking into the possibility of raising the fence again, as well as extending the overhang.")

85. See Scott Fowler, *Tragic Night Should Be Last Charlotte IRL Stop*, CHARLOTTE OBSERVER, May 3, 1999 ("The IRL [Indy Racing League] is a speedy carnival sideshow that should have worn out its once-a-year welcome.")

86. See Miller, *supra* note 6; Poole, *supra* note 10. See also Mike Harris, *Despite Recent Accident, Spectators have No Need to be Driven by Fear*, CHICAGO SUN-TIMES, Aug. 2, 1998. Cf. Rick Reilly, *Next Time, Stop the Freaking Race*, SPORTS ILLUSTRATED, Aug. 17, 1998 (criticizing Speedway officials' decision to continue the race after fan injuries).

87. Hutchens et al., *supra* note 12.

88. See Miller, *supra* note 6. See also Mraz, *supra* note 70.

89. See Cathy Nikkel, *Racetrack Safety for the Street?*, MOTOR TREND, Jan. 1997. See also Mraz, *supra* note 70.

90. See Mraz, *supra* note 70.

91. Miller, *supra* note 6.

design a race track, there's always going to be the possibility that something freak could happen."⁹² Michigan Speedway's president, referring to his track's recent improvements, maintains a realistic outlook, "[t]his will be a deterrent to objects flying over the fence. To say that something couldn't get over the fence, no, we're not saying that."⁹³

Utmost care, then, consists of taking virtually every precaution that will minimize spectator risk. Involvement with aggressive research and development programs by track owners⁹⁴ should be looked upon favorably in determining that specific conduct meets the standard. Likewise, the willingness of track proprietors to make reasonable changes deserves attention. The president of Talladega Speedway in Alabama embraces this philosophy, "[o]ur sport is going to have unavoidable incidents. [We have] to learn from them and adapt our methods."⁹⁵ His Michigan counterpart echoes the sentiment, "[a]ny time we can enhance safety, we're going to."⁹⁶

V. HOW MUCH IS ENOUGH—COURTS ADDRESS SUFFICIENCY OF PHYSICAL BARRIERS

The sufficiency of fences at racing facilities was at issue in some of the earliest recorded opinions. In *Arnold v. State*,⁹⁷ a New York case arising out of a 1911 disaster, the court opined that "[r]easonable care required special construction to provide for the safety of those invited by the state to a place of public entertainment."⁹⁸ There, a wooden fence initially built for horse racing failed to contain an errant race car, causing the court to conclude that "the race was inherently dangerous" and that there was "no contributory negligence on the part of the decedents [spectators]."⁹⁹

Eventually, it became clear that reasonably constructed barriers would satisfy the standard when challenged on foreseeability grounds. *Blake v. Fried*¹⁰⁰ asked whether "a wheel becoming dislodged from a racing car . . . would foreseeably clear a fence 14 feet in height, hurtle through the air and injure spectators in the fourth or fifth row."¹⁰¹ In concluding that "[w]ant of ordinary care consists in failure to anticipate what is reasonably probable, not what is remotely possible,"¹⁰² the court held "that as a matter of law, defendants were not guilty of negligence"¹⁰³ for such an

92. Hutchens et al., *supra* note 12.

93. Poole, *supra* note 10.

94. *See, e.g., id.* (investigating options such as glass used at hockey rinks). *See generally* Mraz, *supra* note 70, and Nikkel, *supra* note 89 (describing technological advancements in racetrack safety).

95. Poole, *supra* note 10.

96. *Id.*

97. 148 N.Y.S. 479 (1914).

98. *Id.* at 483.

99. *Id.* at 485.

100. 95 A.2d 360 (Pa. Super. Ct. 1953).

101. *Id.* at 364.

102. *Id.*

103. *Id.* at 365.

unlikely occurrence.

By 1970, experts were testifying “that race track custom required [at least] the erection of a vertical, 12-foot, cyclonetype fence to separate the stands from the track.”¹⁰⁴ And, in 1975, *Kaiser v. Cook*¹⁰⁵ rejected a plaintiff’s claim that the defendant race track was negligent in building a fence reaching fourteen to fifteen feet above the racing surface, concluding that the precaution was adequate.¹⁰⁶

The maintenance requirement is a significant factor in the determination of due care on the part of a track owner. Mere presence of a protective device will not meet a stated standard, according to *Barker v. Colorado Region-Sports Car Club of America, Inc.*¹⁰⁷ In *Barker*, a race official negligently failed to ensure that barrels separating the racing surface from the pit area were filled with water.¹⁰⁸ That conduct defeated the track’s assumption of risk defense and the judgments for the plaintiffs were affirmed.¹⁰⁹ A similar result was obtained in *Gibson v. Shelby County Fair Ass’n*,¹¹⁰ where a wheel penetrated a fence that was kept “in poor repair.”¹¹¹

VI. THE UNTHINKABLE? SPECTATOR INJURY AND DEATH AT THE RACES

If fan enthusiasm and unprecedented growth are any indications, certainly auto racing is not about to become a victim of its own inherent risks, even in the face of recent, highly publicized tragedies. Tracks, of course, take all of the necessary precautions, but just how safe are the fans? In the relative calm preceding the storms of late, no one dared suggest that the problem of spectator safety was solved. Instead, there seems to have been, and still seems to be, a consensus that no “solution” exists at all.¹¹² Nevertheless, the diminishing frequency and severity of incidents *historically* suggests that the sport is indeed headed in the right direction. One need only look into the not too distant past for verification.

Racing’s colorful history is dotted with infamous chapters. The Automobile Club of America’s Vanderbilt Cup, held on Long Island in the early 1900s, attracted scores of fans but also produced a number of injuries and, in 1906, two deaths.¹¹³ Visitors to the 1911 New York State Fair witnessed one of North America’s worst racing tragedies when a car left the track and killed eleven spectators.¹¹⁴ In the 1950s, race fans abroad were plagued with horrific accidents. Three separate

104. *Fitchett v. Buchanan*, 472 P.2d 623, 626 (Wash. Ct. App. 1970).

105. 227 N.W.2d 50 (Wis. 1975).

106. *See id.* at 53.

107. 532 P.2d 372 (Colo. Ct. App. 1974).

108. *See id.* at 376.

109. *See id.* at 379, 380.

110. 65 N.W.2d 433 (Iowa 1954).

111. *Id.* at 435.

