TORTIOUS LIABILITY IN CHINA'S MOTORSPORTS INDUSTRY

Dr. Jing Hui,[*] *Dr. Chen Gengzhao,*[**] *and Sun Bing*[***]

TABLE OF CONTENTS

[*] Assistant Professor, Faculty of Law, The University of Hong Kong.
[**] Assistant Professor, School of Business, The Hang Seng University of Hong Kong.
[***] The Hang Seng University of Hong Kong, MA in Translation (Business and Legal).

Abstract

In 2020, the Chinese Civil Code came into effect. Article 1176 of the code offers a statutory defense for those participating in "a recreational or sports activity carrying certain risk" when they cause injury to other participants. However, the Chinese Civil Code does not specify how or to what extent Article 1176 may be relied upon as a statutory defense in assessing the tortious liability of the organizers of such recreational or sports activities. The courts in China have long sought to develop a principled approach to applying the voluntary assumption of risk defense to such organizers. This Article provides a case study to examine how Article 1176 operates in the context of motor racing activities, identifying sources of uncertainty surrounding the application of the law. By reviewing how Australian law analyses the duty and liability of event organizers, this Article also identifies the strengths of the Australian approach and how it may inform Chinese law with respect to addressing the problems associated with Article 1176.

I. BACKGROUND

This Article uses a case study to examine legal issues in tortious claims relating to motor racing activities. In the Zhejiang International Circuit case, a driver died in a car racing accident and the family attributed the death to the organizer's failure in exercising the duty of safety protection. The organizer attempted to rely on the exemption clause for exclusion of liability, claiming that the victim voluntarily assumed risks when participating in the car racing activity.[1] Specific issues arising from this case include whether the provision of adequate medical support and effective rescue should be deemed part of a sporting event organizer's legal duty and how to assess an organizer's liability in the context of tortious claims associated with dangerous sports activities.[2] Before Article 1176 of the Chinese Civil Code—China's version of the common law concept of voluntary assumption of risk (VAR)—came into effect in 2021, Chinese law lacked specific provisions for regulating inherently dangerous or highly competitive sports.[3] Furthermore, Article 1176 only applies to the allocation of liability among participants in such sports; it does not consider whether the organizers of such sports events have fully

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[1] SHAO XING RI BAO (紹興日報) [SHAO XING DAILY], *Zhe Qi Che Hui Ren Wang de Shi Gu, Gai Zen Me Kan?* (這起車毀人亡的事故，該怎麼看?) [*How to View this Tragic Racing Incident?*] (Nov. 29, 2018), http://www.shaoxing.com.cn/xinwen/p/2686565.html.

[2] Jian Pan Che Shen Jiao (键盘车神教), *Zhe Sai Bao Ma M3 Qi Huo, Che Shou Si Wang, Sai Dao Fang Que Shuo "Wo Men Shi Mei You Ze Ren de"?* (浙赛宝马M3起火，车手死亡，赛道方却说"我们是没有责任的"?) [*A BMW M3 Caught Fire at the Zhejiang International Circuit, Leading to the Death of the Driver, But the Organizers Claimed They Are Not Responsible*] QI CHE ZHI JIA (汽車之家) [AUTO HOME] (Nov. 29, 2018, 5:39 PM), https://chejiahao.autohome.com.cn/info/3007375.

[3] Zhonghua Renmin Gonghe Guo Minfa Dian (中华人民共和国民法典) [Civil Code of the People's Republic of China] (promulgated by the Nat'l People's Cong., May 28, 2020, effective Jan. 1, 2021), art. 1176, 2020 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (CIVIL CODE SPECIAL ISSUE) 2 [hereinafter Chinese Civil Code].

discharged their duty of safety protection, nor what liability they should bear for their failure to do so. Against this background, this Article reviews a specific set of circumstances in which Article 1176 overlaps with an organizer's duty of safety protection. This Article identifies various uncertainties regarding the legal effect of the VAR defense under Article 1176. It also explores the insights and experience that Australian tort law defenses may provide for the potential reform of China's Article 1176 under similar circumstances.

This Article comprises five parts. The first section (Background) describes the factual scenario of the case in question and the issues that it raises. The second section (Legal Issues in Sports Injury Claims) evaluates whether the provision of adequate medical support and effective rescue should be considered part of an organizer's duty of safety protection and highlights areas of controversy surrounding the application of China's Article 1176. The third section (Australian Position) reviews how Australian tort law analyses an organizer's duty of care in the context of motorsports activities and the rationale for this approach. The fourth section (Implications of the Australian Experience) shows how Australia's approach could inform the development of Chinese tort law. The fifth section concludes the Article.

A. Factual Scenario

On November 22, 2018, during a track day at the Zhejiang International Circuit, a BMW M3 racing car crashed into cement piers inside the track.[4] The impact rendered the driver unconscious.[5] Two minutes later, rescue teams arrived; however, it was too late.[6] The driver did not survive the incident.[7] The organizer of the event claimed that the driver had been fully aware of the risks involved in motor racing and that it had fulfilled its legal obligation as organizer by conducting the rescue, and therefore did not bear any liability for the driver's death.[8] As an additional defense, the organizer asserted that it could not be held liable according to the exemption clause in its contract with drivers.[9] However, the family of the victim suspected that the protective wall involved in the crash did not meet

[4] The Wikipedia page for the "Zhejiang International Circuit" provides an introduction to this incident. *See Zhe Jiang Guo Ji Sai Che Chang* (浙江国际赛车场) [*Zhejiang International Circuit*], WIKIPEDIA (June 15, 2022), https://zh.wikipedia.org/zh-hk/浙江國際賽車場.

[5] *Id.*

[6] *Id.*

[7] *Id.* The time of the rescue was contested by both sides: the victim's wife claimed that the rescue took more than two minutes while the organizer claimed that the rescue team arrived in about one and a half minutes. See *Zhang Fu Kai Bao Ma Sang Ming, Shao Fu Zai Shi Fa Xian Chang Tou Tou Lu Xia Si Wang Shun Jian* (丈夫开宝马丧命 少妇在事发现场偷偷录下死亡瞬间) [*Husband Died Racing in BMW, Wife Secretly Recorded Surveillance Tape*], XIN LANG (新浪) [SINA] (Nov. 29, 2018), https://news.sina.com.cn/s/2018-11-29/doc-ihpevhcm3427623.shtml.

[8] *Id.*

[9] *Id.*

the applicable safety standards and questioned whether staff were sufficiently trained and qualified to provide assistance.[10] Moreover, they claimed that the driver's death resulted from the failure to provide immediate and effective rescue, as the rescuers' delay caused the "golden time" for survival to be missed.[11]

The waiver signed by the driver mentioned neither medical support nor emergency rescue.[12] According to the written waiver, the victim had acknowledged that he understood the risks involved in motor racing. Although the waiver described multiple potential risks such as health conditions that could have impact on driving ability, driver's use of alcohol or substance abuse that could affect his judgment when utilizing equipment, and facilities provided by the circuit, the list was not exhaustive. This led to the key issue of this case: whether the victim could have foreseen the organizer's negligence in failing to provide timely and effective rescue in a sports activity that could potentially lead to participants' personal injury or death, or whether the organizer should be able to claim exemption from liability on the grounds that the victim had voluntarily assumed the risk of injury or death when participating in the activity.

Similar incidents have drawn public attention to China's emerging motor racing industry, and tort claims arising from personal injuries sustained by participants in dangerous sports activities have spurred ongoing debate. This Article discusses the legal issues related to such sports injury claims in China, specifically in the motor racing industry, and draws implications for the future development of the law via a case study.

B. Legal Background

i. Regulatory Landscape of Motorsports in China

In general, motor racing events are divided into the following two categories: competitive activities, which aim at setting new records and creating new winners, and mass activities, in which participants engage merely for relaxation and enjoyment.[13] However, this division is unclear, as "mass activities" is not a legal term;

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[10] Zhejiang Satellite TV interviewed the victim's wife and the Vice President of Zhejiang International Circuit. Yi Ba Yi Ba Huang Jin Yan (1818黄金眼), *Bao Ma Kai Jin Sai Dao, Lao Gong Zai Mei Hui Lai* (【1818黄金眼】宝马开进赛道 老公再没回来) [*BMW Entered Race Circuit, Husband Never Come Back*], YOUTUBE (Nov. 26, 2018), https://www.youtube.com/watch?v=11FbuRiV9oo.

[11] *Id.*

[12] Zhe Jiang Guo Ji Sai Che Chang (浙江国际赛车场) [Zhejiang International Circuit], *Zhe Jiang Guo Ji Sai Che Chang Sai Dao Jia Shi Huo Dong Cheng Ruo Shu* (浙江国际赛车场赛道驾驶活动承诺书) [*Declaration on (Assumption of Risk Relating to) Racing Activity*], BAI DU WEN KU (百度文库) [BAI DU FILES] (Jan. 10, 2022), https://wenku.baidu.com/view/4a6f38f8142ded630b1c59eef8c75fbfc77d94ed.html [hereinafter *ZIC Disclaimer*].

[13] "Mass sports" and "competitive sports" are not legally defined terms; however, they are used in Chinese government documents. *See, e.g.*, GUOWUYUAN GUANYU YINFA QUANMIN JIANSHEN JIHUA (2016-2020NIAN) DE TONGZHI

it generally refers to sports and cultural or social activities that are open to the public or to an unspecified number of persons.[14] In China, competitive sports have a long history of being regulated by administrative bodies at the national and district levels.[15] However, under the current legal framework, there are no specific regulations for mass sports, only some general guiding principles according to the National Fitness Plan issued by the central government.[16]

ii. Regulating Sports Involving Inherent Risk

The theory of "permissible risk" is used to analyze tortious liability in sports injury claims. This theory argues that the law should allow, within certain limits, tortious conduct that "inevitably hurts [the] legitimate interest[s] [of participants] but is necessary and essential for the development of society."[17] As applied to tortious conduct occurring during sports activities involving inherent risk, the theory perceives such conduct is of "unique value to mankind" and that possible injury sustained by players is "the price paid in challenging the limits of physical extremes of humans."[18] However, scholars argue that tortious conduct should only be tolerated by the law to a certain extent and that when the rules of a game are deliberately violated by participants, resulting in serious injury to other participants, the law must intervene.[19] In such cases, the conduct exceeds the boundaries that can be justified under the theory and constitutes a threat to personal safety, an important interest that the law must protect.[20] The Supreme People's Court of China states that if a participant's conduct seriously violates the ethical rules of a

(国务院关于印发全民健身计划(2016–2020年) 的通知) [NOTICE OF THE STATE COUNCIL ON PRINTING AND DISTRIBUTING THE NATIONAL FITNESS PLAN (2016–2020)] (promulgated by the St. Council, June 15, 2016, effective June 15, 2016), *Guo fa* [2016] No. 37, ch. 7, CLI.2.272882 (PKULaw) [hereinafter NOTICE OF THE NATIONAL FITNESS PLAN].

[14] CHENG XIAO (程啸), QINQUAN ZEREN FA (侵权责任法) [TORT LAW] 464 (2019).

[15] Quanguo Qiche Yundong Guanli Guiding (全国汽车运动管理规定) [National Automobile Sports Management Regulations] (promulgated by the Gen. Admin. Sport China, Oct. 12, 2001, effective Oct. 12, 2001), *Ti Qi Lian Zi* [2001] No. 122, CLI.4.48001 (PKULaw), *invalidated by* Guojia Tiyuzongju Guanyu Feizhi he Xiugai Bufen Guizhang he Zhengcexing Wenjian de Jueding (国家体育总局关于废止和修改部分规章和政策性文件的决定) [Decision to Abolish and Revise Some Regulations and Policy Documents] *Ti Yu Zong Ju Ling* [2016] No. 22 (promulgated by the Gen. Admin. Sport China, May 9, 2016, effective May 9, 2016), CLI.4.278881 (PKULaw).

[16] In this document, the State Council elaborated on the guiding principles, targeted goals, and main tasks involved in promoting mass sports. NOTICE OF THE NATIONAL FITNESS PLAN, *supra* note 13.

[17] Qian Yeliu (钱叶六), *Jingji Tiyu Shanghai Xingwei de Zhengdanghua Genju Ji Bianjie* (竞技体育伤害行为的正当化根据及边界) [*Proper Foundation and Boundary of the Injurious Act in Competitive Sports*], 3 FAXUE JIA (法学家) [THE JURIST] 99, 99 (2017).

[18] *Id.* at 103.

[19] *Id.* at 108–11.

[20] *Id.* at 111.

sports activity and causes extremely serious harm, the court shall support the claim for damages.[21]

Before Article 1176 of the Civil Code was enacted, there were no specific regulations addressing inherently risky sports, except for the general provisions of the Law of Torts.[22] Compared with comparatively safe, amateur, fun-seeking activities participated in by the public (i.e., mass activities), such sports are known for their dangerous nature and the excitement they generate, which probably constitute their very attraction for participants. Such dangerous sports activities demand a different legislative mechanism to regulate the various parties' rights and interests than that which regulates sports activities involving a much lower level of risk, despite the lack of distinction between the two under the Law of Torts.

iii. Article 1176 of the Civil Code

A new provision in the recently enacted Chinese Civil Code helps to fill the above-mentioned legal gap. Article 1176 of the Civil Code stipulates that:

> Where a voluntary participant in a recreational or sports activity carrying certain risk sustains harm caused by another participant, the victim may not require the other participant to assume tort liability, unless the harm is caused intentionally by, or through gross negligence on the part of, the other participant.[23]

This provision is viewed as the Chinese version of the VAR and is meant to solve sports injury-related tort claims involving dangerous sports such as diving and motor racing.[24] The legislative intent of Article 1176 is to protect citizens' autonomy to engage in such sports or other recreational activities by freeing participants from concerns about potential tortious liability.[25] The provision targets sports and other recreational activities that carry a certain level of risk. It was the view of the Constitution and Law Committee (the Committee) that VAR rules

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[21] ZUIGAO RENMIN FAYUAN QUANGUO MINSHI SHENPAN GONGZUO HUIYI JIYAO (最高人民法院全国民事审判工作会议纪要) [EXECUTIVE SUMMARY OF THE NATIONAL WORKING CONFERENCE ON CIVIL TRIALS] (promulgated by the Sup. People's Ct., June 22–24, 2011), art. 49, Fa Ban No. 442, Oct. 9, 2011. *See* Yang Lixin (杨立新), *Zigan Fengxian: Bentuhua De Gainian Dingyi*、*Leixing Jiegou Yu Falv Shiyong* (自甘风险: 本土化的概念定义、类型结构与法律适用—
以白银山地马拉松越野赛体育事故为视角) [*Voluntary Assumption of Risk: Localizing Conceptualization, Classification and Legal Application from the Perspective of a Silver Marathon Sports Accident*], 4 DONGFANG FAXUE (东方法学) [ORIENTAL L.] 107, 112 (2021).

[22] Zhonghua Renmin Gongheguo Qinquan Zeren Fa (中华人民共和国侵权责任法) [Tort Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009), *repealed by* Chinese Civil Code, *supra* note 3.

[23] Chinese Civil Code, *supra* note 3, at art. 1176.

[24] Yang Lixin (杨立新), *supra* note 21, at 112.

