

Court Of Appeals Decisions Clarify Primary Assumption Of Risk Defense In Tort Actions



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The Court of Appeals decided two cases in 2012 dealing with the primary assumption of risk defense in tort cases. In *Bukowski v. Clarkson University*,¹ Plaintiff was a college baseball pitcher who was injured when he was struck by a line drive during indoor baseball practice. He argued that the school was negligent due to the lack of an L screen which is a protective device used in batting practice, and inadequate indoor lighting.

Defendant argued that the indoor baseball practice field was as safe as it appeared, and the risks of being hit by a batted ball were open and obvious to a baseball pitcher.

The Court held that Bukowski was an experienced baseball player, and assumed the inherent risk of being struck by a batted ball. Even if the conditions at the winter indoor practice were less than optimal, the defense of primary assumption of risk defense applied. There was no defective equipment involved and no violation of any established safety protocol. The risks of being hit by a ball were not concealed or increased by defendant.

The Court concluded that the doctrine of assumption of risk.....

“shields college athletics from potentially crushing liability. Clarkson University, a college located in upstate New York, should be able to allow its sports teams to practice indoors during the cold winter months without fear of liability for inability to replicate the ideal conditions of the outdoor spring season.”²

Four months later, the Court of Appeals decided *Custodi v. Town of Amherst*,³. The Court

held that primary assumption of risk did not preclude a rollerblader from maintaining an action against landowners for negligent maintenance of a driveway or street. Plaintiff was an experienced rollerblader, who was injured when her skates struck a two inch height differential at the edge of where the driveway met the street.

Defendants argued that she assumed the risk of injury by rollerblading in the street or on sidewalks with knowledge of elevation differences between sidewalk and streets. The trial court dismissed the action, but the Appellate Division Fourth Department reversed and reinstated the claim.⁴

The Court of Appeals affirmed the decision of the Appellate Division, holding that primary assumption of risk did not apply because plaintiff was not engaged in a sporting competition, at a designated venue or facility owned or operated by defendant.

Generally, the Court said that primary assumption of risk applies when a participant in a qualified activity is aware of and voluntarily assumes risks inherent in that activity.⁵

Application of the doctrine facilitates vigorous participation in athletic activities which has social value and shields sponsors or venue owners from liability which would discourage them from sponsoring athletic events or allowing participants to use their facilities.

The Court clarified that the defense is available to those defendants that sponsor or support athletic activity at a designated venue.⁶ In *Custodi*,

1 *Bukowski v. Clarkson University*, 19 NY3d 353 (June 5, 2012).

2 *Bukowski*, Id. at 358.

3 *Custodi v. Town of Amherst*, 2012 NY Lexis 3261, 2012

NY Slip Op 7225 ___ NY 3d ___ October 30, 2012.

4 *Custodi v. Town of Amherst*, 81 AD 3d 1344 (App. Div Fourth Dept. 2011).

5 *Custodi* 2012 NY Slip Op 07225 at 3.

6 *Custodi* 2012 NY Slip Op 07225

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plaintiff was rollerblading on a public sidewalk and street, not at a rink or skate park operated by a defendant. Defendants did not sponsor or promote her rollerblading activity.

The Court declined to apply assumption of risk for an alleged defect on a public street or sidewalk as it would diminish the duty of landowners to maintain their property in a reasonably safe condition.⁷ Sidewalk or street defects are not the type of inherent risks to be assumed by all joggers, runners, rollerbladers or bicyclists. Extending the defense under these circumstances would not further the rationale for the doctrine to encourage sporting activity.

As such, the usual rules of negligence, causation and comparative fault apply and the case was remanded back for trial.

CONCLUSION

The 2012 decisions issued by the Court of Appeals clarified the elements of the primary assumption of risk defense which is a complete defense in a tort action.

It applies to inherent risks in qualified athletic activities sponsored or operated by a defendant that are held at designated venues. It does not apply as a complete bar in suits against landowners for defects in public streets or sidewalks being used by joggers, bicyclists or rollerbladers. In those cases, the usual rules of comparative fault apply.

⁷ Custodi 2012 NY Slip Op 07225 at 5