112. *See Poole, supra* note 10 (“[O]fficials understand that even state-of-the-art safety features can’t cover every scenario.”); *see also Miller, supra* note 6 (noting that fences keep projectiles away from fans, “[b]ut there is no safe seat when speed and competition collide.”); *see also Harris, supra* note 86 (statement of Mike Helton, NASCAR Vice President of Competition) (“It’s not possible to cover every scenario that can cause tragedies.”).

113. *See George DeWan, 100 Years of Driving, NEWSDAY*, June 10, 1996 at B4.

114. *See Arnold v. State*, 148 N.Y.S.2d 479, 481 (1914).

accidents at the 1953 Argentinean Grand Prix claimed a total of thirty lives. A 1955 disaster at LeMans, France, took the lives of eighty-one people.¹¹⁵ As a result, the remaining Formula One season was canceled, and neighboring Switzerland officially banned racing forever.¹¹⁶ Two years later, ten fans were killed at what was to be the last running of the Italian Mille Miglia road race.¹¹⁷

Decades later, the headlines tend to be eerily reminiscent, but the results are considerably less shocking. In July 1996, at Alencon, France, an out-of-control race car hurtled into a crowd but killed only five while injuring just twenty-three.¹¹⁸ Incidentally, that very weekend, the sport provided a sobering and global reminder of just how deadly she could be. In Toronto, a rookie Championship Auto Racing Teams (CART) driver and one track side official were killed.¹¹⁹ Back in Europe, a British motorcycle racer and track official died during an event in Belgium.¹²⁰ A dark couple of days indeed for a sport thriving on unprecedented popularity and “an ever-improving safety record.”¹²¹

American race fans have seen their share of mishaps in recent years as well. In 1996, one spectator was killed and one injured when a sprint style car left the racing surface at a small track in Mesquite, Texas.¹²² A competitor’s 7-year-old daughter was killed by a tire while seated in a grandstand at a Wichita, Kansas track in September, 1993.¹²³ Her older brother was critically injured.¹²⁴ Earlier that year, two men were killed and a teenage boy was injured by an airborne muffler at a small track in Wisconsin.¹²⁵ Tragedy also visited NASCAR racing at the 1987 Winston 500 in Talladega, Alabama, where an out-of-control car crashed into a span of catch fencing, hospitalizing three spectators.¹²⁶ No single incident, however, even begins to approach the disasters of the past.

Infamy is a title seldom bestowed in contemporary auto racing lore. Exhaustive research discloses only one incident¹²⁷ arguably deserving of such a label throughout the better part of this century.¹²⁸ Heightened standards for fan safety, while far from perfect, are a likely contributor. Consider that since the 1955 catastrophe at LeMans,

115. See Miller, *supra* note 6.

116. See *id.*

117. See *id.*

118. See, e.g., *Toronto Crash Kills 2 on Tragedy-Filled Race Day*, FORT LAUDERDALE SUN-SENTINEL, July 15, 1996, at 6C. See also Frederick Veille, *Number of Race Fatalities Grows to Five*, ROCKY MOUNTAIN NEWS, July 16, 1996, at 13C.

119. See *Toronto Crash Kills 2 on Tragedy-Filled Race Day*, *supra* note 118; see also Veille, *supra* note 118.

120. See *Toronto Crash Kills 2 on Tragedy-Filled Race Day*, *supra* note 118; see also Veille, *supra* note 118.

121. Harris, *supra* note 86 (explaining that auto racing prides itself on its safety record).

122. See *Sports Briefs*, THE COURIER-JOURNAL (Louisville, KY), Mar. 25, 1996, at 5D.

123. See Rob DeWolf, *Sports Beat - Auto Racing*, THE COURIER-JOURNAL (Louisville, KY), Sept. 6, 1993, at 10D.

124. See *id.*

125. See *Two Die of Injuries after Muffler Hits Them at Auto Race*, STAR-TRIBUNE (Minneapolis-St. Paul, MN), May 10, 1993, at 3B.

126. See *An Allison Wrecks, an Allison Wins*, THE WASHINGTON POST, May 4, 1987, at D10.

127. See *Auto Racing*, THE WASHINGTON POST, Mar. 7, 1988, at D2 (“In Necochea, Argentina, a race car blew a tire and plunged into a crowd of spectators, killing at least 16 persons and injuring more than a dozen others.”).

128. See, e.g., Miller, *supra* note 6 (stating that despite a handful of frightening moments that could have turned disastrous, “nothing approaching previous auto racing catastrophes elsewhere has ever haunted the [Indianapolis] Speedway . . . For whatever reason, [debris] hasn’t done more serious harm to spectators in recent years.”).

that event has persevered without injuring a single spectator.¹²⁹ Given the sport's proliferation and the sheer number of tracks hosting races on any given weekend, injuries and the occasional fatality are tolerated, even expected. After all, "spectators know the sport they're watching is dangerous. It's part of the thrill."¹³⁰

Opinions may differ about the lasting effects of such incidents on race fans. The July 1998 CART U.S. 500 at Michigan was a spectacular affair, a high-speed shootout right down to the finish (track officials allowed the event to continue), but it is unlikely to be remembered for its thrilling conclusion or edge-of-your-seat excitement; "tragedy puts anything we consider entertainment into immediate perspective."¹³¹ If the racing industry gained anything that day, it was a greater sensitivity to fans' emotions, accentuated by the sting of criticism¹³² endured for running the event to completion.

Unlike the race in Michigan, the May 1999 Indy Racing League (IRL) VisionAire 500 was halted (and subsequently canceled with no plans to reschedule) when the gravity of the situation became apparent to officials of the IRL and Lowe's Motor Speedway.¹³³ In the words of track president Humpy Wheeler, "[w]e made the decision out of respect for those who lost their life up there. We think it was the only thing to do."¹³⁴

The overwhelming success of the sport suggests that consumer confidence, thus fan comfort, remains high. In the end, "racing and sports and the world spin on at 9,000 rpm."¹³⁵ Accordingly, the knee-jerk propensity for gross overreaction must be overcome. A deluge of costly fan safety measures is not the answer.

VII. WHAT IF? GENERAL LEGAL CONSIDERATIONS AND THE NEED FOR REFORM

In the aftermath of the Michigan disaster, the need for a reliable doctrine reinforced by adequate legislation became dreadfully apparent. Questions swirled about who would sue whom, and for how much. Asked by a reporter about the possibility of lawsuits, that track's legal consultant could only opine that "the question of liability for accidents involving spectators 'remains a very gray area.'"¹³⁶ A former Indiana Supreme Court Justice elaborated on the collective frustration, suggesting that a test of reasonableness was appropriate and remarking that waivers of liability "hardly ever hold up," ultimately concluding that "[i]n the end, it would come down to a question of balance."¹³⁷

129. See Harris, *supra* note 86.

130. Hutchens et al., *supra* note 12.

131. Miller, *supra* note 6.

132. See Reilly, *supra* note 86.

133. See Ron Green, Jr., *3 Race Fans Killed, 8 Hurt by Flying Tire, Debris; Speedway Cancels Indy Event after Tragedy in Stands*, CHARLOTTE OBSERVER, May 2, 1999, at 1A.