[25] *Id.*

should not be widely applied but rather limited to these activities.[26] Initially, the wording "dangerous activities" was considered for inclusion instead of "recreational or sports activities carrying certain risk."[27] However, the term "dangerous activities" was viewed as too general, and there was concern that adopting the term would cause conflict between Article 1176 and certain provisions of the Law of Torts that categorize certain dangerous activities as special tortious conduct because the principle adopted to allocate tortious liability is entirely different from that adopted by Article 1176.[28]

While Article 1176 applies to the liability of sports participants, the Civil Code addresses the liability of organizers of mass activities in several other provisions (Articles 1198–1201).[29] Article 1198 of the Civil Code is said to "inherit" Article 37 of the Law of Torts, which treated organizers of mass activities as a special type of tortfeasor and imposed a special legal duty—that of safety protection—on them.[30] A number of scholars argue that the provisions of the Civil Code addressing the liability of organizers of mass sports and other activities inherit rather than repeal the corresponding provisions in the Law of Torts.[31] Although legislators have made certain adjustments in the Civil Code, these scholars claim that such revisions are merely technical, rather than structural or substantial.[32]

The legal effect of the Chinese version of VAR is limited in the sense that Article 1176 addresses tortious liability among participants only. The law does

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[26] Quanguo Renmin Daibiao Dahui Xianfa He Falv Weiyuanhui Guanyu 《Minfa Dian Qinquan Zeren Bian (Cao'an) 》Xiugai Qingkuang de Huibao (全国人民代表大会宪法和法律委员会关于《民法典侵权责任编（草案）》修改情况的汇报) [Report on the Revision of the Chapter of Tort Liability in the Civil Code (Draft)] (promulgated by the Const. & L. Comm. Nat'l People's Cong., Dec. 23, 2018), ch. 2.

[27] Zhou Xiaochen (周晓晨), *Lun Shouhai Ren Zigan Maoxian Xianxiang de Qinquan Fa Guizhi* (论受害人自甘冒险现象的侵权法规制) [*Commentary on Tortious Regulation of Victim's Voluntary Assumption of Risk*], 2 DANGDAI FAXUE (当代法学) [CONTEMP. L. REV.] 33, 42 (2020).

[28] *Id.*

[29] Article 1176 of the Chinese Civil Code stipulates that "the liability of the organizer of the activity shall be governed by the provisions of Articles 1198 through 1201 of this Code." *See* Chinese Civil Code, *supra* note 3, at art. 1176. While Article 1198 addresses mass activity organizers' liability in a general sense, Articles 1199–1201 focus on kindergartens' and other educational institutions' liability in tort claims related to personal injury. *Id.* at arts. 1198–1201.

[30] ZHONG HUA REN MIN GONG HE GUO MIN FA DIAN SHI YI JI SHI YONG ZHI NAN (中华人民共和国民法典释义及适用指南) [GUIDES ON THE ILLUSTRATION OF CONCEPTS AND APPLICATION OF THE CHINESE CIVIL CODE] 1980 (Huang Wei ed., 2020) [hereinafter CHINESE CIVIL CODE GUIDE].

[31] Wang Liming (王利明), *Lun Shouhai Ren Zigan Maoxian* (论受害人自甘冒险) [*On Victim's Voluntary Assumption of Risk*], 2 BIJIAO FA YANJIU (比较法研究) [COMP. L. REV.] 4 (2019). *See also* Zhang Xinbao (张新宝), *Qinquan Zeren Bian: Zai Chengji Zhong Wanshan he Chuangxin* (侵权责任编：在承继中完善和创新) [*Tort Liability in the Civil Code: Perfection and Innovation in Inheritance*], 4 ZHONGGUO FAXUE (中国法学) [CHINA LEGAL SCI.] 109 (2020).

[32] Zhang Xinbao (张新宝), *supra* note 31.

not clarify to what extent Article 1176 would apply in the assessment of an organizer's performance of its duty of safety protection.[33] This raises issues when Article 1176's provisions overlap with other provisions, e.g., Article 1198, especially when considering the different rationales underlying the relevant provisions. While Article 1176 does not distinguish between competitive sports and mass sports, Articles 1198–1201 (and their predecessor, Article 37) clearly state that they are meant to regulate organizers of mass sports, not those of professional sports.[34] The rationale is that in contrast with professional players, amateur players lack knowledge of and experience with injury prevention, rescue measures to adopt should the need arise, and the resources necessary to address emergencies and injuries. Imposing a special duty on organizers is therefore viewed as a necessary legal tool to protect the legitimate interests of the participants in amateur events.[35] In addition to regulating the organizers of mass activities, Article 1198 regulates another category of persons, namely the managers or operators of venues where mass activities are conducted.[36] A duty of safety protection is imposed on this category of persons due to the commercial nature of these types of activities. That is, as these persons benefit financially from organizing such events, it is only fair for them to bear the corresponding legal obligations.

The purpose of Article 1176 is different. It aims to encourage the public to participate in sports or cultural activities that carry certain risks and to promote citizens' autonomy by limiting their exposure to the potential liabilities associated with such activities.[37] Further, as Article 1176 does not specify whether the sports events it regulates are organized or not, it can be applied irrespective of that detail.[38] Therefore, both Articles 1176 and 1198 apply to sports or recreational activities that are viewed as "carrying certain risk," involve numerous participants, and are organized or held in commercial or public venues run by organizers.

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[33] One scholar argues that the stipulation in Article 1176(2) that "organizers' duty must apply Article 1198–1201" excludes Article 1176 as a defense available to organizers. Yang Lixin (杨立新), *supra* note 21, at 111. The authors disagree, for two main reasons. First, it is clearly stipulated in Articles 1199–1201 that these provisions address only kindergartens' and other educational institutions' liability when students with limited or no civil capacity of conduct sustain injuries at school; they are not general clauses that address organizers' duty of safety protection. Second, this clause merely states that the law considers an organizer's duty of safety protection to be relevant in this context in assessing its liability; it never suggests the exclusion of VAR as a defense available to organizers.

[34] Chinese Civil Code, *supra* note 3, at art. 1198.

[35] Deng Rui (邓蕊) & Yuan Aihua (袁爱华), *Lun Qunzhongxing Tiyu Huodong Zuzhizhe De Anquan Baozhang Yiwu Ji Kangbian Shiyou- Yi Kunming Malasong Cansai Zhe Cusi An Wei Li* (论群众性体育活动组织者的安全保障义务及抗辩事由—以昆明马拉松参赛者猝死案为例) [*On the Organizers' Duty of Safety Protection in Organizing Mass Sports Events and Defenses – The Case of Kunming Marathon Participant's Sudden Death*], 17 NEIMENGGU NONGYE DAXUE XUEBAO (SHEHUI KEXUE BAN) (内蒙古农业大学学报 (社会科学版)) [J. INNER MONGOLIA AGRIC. U. (SOC. SCI. EDITION)] 45 (2015).

[36] Chinese Civil Code, *supra* note 3, at art. 1198.

[37] Yang Lixin (杨立新), *supra* note 21.

[38] *Id.*

iv. Exemption Clause and Contract Law Issues

In the Zhejiang International Circuit case, the organizer attempted to rely on the exemption clause to exclude his liability. A factor that complicates the analysis of organizers' tortious liability in sports injury claims is that, as standard practice in the industry, participants in a motor racing event are usually required to sign a contract with the organizer.[39] These contracts often contain clauses that specify various circumstances under which the organizer is exempt from liability even if a participant sustains a personal injury or dies. These contracts often include clauses which exempt the organized when the participant has a health condition that is likely to affect his ability to control a race car.[40] When the organizers of sports events include exemption clauses in standard contracts distributed to all participants, the legitimate concern arises that the terms of these contracts may be prejudicial to the interests of the participants. According to the Chinese Civil Code, the exemption clause would be void if it involves acts that cause personal harm to the other party or cause property damage to the other party intentionally or in gross negligence.[41] The effectiveness of exemption clauses in this context is not only evaluated in terms of contract law; it may also depend on how organizers' duties are interpreted in terms of tort law.

II. LEGAL ISSUES IN SPORTS INJURY CLAIMS

Three main legal issues related to sports injury claims are relevant to the Zhejiang International Circuit case. The first concerns which of three methods of assigning tortious liability stipulated by the Civil Code applies. These three methods derive from the following principles: a fault-based principle, a strict liability principle, and a principle allocating liability based on constructive or presumed fault.[42] The second legal issue concerns how to interpret and apply an organizer's duty of safety protection. The last issue concerns how this duty interacts with the application of Article 1176, as under certain circumstances the application of these two provisions may overlap.

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[39] A regulation issued by a professional body of the automotive industry specifies that at organized events, drivers must have a contractual agreement on the exemption of liability. *See* Zhongguo Qiche Motuoche Yundong Lianhehui Saishi Anquan Shengchan Guanli Guiding (中国汽车摩托车运动联合会赛事安全生产管理规定) [Regulation Over Safety Management of Organized Event] (promulgated by China Auto. Sports Union, Sept. 27, 2021, effective Sept. 27, 2021) FENG HUANG WANG HENAN (凤凰网河南) [PHOENIX NET HENAN], Sept. 29, 2021, at art. 9, http://www.autosports.org.cn/fasc/management/2021/0927/391345.html.

[40] *See, e.g.*, *ZIC Disclaimer*, *supra* note 12.

[41] Chinese Civil Code, *supra* note 3, at art. 506.

[42] Article 1165 of the Civil Code stipulates fault-based liability and liability based on constructive fault, while Article 1166 of the Code sets out strict liability. *Id.* at arts. 1165–66.

As for the first issue, there is a consensus that the principle of fault-based liability should be adopted in such sports injury claims.[43] In deciding how to assign damages in tortious cases, fault-based liability is the most frequently invoked principle.[44] Fault-based liability is applied in the absence of explicit reference to constructive fault or strict liability. As neither Article 1176 of the Civil Code nor provisions in the same code that apply to the organizers of mass activities specifically invoke the application of either constructive fault-based liability or strict liability, fault-based liability arguably applies under these provisions.[45]

As the first legal issue is relatively straightforward, the following sections examine the two more controversial issues: the proper interpretation of an organizer's duty of safety protection and the potential interaction of this duty with the application of Article 1176.

A. Organizers' Duty of Safety Protection in Organizing Mass Sports Events

i. Legal Source

The legal source of the duty of safety protection (the duty) consists of statutory provisions and judicial interpretations that guide courts. In the context of mass sports events, the duty is governed by Article 1198 of the Civil Code, which stipulates:

> The operator or manager of a commercial or public venue such as [a] hotel, shopping center, bank, station, airport, sports venue, or entertainment place or the organizer of a mass activity shall assume the tort liability for any harm caused to another person as the result of his failure to fulfill the duty of safety protection. If the harm to another person is caused by a third party, the third party shall assume the tort liability; and the operator, manager or organizer, if failing to fulfill the duty of safety protection, shall assume the corresponding complementary liability. The operator, manager or organizer that has assumed the complementary liability may claim reimbursement from the third party.[46]

This provision clearly anticipates two scenarios. The first is that harm is caused by a third party. The second is that the harm, while caused by a third party, is also the fault of the organizer. For example, the organizer may have failed to prevent the third party's conduct from causing injury to participants in a mass

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[43] CHENG XIAO (程啸), *supra* note 14. *See also* Deng Rui (邓蕊) & Yuan Aihua (袁爱华), *supra* note 35.

[44] Indeed, one scholar argues that the fault-based principle should be the only principle adopted in Chinese tort law in allocating liability. CHENG XIAO (程啸), *supra* note 14.

[45] Deng Rui (邓蕊) & Yuan Aihua (袁爱华), *supra* note 35.

[46] Chinese Civil Code, *supra* note 3, at art. 1198.

activity by exercising due care.[47] In the second scenario, the manager or organizer bears "complementary liability" and must compensate the victim fully and seek recourse against the third party for its share of the damages.

The organizer's duty is further clarified by the following judicial interpretation:

> Where a natural person, legal person or any other organization who organizes business or social activities, fails to perform he obligation of safety protection and led to personal injury of any other person, if the victim makes compensation claims against the organizers, the People's Court shall, within a reasonable scope, support such claims made.[48]

The "reasonable scope" standard raised by this judicial interpretation has been a topic of debate among academics hoping to further clarify the standard. This debate is summarized below.[49] However, readers are reminded that (as in other jurisdictions of civil law) while academic debates play an important role, the concrete rules are shaped by judicial practice.

ii. Content of the Duty

The law does not specify the content of organizers' duty of safety protection, but one scholar argues that it has two basic aspects—the "hard facility" aspect and the "software and service" aspect.[50] The "hard facility" aspect of the duty requires organizers to ensure that the facilities and equipment they provide for participants are safe and that there are sufficient qualified staff present to assist the participants.[51] The "software and service" aspect of the duty requires organizers to notify participants of important matters regarding the mass activities.[52] This includes proper warnings of risks and, for a dangerous activity attended by numerous participants, the preparation of an emergency alternative or evacuation plan, and the execution of this plan, should circumstances warrant it.[53]

The judicial interpretation suggests a restrictive interpretation of the extent of the duty in its wording "within a reasonable scope." Scholars express different

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[47] CHENG XIAO (程啸), *supra* note 14.

[48] Zuigao Renmin Fayuan Guanyu Shenli Renshen Sunhai Peichang Anjian Shiyong Ruogan Falv Wenti de Jieshi (最高人民法院关于审理人身损害赔偿案件适用法律若干问题的解释) [Interpretation of the Supreme People's Court of Some Issues Concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury] (promulgated by the Sup. People's Ct., Dec. 4, 2003, effective May 1, 2004), art. 6, CLI.3.51002 (PKULaw).

[49] *See* discussion *infra* Section II(A)(ii).

[50] Deng Rui (邓蕊) & Yuan Aihua (袁爱华), *supra* note 35.

[51] *Id.*

[52] *Id.*

[53] *Id.*; *see also* Yang Lixin (杨立新), *supra* note 21, at 116.

views on how this interpretation limits an organizer's duty.[54] Various factors are considered relevant to the interpretation of "reasonable" and thus relevant to a court's assessment of an individual organizer's tortious liability, including the organizer's professional reputation, financial status, and "way of organizing" (namely whether the organizer played a minor or major role in organizing the event).[55]

In contradistinction, other commentaries posit that "reasonableness" lies in the assessment of the time, place, and subject of a given scenario and that these three dimensions define the limits of the duty.[56] Specifically, in terms of the time limitation, it is argued that organizers' duty should exist only during the mass activity and the periods immediately before and afterward.[57] Before events, organizers have the duty of screening the participants' eligibility to participate.[58] During the events, they are obliged to assist and take care of participants, to notify them of relevant matters, and to rescue them should the need arise. Their post-event duties include evacuating or executing an emergency plan as appropriate.[59] In terms of the venue, "a reasonable scope" suggests that an organizer's duty is not restricted to the boundaries of the venue of the mass activity, where their duty is to remove obstacles that may pose threats to participants' personal safety.[60] Instead, organizers may be liable even when participants sustain injury adjacent to or reasonably related to the event venue, depending on the scale and type of event.[61] Finally, as regards the subject of the event, reasonableness requires that organizers only owe the duty towards a specific group of persons reasonably related to the mass sports event, which typically includes participants, coaches and staff.[62]

Different views over the scope of organizers' duty of safety protection highlight the uncertainty involved in assessing this duty. The existence of various possible interpretations of the reasonableness test, the primary purpose of which is to limit the scope of the duty, complicates the application of the duty. This in turn

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[54] *See, e.g.*, Wang Liming (王利明), *supra* note 31; Long Zhuhua (龙著华) & Wu Jinghuang (吴静煌), *Lun Qunzhongxing Tiyu Huodong Zuzhi Zhe de Anquan Baozhang Yiwu* (论群众性体育活动组织者的安全保障义务) [*On Organizers' Safety Protection Duty in Public Sports Activities*], 29 GUANGDONG WAIYU WAIMAO DAXUE XUEBAO (广东外语外贸大学学报) [J. GUANGDONG U. FOREIGN STUD.] 103 (2018).

[55] This may introduce a paradox, wherein an organizer's exercising more control over an activity increases its duty of safety protection. According to this argument, if organizers devote more resources to organizing activities, thereby increasing their organizational role, their duty of safety protection also increases. *See* Wei Yilin (危羿霖), *Huwai Yundong Renshen Sunhai de Zuzhi Zhe Zeren Chengdan Ji Sifa Rending* (户外运动人身损害的组织者责任承担及司法认定) [*Responsibility of the Outdoor Sports Organizer in Personal Injury Claims and Judicial Cognizance*], 33 TIYU CHENGREN JIAOYU XUEKAN (成人教育学刊) [J. SPORTS ADULT EDUC.] 40 (2017).

[56] Long Zhuhua (龙著华) & Wu Jinghuang (吴静煌), *supra* note 54

[57] *Id.* at 106–08.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 108.

[61] *Id.*

[62] *Id.*

complicates analysis of the key issue of the Zhejiang International Circuit case, specifically whether the duty of effective rescue is owed by an organizer of a mass motor racing sports event to participants in the event.

iii. Adequate Medical Support as Part of the Duty of Safety Protection?

For the case in question, discussion of the application of the organizer's duty gives rise to a more specific question, namely whether the organizer's duty of safety protection includes the provision of adequate medical support and effective rescue should accidents occur during a mass motor racing activity. This Article argues that such provisions should be covered by the organizer's duty of safety protection. The rationale underlying this argument is presented below with reference to the various approaches adopted in the literature to the interpretation of "reasonableness."

An inspection of the literature suggests that the following four main factors account for the imposition of the duty of safety protection on motor racing activity organizers: an organizer's previous conduct created the possibility of participants' injury; organizers can control the danger associated with such activities to various degrees; the participants in such organized mass sports events tend to rely on the organizers for safety protection; and organizers frequently benefit from organizing such mass events.[63]

The "previous conduct" factor refers to conduct by an organizer in initiating the mass activity that causes numerous participants to gather in a specific place. Furthermore, such activities often entail frequent bodily contact and conflict, which constitute a source of danger and create opportunities for participants to sustain injury. As it is the organizer's conduct that generates these threats, it is reasonable that the organizer be required to adopt measures to prevent the participants from sustaining injury.[64]

The argument relating to the second factor is that because the organizer possesses superior professional knowledge of the relevant sports activity and greater access to resources, as compared with the participants, the organizer better understands the risks involved and is in a better position to adopt safety measures while planning and organizing the activity to prevent injuries. Compared with the "previous conduct" argument, which focuses on the source of danger, this line of argument focuses more on organizers' ability to control the danger and factors that influence this ability.[65] Following this line of reasoning, it is reasonable to conclude that the greater an organizer's ability to control the danger involved in such an activity, the more extensive the organizer's duty of safety protection should be.

Arguments relating to the third factor take a different perspective, focusing on participants' reasonable reliance on organizers. It is argued that when participants

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[63] *Id*.54 *See also* Wang Liming (王利明), *supra* note 31.
[64] Wang Liming (王利明), *supra* note 31.
[65] Long Zhuhua (龙著华) & Wu Jinghuang (吴静煌), *supra* note 54.

engage in organized mass sports activities, their conscious self-protection is reduced, as they reasonably rely instead on the organizers of the events and therefore exercise less care than they would if participating in non-organized events. In other words, they rely on organizers to alert them to safety-related concerns. Therefore, it is reasonable and imperative for the law to impose a duty of care on the organizers of such events.[66]

The fourth factor is associated with the commercial nature of organized mass sports events. The associated argument posits that because organizers benefit from such events, it is only fair to impose on them the duty of safety protection and to require them to bear the cost of adopting appropriate safety measures.[67]

The above arguments lend support to the conclusion that the provision of adequate medical support and effective rescue should indeed be included in organizers' duty of safety protection. According to the "previous conduct" argument, if organizers did not conduct mass sports events, thus generating a source of danger, participants would not require medical support or emergency rescue. The "ability to control the danger" argument points out that organizers are in a better position than participants to provide safety and rescue services in terms of both experience and resources, and thus are in a better position to incorporate such services into the overall arrangement when they organize events. Moreover, the greater the potential danger created by an organizer, and the greater the ability of the organizer to prevent or control this danger, the more extensive the organizer's duty should be. In the context of a mass sports event "that carries certain risk," the organizer's failure to provide adequate medical support and effective rescue would undoubtedly exacerbate the harm suffered by injured participants. Thus, it is reasonable to construe the organizer's duty of safety protection as including the timely provision of adequate medical and rescue services for participants. Given the high-risk nature of motor racing activities, the organizer of such an event must have the capacity to provide such services as are commonly understood to be necessary in racing practice. This suggests that the organizer cannot claim exemption from liability in the present case.

With respect to the third factor, that of "reasonable reliance," participants in a mass sports event reasonably rely on its organizer to provide medical and rescue services; they would not expect to be warned of insufficient or absent medical support or rescue plans, like those in the present case. Furthermore, as medical and rescue services are increasingly perceived as a regular and an integral part of major mass sports events, participants are unlikely to anticipate that such arrangements will not be provided when deciding whether to engage in such events.[68]

Finally, as the provision of medical support helps to ensure that mass sports events run successfully and smoothly, it should be viewed as part of the cost of

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[66] *Id.*

[67] *Id.* at 106.

[68] Scholars argue that when dangerous mass sports activities involve numerous participants and complicated procedures, an emergency plan is part of the "software and service" aspect of the organizer's duty of safety protection. *See* Deng Rui (邓蕊) & Yuan Aihua (袁爱华), *supra* note 35.

organizing such events. As organizers profit from organizing these events, it is fair to require them to bear the relevant costs, as with rights come responsibilities.

iv. Justification with Reference to the Reasonableness Test

It is worth considering the possible relevance of the above debates on "reasonableness" to the duty to provide adequate medical support. One argument concerning reasonableness, as described above, is that organizers are expected to carry out the duty of safety protection "within a reasonable scope" and that this scope must depend on organizers' professional reputation, their financial status, and the extent of the role they assume (minor or major) in organizing the event.[69] These criteria are used to adjust the scope of a given organizer's liability according to the individual circumstances of their particular case. None of these factors affect whether the provision of medical support or effective rescue should be part of an organizer's duty of safety protection. However, they may be relevant to a court's assessment of the degree to which an organizer is expected to carry out this specific duty.

Another approach to interpreting "reasonableness" is to qualify the scope of an organizer's duty of safety protection as limited by the relevant time, venue, and subject. This line of reasoning does not exclude the provision of medical or rescue services from being part of an organizer's duty of safety protection, as such support is often called for when participants suffer personal injuries either during an event or immediately before or after the event. Injuries often take place in the venue where the event is held, and most victims are either participants or people reasonably related to the event. As the "reasonableness" test is to contain the scope of organizer's duty of safety protection, if it is understood to limit the duty by the relevant time, venue, and subject, it will not exclude provision of adequate medical support as a part of the duty. Thus, the conclusion that the provision of adequate medical support should be part of organizers' duty of safety protection is not affected by any of the above arguments regarding the proper interpretation of "reasonableness."

B. Article 1176's Effect on Organizers' Duty of Safety Protection

The third legal issue relating to sports injury claims is how Article 1176 affects the application of organizers' duty of safety protection. To adequately address this issue, three sub-issues require examination. First, Article 1176 governs "activities carrying certain risk," and it is assumed that people engaging in such activities voluntarily assume such risk.[70] However, several elements of this provision are not properly defined, leading to ambiguity regarding its proper application. For instance, "risk" is not defined; it may refer to the risk perceived by participants when they engage in such sports, the risk inherent to a category of sports or

[69] Wei Yilin (危羿霖), *supra* note 55.
[70] Chinese Civil Code, *supra* note 3, at art. 1176.

cultural activities or simply all risk involved in participating in such activities. Accordingly, it remains unclear whether Article 1176 presumes that participants voluntarily assume inherent risks (i.e., risks that people expect to be, or that are, usually associated with the type of sports or recreational activities in which they engage), assume all foreseeable risks of engaging in such activities, or assume all of the risks associated with engaging in these activities.

Second, Article 1176 only exempts participants from liability for torts committed against other participants; it does not address the allocation of liability between the participants and the organizer of an event. While the Civil Code addresses an organizer's duty of safety protection in other provisions, it fails to address the relevance of the participants' conduct to the assessment of organizer's negligent liability. This may require courts to rely on their own interpretation of the law when adjudicating relevant cases, leading to inconsistent rulings.

Third, even if scholars agree that participants' fault is relevant in assessing organizers' duty of safety protection,[71] the approach to be adopted by the courts is unclear. Assuming that participants' fault can be relied upon as a statutory defense for organizers, a question remains regarding to what extent organizers can be exempted from liability by relying on this defense. In other words, is a participant's fault a complete defense that erases all liability on the part of the organizer or merely a mitigating factor that reduces the organizer's liability?

i. Scope of "Risk" and Other Concepts in Article 1176

To determine the scope of risk that participants are presumed to voluntarily assume under Article 1176, it is necessary to explore the legislative intent of Article 1176. As mentioned above, when introducing Article 1176, it was the Committee's view that VAR rules should not be widely applied; rather, they should be limited to "sports or recreational activities that carry certain risk."[72] Furthermore, the main purpose of Article 1176 is to encourage people to engage in sports and recreational activities that carry certain risk by alleviating their concerns about potential tortious liability.[73] Therefore, a broad interpretation of "risk" as referring to all of the risks entailed in participating in such activities would diverge from the legislative intent of the law. Further, from the perspective of legislative technique, "risk" could not be construed here as "risk foreseeable by participants" because it was employed to define "activities." This leaves the third option, namely that "risk" in this context refers to the inherent risks incurred by a

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[71] CHENG XIAO (程啸), *supra* note 14. *See also* Deng Rui (邓蕊) & Yuan Aihua (袁爱华), *supra* note 35.

[72] Quanguo Renmin Daibiao Dahui Xianfa He Falv Weiyuanhui Guanyu 《Minfa Dian Qinquan Zeren Bian (Cao'an) 》Xiugai Qingkuang de Huibao (全国人民代表大会宪法和法律委员会关于《民法典侵权责任编（草案）》修改情况的汇报) [Report on the Revision of the Chapter of Tort Liability in the Civil Code (Draft)] (promulgated by the Const. & L. Comm. Nat'l People's Cong., Dec. 23, 2018), ch. 2.

[73] Yang Lixin (杨立新), *supra* note 21, at 112.

particular type of sports activity, which could reasonably be associated with that type of activity. In a recent book written by experts who have been involved in the enactment of the code, "activities carrying certain risk" is explained as "(cultural or sporting activities) that involve[] certain level of risk, demands thresholds in participating, and of the hostile or competitive nature."[74] This reading is consistent with our viewpoint of "risk" explained above.

Under this interpretation of the scope of risk under Article 1176, it is not presumed that participants, by engaging in risky sports or recreational activities, willingly assume any risks unrelated to those sports or activities themselves. Therefore, the organizers of such events should not be shielded from liability by Article 1176 for injuries resulting from risks posed to participants that are caused by the organizers' negligence. In that sense, the application of Article 1176 should not exclude the application of organizers' duty of safety protection. Nonetheless, questions remain. When the inherent risk of such activities is very high, would a court be justified in imposing on organizers the duty of safety protection to participants in the activity? What would be the nature of their duty? No existing law addresses these questions explicitly, nor have the courts issued any illuminating judicial interpretations.

In the case *He Xiaofei v. Beijing Mijing Hefeng Technology Co.*, an internet platform was deemed to have breached its duty of safety protection.[75] The court commented that, by allowing a participant to upload and share a video of himself climbing high-rise buildings, the platform encouraged similar dangerous activity, increasing the "risk" and danger posed to the participant, and the platform was therefore liable for the participant's injuries.[76] The authors of this article disagree with the court's interpretation of "risk" in this case. We are of the view that the risks inherent to the climbing activity were neither amplified nor reduced by the platform's conduct. Hence, the VAR ground should not be invoked at all.

The above analysis shows that Article 1176, as it is worded, falls short of establishing the legal elements that would constitute participants' VAR, by including terms such as "harm must result from risks inherent to these activities" or "provision to be invoked only by *participants* in these activities," thereby creating uncertainty over the legal effect of applying this provision.[77] Another recent case is illustrative. This case involved an elderly woman who crossed a university basketball court during a student competition and sustained an injury when she was knocked down by one of the players.[78] She sued both the player and the university,

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[74] CHINESE CIVIL CODE GUIDE, *supra* note 30, at 1937.

[75] He Xiaofei Su Beijing Mijinghefeng Keji Youxian Gongsi Wangluo Qinquan Zeren Jiufen Anjian (何小飞诉北京密境和风科技有限公司网络侵权责任纠纷案件) [He Xiaofei v. Beijing Mijing Hefeng Technology Co.], PKULaw (Beijing 4th Internet Ct. 2019).

[76] *Id.* Note that this case was decided before Article 1176 was enacted.

[77] Chinese Civil Code, *supra* note 3, at art. 1176.

[78] *Laotai Hengchuang Bisai Zhong de Lanqiuchang Bei Zhuangshang Hou Qisu Suopei; Wuhan Zhongyuan: Laotai Zigan Maoxian Ying Zixing Chengdan Sunhai Houguo* (老太横穿比赛中的篮球场被撞伤后起诉索赔；武汉中院：老太自甘冒险应自行承担损害后果) [*Hubei Wuhan City Intermediate People's Court Comments that Old Lady*

which was the operator of the basketball court. The court ruled that the university had exercised due care by painting the court a color that was sufficiently distinguishable from walkways at the university and had drawn lines sufficiently noticeable to pedestrians, thus fulfilling its duty of safety protection.[79] Furthermore, the court held that the plaintiff should be perceived to have "voluntarily assumed the risk" when she crossed the court where an activity "carrying certain risk" was being conducted.[80] However, a close examination reveals that Article 1176 should not have been invoked, as it applies to tortious claims arising from injuries sustained by *participants* in certain activities involving inherent risks; the plaintiff did not belong to this category. The plaintiff's case could have been resolved by applying the general principles of tort law in assessing the fault-based liability of the organizer, thereby avoiding the invocation of Article 1176.

ii. Participants' Fault in Assessing Organizers' Duty of Safety Protection

In terms of the second legal issue at hand—whether courts should factor participants' fault, or the absence of it, into their assessment of organizers' duty of safety protection—we look to the principle that courts adopt in applying the duty. As discussed above, the principle adopted to allocate tortious liability in this context is fault-based.[81] This suggests that the fault of participants is relevant to the allocation of liability between organizers and participants. However, it must be emphasized that the mere fact of engaging in recreational or sports activities that carry certain risks is not perceived as constituting "fault" on the part of the participants. As long as the participants' conduct does not contribute to the occurrence or degree of harm caused to them by the organizers, their voluntary participation in the activities neither exempts the organizers from the duty of safety protection nor mitigates this duty. Only in circumstances where participants negligently contribute to the harm done to them, by disregarding warnings, disobeying instructions given by the organizers, or similar behavior, is the liability shared between organizers and participants.

This raises a further question. When allocating liability between participants and organizers in the context of these types of activities, does this context affect the fault-based liability assessment on either or both sides? In 2021, in the first case applying Article 1176 as a VAR defense, the court cautioned that because of the intense nature of the sports activity in question, the duty of care imposed on participants who caused injury to other participants should not be too

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Voluntarily Assumes the Risk when Crossing Basketball Court During the Game], REN MIN FA YUAN BAO (人民法院报) [PEOPLE'S CT. DAILY] (May 19, 2021), http://rmfyb.chinacourt.org/paper/images/2021-05/19/03/2021051903_pdf [hereinafter *VAR Basketball Crossing*].

[79] *Id.*

[80] *Id.*

[81] CHENG XIAO (程啸), *supra* note 14. *See also* Deng Rui (邓蕊) & Yuan Aihua (袁爱华), *supra* note 35.

demanding and that, in that context, their conduct should be held to a more relaxed standard of "sports ethics and rules."[82] However, conduct should be considered "grossly negligent" if it violates the rules of the game.[83] This suggests that the court imposed a stricter duty of care on victim participants who chose to engage in more dangerous cultural or recreational activities. However, this case did not involve the event's organizer, and the issue of whether negligence or gross negligence precludes organizers from relying on the VAR defense has not yet been addressed in the courts.