134. *Id.*

135. Reilly, *supra* note 86 (criticizing officials' decision not to 'red flag' or stop the race after fans were seriously injured).

136. *Officials Defend Tracks After Fatal Crash*, *supra* note 8.

137. Hutchens et al., *supra* note 12.

The list of who stands to benefit from a clearer understanding of the applicable law is lengthy, underscoring the need for critical legal analysis and corrective legislative action to minimize the "gray." Obviously, attorneys representing race tracks and racing interests could prepare concise, affirmative defenses in accordance with the appropriate statute. Likewise, the plaintiff's bar would be in a superior position from which to counsel potential clients regarding the feasibility of claims sounding in negligence. Judges, often charged with alleviating load burdens within the system, might be better equipped to reach that desired end by expediting settlements and dismissing as a matter of law those claims that fail to meet delineated criteria.

Persons outside the legal arena can also expect to gain from a refined expectation of liability. Track owners, officials, and sponsors can better protect their investments by taking the steps necessary to ensure that their facilities meet the stated standard in their respective jurisdictions. Race sanctioning bodies and sponsors could make informed decisions as to site selection based on an objective assessment of compliance with the applicable liability avoidance doctrine. Municipalities and local governments, whose cooperation is essential to a track's viability, would similarly have a reliable means of policing their resident facilities.

Finally, the ultimate benefit of this reform would fall upon the fans themselves where many will argue it belongs. "No other sport relies so much on its fans for success."¹³⁸ Having acknowledged a need to protect its own economy and the related interests of its sports fans, Colorado reasoned that "[l]imiting the civil liability of those who own professional baseball teams and those who own stadiums . . . will help contain costs, keeping ticket prices more affordable."¹³⁹ The same reasoning that worked so well for lawmakers in reference to baseball can be applied directly to auto racing with good cause to expect similar results.¹⁴⁰

As alluded to previously, the jurisprudence derived from race track injury litigation fails to provide the sort of guidance upon which parties might rely to avoid unnecessary trials. Whether the question is one of assumption of risk, or merely one to test the sufficiency of a liability release, one can readily obtain precedent leading in virtually every direction. Fortunately, with the daring stroke of a pen, equitable statutory schemes are available for both.

VIII. HOW COULD THEY *NOT* KNOW? ASSUMPTION OF RISK'S TROUBLING FAILURES

It was once suggested that common observation and common sense were the

138. HAGSTROM, *supra* note 1, at 147.

139. COLO. REV. STAT. ANN. § 13-21-120 (West 1998).

140. *But see* Goade v. Benevolent and Protective Order of Elks, 28 Cal. Rptr. 669, 672 (Cal. Ct. App. 1963) ("Sports car racing can hardly be said to compare with the universal popularity of baseball. . . . The risk of being killed or injured by a racing sports car is neither so common, frequent nor expected an occurrence that it should be considered a matter of 'common knowledge' sufficient to impose 'actual knowledge' on the paying spectator who is standing in an approved spectator area.").

only proof required to appreciate the dangers of auto racing.¹⁴¹ Nevertheless, all roads do not lead to assumption of risk. Certain opinions, however, do suggest a reliable way to get there. At its simplest, the doctrine has been applied in situations like the one presented in *Barrett v. Faltico*,¹⁴² where a spectator who was reasonably familiar with the sport assumed a position atop an unprotected structure along a race track, despite the availability of a grandstand.

The hazards of automobile racing to an onlooker, who places himself in a position near the track, without the protection of any intervening barrier, are unmistakably clear and obvious. It is difficult to imagine a normal, adult person so naive as to be unaware that automobiles in competitive races attain dangerously high speeds and that, on small, circular tracks, they are very likely to get out of control and out of bounds. Plaintiff may be assumed to have known the danger of the position in which he placed himself, as he not only was an adult person, but on two, prior occasions, had attended the races at the same track and had seen cars leave the track and crash against the spectator stands.¹⁴³

The element of familiarity was revisited in the 1953 Pennsylvania decision, *Shula v. Warren*.¹⁴⁴ The notion that the injured plaintiff, a frequent attendee and one-time announcer at stock car races, did not appreciate the risks accompanying his presence in the pit area was held "inconceivable."¹⁴⁵ As a result, "the court below was fully justified in entering judgment for the [defendant speedway]."¹⁴⁶

Saari v. State,¹⁴⁷ a frequently-cited New York opinion, acknowledged that the application of assumption of risk to race spectators led to "results [that] are not wholly consistent."¹⁴⁸ While patrons "assume the obvious dangers arising from the normal operation or conduct of the sport,"¹⁴⁹ the court noted that despite a familiarity with automobiles and a reasonable awareness of racing in general, none of the injured spectators had actually witnessed a race and thus could not be "properly be charged with assumption of the risk."¹⁵⁰ Apparently, "common observation and common sense"¹⁵¹ were not quite determinative on the issue of familiarity.

The difficulties in determining a spectator's familiarity with the sport of auto racing for purposes of applying assumption of risk can be overcome. The remedy is simple: eliminate the distinction altogether. After all, can a fair determination really be made? Is attendance at one race sufficient? What about five years of occasional viewing on television? Must one be a veteran stock car driver before she is presumed

141. See *Saari v. State*, 119 N.Y.S.2d 507, 515 (N.Y. Ct. Cl. 1953).

142. 117 F. Supp. 95 (E.D. Wash. 1953).

143. *Id.* at 100.

144. 150 A.2d 341 (Pa. 1959).

145. *Id.* at 344.

146. *Id.* at 345.

147. 119 N.Y.S.2d 507 (N.Y. Ct. Cl. 1953).

148. *Id.* at 521.

149. *Id.*

150. *Id.* at 522-23.

151. *Id.* at 515.

to know that “there is present in high speed auto racing a constant danger that a racing car, operating at high speed, may hurtle from the course by reason of skidding, collision, mechanical failure, or loss of control, to the great peril of any spectators in its path”?¹⁵² The presumption of risk appears obvious.