C. Article 1176 Defense: Partial Exemption or Complete Exemption?

The final sub-issue concerns whether organizers may invoke Article 1176 as a complete defense against liability or only as a mitigating factor. A survey conducted in 2019 reveals that the term "voluntary assumption of risk" had been in use by Chinese courts in sports injury cases for some time before Article 1176 was enacted.[84] The author of the study identified 131 judgments referencing VAR and found that in most cases (125 out of 131) the court used the plaintiff's VAR as a basis for proportionately reducing the organizer's liability, instead of treating it as an independent ground for a possible complete exemption.[85] One wonders whether courts would adopt a similar approach when applying Article 1176 in assessing an organizer's duty.

While Professor Zhang Xinbao points out that Article 1176 was added as a new category of statutory defense for tort cases, suggesting that it should be applied in a manner similar to statutory defenses under Article 1173 (contributory negligence) or 1174 of the Civil Code (implicit consent), [86] this argument fails for two reasons. First, as compared with the general nature of the defenses stipulated by Articles 1173 and 1174,[87] the statutory defense under Article 1176 as it is currently drafted is limited: it only addresses tortious liability among participants in a mass event. While it is clear that participants can invoke this defense, it is unclear whether organizers or other non-participant defendants in the same case can invoke it. Second, an organizer defendant invoking the defense under Article 1176

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[82] Song Bangzhen Yu Zhou Jun Shengming Quan、Shenti Quan、Jiankang Quan Jiufen Yi An Ershen Minshi Panjueshu (宋邦祯与周君生命权、身体权、健康权纠纷一案二审民事判决书) [Civil Judgment Between Song Bangzhen and Zhou Jun Regarding Disputes over Right to Life, Health and Bodily Integrity], PKULaw (Beijing 3d Internet Ct. 2021) [hereinafter *Song v. Zhou*].

[83] *Id.*

[84] Zhou Xiaochen (周晓晨), *supra* note 27.

[85] *Id.* Only in two cases (out of 131) did the court treat the victim's voluntary assumption of risk as legal grounds to completely exempt the organizer from liability. *Id.*

[86] Zhang Xinbao (张新宝), *supra* note 31.

[87] Article 1173 of the Civil Code states that "[w]here the victim of a tort is at fault as to the occurrence or aggravation of the same harm, the liability of the tortfeasor may be mitigated." Article 1174 of the Code stipulates that "[t]he actor shall not be liable for any harm that is caused intentionally by the victim." Chinese Civil Code, *supra* note 3, at arts. 1173–74.

against a participant plaintiff would be required to raise it either as a contributory negligence defense as stipulated by Article 1173 or as a complete exemption under Article 1174. The distinction between these two approaches is the exact focus of the longstanding academic debate surrounding the VAR defense in the Chinese context, a debate that predates Article 1176.[88]

It is necessary to examine this debate not only because it sheds light on the proper application of Article 1176 and VAR, but also because in the Chinese context, although legal sources do not include legal theory, legal theory may be applied in the reasoning of courts. This means that this debate may influence courts' conceptual understanding of VAR as a legal ground for defense, as reflected in their reasoning in relevant judgments.[89] The following section introduces the debate and discusses whether the conceptual understanding of VAR underpinning this debate can be appropriately applied to Article 1176.

i. The Academic Debate

The debate centered around whether VAR shall be treated as a mitigating factor and be applied via a "contributory negligence" approach in affecting the allocation of tortuous liability between participants and organizers, or as grounds for complete exemption from liability, whereby the victim's VAR was interpreted as their implicit consent to incur risk, a statutory defense now codified in Article

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[88] CHENG XIAO (程啸), *supra* note 14. *See also* Wang Liming (王利明), *supra* note 31.

[89] Courts may quote legal theory to strengthen their analysis in judgments, according to a notice issued by the Supreme People's Court in 2018:

> Besides the provisions of laws, regulations, and judicial interpretations, judges may justify *ratio decidendi* by the following arguments, in order to improve the legitimacy and acceptability of adjudicative conclusions: guiding cases issued by the Supreme People's Court . . .; legal principles and generally accepted academic views and other arguments not in conflict with regulatory and legal documents such as laws and judicial interpretations.

ZUIGAO RENMIN FAYUAN YINFA 《GUANYU JIAQIANG HE GUIFAN CAIPAN WENSHU SHIFA SHUOLI DE ZHIDAO YIJIAN DE TONGZHI》(最高人民法院印发《关于加强和规范裁判文书释法说理的指导意见》的通知) [NOTICE OF THE SUPREME PEOPLE'S COURT ON ISSUING THE GUIDING OPINIONS ON STRENGTHENING AND STANDARDIZING THE ANALYSIS AND REASONING IN ADJUDICATIVE INSTRUMENTS] (promulgated by the Sup. People's Ct., June 1, 2018, effective June 13, 2018), art. 13, PKULaw [hereinafter NOTICE OF ANALYSIS]. *See also* Zhang Xinbao (张新宝), *supra* note 31, at 121. According to Zhang, scholars' opinions on specific issues in tort law have influenced, directly or indirectly, the enaction of the chapter on tortious liability in the Chinese Civil Code. *See also* Peng Zhong Li (彭中礼), *Lun Falv Xueshuo de Sifa Yunyong* (论法律学说的司法运用) [*On the Judicial Application of Legal Theory*], 4 ZHONGGUO SHEHUI KEXUE (中国社会科学) [SOC. SCI. CHINA] 90, 90 (2020) (noting that "though the opinion mentioned that judges could apply 'legal principles and generally accepted academic views,' these terms are not strictly speaking legal concepts and the status and nature of legal theory in fact were not specified under the Chinese legal system.").

1174 of the Civil Code.[90] It is worth emphasizing that the effect of Article 1174 is to fully exempt the tortfeasor from liability, as it provides that when a person has full knowledge of the nature and extent of the risks he assumes he implicitly agrees to incur such risks, and the tortfeasor is therefore not liable for any harm to the person.[91] Ultimately, the debate was settled, and a consensus was reached that VAR as a general defense does not entail implicit consent to incur risk.[92] Instead, it should be treated as a mitigating factor and applied via a contributory negligence approach, as stipulated by Article 1173 of the Civil Code as, "[w]here the victim of a tort is at fault as to the occurrence or aggravation of the same harm, the liability of the tortfeasor may be mitigated."[93]

The scholarly argument that VAR should not lead to a complete exemption is based on the following reasoning.[94] When engaging in these types of dangerous activities, participants are aware only that there is some level of risk; they have no knowledge of the full extent of the risks involved. A participant may not be aware in advance of the specific risk that could lead to injury or the exact extent of possible injury. In this regard, the victim cannot be viewed as having implicitly consented to bear the risk, as such consent would require full knowledge of the nature and extent of such risk and harm. Therefore, a complete defense is not applicable in this context.[95]

However, this line of reasoning, focusing on whether participants could have foreseen certain risks when deciding whether to participate in the activity, ignores the specific risks that materialize and lead to injury in a concrete case scenario. This approach also fails to account for how the courts may distinguish risks when performing a risk-related analysis, as such distinction and analysis is the key to properly allocating liability between organizers and participants. Moreover, if the specific risk that materializes has been mentioned and sufficiently detailed in a signed waiver indicating that the participants acknowledged this risk in advance, it could be argued that a full exemption should be granted to the organizer.

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[90] Chinese Civil Code, *supra* note 3, at art. 1174. Article 37 of the Tort Law of People's Republic of China is viewed as its predecessor. Zhang Xinbao (张新宝), *supra* note 31.

[91] *Letang v Ottawa Electric Ry. Co.* [1926] S.C.R. (Can.). *See also* Wang Liming (王利明), *supra* note 31.

[92] CHENG XIAO (程啸), *supra* note 14. *See also* Wang Liming (王利明), *supra* note 31, at 4, 9.

[93] Chinese Civil Code, *supra* note 3, at art. 1173.

[94] CHENG XIAO (程啸), *supra* note 14. *See also* Wang Liming (王利明), *supra* note 31. In his article, Wang comments on the drafted provision of VAR (Article 973 in the second draft of the Chinese Civil Code, not Article 1176), in which the wording "dangerous activities" was still used. Wang argues that the VAR defense must be applied according to the specific context and that the legal effect of VAR—specifically, whether it is treated as a complete exemption or a mitigating factor—very much depends on that context. The authors are in complete agreement with this opinion. As the term "dangerous activities" was ultimately replaced with "activities that carry certain risk" in Article 1176 and it was the legislative intent to limit the VAR defense to this very specific context, it is reasonable to assume that the defense is intended to grant a complete exemption.

[95] CHENG XIAO (程啸), *supra* note 14. *See also* Wang Liming (王利明), *supra* note 31.

ii. VAR in the Context of Article 1176 Application

It may be a mistake to assume that Article 1176 should be applied via the approach of contributory negligence, the same way courts used to apply VAR ground in sports injury claims before Article 1176 was enacted, for three main reasons. First, Article 1176 is not a general defense of VAR, as it applies to a particular context. As the Committee chose, when drafting Article 1176, the narrower subject of "sports, social and cultural activities that carry certain risk," rather than the broader "dangerous activities," it is evident that the legislative intent was to limit the application of the VAR defense under the law. Therefore, the interpretation of Article 1176 must follow the same logic.[96] Intended to be applied in the context of injury claims resulting from highly dangerous sports activities, Article 1176's VAR defense was mainly designed to allocate liability arising from losses when the "inherent risk" of these types of dangerous activities has materialized and caused harm to participants, not necessarily due to the fault of any party. It is meant to strike a balance among stakeholders' interests should injury occur.[97]

Second, as discussed above, the interpretation of "risk" under Article 1176 refers to the inherent risks of such activities governed by the article when accounting for the legislative intent. In circumstances where such inherent risks materialize and cause harm to participants in an organized sports activity, even though the organizer has fulfilled its duty of safety protection, it is reasonable to allow the organizer to invoke Article 1176 to claim complete exemption from tortious liability. When the inherent risk of a certain activity is high and frequently leads to injury or when participants' grossly negligent conduct contributes to their harm, organizers should be given a reasonable opportunity to claim full exemption from liability.[98]

Third, as argued above, fault-based liability applies in cases assessing an organizer's duty of safety protection, which means that any negligence on the part of an organizer will affect the allocation of liability between a participant and the

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[96] *See* Yang Lixin (杨立新) & She Mengqing (佘孟卿), *Minfa Dian Guiding de Zigan Maoxian Guize Ji Qi Shiyong* (民法典》规定的自甘风险规则及其适用) [*Voluntary Assumption of Risk Rules and Application in the Civil Code*], 4 HENAN CAIJING ZHENGFA DAXUE XUEBAO (河南财经政法大学学报) [J. HENAN U. ECON. & L.] 1 (2020).

[97] In another article on the same topic, Yang points out that the limitation of the Chinese version of the VAR defense is its failure to strike a proper balance between safeguarding participants' autonomy and personal safety and protecting organizers' rights and interests in organizing events. *See* Yang Lixin (杨立新), *supra* note 21.

[98] *See* He Xiaofei Su Beijing Mijinghefeng Keji Youxian Gongsi Wangluo Qinquan Zeren Jiufen Anjian (何小飞诉北京密境和风科技有限公司网络侵权责任纠纷案件) [He Xiaofei v. Beijing Mijing Hefeng Technology Co.], PKULaw (Beijing 4th Internet Ct. 2019). It is the authors' opinion that the platform should not bear any liability, as its duty of safety protection should not extend to protecting participants' personal safety, nor does the platform have the capacity to prevent any injury that is a materialization of the risk that is inherently associated with climbing high-rise buildings. The authors thus disagree with the court's ruling on this point.

organizer. Thus, before the enactment of Article 1176, it was expected that fault-based assessment would apply via Article 1173's approach of contributory negligence, meaning that negligence on the part of participants would mitigate the liability of the organizer. This raises the question of why types of activities that carry certain risk were singled out to be regulated by Article 1176. A systemic interpretation of the Civil Code is that Article 1176 should be construed as carving out a statutory defense for organizers in the unique context of highly dangerous activities. By granting organizers full exemption from liability should circumstances warrant it, the provision is designed to provide greater autonomy for people who choose to engage in these activities, to facilitate the development of the industry by removing some of the disincentives encountered by organizers, and to balance the interests of various stakeholders.

A close inspection of court opinions reveals that scholars' conceptual understanding of the VAR defense continues to influence the courts. As the courts tend to apply VAR grounds via the contributory negligence approach, treating VAR as a mitigating factor instead of a complete defense, this creates a strong possibility that Article 1176 will be misapplied by the courts.[99] This would also cause the "fault-based" principle to be skewed in those cases. As discussed above, courts adopt the fault-based principle when allocating liability between organizers and participants and consider both sides' fault to be relevant. As the current version of Article 1176 does not clearly set out all of the legal elements required to establish this defense, but only mentions "participants engaging in these activities," the courts construe participants' mere involvement in dangerous mass sport activities as their "fault" and thus as a universally applicable factor mitigating organizers' tortious liability.[100] This was found when the authors reviewed several sports

[99] For the influence of scholars on the courts, see NOTICE OF ANALYSIS, *supra* note 89, at art. 13. *See also* Zhang Xinbao (张新宝), *supra* note 31; Peng Zhong Li (彭中礼), *supra* note 89.

[100] The courts seem to have viewed participation in this type of sport as entailing voluntary assumption of the risks involved, without further discussion of associated factors such as the scope of the risks or aspects of participants' individual backgrounds that might affect their ability to assess the concrete risk, instead treating it as a universally applicable mitigating factor in assessing organizers' tortious liability. *See* Zhou Jingying Yu Shanghai Guoji Saiche Chang Jingying Fazhan Youxian Gongsi Weifan Anquan Baozhang Yiwu Zeren Jiufen Yishen Minshi Panjueshu (周菁颖与上海国际赛车场经营发展有限公司违反安全保障义务责任纠纷一审民事判决书) [Civil Judgment of First Instance Case Between Zhou Jing Ying and Shanghai International Circuit Management Development Co. Regarding Disputes over Liability Arising from Breach of Duty of Safety Protection], PKULaw (Shanghai Jiading Dist. People's Ct. 2020) [hereinafter *Zhou v. Shanghai*]; Yin Jia Su Shanghai Quyang Saiche Julebu Youxian Gongsi Shengming Quan、Jiankang Quan、Shenti Quan Jiufen Shangsu Minshi Panjueshu (尹甲诉上海曲阳赛车俱乐部有限公司生命权、健康权、身体权纠纷上诉案民事判决书) [Civil Judgment of Appellate Case Between Yin Jia and Shanghai Quyang Racing Club Co. Regarding Disputes Over Right to Life, Health and Bodily Integrity], PKULaw (Shanghai 2nd Internet People's Ct. 2010) [hereinafter *Yin v. Shanghai*]; Qiaobin Yu Shanghai Lisheng Saiche Wenhua Gufen Youxian Gongsi Songjiang Fen Gongsi Shanghai Lisheng Saiche Wenhua Gufen Youxian Gongsi

injury cases to examine how courts have applied the VAR defense in the context of motor racing activities. Although these cases were decided before Article 1176 was enacted, if such an approach were adopted in applying Article 1176's VAR grounds, it would frustrate the Article's legislative intent. The drafters of Article 1176 made it clear that this provision aims to encourage people to participate in such activities by alleviating their concerns about potential exposure to tortious liability. To assume fault for mere participation would undermine this goal.

However, treating Article 1176 as a complete defense for organizers would also generate problems. To do so would risk subjecting Article 1176 to abuse by organizers attempting to evade their legal obligations. Thus, organizers should be permitted to rely on Article 1176's VAR defense for a full exemption, but the law should be amended to specify the legal elements required to invoke this statutory defense to avoid confusion about and abuse of the law.

III. AUSTRALIAN POSITION

The development of a country's laws depends partly on how much experience it can draw from other jurisdictions.[101] There are two good reasons for China to draw on Australian tort law to inform its own laws. First, Australian tort law is a hybrid of public and private law.[102] Australian tort law and Chinese tort law show similarities in terms of this public-private divide. For example, they both protect the right of race car drivers to participate in competitions in a safe environment while holding motorsports organizers responsible for fulfilling certain duties to ensure such an environment, which derives from a private law perspective.[103] They also both apply public law reasoning in facilitating the stable development

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Shengming Quan、Jiankang Quan、Shenti Quan Jiufen Shangsu Minshi Panjueshu (乔斌与上海力盛赛车文化股份有限公司松江分公司、上海力盛赛车文化股份有限公司生命权、健康权、身体权纠纷一案民事判决书) [Civil Judgment of First Instance Case Between Qiao Bin and Shanghai Lisheng Racing Culture Co., Songjiang Branch and Shanghai Lisheng Racing Culture Co. Regarding Disputes Over Right to Life, Health and Bodily Integrity], PKULaw (Shanghai Songjiang Dist. Ct. 2020) [hereinafter *Qiao v. Shanghai*]; Ye Weijian Su Foshan Shi Sanshui Senlin Saiche Julebu Youxian Gongsi Weifan Anquan Baozhang Yiwu Zeren Jiufen An (叶伟健诉佛山市三水森林赛车俱乐部有限公司违反安全保障义务责任纠纷案件) [Case between Ye Weijian and Foshan Sanshui Forest Racing Club Co. Regarding Disputes over Liability arising from Breach of Duty of Safety Protection], PKULaw (Sanshui Dist. Ct., Foshan City, Guangdong Prov. 2016) [hereinafter *Ye v. Foshan*]. For arguments against perceiving participation as "fault," see Yang Lixin (杨立新) & She Mengqing (佘孟卿), *supra* note 96.

[101] Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMPAR. L. 671 (2002); H. Patrick Glenn, *Against Method*, *in* THE METHOD AND CULTURE OF COMPARATIVE LAW: ESSAYS IN HONOUR OF MARK VAN HOECKE 177 (Maurice Adams & Dirk Heirbaut eds., 2014).

[102] HAROLD LUNTZ ET AL., TORTS: CASES AND COMMENTARY 144–45 (7th ed. 2013).

[103] Deng Rui (邓蕊) & Yuan Aihua (袁爱华), *supra* note 35; LUNTZ ET AL., *supra* note 102, at 365–66.

of the sports industry and taking measures to combat public liability crises.[104] Second, Chinese legislators and scholars extensively reference Australian tort law commentaries and cases when discussing the content and application of the duty of care.[105] It is, therefore, argued that the Chinese concept of negligence shares a similar origin to its counterpart in Australian law.

These similarities pave the way for Chinese lawmakers to draw wisdom from Australia's tort law development. The authors do not advocate simply replicating Australian tort law; rather, we aim to show how Australian courts and the Australian government analyze organizers' duty of care in the context of motorsports activities; to understand the rationales underpinning such analyses; and to incorporate the resulting insights into the analysis and development of Chinese tort law.

A. *Duty of Care*

i. Common Law Source

In the early 2000s, Australia's courts tended to "award large sums in damages in negligence suits and [give] little regard to the personal responsibility of plaintiffs."[106] This engendered critical debate on implementing tort reforms to "restore sense and balance in the law of negligence"[107] in Australia. In response to this debate and the insurance crisis of 2002,[108] the federal and state governments formed a Panel of Eminent Persons,[109] chaired by Justice David Ipp (the Ipp Panel), to undertake a "Principles-based Review of the Law of Negligence."[110] This panel was instructed to "examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal death and injury."[111] This review resulted in broad tort reforms in states

[104] S*tewart v Ackland* [2015] ACTCA 1, ¶ 128. The Premier of New South Wales predicted that after the bill passed, "personal responsibility [would] rightly assume a much higher profile . . . . [T]here [would] be no duty to warn of an obvious risk, providing that no written law requires such a warning in the particular case. Nor [would] there be any liability for the obvious risks of particularly dangerous sports and other risky activities." Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW).

[105] Paula Giliker, *Comparative Law and Legal Culture: Placing Vicarious Liability in Comparative Perspective*, 6 CHINESE J. COMPAR. L. 265, 288–91 (2018).

[106] Gabriel Perry, *Obvious Risks of Dangerous Recreational Activities: How Is Risk Defined for Civil Liability Act Purposes?*, 23 TORTS L.J. 56, 58 (2016).

[107] David Thorpe & Leanne Houston, *Game Changer? Professional Sport and Dangerous Recreational Activity: Revisiting the Ruling in* Dodge v Snell, 11 AUSTL. & N.Z. SPORTS L.J. 75, 77 (2016).

[108] An important public liability insurer collapsed in 2002, and at the same time, other such insurers turned their backs on the Australian market. These events resulted in an increase in third-party insurance premiums and difficulties for certain recreational service providers, such as sporting clubs, in obtaining insurance coverage. Perry, *supra* note 106.

[109] Thorpe & Houston, *supra* note 107.

[110] PANEL OF EMINENT PERSONS, COMMONWEALTH OF AUSTRALIA, REVIEW OF THE LAW OF NEGLIGENCE: FINAL REPORT ix (2002).

[111] *Id.*

such as New South Wales, Queensland, and Tasmania. The Civil Liability Act that was accordingly promulgated plays an essential role in addressing negligence in Australia, for example, by the "reduction of contributory negligence from a complete defense to a ground for apportionment"[112] and the introduction of the defense of dangerous recreational activity (DRA defense).

Unfortunately, however, these new laws do not provide a comprehensive definition of the duty of care. Although the Civil Liability Act, as adopted by New South Wales, has provisions addressing the duty of care, none of them explicitly describe the scenarios in which the duty of care may arise, the scope of this duty, or the criteria for assessing its breach.[113] As Judge Leeming observed in *Goode v Angland*: "The Civil Liability Act uses language in potentially *deceptive* ways. One example is 'negligence', which *does not mean the tort*, and can include causes of action in contract, equity and under statute."[114]

This indicates that when exploring motorsports organizers' duty of care under Australian law, one should focus primarily on case law. The common law requirement of the duty of care as a prerequisite for negligence claims continues to apply, and the principles upon which such a duty was established are those developed under case law.[115] Three elements are generally examined regarding the duty of care in the context of Australian law, namely: (a) the existence of a duty of care, (b) the content or scope of the duty, and (c) the breach of the duty.[116] The Australian cases adjudicated to date have widely upheld that motorsports organizers owe motorists a common duty of care, such as by establishing appropriate safety barriers on a racing circuit.[117] In view of the material facts of the present case, which are summarized in the introduction, the main question at issue is whether motor race organizers have a duty to guarantee that "all reasonable steps [are] taken to ensure that [racing drivers receive immediate and effective medical and [rescue] treatment should [they] sustain injury at the race."[118] This question concerns the particular content of an organizer's duty of care.[119]

ii. Particular Content of the Duty of Care

As noted above, Chinese scholars and practitioners have reached no consensus as to whether motorsports organizers have a duty to provide immediate and

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[112] LUNTZ, ET AL., *supra* note 102, at 149.

[113] *See* Joachim Dietrich, *Duty of Care Under the 'Civil Liability Acts'*, 13 TORTS L.J. 17 (2005).

[114] *Goode v Angland* [2017] NSWCA 311, ¶ 205 (emphasis added) (citing *Paul v Cooke* [2012] NSWSC 840, ¶¶ 40–41).

[115] *See* Dietrich, *supra* note 113, at 25.

[116] LUNTZ ET AL., *supra* note 102, at 142.

[117] *Wattleworth v Goodwood Road Racing Co.* (2004) EWHC 140.

[118] *Id*. ¶ 114.

[119] In *Roads & Traffic Auth. of NSW v. Dederer*, Judge Gummow asserted that "duties of care are not owed in the abstract. Rather, they are obligations of a particular scope, and that scope may be more or less expansive depending on the relationship in question." *Roads & Traffic Auth. of NSW v Dederer* (2007) 238 ALR 761, ¶ 43.

effective medical and rescue services for injured motorists and, if so, how this duty is properly performed. In Australia, this is also the subject of many academic and judicial writings; it involves an evaluative judgment that entails "normative considerations as to the appropriateness of the imputation of legal responsibilities"[120] on the parties to motor racing. Upon closer inspection of Australian case law, it is not difficult to conclude that motorsports organizers should be subject to the particular content of the duty of care, i.e., to provide medical assistance and rescue services as needed.

In motor racing activities, racing drivers' "physical safety becomes dependent upon the acts or commissions of"[121] the organizer. Organizers have a high level of control over the provision of medical care. Their unreasonable failure to provide such care results in "foreseeable risks of personal injury"[122] to motorists for four main reasons. First, the organizers of such races explicitly state their commitment to safeguarding motorists' physical safety. Second, participation in motor race activities inevitably incurs the risk of "physical injury and the need for medical precautions against the consequences of such injury."[123] Third, the organizer of such an event controls the medical assistance provided and has "access to specialist expertise in relation to appropriate standards of medical care."[124] Fourth, an organizer's assumption of responsibility with respect to medical care may lead to motorists' reasonable belief that they can rely on the organizer to look after their physical safety. In view of these four considerations, it is foreseeable, "in the sense of a real and not far-fetched possibility,"[125] that an organizer's careless act or omission (failure to provide immediate and effective medical treatment when a motorist sustains an injury at a race) may result in physical injury to motorists.[126] Following this line of thought, motorists' physical safety may be "closely and directly affected"[127] by a careless act or omission by the organizer regarding a matter that the organizer should reasonably have had "in contemplation."[128] The reasonable foreseeability of physical injury, in conjunction with the proximate relationship between organizers and motorists, points to the particular duty of care to provide such medical and rescue services on the part of motorsports organizers.

B. *Defenses Available to Motorsports Organizers*

Given the complete control that motor racing organizers hold over the provision of immediate medical treatment to motorists,[129] it is not difficult to establish

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[120] LUNTZ ET AL., *supra* note 102, at 114.
[121] Watson v. British Boxing Bd. of Control Ltd. [2001] QB 1134 at 1151 (Eng.).
[122] Perrett v. Collins [1998] 2 Lloyd's Rep. 255, 261 (Eng.).
[123] *Watson*, [2001] QB at 1162–63.
[124] *Id.* at 1163.
[125] *Sullivan v Moody* [2001] 183 ALR 404, 412 (Austl.).
[126] *Chapman v Hearse* [1961] 106 CLR 112, 120–21 (Austl.).
[127] Donoghue v. Stevenson [1932] AC 562, 580 (Eng.).
[128] *Id.*
[129] *See* discussion *supra* Section III(A).

actual causation.[130] This means that the physical damage suffered by an injured motorist would not have been so severe but for the organizer's negligent act (i.e., failure to provide immediate rescue and medical support). For example, given the material facts of the present case, it could be argued that if the organizer had provided immediate and effective rescue and medical services to the injured motorist, the degree of physical injury suffered by the motorist might not have been as serious as death.

Having established a breach of a duty of care, the next question to be considered is whether the organizer can assert certain defenses against the motorist's claim of negligence. Australian tort law provides two defenses for an organizer in cases such as the present case, namely: (a) the defense of dangerous recreational activity (the DRA defense), which is a statutory defense under the Civil Liability Act, and (b) the defense of voluntary assumption of risk (the VAR defense), which is a common law defense with origins that can be traced back to the 19th century.[131] The following section outlines the operative mechanism of each defense and the extent to which each defense can mitigate the liabilities that motorsports organizers are exposed to.

i. DRA Defense

The first defense available to motor racing organizers under Australian tort law is the DRA defense. Created by legislators in response to the public liability crisis, this defense permits injured persons to be presumed to be aware of obvious risks under common law[132] and exempts organizers from liability for harm to participants arising from the obvious risks of dangerous recreational activities.[133] The DRA defense is a complete defense, which means that it prohibits an injured motorist from claiming damages from a motor race organizer, even if the motorist's physical harm was caused by the organizer's negligent conduct or omission.[134] The DRA defense requires that three components be present.[135] First, the motorist must have been engaged in a "recreational activity." Second, this activity must

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[130] *Zanner v Zanner* [2010] NSWCA 343, ¶ 11 (Austl.).

[131] LUNTZ ET AL., *supra* note 102.

[132] *Civil Law (Wrongs) Act 2002* (Austl. Cap. Terr.) sch 3; *Civil Liability Act 2002* (N.S.W.) s 5G; *Civil Liability Act 2003* (Queensl.) s 14; *Civil Liability Act* 1936 (S. Austl.) s 37; *Civil Liability Act 2002* (Tas.) s 16; *Wrongs Act 1958* (Vict.) s 54; *Civil Liability Act 2002* (W. Austl.) s 5N. Note that the Civil Law (Wrongs) Act of the Australian Capital Territory deals only with obvious risks in the instance of equine activities. *Civil Law (Wrongs) Act 2002* (Austl. Cap. Terr.) sch 3. The Northern Territory legislation is silent on the issue.

[133] *Civil Liability Act 2002* (N.S.W.) s 5L; *Civil Liability Act 2003* (Queensl.) s 15; *Civil Liability Act 2002* (Tas.) s 20; *Civil Liability Act 2002* (W. Austl.) s 5H. In South Australia, torts relating to recreational activities are addressed via various processes. *Recreational Services (Limitation of Liability) Act 2002* (S. Austl.). All other jurisdictions are silent on the issue.

[134] *See* Perry, *supra* note 106.

[135] *Id.* at 57–59.

have been a "dangerous" recreational activity. Third, the harm suffered by the motorist must have resulted from the materialization of an obvious risk associated with the dangerous recreational activity. Dispute as to the scope and operation of this defense persists, and the courts are inconsistent in their interpretation of these three components.

a. Scope of "Recreational Activity"

The Civil Liability Act defines "recreational activity" broadly, as: (a) any sport; (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure; or (c) any pursuit or activity engaged in at a place where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.[136] Despite this broad description, it is debatable whether professional (as opposed to amateur) motor racing activities fall within the scope of "recreational activity." This point is well illustrated by comparing the decisions in *Goode v Angland*[137] and *Dodge v Snell*.[138] Both cases involved professional jockeys who were injured when their mounts fell on the track during a race. However, the Supreme Court of New South Wales (NSW) and the Supreme Court of Tasmania delivered inconsistent judgments despite applying identical legal provisions. The reasoning for the two judgments was considerably at odds. The fundamental divergence lay in whether horse riding can be classified as a "recreational activity."

Judge Wood in *Dodge v Snell* defined the scope of "recreational activity" narrowly, stating that the term refers to activities that are "recreational" and does not "extend to activities carried out in the course of employment or occupation."[139] According to Wood, "[t]he word 'recreational' imparts meaning to the word 'sport'";[140] therefore, horse racing, as a professional activity, does not fall within the definition of "recreational activity" due to its lack of a recreational element. Following his reasoning, those who negligently harm another in a professional sports context are "exposed to civil liability."[141] In contradistinction, in *Goode v Angland*, Judge Harrison found that the physical harm caused to plaintiff Mr. Goode was the materialization of an obvious risk associated with a dangerous recreational activity and, accordingly, that the DRA defense could be invoked to "exclude Mr. Angland's liability."[142] In arriving at this conclusion, Judge Harrison focused on the usage of the phrase "any sport" in the definition of "recreational activity," arguing that it "leaves no room for an argument that relevantly enlivens the distinction between sport that is undertaken or pursued for

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[136] *Civil Liability Act 2002* (N.S.W.) s 5K; *Civil Liability Act 2002* (Tas.) s 19; *Civil Liability Act 2002* (W. Austl.) s 5E.

[137] *Goode v Angland* (2017) 96 NSWLR 503.

[138] *Dodge v Snell* [2011] TASSC 19.

[139] *Id*. ¶ 277.

[140] *Id*. ¶ 261.

[141] Thorpe & Houston, *supra* note 107.