IX. EXHIBIT A—COLORADO’S BASEBALL STATUTE AS A MODEL

The Colorado Baseball Spectator Safety Act of 1993¹⁵³ is notable for both its simplicity and its substance. A clear and concise statutory remedy to a basic public policy concern, the Act is an effective vehicle for limited but unquestionably deliberate tort reform. While no indication of purpose apart from public policy appears in the text of the statute, the contemporaneous arrival in Denver of a coveted Major League Baseball franchise suggests the relevant political climate.¹⁵⁴

Referred to by the Denver Post as a “be nice to baseball bill,”¹⁵⁵ the Act was one of three laws arising out of a perceived need to buffer Denver’s ambitious baseball enterprise from financial hardship.¹⁵⁶ A Post columnist authored a scathing piece that condemned “petty” baseball interests for lobbying to “significantly reduce current or future costs for both the stadium district and the owners.”¹⁵⁷ Along with unheard of latitude in land acquisition and construction contracts, the Act’s “tailored liability requirements on the handling of injuries” should, it was argued, “raise red flags for both lawmakers and citizens.”¹⁵⁸

In fact, Colorado’s legislators weathered the criticism and chose to emphasize the bill’s broader public policy ramifications by sending it out of committee by an eight to one margin.¹⁵⁹ Euphoria over big league baseball had swept the state and collected the political machinery in its wake.¹⁶⁰ One week later, the Act was passed by the full General Assembly.¹⁶¹

For purposes of this discussion, the language of the Act is more than sufficient to provide a detailed outline for the prototype Motor Sport Spectator Safety Act. While highly informal, a ‘cut and paste’ approach to drafting new legislation is tempting. By replacing baseball references with auto racing language, the minimally altered Act takes on its desired meaning without disturbing the underlying policies or spirit of the law:

152. *Id.* at 515-16.

153. COLO. REV. STAT. ANN. § 13-21-120 (West 1998).

154. The most likely explanation for the statute’s existence is that in the years leading up to 1993, Denver, Colorado was in the process of acquiring a Major League Baseball franchise through league expansion. A new stadium was being constructed and investors were being courted. See *The Official Web Site of the Colorado Rockies* (visited Nov. 29, 1998) <<http://www.coloradorockies.com/rockies/time/2.html>>.

155. *Session in brief: What passed and what died?*, DENVER POST, May 13, 1993, at 3B.

156. See, e.g., Al Knight, *Why is the baseball stadium district still playing petty political games?*, DENVER POST, April 11, 1993, at 1D.

157. *Id.*

158. *Id.*

159. See *Foul Play*, DENVER POST, May 5, 1993, at 3B.

160. See generally *id.* (clarifying that the statute recognizes “hazards that go along with the game,” and if a stadium “meet[s] all of the criteria and a fan still gets beamed on the head with a baseball, [the fan] cannot file suit.”).

161. See *Session in brief: What passed and what died?*, *supra* note 155.

. . . (2) The general assembly recognizes that persons who attend professional [auto races] may incur injuries as a result of the risks involved in being a spectator at such [auto races]. However the general assembly also finds that attendance at such professional [auto races] provides a wholesome and healthy family activity which should be encouraged. The general assembly further finds that the state will derive economic benefit from spectators attending professional [auto races]. It is therefore the intent of the general assembly to encourage attendance at professional [auto races]. Limiting the civil liability of those who own professional [race] teams and those who own [tracks] where professional [races] are [held] will help contain costs, keeping ticket prices more affordable. . . .

(3)(c) "Spectator" means a person who is present at a professional [auto race] for the purpose of observing such [race], whether or not a fee is paid by such "spectator".

(4)(a) Spectators of professional [auto races] are presumed to have knowledge of and to assume the inherent risks of observing professional [auto races], insofar as those risks are obvious and necessary. . . .

(b) . . . [T]he assumption of risk set forth in this subsection (4) shall be a complete bar to suit and shall serve as a complete defense to a suit against an owner by a spectator for injuries resulting from the assumed risks, . . . [A]n owner shall not be liable for any injury to a spectator resulting from the inherent risks of attending a professional [auto race], and . . . no spectator nor spectator's representative shall make any claim against, maintain an action against, or recover from an owner for injury, loss, or damage to the spectator resulting from any of the inherent risks of attending a professional [auto race]. . . .

(5) Nothing in subsection (4) of this section shall prevent or limit the liability of an owner who:

(a) Fails to make a reasonable and prudent effort to design, alter, and maintain the premises of the [track] in reasonably safe condition relative to the nature of the [sport of auto racing];

(b) Intentionally injures a spectator; or

(c) Fails to post and maintain the warning signs required pursuant to subsection (6) of this section.

(6)(a) Every owner of a [track] where professional [auto races] are [held] shall post and maintain signs which contain the warning notice specified in paragraph (b) of this subsection (6). Such signs shall be placed in conspicuous places at the entrances outside the [track] and at [track] facilities where tickets to professional [auto races] are sold. . . .

(b) The signs described in paragraph (a) of this subsection (6) shall contain the following warning notice:

WARNING

UNDER COLORADO LAW, A SPECTATOR OF PROFESSIONAL [AUTO RACING] ASSUMES THE RISK OF ANY INJURY TO PERSON OR PROPERTY RESULTING FROM ANY OF THE INHERENT DANGERS AND RISKS OF SUCH ACTIVITY AND MAY NOT RECOVER FROM AN OWNER OF A [RACE] TEAM OR AN OWNER OF A [TRACK] WHERE PROFESSIONAL [AUTO RACING] IS [HELD] FOR INJURY RESULTING FROM THE INHERENT DANGERS AND RISKS OF OBSERVING PROFESSIONAL [AUTO RACING], INCLUDING BUT NOT LIMITED TO, BEING STRUCK BY [DEBRIS]. . . .¹⁶²

In so far as the proposed statute is an accurate reflection of Colorado's original legislative intent to limit liability in the spectator sports context, it would be difficult to challenge this logical furtherance of public policy. Even assuming that Colorado's General Assembly did not contemplate its use beyond baseball, the Act lends itself to such utilization. The issue of scope arose while the bill was in committee, but a

162. See COLO. REV. STAT. ANN. § 13-21-120 (West 1998), *supra* note 27, as modified for illustration purposes only.

workable resolution was curiously averted.¹⁶³ Incidentally, the recent emergence and promising future of major auto racing in Colorado suggests that the rationale for the Baseball Act may soon be revisited in the halls of the state house.¹⁶⁴