[142] *Goode v Angland* [2016] NSWSC 1014, ¶ 146.

enjoyment, relaxation or leisure and sport that is undertaken or pursued as a profession or occupation."[143]

The decision in *Goode v Angland* was appealed to the NSW Court of Appeal,[144] which affirmed Judge Harrison's construction of the term "recreational activity" under section 5L of the Civil Liability Act (NSW).[145] On appeal, Judge Leeming expressed his respectful disagreement with Judge Wood in *Dodge*. He considered it unhelpful to refer to the ordinary meaning or dictionary definition of "recreational activity."[146] Consistent with Judge Harrison's observation in *Goode*, the three judges in the NSW Court of Appeal unanimously held that no distinction should be drawn between sports participated in for recreational purposes and those participated in for professional purposes.[147] At the time of writing, the High Court has not yet issued a judgment clarifying the interpretation of "recreational activity." The NSW Court of Appeal's decision therefore has significant influence and should "apply in all jurisdictions that have adopted the uniform national legislation."[148] As Chief Justice Gleeson and Justices Gummow, Callinan, Heydon, and Crennan in *Farah Construction Pty Ltd v Say-Dee Pty Ltd*[149] asserted: "Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong."[150] Applying the reasoning of the NSW Court of Appeal to our hypothetical case presented in the Background section, motor racing activities (professional or amateur) fall within the scope of "recreational activities" as defined under state civil liability legislation.

b. Meaning of "Dangerous Recreational Activity"

The second component of this defense concerns whether the recreational activity in question is dangerous. The dangerousness of an activity should be assessed on an objective and prospective basis[151] by determining "before the injury was caused," whether a reasonable observer in the plaintiff's position "would have regarded the recreational activity as dangerous."[152] According to the Civil Liability Act, a recreational activity is dangerous when it involves a significant

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[143] *Id*. ¶ 144.
[144] *Goode v Angland* (2017) 96 NSWLR 503.
[145] *Id*. ¶¶ 200–11.
[146] *Id*. ¶¶ 205–06.
[147] *Id*. ¶ 210.
[148] Thorpe & Houston, *supra* note 107, at 90.
[149] *Farah Construction Pty Ltd v Say-Dee Pty Ltd* (2007) 236 ALR 209.
[150] *Id*. ¶ 135.
[151] *Stewart v Ackland* [2015] ACTCA 1, ¶ 11; *Lormine Pty Ltd v Xuereb* [2006] NSWCA 200, ¶ 31; *Jaber v Rockdale City Council* [2009] NSWCA 98, ¶ 42.
[152] *Stewart*, [2015] ACTCA ¶ 11.

risk of physical harm.[153] Therefore, the interpretation of the phrase "significant risk of physical harm" influences whether a motor race event constitutes a "dangerous recreational activity."

The term "significant" is "capable of a very wide and general meaning,"[154] and the context in which it is used is crucial in its interpretation. Judge Ipp observed in *Fallas v. Mourlas*[155] that the word "significant," in the context of a dangerous recreational activity, should be construed with reference to the elements of "both risk (which it expressly qualifies) and physical harm (which is indivisibly part of the expression under consideration)."[156] In the same case, Judge Basten considered three matters relevant in determining whether a particular risk is significant, specifically: (a) whether "the results of [the risk] eventuating are likely to be catastrophic,"[157] (b) whether the risk "[occurs] with significant frequency,"[158] and (c) the relevance of participants' particular circumstances to the eventuation of risk, e.g., whether "they [are] fresh or tired, sober or inebriated and whether they [are] known to be careful and responsible people."[159] Judge Ipp adopted a similar approach in construing the phrase "significant risk of physical harm" in *Falvo v. Australian Oztag Sports Association*,[160] holding that "risk and harm mutually [inform] each other"[161] and indicating that both "the likelihood of a particular risk materializing"[162] and "the seriousness of the consequences of such an event"[163] are relevant to the risk assessment process. In *Fallas,* Judge Ipp noted that whether the risk of physical harm is significant should be evaluated based on the "circumstance of each individual case."[164] He further stressed that "factors such as time, place, competence, age, sobriety, equipment and even the weather may make dangerous a recreational activity which would not otherwise involve a risk of harm."[165] That is, a participant's particular situation is of considerable relevance to the assessment of the activity's level of risk.

Judge Ipp's analysis of the relevance of these three factors (the likelihood of occurrence of risks, the severity of physical injury, and the incompetence or carelessness of the injured participants) to risk assessment received much support in subsequent court decisions, particularly in the judgments of Judge McColl of the NSW Court of Appeal in *Lormine Pty Ltd v Xuereb*,[166] Judge Ward of the NSW

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[153] *Civil Liability Act 2002* (N.S.W.) s 5K; *Civil Liability Act 2002* (Tas.) s 19; *Civil Liability Act 2002* (W. Austl.) s 5E; *Civil Liability Act 2003* (Queensl.) s 18.

[154] Gartside v. Inland Revenue Commissioners [1968] AC 553, 617 (Eng.).

[155] *Fallas v Mourlas* (2006) 65 NSWLR 418 (Austl.).

[156] *Id*. ¶ 17.

[157] *Id*. ¶ 144.

[158] *Id*.

[159] *Id*.

[160] *Falvo v Australian Oztag Sports Association* [2006] NSWCA 17.

[161] *Id*. ¶ 31.

[162] *Stewart v Ackland* [2015] ACTCA 1, ¶ 32.

[163] *Id*. ¶ 33.

[164] *Fallas v Mourlas* (2006) 65 NSWLR 418, ¶ 18.

[165] *Id*. ¶ 36.

[166] *Lormine Pty Ltd v Xuereb* [2006] NSWCA 200, ¶ 31.

Court of Appeal in *Campbell v Hay*,[167] and Judge Penfold of the Australian Capital Territory Court of Appeal in the *Stewart* case.[168] These courts adopted a consistent construction of the latter two factors. However, regarding the first factor, likelihood of risk occurrence, they developed slightly different standards of interpretation. In *Falvo* and *Fallas*, Judge Ipp stated that the "likelihood" here should be "more than trivial"[169] to qualify a risk as significant. Consistent with Judge Ipp's construction, Judge McColl in *Lormine* further defined the scale of "likelihood" by stating that "[the] standard lies somewhere between a trivial risk and one that is likely to occur."[170] Judge Tobias in *Fallas* and Judge Barrett in *Campbell* expressed similar views, using slightly different wording. Judge Tobias suggested that significant risk should be "not merely trivial but one which has a real chance of materializing."[171] In contrast, Judge Barrett stated that the "scale of possibility of occurrence [should be] beyond trivial but short of likely."[172]

Given the foregoing analysis, determining whether motor racing competitions are dangerous ought to be assessed with reference to these three factors. In view of the number of media reports of accidents experienced by motorists in racing competitions and the serious physical damage they have suffered as a result, the "dangerous" element is not difficult to prove. Although a distinction can be made between professional motorists and inexperienced amateur motorists,[173] motor racing can generally be classified as dangerous. Accident records show that even professional motorists face a certain likelihood of accidents in racing competitions.[174] The scale of possibility of the occurrence of racing accidents can easily pass the test of likelihood, regardless of whether significant risk is regarded as "beyond trivial but short of likely"[175] or having "a real chance of materialising."[176]

c. Materialization of Obvious Risk

This section analyzes whether the physical harm suffered by the motorist in the present case resulted from the materialization of an obvious risk associated by the racing competition. This analysis turns on the interpretation of two terms: "materialization" and "obvious risk." According to the definition of "obvious risk" under the Civil Liability Act, one must determine "whether the risk which resulted in [the plaintiff's] suffering that harm would have been obvious to a

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[167] *Campbell v Hay* [2014] NSWCA 129, ¶¶ 116–17.

[168] *Stewart v Ackland* [2015] ACTCA 1, ¶ 34.

[169] *Falvo v Australian Oztag Sports Association* [2006] NSWCA 17, ¶ 31; *Fallas*, 65 NSWLR, ¶ 14.

[170] *Lormine*, [2006] NSWCA, ¶ 31.

[171] *Fallas*, 65 NSWLR, ¶ 90.

[172] *Campbell*, [2014] NSWCA, ¶ 8.

[173] *Fallas*, 65 NSWLR, ¶ 89.

[174] O Minoyama & H Tsuchida, *Injuries in Professional Motor Car Racing Drivers at a Racing Circuit Between 1996 and 2000*, 38 BRIT. J. SPORTS MED. 613, 614–15 (2004).

[175] *Campbell*, [2014] NSWCA, ¶ 8.

[176] *Fallas*, 65 NSWLR, ¶ 90.

reasonable person in his position."[177] Put another way, the "risk" here must be "that which matured and caused [the plaintiff's] injury."[178] As Judge Walmsley explained in *Stewart v Ackland*, the DRA defense serves to "save a potential tortfeasor [from harm] from an action arising from a risk which has *come home* rather than one which has not."[179] Following this line of thought, the risk that renders a recreational activity "dangerous" is distinct from "obvious risk that materializes."[180] Albeit overlapping in some situations, the two types of risk are distinguishable, and the DRA defense can be applied in a case "involving the materialization of an obvious risk of an activity that would not of itself have rendered the activity 'dangerous.'"[181]

In understanding "obvious risk" in this way, an issue that has long been controversial is the definition of "obvious risk which materialized."[182] In the case of motor racing, the question is whether the risk to motorists is "generally a . . . risk of suffering physical harm"[183] during motor racing from any cause or "more narrowly the risk of"[184] motorists suffering serious physical harm because of the organizer's failure to provide immediate rescue and medical services upon the occurrence of accidents. How to characterize the risk is essential to determining whether "the extent to which the probability of its occurrence is or is not readily apparent to the reasonable person in the [plaintiff's] position."[185] For example, in *Stewart v Ackland*, Judge Penfold upheld the trial judge's distinction between the "perception of risk of minor harm" and the "perception of risk of a serious neck injury," and endorsed the trial judge's observation that the latter risk was not obvious to the respondent.[186] Likewise, in *Fallas v Mourlas*, Judge Basten stated that if the risk was "that of harm flowing from the accidental discharge of a gun, whilst pointed at the plaintiff, that risk was obvious to the plaintiff";[187] however, the risk would not have been obvious if the plaintiff had taken "into account the assurances given by the defendant that the gun was not loaded at the relevant time."[188] In *Kelly v State of Queensland*,[189] Judge McMeekin distinguished between "the

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[177] *Id*. ¶ 98.

[178] *Liverpool Catholic Club v Moor* [2014] NSWCA 394, ¶ 24.

[179] *Stewart v Ackland* [2015] ACTCA 1, ¶ 150 (emphasis added). *See also CG Maloney Pty v Hutton-Potts* [2006] NSWCA 136, ¶¶ 173–74.

[180] *Fallas*, 65 NSWLR, ¶ 29.

[181] *Stewart v Ackland* [2015] ACTCA 1, ¶ 19. Judge Basten expressed a different opinion in *Fallas v Mourlas*, suggesting that "[for] s 5L to be engaged, at least one of those risks must materialise and result in the harm suffered by the plaintiff. Further, that risk must be an 'obvious risk' within the meaning of s 5F of the Act. These two elements must, to an extent, be treated together." *Fallas*, 65 NSWLR, ¶ 151.

[182] *Queensland v Kelly* [2014] QCA 27, ¶ 40.

[183] *Mikronis v Adams* (2004) 1 DCLR NSW 369, ¶ 74.

[184] *Id*.

[185] *Jaber v Rockdale City Council* [2008] NSWCA 98, ¶ 35.

[186] *Stewart v Ackland* [2015] ACTCA 1, ¶ 41.

[187] *Fallas v Mourlas* (2006) 65 NSWLR 418, ¶ 153.

[188] *Id*.

[189] *Kelly v State of Queensland* [2013] QSC 106.

risk of serious injury from entering the water head first too close to the shore"[190] and "the risk of serious injury because of the possibility of the sand giving way or tripping up at the crucial moment when running down" a sand dune into the water.[191] Judge McMeekin found that the former was an obvious risk, whilst the latter was not. The decision in this case was eventually appealed, and the full bench of the Queensland Court of Appeal affirmed Judge McMeekin's approach to the interpretation of "obvious risk."[192]

Despite the importance of this issue, to date there is a lack of a consistent approach to characterizing or defining risk that allegedly materialized as satisfying the requirements for the application of the DRA defense. With respect to the "level of precision with which the risk is defined,"[193] a great deal of uncertainty and inconsistency has arisen in court decisions. It is recognized that the definition of obvious risk "which is picked may be crucial,"[194] but courts frequently face difficulties in articulating the reasons for their ultimate choice of definitions of key legal elements. There are numerous debates surrounding how obvious risk should be characterized,[195] including one that is highly relevant to the context of motor racing activities—that is, whether a sport organizer's negligence should be included in the definition of obvious risk. This is critical in determining whether an obvious risk has materialized from the perspective of a reasonable person in the position of the injured motorist.

In their *Review of the Law of Negligence*,[196] the Ipp Panel envisioned the possibility of characterizing "a risk that a person will be negligent" as "obvious risk."[197] The relevant case law shows that courts have often treated the alleged negligent conduct of the defendant as part of the risk involved in the activity. In *Dodge v Snell*, Judge Wood stated that risk characterization should be "refined further by including facts such as the jockey at fault ignoring warning calls from the jockeys in his pathway."[198] In *Fallas v Mourlas*, Judge Basten described what eventuated as a risk of "accidental discharge of a gun whilst pointed at the plaintiff"[199] and held that this was an obvious risk, regardless of "the [plaintiff's] knowledge, belief and circumstances which existed immediately prior to the

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[190] *Id*. ¶ 64.

[191] *Id*. ¶ 65.

[192] *Queensland v Kelly* [2014] QCA 27, ¶¶ 48, 58, 62.

[193] *Fallas v Mourlas* (2016) 65 NSWLR 418, ¶ 156.

[194] *Mikronis v Adams* (2004) 1 DCLR NSW 369, ¶ 75.

[195] Gabriel Perry summarizes the four main questions regarding risk characterization: (a) How, specifically, should the risk be defined? (b) To what extent should the defendant's negligence form part of the risk description? (c) If a description of risk is defined, how long does it take to go back in time along the chain of events that may cause harm? (d) Is it necessary to describe the risk as one of a particular type of harm being sustained. *See* Perry, *supra* note 106.

[196] PANEL OF EMINENT PERSONS, *supra* note 110, at 63–64.

[197] *Id*. ¶ 4.15.

[198] *Dodge v Snell* [2011] TASSC 19, ¶ 217.

[199] *Fallas v Mourlas* (2006) 65 NSWLR 418, ¶ 153.

discharge."[200] In the same judgment, Judge Ipp made a novel distinction between gross negligence and negligence, arguing that if "the conduct that caused the risk amounted to gross negligence, it [is] necessary . . . to determine whether the risk of harm caused by gross negligence of the kind in question was obvious."[201] A final example is *Campbell v Hay*, in which Judge Ward, with whom Judges Barrett and Meagher agreed, highlighted the risk that "Mr. Hay would not be able to [land the plane safely] or would, in an emergency situation, make an incorrect decision."[202]

Conversely, a large body of court decisions point towards the exclusion of any reference to a defendant's negligence in the description of the risk involved. Judge Dodd's explanation in *Mikronis v Adams* is illuminating in this respect.[203] He wrote, "[i]t cannot be said that it is an obvious risk of an activity that persons providing equipment and conditions for it will do so negligently and without care for the safety of patrons in particular respects."[204] Similarly, Barbara McDonald commented as follows:

> Can a risk of negligence by a defendant in relation to a dangerous activity ever be classed as an 'obvious risk of the activity'? Surely, it is the opposite; the reasonable expectation of any participant is that the provider will take at least reasonable care. But expectations aside, it seems that the unspecified negligence of another person is not a risk arising out of the activity itself.[205]

Consistent with this reasoning, in *Jaber v Rockdale City Council*, the NSW Court of Appeal judges agreed that it was not necessary to determine whether Rockdale City Council had been negligent. It sufficed to characterize the risk at a general level and determined that "diving into shallow water or water of uncertain depth might result in injury."[206] Similarly, in *Streller v Albury City Council*,[207] when considering the types of risk arising from diving or jumping into a river, Judge Meagher, with whom Judges Ward and Emmett agreed, considered it adequate to describe the risk broadly as the risk of the plaintiff's "being injured from impact with the riverbed" when using a rope swing to perform a backflip.[208]

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[200] *Id*. ¶ 158.
[201] *Id*. ¶ 54.
[202] *Campbell v Hay* [2014] NSWCA 129, 149.
[203] *Mikronis v Adams* [2004] 1 DCLR (NSW) 369, ¶ 74.
[204] *Id*.
[205] Barbara McDonald, *Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia Tort*, 27 SYDNEY L. REV. 443, 471 (2005).
[206] *Jaber v Rockdale City Council* [2009] NSWCA 98, ¶¶ 29, 38, 59–60.
[207] *Streller v Albury City Council* [2013] NSWCA 348.
[208] *Id*. ¶ 32.

d. Risk Description in the Context of Motor Racing

As the above analysis shows, it remains unclear whether a sports event organizer's potential negligence should form part of the description of the obvious risk associated with the sport under Australian law. Inconsistencies in the opinions of authorities may lead to uncertainty for legal advisers, sports event organizers, and motorists themselves. As demonstrated above,[209] how "obvious risk" is defined is crucial to determining whether the risk in question would be obvious to a reasonable person in the position of an injured motorist and whether the organizers of motorsports activities are entitled to apply the DRA defense to mitigate liability associated with their failure to provide immediate medical and rescue assistance to injured motorists.