X. THE UNTHINKABLE HAPPENS—ASSESSING LIABILITY UNDER A NEW STATUTORY SCHEME

In packing race venues to record capacities, the race-going public regularly speaks to the question of confidence in track safety. After all, “a person almost certainly is at greater risk of being struck while crossing a street than of being injured or worse while watching a race.”¹⁶⁵ It should not be within a court’s province to render race track owners and similarly situated parties liable simply because their sport is dangerous. The Maryland Court of Special Appeals suggested as much in dictum: “A defect inherent in the nature of man is that perversity of spirit which attracts us to spectacles of danger in which our fellow men risk death for our amusement.”¹⁶⁶

Concerns over the bold imposition of assumption of risk pursuant to the proposed statute should easily be placed to rest. Regardless of the standard imposed on owners, utmost care¹⁶⁷ or ‘reasonably safe condition,’¹⁶⁸ the recognized principle that “the individual is the master of his own fate, with the right to choose a course of action and the responsibility to accept the consequences of the choice”¹⁶⁹ must be upheld. *Volenti non fit injuria*. If one, knowing and comprehending the danger, voluntarily exposes herself to it, though not negligent in so doing, she is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom.¹⁷⁰

Examination of the key elements of this doctrine as outlined in its definition—risk, knowledge, comprehension, and voluntary exposure—serves to demonstrate its unqualified utility in this rather specialized area of tort law. The doctrine underlying the statute can be interpreted liberally enough to include all spectators, thereby rendering unnecessary the fuzzy distinction between fan and casual observer and precluding collateral inquiries into relative familiarity, prior conduct or subjective intent on the part of an injured fan to be viewed as either a fanatic, enthusiast or

163. See *Foul Play*, *supra* note 159 (“Rep. Ron May, R-Colorado Springs, questioned why other professional sports don’t have similar laws. But [bill co-sponsor, Rep. Mike] Coffman noted that baseballs commonly are fouled off, while basketballs and footballs usually stay in the playing area.”).

164. In recent years, Pikes Peak Speedway has hosted major events, including NASCAR’s Busch Grand National Series. See Al Pearce, *Sayonara*, *AUTOWEEK*, Nov. 30, 1998, at 50 (predicting that NASCAR’s Winston Cup Series will soon make a stop in the Denver area). See also HAGSTROM, *supra* note 1, at 127; and Loren Mooney, *Revving Up for ‘99*, *SPORTS ILLUSTRATED*, Special Issue Nov. 25, 1998, 128 at 131 (suggesting that Denver is among those locations under consideration for new facilities and eventual Winston Cup races).

165. Harris, *supra* note 86.

166. *Capital Raceway Promotions, Inc. v. Smith*, 322 A.2d 238, 239 (Md. Ct. Spec. App. 1974).

167. See *supra* Part IV.

168. COLO. REV. STAT. ANN. § 13-21-120 (West 1998).

169. JOSEPH W. GLANNON, *THE LAW OF TORTS EXAMPLES AND EXPLANATIONS* 417 (1995).

170. *BLACK’S LAW DICTIONARY* 1569 (7th ed. 1999).

devotee.¹⁷¹

As posited in section III above, risk may be defined as the likelihood that a spectator will be placed in harm's way while that spectator is or should be watching the race from a designated or assigned location.¹⁷² Risk in this context will not arise in traditionally non-viewing locations such as gathering spaces beneath a grandstand, public restrooms, concession areas or public parking lots. For purposes of this discussion, a spectator will acquire risk when moving between the designated viewing area and any stated exempt areas. The rationale for this distinction is that the underlying risk is not suspended merely because a spectator's attention is voluntarily diverted. Risk shall exist concurrently with the presence of authorized¹⁷³ vehicles on the racing surface engaging in activities associated with the sport (i.e. during practice or a race).

Knowledge and comprehension of risk shall be established via a standard of whether a reasonably prudent spectator of comparable years and intelligence, in the same or similar circumstances, would be aware or should be aware of the existence of a risk as defined in the preceding paragraph. To this end, the expanded media coverage¹⁷⁴ that has accompanied the exponential growth of racing virtually guarantees that a substantial percentage of the population is regularly (i) entertained by images of spectacular mishaps, and (ii) informed of news items such as spectator injuries and deaths. Reasonably prudent spectators, assisted by highly visible signage per the proposed statute, will recognize the dangers inherent in watching a high-speed automobile race.¹⁷⁵ One may look to *DeBoer v. Florida Offroaders Driver's Ass'n* for guidance: "[a]bsent impaired mental faculties, one need not be an experienced spectator or competitor to recognize the potential for injury."¹⁷⁶

Attendance at a racing event shall create a rebuttable presumption of voluntary exposure of oneself to risk as previously defined. Voluntary exposure goes to the heart of assumption of risk. A reasonably prudent spectator, charged with knowledge and comprehension of the risk incurred by spectators at auto races in general, will be presumed to have voluntarily exposed herself to said risk. "The hazards of automobile racing to an onlooker . . . are unmistakably clear and obvious."¹⁷⁷ This presumption could theoretically be overcome only upon a showing of incapacity or on a theory of false imprisonment.

It is difficult to imagine a situation in which *volenti non fit injuria* would not apply in the race track context. One might even conclude that assumption of the risk

171. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 448 (1990) (defining "fan").

172. See *supra* Part III (discussing quasi-mathematical determination of risk).

173. Cf. *Rieger v. Zackoski*, 321 N.W.2d 16 (Minn. 1982) (involving a bizarre situation in which spectator-plaintiff was struck by an *unauthorized* vehicle improperly on the racing surface after an event had concluded. A spectator cannot reasonably anticipate risks associated with such activity).

174. See e.g. HAGSTROM, *supra* note 1, ch. 4.

175. See, e.g., *Morton v. California Sports Car Club*, 329 P.2d 967, 969 (Cal. Ct. App. 1958). *But see* *Goade v. Benevolent and Protective Order of Elks*, 28 Cal. Rptr 669 (Cal. Ct. App. 1963) (distinguishing plaintiff who had never been to a sports car race, never assisted in the operation of a sports car race, never saw films of such races, and has no particular interest in going to the races).

176. 622 So. 2d 1134, 1136 (Fla. Dist. Ct. App. 1993).