Following the opinions in *Mikronis, Jaber*, and *Streller*, the risk that is said to have materialized in a given case can be defined in a broad way, e.g., the risk of serious physical injury while engaging in motor racing activities. A broader definition such as this lowers the threshold from "obvious" and thereby facilitates the invocation of the DRA defense by sports organizers. In contrast, according to the authorities in *Fallas*, *Campbell*, and *Dodge*, the risk should be described by reference to the defendant's careless conduct. Thus, it is appropriate to describe the risk in the present case as that of a motorist suffering serious physical injury due to the sports event organizer's failure to provide immediate medical service and rescue support upon the occurrence of an accident. Given the close relationship between motorsports organizers and motorists, as outlined above,[210] under this interpretation, the risk concerned would not be considered obvious to a reasonable motorist in the position of the injured motorist in the present case.

ii. The Defense of Voluntary Assumption of Risk

The second defense available to a motor racing organizer under Australian tort law is that of the VAR defense. The VAR defense was developed in the 19th century[211] and is encapsulated by the Latin maxim *volenti non fit injuria* ("to one who is willing, no legal wrong is done").[212] The VAR defense was succinctly summarized in *Imbree v McNeilly*,[213] in which Judges Gummow, Hayne, and Kiefel stated as follows in a joint decision:

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[209] *See* discussion *supra* Section III(B).

[210] The proximate relationship is manifested in the following three aspects: the full control of organizers over the provision of medical services to motorists, motorists' reliance on organizers to look after their physical safety, and the absence of any explicit warning that organizers may be negligent in providing immediate medical and rescue assistance. *See* discussion *supra* Section III(A)(ii).

[211] *New South Wales v Fahy* (2007) 232 CLR 486, ¶ 88; LUNTZ ET AL., *supra* note 102.

[212] LUNTZ ET AL., *supra* note 102; *Taylor v Hall* [2020] NSWDC 321.

[213] *Imbree v McNeilly* (2008) 236 CLR 510.

> Absent relevant statutory modification, the doctrine of voluntary assumption of risk requires proof that "the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk . . . impliedly agreed to incur it". In the absence of some express exclusion of liability or notice of exculpation, demonstrating that a plaintiff both knew of a risk and voluntarily agreed to incur that risk will often be difficult. But if both conditions are satisfied, the plaintiff's claim against the defendant will fail.[214]

To date, no statutory modification of the common law VAR defense has been applied to cases involving motor racing.[215] In contrast with the defense of contributory negligence, the VAR defense takes an "all-or-nothing approach."[216] Under this approach, "a plaintiff [who] voluntarily assumed the risk in question is readily seen as equivalent to concluding that the defendant owed that plaintiff *no* duty of care."[217] Therefore, if the VAR defense is successfully established, it "provides a complete [defense]" against a claim for personal injury or death[218] and does not enable the court to "apportion the loss[es] between the parties."[219]

The *Imbree v. McNeilly* decision laid out the two elements required to establish a VAR defense in this context: (a) the plaintiff had full knowledge of the facts constituting the danger and sufficiently appreciated the danger inherent in the factual situation and (b) the plaintiff freely and willingly engaged in the dangerous activity. It has been widely acknowledged in case law that the onus of proving

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[214] *Id*. ¶ 81.

[215] Some Australian states have modified the VAR defense in their statutes. For example, in NSW, the VAR defense has been abolished in motor accident cases other than those occurring during motor racing. *See Joslyn v Berryman* [2003] HCA 34, ¶ 71; *Taylor v Hall* [2020] NSWDC 321, ¶ 62; *Vega v Tvedsborg and Anor* [2007] NSWDC 197, ¶ 62. The Motor Accidents Act of 1988 states:

> (1) Except as provided by subsection (2), the defense of *volenti non fit injuria* is not available in proceedings for damages arising from a motor accident but, where that defense would otherwise have been available, the amount of any damages shall be reduced to such extent as is just and equitable on the presumption that the injured person or deceased person was negligent in failing to take sufficient care for his or her own safety.
> (2) If a motor accident occurs while a motor vehicle is engaged in motor racing, the defense of *volenti non fit injuria* is available in proceedings for damages brought in respect of the death of or injury to:
> (a) the driver of the vehicle so engaged, or
> (b) a passenger in the vehicle so engaged, other than a passenger who is less than 18 years of age or who otherwise lacked capacity to consent to be a voluntary passenger.

Motor Accidents Act 1988 (NSW) ss 76(1)–(2).

[216] PANEL OF EMINENT PERSONS, *supra* note 110, ¶ 4.20.

[217] *Imbree*, 236 CLR, ¶ 81.

[218] PANEL OF EMINENT PERSONS, *supra* note 110, ¶ 4.20.

[219] *Id*.

these two elements rests squarely on the defendant.[220] Applying this practice to the current case, the responsibility lies with the motor racing organizer to prove that the injured motorist "voluntarily, with full knowledge of the nature and extent of the risk . . . agreed to [accept the risk]"[221] inherent in motor racing.

a. Nature and Scope of the Plaintiff's Knowledge

Australian case law requires the plaintiff's knowledge to be actual rather than constructive.[222] In addition, the scope of the plaintiff's knowledge should extend to the particular risk that is alleged to have materialized. The requirement of actual knowledge on the part of the plaintiff was well described in *Scanlon v American Cigarette Company (Overseas) Pty Ltd. (No 3)*,[223] in which Judge Nicholson wrote, "[i]n all of those cases are to be found expressions of judicial opinion that actual, rather than constructive knowledge on the part of a plaintiff is necessary in order for the defense to be made out."[224] Similarly, in *Roggenkamp v Bennett*,[225] Judges McTiernan and Williams stated that "in order to establish this defense, the plaintiff must be shown not only to have perceived the existence of danger, for this alone would be insufficient," but also to have "*fully appreciated* it and voluntarily accepted the risk."[226]

Australian case law shows that a successful defense based on VAR requires the defendant to prove that the plaintiff had foreseen or contemplated the extent of the particular risk eventuated, as opposed to "the whole risk"[227] in a general sense. In *Kent v Scattini*,[228] Judge Jackson of the Supreme Court of Western Australia struck down the defendant's use of the VAR defense to mitigate his liability on the grounds that the plaintiff had neither consented to "the defendant driving around the bend in Gatacre Road at a fast speed"[229] nor foreseen "the likelihood of the [defendant] doing so."[230] Similarly, in analysis of the elements of the VAR defense in the NSW case of *Oran Park v Fleissig*,[231] Judge Einstein emphasized the precise nature and extent of the risk that the plaintiff is required to contemplate, observing that the defendant "bear[s] the onus of proving that [the plaintiff] consented not only to some risk of injury but to the particular risk which

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[220] *See, e.g.*, *Vega v Tvedsborg and Anor* [2007] NSWDC 197, ¶ 64; *Joslyn v Berryman* [2003] HCA 34, ¶ 26; *Oran Park v Fleissig* [2002] NSWCA 371, ¶ 104; *Roggenkamp v Bennett* (1950) 80 CLR 292, 300; *Scanlon v American Cigarette Company (Overseas) Pty Ltd. (No 3)* [1987] VR 289, 291.

[221] *Imbree v McNeilly* (2008) 236 CLR 510, ¶ 81.

[222] LUNTZ ET AL, *supra* note 102, at 362.

[223] *Scanlon v American Cigarette Company (Overseas) Pty Ltd. (No 3)* [1987] VR 289.

[224] *Id*. at 290.

[225] *Roggenkamp v Bennett* (1950) 80 CLR 292.

[226] *Id*. at 300 (emphasis added).

[227] *Monie v Commonwealth of Australia* [2005] NSWCA 25, 75.

[228] *Kent v Scattini* [1961] WAR 74.

[229] LUNTZ ET AL., *supra* note 102, at 368.

[230] *Id*.

[231] *Oran Park v Fleissig* [2002] NSWCA 371.

culminated in injury."[232] Recently, in *Monie v Commonwealth of Australia*,[233] the NSW Court of Appeal cited Judges McTiernan and Williams's statement in *Roggenkamp* with approval and declared that "[m]ere knowledge that a risk exists is not the same as consenting to the risk;"[234] "[t]here must be an assent to undertake the [particular] risk with the full appreciation of its extent."[235]

The cases examined above suggest that if the motorsports organizer in the case examined here were to resort to the VAR defense under Australian law, it would need to prove that the motorist had "full knowledge of the nature and extent of the [particular] risk"[236] that he encountered. "Particular risk" in this context refers to the risk of the organizer's failure to provide injured motorists with immediate and appropriate medical and rescue assistance upon the occurrence of motor racing accidents.[237] Considering "all the circumstances"[238] surrounding motor racing activities, the following two aspects are relevant in assessing whether motorists are able to foresee such a particular risk: the dangerous nature of motor racing and the risk warning issued by the sports event organizer.

Regarding the first aspect, due to the dangerous nature of motor racing activities and the high incidence of motor racing accidents reported by medical platforms over the past two decades, it is possible for motorists to foresee and comprehend the general risks present in motor racing (e.g., collisions) as well as the type and extent of the harm flowing from the materialization of these general risks (e.g., death or physical injury). However, it is difficult for motorists to foresee the particular risk of organizers' negligent failure to provide immediate rescue and medical assistance in the case of collisions, largely due to the proximate relationship between motorists and organizers. As explained above,[239] due to organizers' complete control over the carrying out of motor racing events, motorists can expect organizers to take reasonable measures to ensure the safety of all of the motorists of such an event, which includes the provision of such medical services.

Regarding the second aspect, it is a general principle of contract law that, in the absence of misrepresentations by the defendant, a plaintiff who signs a contract is bound by the contract's terms as to exclusion of liability, notwithstanding the fact that the plaintiff lacks subjective awareness of its content.[240] In the context of the VAR defense, a motorsports organizer's proper warning of risks has a direct bearing on a motorist's comprehension of the nature and extent of the risk associated with motor racing. Judges Gummow, Hayne, and Kiefel noted in *Imbree v McNeilly*[241] that "[i]n the absence of some express exclusion of liability or notice

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[232] *Id*. ¶ 104.
[233] *Monie v Commonwealth of Australia* [2005] NSWCA 25.
[234] *Id*. ¶ 75.
[235] *Id*. (quoting *Smith v Baker & Sons* [1891] AC 235 at 369).
[236] *Id*.
[237] *See* discussion *supra* Section III(B)(i).
[238] *Re Hampton Fuel Allotment Charity* [1989] Ch 484, 495.
[239] *See* discussion *supra* Section III(B)(i).
[240] LUNTZ ET AL., *supra* note 102.
[241] *Imbree v McNeilly* (2008) 236 CLR 510.

of exculpation, demonstrating that a plaintiff both knew of a risk and voluntarily agreed to incur that risk will often be difficult."[242]

Similarly, in *Roggenkamp*, Judges McTiernan and Williams explained the role of "proper [risk] warning" in determining whether a plaintiff "fully appreciated and voluntarily accepted the risk," suggesting that whether the plaintiff fully appreciated the risk involved is a question of fact that "may be inferred from [the plaintiff's] conduct" on a case-by-case basis.[243] The "proper warning" given by the defendant can provide insights into this inference-drawing process.

For participants in a motor racing event to fully appreciate the particular risk at issue upon the receipt of a risk warning, the content of the warning must be "sufficiently specific"[244]— it should include the "[specific] nature of the particular risk concerned"[245] and remind motorists of the "explicit danger"[246] to participants inherent in motor racing activities. In the present case, as previously discussed, the motorsports organizer indeed issued a warning of the risks, which was incorporated into the waiver and read:

> I acknowledge, assume, and admit, that risks reside in the activity conducted within the area of racing circuit, or by utilizing the track, facility or service provided by the organizer, due to the factors including but not limited to space, weather, temperature, or facility maintenance, the action/inaction of other people, and/or other factors, and would possibly lead to personal injury, death, and property loss. After a full deliberation and contemplation of risks, which I understood, assumed, and admitted, I acknowledge that I voluntarily participate in activities, and agree to assume all the risks above-mentioned.[247]

However, a literal reading of this warning reveals that its content is expressed in a general manner.[248] Although the warning lists certain risks that a motorist may encounter while motor racing, it makes no explicit mention of the particular risk that is at issue in the present case. Nor does it warn of the "general nature of the particular risk concerned."[249] Such a warning made it difficult for the organizer in this case to "discharge [their] evidentiary onus"[250] such that the motorists fully appreciated the risk of the organizer's negligent failure to provide appropriate rescue and medical support for injured motorists.