177. *Barrett v. Faltico*, 117 F. Supp. 95, 100 (E.D. Wash. 1953).

is so inextricably intertwined with the injured race fan scenario that it creates a *per se* rule of protection for track owners. The court in *McPherson v. Sunset Speedway Inc.* reached this very conclusion.¹⁷⁸ Obvious connotations notwithstanding, courts in numerous jurisdictions have still found an end-run around assumption of risk. How does one possibly reconcile such conclusions with *Saari's* seemingly sublime statement of "common observation and common sense?"¹⁷⁹

XI. THE FINE PRINT—RELEASE FROM LIABILITY AS A PROTECTIVE DEVICE

Spectators typically encounter two types of releases at the race track. The first species are those pre-printed on the admission ticket. It is commonplace to find a paragraph or two of 'legalese' on virtually any ticket for admission to a public performance, exhibition or sporting event. Some examples of events that distribute tickets containing such language are certain professional baseball games,¹⁸⁰ professional basketball games,¹⁸¹ and rock concerts.¹⁸² Illustrative of the disparity between facilities, one can just as easily find comparable tickets that are free of any attempt by the owner to limit liability. These include professional baseball,¹⁸³ professional and collegiate basketball,¹⁸⁴ Triple Crown horse racing,¹⁸⁵ film festivals,¹⁸⁶ and airboat excursions.¹⁸⁷

Likewise, motor sport facilities vary considerably when it comes to the placement of exculpatory language on admission tickets and other spectator documents. Inevitably, most tracks elect to print clauses purporting to limit their liability on all of their standard ticket stock.¹⁸⁸ Of course, there are exceptions. Some choose not to utilize this particular protective device at all.¹⁸⁹

Not surprisingly, "unsigned agreements, such as may be printed on the patron's admission ticket, are ordinarily held ineffective to relieve an amusement operator from liability for personal injuries to the patron."¹⁹⁰ Such clauses create obvious difficulties for track owners either by way of statutory prohibition¹⁹¹ or through

178. 594 F.2d 711 (8th Cir. 1979) (indicating that plaintiff was familiar with race tracks similar to the one owned by defendant, and assumption of risk operated as a complete defense).

179. *Saari v. State*, 119 N.Y.S.2d 507, 515.

180. *See, e.g.*, Oriole Park at Camden Yards (Baltimore, MD) ticket stock. *See also* Joe Robbie a.k.a. Pro Player Stadium (Miami, FL) ticket stock.

181. *See, e.g.*, U.S. Air Arena (Landover, MD) ticket stock.

182. *See, e.g.*, TicketMaster ticket stock.

183. *See, e.g.*, Veteran's Stadium (Philadelphia, PA) ticket stock.

184. *See, e.g.*, Baltimore Arena (Baltimore, MD) ticket stock. *See also* University of Maryland Cole Field House (College Park, MD) ticket stock.

185. *See, e.g.*, Pimlico Race Course (Baltimore, MD), Preakness Stakes Infield Pass.

186. *See, e.g.*, TicketMaster ticket stock.

187. *See, e.g.*, Sawgrass Recreation Park (Broward County, FL) ticket.

188. *See supra* note 63 (noting that tracks at Pocono, Las Vegas, and Texas have such clauses).

189. *See Officials Defend Tracks After Fatal Crash, supra* note 8 (noting that Michigan did not print waivers on tickets); *see also* Hagerstown Speedway (MD) ticket stock.

190. Randy J. Sutton, Annotation, *Validity, Construction, and Effect of Agreement Exempting Operator of Amusement Facility from Liability for Personal Injury or Death of Patron*, 54 A.L.R.5th § 9 (1997).

191. *See, e.g.*, N.Y. GEN. OBLIG. LAW § 5-326, *supra* note 17.

general public policy considerations that foster a dislike of unilateral agreements and contracts of adhesion.¹⁹² In fact, none of the cases examined address this issue in the auto racing context, nor do any in the cited annotation.¹⁹³

The focus, then, shifts to the other type of release: an express waiver that is bargained for and executed by a party. Such agreements are usually reserved for spectators who seek admission to the pit and garage areas of a track's infield. For purposes of this discussion, the examination is narrow in scope and concentrates on what are commonly known as pit passes. Interestingly, it is not unusual for facilities to require spectators to execute releases to obtain pit passes, only to distribute actual passes that do not themselves contain any legal language, reminders or warnings.¹⁹⁴ A considerable amount of case law has been generated in response to this mechanism for limiting liability.¹⁹⁵

XII. READING BETWEEN THE LINES—EXCULPATORY AGREEMENTS UNDER SCRUTINY

A survey of the relevant law addressing the enforceability of exculpatory agreements in the race track context can be reduced to a common denominator, best stated in *DeBoer*: "Although exculpatory clauses are disfavored, they are enforceable."¹⁹⁶ Nevertheless, it is virtually impossible to predict how a particular court might rule on any given day. Nowhere in this area of law is the "unnerving fabric"¹⁹⁷ more cumbersome.

Track owners can anticipate a warm, if not favorable, reception to exculpatory agreements that are executed under the guise of a fair bargain. Releases are generally enforceable if they are "conspicuous, legible, and recognizable by a reasonable person as a release from liability."¹⁹⁸ Another concern, of course, is the ultimate legality of such a waiver given the existence in some jurisdictions of legislation barring its enforcement.¹⁹⁹ A general rule has been enunciated in lieu of prohibitory legislation: "[E]xculpatory agreements are valid when fairly made and may be enforced to preclude recovery for injury caused by simple negligence."²⁰⁰ Finally, in testing the validity of any such agreement, its language is to be construed strictly against the defendant race track.²⁰¹

Releases have been upheld, to the benefit of facility owners, in a number of

192. See, e.g., *Deboer v. Florida Offroaders Driver's Ass'n*, 622 So. 2d 1134 (Fla. Dist. Ct. App. 1993).

193. See Sutton, *supra* note 190.

194. See *Las Vegas Motor Speedway* (distributing 6" x 3" paper passes); *Pocono International Raceway* (distributing 1" wristbands).

195. See cases cited *supra* note 54.

196. See *DeBoer*, 622 So. 2d at 1135.

197. *Kastenberg*, *supra* note 5 at 209.

198. See Sutton, *supra* note 190.

199. See, e.g., N.Y. GEN. OBLIG. LAW § 5-326, *supra* note 17.

200. *Barker v. Colo. Region-Sports Car Club of Am., Inc.*, 532 P.2d 372, 377 (Colo. Ct. App. 1974).

201. See, e.g., *Celli v. Sports Car Club of Am., Inc.*, 105 Cal. Rptr. 904 (Cal. Ct. App. 1972); see also *Hine v. Dayton Speedway Corp.*, 252 N.E.2d 648 (Ohio Ct. App. 1969).

cases.²⁰² The following criteria have been examined by courts in determining enforceability of exculpatory agreements in the race track context: ambiguity;²⁰³ clarity as to significance;²⁰⁴ sufficient opportunity to examine;²⁰⁵ fulfillment of one's duty to read the release;²⁰⁶ duress and/or compulsion;²⁰⁷ voluntary execution;²⁰⁸ fair bargain;²⁰⁹ familiarity with risks;²¹⁰ and typeface.²¹¹

Considerable guidance may be found in *Hine v. Dayton Speedway Corp.*,²¹² where a spectator was injured when one of two cars involved in a collision hit him while he was standing in the pit area. He sought to avoid the effect of the release he had executed on the theory that the release "lacked the required specificity [by] not specify[ing] that it was a release for actions arising out of negligence or wanton misconduct, but specify[ing] only assumption of the risks and hazards inherent in automobile racing."²¹³

Wary of its "extreme connotation,"²¹⁴ the court rejected the notion that the spectator's injuries arose out of a nebulous wanton misconduct. Furthermore, reading the assumption of risk clause broadly, *Hine* concluded that since "the plaintiff assumed all risks incident to the sport of automobile racing, [and] [a]utomobile racing, by its nature, embraces unusual danger to life and limbs, [t]he facts alleged will not support an action based upon wanton misconduct."²¹⁵

The argument that negligence, excluded from the text of the release, could not

202. See generally Sutton, *supra* note 190.

203. Compare *Haines v. St. Charles Speedway Inc.*, 874 F.2d 572 (8th Cir. 1989); *DeBoer v. Florida Offroaders Driver's Ass'n*, 622 So. 2d 1134; *Huber v. Hovey*, 501 N.W.2d 53 (Iowa 1993) (upholding release upon finding that language was not ambiguous) with *Celli v. Sports Car Club of America Inc.*, 105 Cal. Rptr. 904 (Cal. Ct. App. 1972) ("release agreements did not absolve defendants from the consequences of their own negligence as the express words did not specifically and clearly declare this result.").

204. See, e.g., *Haines*, 874 F.2d 572, 575 (8th Cir. 1989) (upholding release upon finding that a reasonable person would have understood its significance).

205. Compare *DeBoer*, 622 So. 2d 1134 (upholding release upon finding that plaintiff had an opportunity to examine the release) with *Eder v. Lake Geneva Raceway Inc.*, 523 N.W.2d 429 (Wis. Ct. App. 1994) ("no meaningful opportunity for [plaintiffs] to read the agreements before signing.").

206. See, e.g., *Huber*, 501 N.W.2d 53 (holding that failure to read release would not nullify the agreement if otherwise enforceable); see also *Lee v. Allied Sports Assoc.*, 209 N.E.2d 329, 332 (Mass. 1965) ("[P]laintiff cannot fail to have been aware that there was printing at the top of the sheet he signed . . . [N]o evidence that [plaintiff] was denied the opportunity to read . . . [P]laintiff cannot not complain that he had no notice of the import of the paper which he signed.").

207. See, e.g., *Haines*, 874 F.2d 572 (upholding release upon finding that plaintiff did not execute waiver under duress); see also *LaFrenz v. Lake County Fair Bd.*, 360 N.E.2d 605, 608 (Ind. Ct. App. 1977) (holding that decedent was under no compulsion to execute agreement).

208. See, e.g., *Hine v. Dayton Speedway Corp.*, 252 N.E.2d 648, 652 (Ohio Ct. App. 1969) ("[P]laintiff voluntarily executed the release and . . . there was no clear and convincing evidence of any fraud in either the factum or the inducement.").

209. Compare *LaFrenz*, 360 N.E.2d 605, 608 ("[T]here was no unequal bargaining power between the parties.") with *Eder*, 523 N.W.2d 429, 432 ("[W]e cannot conclude, under the circumstances of this case, that there was a 'bargain freely and voluntarily made through a process which has integrity.'")

210. See, e.g., *Haines*, 874 F.2d 572 (finding that plaintiff-car owner was reasonably familiar with the risks of car racing, including injury to spectators in the infield; summary judgment for defendant affirmed).

211. Compare *DeBoer v. Florida Offroaders Driver's Ass'n*, 622 So. 2d 1134 (upholding release printed in at least eight-point type) with *Celli*, 105 Cal. Rptr. 904 (invalidating release printed in less than six point type).

212. 252 N.E. 2d 648 (Ohio Ct. App. 1969).

213. *Id.* at 651.

214. *Id.* (defining wanton misconduct as conduct "manifest[ing] a disposition toward perversity.").

215. *Id.*

have been contemplated by the releasing parties was likewise rejected:

[T]here can be no doubt that [the release's] exculpatory language is thorough and comprehensive. Specifically the plaintiff released the defendants from all causes of action and from all liability for injuries. . . . [I]t is not necessary to use the word 'negligence' if the intent of the parties is expressed in clear and unequivocal terms. . . . In fact, the release has no purpose unless it insures against negligence because, even in the absence of a release, the plaintiff assumed all risks incident to the sport in which he was engaged.²¹⁶

A preponderance of case law on this question supports the notion that there is indeed a trend towards favoring releases that meet at least some of the suggested criteria. Trends notwithstanding, discrepancies abound²¹⁷ and the issue remains largely unresolved and subject to wide local variation.²¹⁸ Statutory language embodying the enforceability trend would substantially legitimize the common law and bring many jurisdictions together. Of course, such legislation would also serve the greater public policy interests inherent in solving the liability dilemma of race track owners.

XIII. EXHIBIT B—FLORIDA'S MOTORSPORT RELEASE STATUTE AS A MODEL

By statute, Florida recognizes and enforces liability releases executed by nonspectators at motorsport events.²¹⁹ As with the Colorado baseball statute,²²⁰ Florida's motorsport legislation provides a useful framework out of which the desired remedial action can arise. Of course, one may engage in speculation about the drafters' intent regarding scope, but it is not necessary for purposes of this discussion. It is likely that the Florida legislature simply did not contemplate a situation in which non-participants (spectators) would routinely gain access to nonspectator areas.²²¹ A definition for participant in this context was not available.²²²

Again, only minor modifications are necessary to effect the change that will arguably resolve a number of interpretational difficulties. A prototypical motorsport spectator and participant liability release statute is obtained:

. . . (1)(b). "Nonspectator area" means a posted area within a closed-course motorsport facility, admission to which is conditioned upon the signing of a motorsport liability release, which is intended for event participants [and a limited number of spectators], and which excludes the "spectator area" as defined in

216. *Id.* at 651-52.

217. *See, e.g.,* Sutton, *supra* note 190.

218. *See generally id.*

219. *See* FLA. STAT. ANN. § 549.09, *supra* note 22.

220. *See* COLO. REV. STAT. ANN. § 13-21-120 (West 1998), *supra* note 27.