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[242] *Id.* ¶ 81.
[243] *Roggenkamp v Bennett* (1950) 80 CLR 292, 300.
[244] *Vreman v Albury City Council* [2011] NSWSC 39, ¶ 111.
[245] *Id*. ¶ 112.
[246] *Id*. ¶ 113.
[247] *ZIC Disclaimer*, *supra* note 12.
[248] *Vreman v Albury City Council* [2011] NSWSC 39, ¶ 112.
[249] *Id.*
[250] *New South Wales v Fahy* (2007) 232 CLR 486, ¶ 208.

b. Voluntary Acceptance of Risk

For the VAR defense to succeed, the sports organizer must prove, in addition to element (a)—that the motorist fully contemplated "the nature and extent of the risk"[251] he encountered—element (b), that the injured motorist "voluntarily agreed to accept [that particular] risk."[252] Proving element (b) is thus conditional upon proving element (a). To meet the threshold of "voluntary acceptance of risk," the motorist must be shown to have been "truly willing" to assume that particular risk and "in a position to choose freely."[253] In *New South Wales v Fahy*,[254] when assessing the scope of application of the VAR defense in Australia, Judge Kirby cited the English Court of Appeal case *Bowater v. Rowley Regis Corp.*,[255] specifically Justice Scott's statement:

> For the purpose of the rule [of voluntary assumption of risk], if it be a rule, a man cannot be said to be truly 'willing' unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will.[256]

Applying Justice Scott's reasoning and considering Australian law, assuming that the motorsports organizer in the present case can prove element (a), he must also prove that the injured motorist chose freely to assume the particular risk of the organizer's failure to provide immediate rescue and medical assistance to injured motorists. Two arguments are relevant to this scenario. First, the signing of a waiver is a necessity for motorists to participate in motor racing. The waiver is often expressed in the form of a standard contract, and motorists are deprived of the opportunity to negotiate the rationality and necessity of particular clauses. This arguably renders motorists' decision to sign the waiver, as it is written, non-voluntary.[257] Second, in contradistinction, motorists are often highly paid under employment contracts due to the dangerous nature of motor racing. They fully understand the formal requirement of signing waivers and, given the relevance of the included warnings to the motorists' own implementation of necessary safety measures, it is reasonable to expect that they read the clauses containing warnings of risks carefully before engaging in the associated motor racing competitions. Motorists therefore intentionally engage in hazardous motor racing competitions in exchange for high payment. It can be argued that they "freely and voluntarily"

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[251] *Monie v Commonwealth of Australia* [2005] NSWCA 25, 75.
[252] *Randwick City Council v Muzic* [2006] NSWCA 66, ¶ 48.
[253] Bowater v. Rowley Regis Corp. [1944] KB 476, 479 (Eng.).
[254] *New South Wales v Fahy* (2007) 232 CLR 486.
[255] *Id*. ¶ 88.
[256] *Bowater*, [1944] KB at 479.
[257] PANEL OF EMINENT PERSONS, *supra* note 110, ¶ 8.28.

accept the particular risk inherent in racing.[258] This line of reasoning appeared in the English case of *Bowater v. Rowley Regis Corp.*,[259] in which Justice Scott observed:

> When the servant is engaged specifically for the performance of a dangerous duty and the presence of the danger is a mutually recognized element in the bargain for remuneration, the servant obviously undertakes the risk for the sake of higher pay . . . in contracts of employment where the service is hazardous and for that reason highly paid it is not easy to imagine a circumstance in which the hazard causing the hurt to the servant is also attributable to the negligence of the master.[260]

IV. IMPLICATIONS FROM THE AUSTRALIAN EXPERIENCE

The discussion in Section II shows that Chinese law faces the following two types of uncertainty in addressing motor racing cases: (a) the consequences associated with the invocation of defense under Article 1176 of the Chinese Civil Code (i.e., whether it is a complete defense or a mitigating factor) and (b) the understanding of "risk" in the application of the VAR defense. Although the Australian legal context differs in certain respects from its Chinese counterpart, the uses of the DRA and VAR defenses in the Australian context may provide insights for the development of Chinese law with respect to these uncertainties. Below is a discussion of the application of the VAR defense and the direction of the law in resolving uncertainties regarding the proper application of Article 1176.

A. Application of the VAR Defense

Article 1176 of the Chinese Civil Code establishes the VAR defense in the Chinese tort law system.[261] The analysis in the Legal Issues in Sports Injury Claims section summarizes the uncertainties regarding the VAR defense and the problems with its application in the context of motor racing activities. For example, although legislators have emphasized the importance of risk in invoking the VAR defense and in evaluating the liabilities for which organizers are responsible, they have fallen far short of elaborating the consequences flowing from the invocation of the VAR defense (partial versus complete exemption from liability), the perspectives from which risks are assessed (the foreseeable, high risk inherent in the activity itself, as opposed to the risk arising from the participants' or the organizers' negligence) and the standards for the interpretation of these risks (the risks as evaluated from the perspective of an objective third party in the position

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[258] *Taylor v Hall* [2020] NSWDC 321, ¶ 67.
[259] Bowater v. Rowley Regis Corp. [1944] KB 476.
[260] *Id*. at 479–80.
[261] Yang Lixin (杨立新) & She Mengqing (佘孟卿), *supra* note 96.

of the participants or the subjective risk envisaged by the participants themselves).[262] Thus, there is a long-standing debate amongst Chinese scholars and practitioners as to what elements constitute the VAR defense and how the VAR defense is effectuated. Furthermore, the wording of Article 1176 merely focuses on the liabilities between participants; it makes no explicit mention of the interaction between participants and organizers.[263] This gives rise to considerable uncertainty as to how and to what extent the VAR defense can be applied to mitigate the organizer's negligent liability in its failure to provide immediate medical and rescue assistance to injured motorists.[264]

Analysis of the use of the DRA and VAR defenses in Australia can provide insights into the questions that Chinese law encounters in two respects, which are interrelated, namely the nature of the risk that matters for applying the VAR defense under Chinese law and the weight that should be given to the plaintiff's knowledge regarding the risk. The DRA and VAR defenses have the same effect on the liability of the motorsports event organizer in the present case; as the Ipp Panel explained in the Review of the Law of Negligence, "the effect of the provision [under the DRA defense] can also be explained in terms of the defense of assumption of risk."[265] The rationale for both defenses lies in the "[core] value of the common law which gives primacy to personal autonomy"[266] and the "paramountcy of a person's entitlement 'to make his own decisions about his life.'"[267] To strike a balance between the protection of motorists' autonomy to decide to participate in the dangerous activity of motor racing and the policy concern of holding sports organizers accountable for the provision of an appropriate and safe racing environment for motorists, Australian legislators and courts have established onerous conditions for the application of the two defenses. As explained above, the way in which "obvious risk" is construed—whether the risk that resulted in the plaintiff's harm would have been obvious to a reasonable person in his position—is crucial to assessing whether the DRA defense can be invoked. Whether a risk is obvious has a bearing on whether a motorist had adequate knowledge of it when deciding in advance whether to engage in the activity. The "obviousness" requirement demonstrates the balance-striking motivation embedded in the DRA defense, in that a person should not be allowed to recover damages flowing from the materialization of a risk that is obvious to them and that they are willing to take.

Similarly, following Australia's lead, to invoke the VAR defense, the organizer should be required to prove that the motorist was "[fully] aware of the risk" and that the plaintiff's decision to accept that risk was made "freely and voluntarily" and not "subject to [any] external pressure or influence."[268] While the defense

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[262] *See* discussion *supra* Section I.
[263] *See* Chinese Civil Code, *supra* note 3, at art. 1176.
[264] *See* discussion *supra* Section I.
[265] PANEL OF EMINENT PERSONS, *supra* note 110, ¶ 4.20.
[266] *Stewart v Ackland* [2015] ACTCA 1, ¶ 59.
[267] *Id*.
[268] PANEL OF EMINENT PERSONS, *supra* note 110, ¶ 8.28.

insulates organizers from motorists' damage claims, organizers' onerous burden of proof makes this difficult, which encourages them to take reasonable care in providing safe racing facilities as well as appropriate medical support to motorists. Furthermore, courts reserve the discretion to determine whether the risk involved in a given scenario is obvious to, or can be fully contemplated and apprehended by, the motorist harmed in that scenario. By defining risks "narrowly [or] at a high level of detail,"[269] courts can determine to what extent and in what ways each defense can be applied. Depending on the circumstances of a particular case, courts are able to "apportion the loss between the parties and to give effect to complex judgments of responsibility."[270]

In contrast with Australian law, the VAR defense under Article 1176 of the Chinese Civil Code is riddled with uncertainties. Given that legislators in China are also tasked with balancing the interests of motor racing organizers and motorists, Australia's DRA and VAR defenses are particularly insightful in one important respect, namely, specifying the conditions under which the VAR defense can be invoked. While the introduction of the VAR defense to the area of motor racing is appropriate, the lack of a principled approach to its application is a concern. The priority for Chinese legislators therefore should be to formulate specific guidelines for the application of the VAR defense.

Specifically, drawing upon Australian law, Chinese legislators should reform the law to prescribe that when the risk resulting in a participant's harm is a risk inherent to the activity and obvious to the participants in advance, the VAR defense should be available to exempt the organizer from liability. Australia's experience has proved that this approach is conducive to balancing the interests of organizers of and participants in motor racing activities. Furthermore, Chinese legislators and courts should more clearly define the types of risks triggering the VAR defense, specifically defining the inherent risks of the activity and the characterization of a particular risk as "obvious" to a participant. With reference to the Australian interpretation of the defense (e.g., whether the results of the risk's eventuating are likely to be catastrophic and whether the risk occurs with significant frequency[271]), Chinese courts should develop these elements through judicial interpretation to provide clearer guidelines for motorists and motorsports event organizers.

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[269] *Id*.

[270] *Id*. ¶ 4.20. The defenses of DRA and VAR in Australia are context-based; they should be applied and construed within the context of the Australian legal tradition, including the Australian judicial culture and the role of the courts in the development of Australian laws. *See* Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMPAR. L. 335 (2005); Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313 (1978); ROGER COTTERRELL, LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY (2006).

[271] *Fallas v Mourlas* (2016) 65 NSWLR 418, 144.

B. Resolving Uncertainties over the Application of Article 1176

There are three major sources of uncertainty regarding the proper application of Article 1176. The first concerns the scope and content of the duty of safety protection, as this duty overlaps with the provisions of Article 1176 under certain circumstances. The second is that there is no clear distinction between the VAR defense in a general context and as applied under Article 1176, which leads to the application of fault-based liability when the circumstances warrant a full exemption. The third source of uncertainty lies in Article 1176 itself. As the statute does not establish the legal elements required to invoke Article 1176's VAR defense, courts must resort to their own interpretations of the defense, inviting inconsistent decisions. As the third source of uncertainty is addressed in detail above, the following discussion is limited to the remaining two.

Concerning the present case, the timely provision of effective rescue should be part of a motorsports event organizer's duty of safety protection, not only because the rationale underlying the duty support the inclusion of this specific duty but also because injury is highly likely to occur during these types of dangerous activities. When such activities are organized and involve numerous participants, it is reasonably foreseeable that the failure to provide timely and effective rescue will have catastrophic consequences. Alternatively, if the duty to provide such services is left to contractual agreements between parties, which are generally drafted by the organizers, such contracts may assign the parties' rights and interests in a way that is prejudicial to the participants. To advance the public interest and promote such activities, the law should hold organizers accountable for their negligent failure to ensure the safety of participants by holding them responsible for the risks common to these types of activities. Otherwise, cases such as the present case will continue to be brought to court.

Further, given how courts construe other aspects of organizers' duty of safety protection, there is a risk that they will vary in their approaches to assessing whether the organizers have properly carried out this specific duty "within a reasonable scope," e.g., by considering the professional reputation, economic status, and other individual circumstances of organizers or by limiting the extent of liability to the relevant time, venue, and subject. In contrast, if the legislation were to specifically include medical and rescue services in the duty of safety protection, it would provide a starting point for a consistent approach to implementing the duty.

The authors reviewed several cases to determine how the courts view organizers' duty of safety protection in the motorsports context and how the VAR defense affects its application.[272] Courts ascertaining the content of organizers' duty of safety protection in the context of go-kart racing activities have identified the following specific duties: the duty to provide sufficient technical instructions and safety guidance during the operation of a go-kart racing business,[273] the duty to

[272] *See* cases cited *supra* note 100.
[273] *See Zhou v. Shanghai*, *supra* note 100.

manage the venue by setting proper tracks to separate various categories of go-karting to reduce the chance of collision,[274] the duty to provide qualified staff on site to assist the participants,[275] and the duty to implement and enforce a comprehensive safety management system.[276] Regrettably, none of these cases explicitly mentioned the specific duty of providing effective and timely rescue. However, one case did adopt the "reasonableness" test from the judicial interpretation, restricting the scope of the organizer's duty of safety protection to "the risk that organizers are able to foresee, control and prevent."[277]

It is noteworthy that all the above-mentioned cases were decided before 2020, before Article 1176 came into effect. In the first case applying the Article 1176 VAR defense, the court cautioned that sports ethics and the rules of the game are relevant factors in evaluating whether the duty of care has been properly exercised in the context.[278] Although this case did not involve an organizer, given the similar context, this article argues that sports ethics, the rules of the game and industry practices should likewise be considered relevant factors in evaluating organizers' proper execution of their duty to provide timely and effective rescue. Organizers should be able to demonstrate that the measures they adopt meet the standards commonly accepted by the industry and the ethical standards and rules of the game to support a claim that they have fulfilled their duty.

The law should make clear the distinction between the general VAR defense and the VAR defense under Article 1176, and Article 1176 should apply only to the specific context of "activities carrying certain risk" and that it should carry the legal effect of completely exempting organizers from liability if successfully established. However, to invoke the defense, organizers should be required to meet a certain threshold as defined by specific legal elements. One suggested element is that the organizer may only invoke the defense against participants in the activities in question, not against other parties. For instance, in the case of the elderly woman entering a basketball court cited above,[279] the court would apply the general fault-based principle in assessing both sides' liability, rather than invoking the Article 1176 VAR defense.

Another proposed element is that the participant's harm must have resulted from the materialization of an inherent risk associated with the relevant activity. If not, the Article 1176 VAR defense will not apply; instead, the general fault-based liability principle will apply. In that context, the focus of the court's risk analysis will be on whether the participant had been informed of a specific risk

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[274] *See Yin v. Shanghai*, *supra* note 100.

[275] *See Qiao v. Shanghai*, *supra* note 100.

[276] *See Ye v. Foshan*, *supra* note 100.

[277] *See Yin v. Shanghai*, *supra* note 100; *see also* Zuigao Renmin Fayuan Guanyu Shenli Renshen Sunhai Peichang Anjian Shiyong Ruogan Falv Wenti de Jieshi (最高人民法院关于审理人身损害赔偿案件适用法律若干问题的解释) [Interpretation of the Supreme People's Court of Some Issues Concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury] (promulgated by the Sup. People's Ct., Dec. 4, 2003, effective May 1, 2004) PKULaw, at art 6.

[278] *Song v. Zhou*, *supra* note 82.

[279] *See VAR Basketball Crossing*, *supra* note 78.

via the organizer's warnings. If so, the organizer can claim exemption from liability. The organizer will have the burden of proving that the participant was aware of the scope and nature of the specific risk when engaging in the activity and freely and willingly agreed to assume this risk.

This Article proposes that the Article 1176 defense should provide complete exemption from liability. This raises the following questions. If an organizer is negligent in fulfilling its duty of safety protection, thereby contributing to the harm caused to a participant, should this preclude the organizer from invoking the Article 1176 defense, even though the harm could be said to have arisen from the inherent risks of the activity? Would gross negligence result in a different legal outcome? In the context of organized, highly dangerous sports, cultural, or social activities, legislators should specify certain irreducible core duties on the part of the organizer, e.g., the duty of providing timely and effective rescue. In addition, organizers must be prohibited from relying on Article 1176 in cases of gross negligence in exercising these irreducible core duties. The reasoning for this is that participants engaging in such activities cannot be expected to foresee the risks brought by organizers' violation of such duties. This would be consistent with Article 1176's current approach to tortious liability among participants in that liabilities arising from participants' grossly negligent or intentional conduct are not exempted.

V. CONCLUSION

Article 1176 of the Chinese Civil Code must be refined to address uncertainties regarding the assessment of organizers' liability in the context of dangerous sports activities. This Article indicates how such reform could proceed, such as by clarifying the key term "risk" as referring to the inherent risks associated with such activities. Even more importantly, the revised Article 1176 provision should clarify how the special context of activities "carrying certain risk" will affect the operation of the defense that Article 1176 provides. As proposed above, in applying Article 1176, the courts must distinguish the VAR defense under Article 1176 from the general VAR defense, due to Article 1176's focus on a specific context. The legislative intent of Article 1176 admits the possibility of allowing sports organizers to invoke Article 1176 as a complete defense for liability arising from sports accidents. Further, Australia's DRA and VAR defenses could be particularly helpful in specifying the conditions under which the VAR defense is to be invoked for the purpose of revising the statute.

Moreover, this Article posits that the provision of adequate medical support and effective rescue should be deemed part of the duty of safety protection imposed on organizers, as harm is highly likely to occur when engaging in these types of dangerous activities. Legislators should consider specifying certain irreducible core elements of the duty of safety protection. Article 1176's provisions overlap with the enforcement of organizers' duty of safety protection in numerous respects, rendering it difficult to achieve a principled approach to applying the article without a clear definition of the phrase "duty of safety protection."

Legislators and courts should balance the interests of organizers and participants when determining their respective obligations and liabilities. Establishing irreducible elements would avoid the imposition of disproportionate duties and the unfair assignment of losses flowing from the materialization of risks inherently associated with the activities themselves.