221. *See generally* HAGSTROM, *supra* note 1, at 148 (discussing in general terms the proliferation and availability of pit passes).

222. The only Florida case examined, *DeBoer*, involved a spectator and did not address § 549.09.

paragraph (c).

(c). "Spectator area" means a specified area within a closed-course motorsport facility intended for admission to the general public, whether or not an admission price is charged, or to which admitted persons of the general public have unrestricted access, including the grandstands and other general admission seating or viewing areas. . . .

(g). "Nonspectators" means event participants [and spectators] who have signed a motorsport liability release.

(2). Any person who operates a closed-course motorsport facility may require, as a condition of admission to any nonspectator part of such facility, the signing of a liability release form. The persons or entities owning, leasing, or operating the facility or sponsoring or sanctioning the motorsport event shall not be liable to a nonspectator or her or his heirs, representatives, or assigns for negligence which proximately causes injury or property damage to the nonspectator within a nonspectator area during the period of time covered by the release.

(3). A motorsport liability release may be signed by more than one person so long as the release form appears on each page, or side of a page, which is signed. A motorsport liability release shall be printed in 8 point type or larger.²²³

XIV. EXHIBIT C—A MODEL LIABILITY RELEASE FORM

As statutes that recognize such releases are enacted, a need will arise for race tracks to actually draft forms that embody the protection afforded them by law. Interestingly, West's Racetrack Liability Release form,²²⁴ published for use in conjunction with Florida's previously discussed statute, provides a useful guide for accomplishing this task:

This Release is executed this [date], by and between the undersigned individuals, hereinafter called "Parties A", and the undersigned racetrack, hereinafter called

223. See FLA. STAT. ANN. § 549.09, *supra* note 22, as modified for illustration purposes only.

224. 30 WEST'S LEGAL FORMS § 30.73 (Michael I. Levin ed., 3d ed. 1997).

“Party B”.

Whereas, Party B is the owner or operator of a closed-course speedway or racetrack located at _____, [state], and known as _____, which is designed and intended for motor vehicle competition, and Party A desires admission to certain nonspectator areas (as defined in [statute]) of the racetrack;

Now therefore, in consideration of Party B allowing Parties A admission to certain nonspectator areas of the racetrack, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by Parties A, Parties A, for themselves and their heirs, successors, administrators and assigns, intending to be legally bound, hereby remise, release, acquit, satisfy, and forever discharge Party B and its heirs, personal representatives, successors, assigns, employees, agents and attorneys of and from all actions, lawsuits, attorney fees, medical bills, expenses, costs, claims, demands, injuries, damages and liability whatsoever arising from any negligence or other act or omission within a nonspectator area of the racetrack during the period of time consisting of the following days:
_____.

[space for parties and witnesses to sign omitted]²²⁵

In many respects, the fate of a liability release rests in the hands of the track’s owner. The valuable lessons afforded by previously cited opinions regarding the drafting of such forms should carry significant weight. *LaFrenz*²²⁶ suggests that additional printing on each and every signature line is beneficial:

[T]he form and language of the agreement explicitly refers to the appellee’s negligence; and the decedent could not have signed the instrument without seeing the wording ‘THIS IS A RELEASE.’ Thus the form and language is so conspicuous that reasonable men could not reach different conclusions on the question whether the deceased ‘knowingly and willingly’ signed the document.²²⁷

Furthermore, *Eder*²²⁸ reinforces the notion that it is indeed the track’s

225. *Id.* as modified for illustration purposes only.

226. 360 N.E.2d 605 (Ind. Ct. App. 1977).

227. *Id.* at 609.

228. 523 N.W.2d 429 (Wis. Ct. App. 1994).

responsibility to ensure that patrons are given a “meaningful opportunity. . .to read the agreements before signing.”²²⁹ In addition, a track must be “willing to discuss the terms [and] engage in a process whereby [patrons] could form the required intent to be bound to certain terms.”²³⁰ *Eder* prudently held that the inconvenience caused by longer lines does not excuse a track from its duty to see that its otherwise enforceable exculpatory agreements are properly executed.²³¹

XV. THE CHECKERED FLAG—CONCLUSION

Recent twin tragedies have precipitated a portentous climate for the business of auto racing. The enhanced pecuniary protection for race track owners that will flow from legal reform does not come cheap, nor does it reward those who are unwilling to embrace a lofty standard. Chances are that most of America’s major tracks already meet or exceed expectations higher than the law could articulate. Still, proprietors must seize every opportunity to make their facilities safer, while simple economics dissuade them from passing too much of the cost on to spectators in the form of higher ticket prices. After all, the fans represent “the financial underpinning for the sport”²³² and often support the owner as well.²³³

The benefit to race fans that will flow from legal reform also comes at a price, but a price that is greatly offset by the sheer improbability that any given fan will ever have to pay it. Spectators are asked to sacrifice certain rights to legal redress in exchange for an assurance that ticket prices, though subject to normal market pressures, will not be raised solely to insulate a race track operator from a frivolous judgment rendered in favor of an injured patron. Similarly, pit pass holders are asked to absolve tracks of all liability in exchange for the kind of unfettered access unavailable to fans of any other major professional sport,²³⁴ access that might not persist in the wake of a costly lawsuit initiated by a guest injured in the garage area. An irrational fear of injury hasn’t exactly kept race fans at home in recent years, and it certainly isn’t likely to trump the promise of lower ticket prices and unrivaled access to bona fide sports heroes.²³⁵

In the final analysis, as tort reform measures go, the passage of legislation that protects race track owners from negligence actions brought by injured spectators might not capture the imagination of the populace. For the millions of race fans who eagerly assume the risk, however, and the track owners who are charged with their safety from green flag to checkered flag, corrective statutory measures represent the logical next step.

“In the end, it would come down to a question of balance. . .The balance is

229. *Id.* at 432.

230. *Id.*

231. *See id.*

232. HAGSTROM, *supra* note 1 at 147.

233. *See id.*

234. *See, e.g., id.* at 148.

235. *See generally id.*, ch. 6.

between the interest of the spectator seeing the race and realizing that there is some danger and the spectators expecting that management has done a reasonable job of safeguarding them from dangers.”²³⁶ It can plainly be said that when management has indeed done a reasonable job, the balance clearly ought to be tipped in their favor. Implementation of the proposals contained herein provides a useful means by which such tipping can be accomplished.

Jason R. Jenkins

236. Hutchens et al., *supra* note 12 (quoting former Indiana Supreme Court Justice Jon D. Krahulik on spectator liability at auto racing events).

