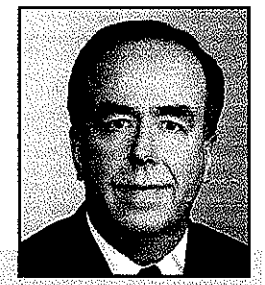
Recent Developments In The Primary Assumption Of Risk Defense



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In *Trupia v. Lake George Central School District*,[1] the Appellate Division, Third Department rejected defendant's attempt to argue primary assumption of risk in a case where an 11 year old boy fell while sliding down a banister at summer camp.

The trial court had granted the motion by defendant to assert assumption of risk as a complete defense. The Appellate Division, Third Department reversed because the activity leading to the injury was not part of a sporting or athletic program.

The Court of Appeals affirmed, holding that complete assumption of risk was not available in circumstances properly characterized as horseplay.[2] Plaintiff was not engaged in an athletic or recreational activity and plaintiff's claim was based on negligent supervision by the School District. In *Dictum*, the court limited primary assumption of risk to cases involving athletic or recreational activities sponsored or enabled by defendants.[3]

In *Cotty v. Town of Southampton*,[4] the Appellate Division, Second Department rejected assumption of risk as a defense in a case involving a bicyclist injured due to negligent maintenance of a roadway. Plaintiff was riding his bicycle as part of a bicycle club outing when a rider in front fell going over a defect in the road created by road maintenance. Plaintiff swerved to avoid the bicyclist and was struck by an oncoming car, sustaining injuries.

The municipal and contractor defendants sought summary judgment, arguing plaintiff was aware of the road condition and voluntarily assumed the risk of injury by participating in the bicycle club outing. The court held that the doctrine of primary assumption of risk is designed to encourage participation in athletic activities, not to relieve municipalities of their duty to maintain roadways in a safe condition.[5]

Merely because a person uses the road as a jogger or a bicycle rider engaged in leisure activities does not eliminate the duty to maintain the road. Riding a bicycle on a paved public roadway does not constitute a "sporting activity" for purposes of applying the primary assumption of risk doctrine. The defense, however, has been applied to bicycle riders injured due to a defect or a hole in unpaved areas while mountain biking on a dirt trail.[6]

In a case involving serious injuries sustained by a rider of an all terrain vehicle (ATV) the Second Department dismissed plaintiff's complaint in Morales v. Coram Materials Corp.[7] Plaintiff was an experienced ATV rider who was injured while riding the ATV up a 40 foot hill of sand and gravel. After he reached the top he observed that the center of the hill on the other side was missing and he fell 40 feet. The Court held that the assumption of risk defense is applicable to the recreational activity of ATV riding at a sand and gravel mine. Irregular terrain is inherent in the recreational activity of ATV riding. The Court rejected plaintiff's claim that the excavation of the side of the hill created a unique danger over and above the usual dangers in the sport of ATV riding.

In Demelio v. Playmakers Inc.[8] the Appellate Division Second Department affirmed denial of summary judgment in a case where plaintiff was injured at a batting cage when a ball ricocheted off a metal pole and struck plaintiff in the eye.

1 Trupia v. Lake George Central School District 62 AD3d 67, 875 NYS2d 298 (3rd Dept. 2009)
2 Trupia v. Lake George Central School District 14 NY3d 392, 901 NYS2d 127 (2010)
3 Id at 396
4 Calise v. City of New York, 239 AD2d 378, 657 NYS2d 430 (2nd Dept. 1997)
5 Id at 255
6 Calise v. City of New York, 239 AD2d 378, 657 NYS2d 430 (2nd Dept. 1997)
7 Morales v. Coram Materials Corp. 64 AD3d 756, 883 NYS2d 311 (2nd Dept. 2009) lv. den. 14 NY3d 728, 900 NYS2d 730 (2010)
8 Demelio v. Playmakers Inc. 63 AD3d 777, 880 NYS2d 710 (2nd Dept. 2009)

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Defendant moved for summary judgment pursuant to the primary assumption of risk doctrine. The trial court denied the motion and the Second Department affirmed because defendant failed to show that the increased risk of ricocheting baseballs caused by an unpadded pole was an inherent risk of the sport. Although plaintiff was clearly engaged in a sporting activity, the Court held that the unpadded pole may have created an increased risk that was not assumed by plaintiff.

In *Anand v. Kapoor*,[9] the Appellate Division, Second Department affirmed dismissal of plaintiff's complaint against a fellow golfer based on primary assumption of risk. Plaintiff and defendant Kapoor were friends and were playing golf together on the first hole when the accident happened. Kapoor was in the rough preparing to hit his ball and plaintiff was closer to the hole, but at a significant angle from defendant's intended line of flight.

Plaintiff claimed that Kapoor failed to yell "fore," which defendant disputed. Plaintiff was struck in the eye and suffered a detached retina and permanent loss of vision. The majority opinion of the Second Department held that defendant was entitled to summary judgment because there was no duty to warn as plaintiff was not in a foreseeable area of danger and plaintiff assumed the risk of being struck by a poor shot.

The dissenting judge felt there was a question of fact as to whether defendant yelled "fore" and whether that failure unreasonably increased the inherent risk of being struck by a shot.[10]

The Court of Appeals affirmed dismissal of the case, holding that a voluntary participant in a sport consents to certain risks that arise out of the nature of the sport. A participant does not assume the risk of reckless or intentional conduct, or concealed risks.[11] Kapoor's failure to yell "fore" did not amount to reckless or intentional conduct, and did not unreasonably increase the inherent risks of playing golf. Being struck by a "shanked" golf shot is a commonly appreciated risk of golf.[12]

9 Anand v. Kapoor, 61 AD3d 787, 877 NYS2d 425 (2nd Dept. 2009)

10 Id at 793

11 Anand v. Kapoor, _____ NY3d _____, 2010 NY Slip Op 9380, 2010 NY Lexis 3730

CONCLUSION

The Court of Appeals has reaffirmed the validity of primary assumption of risk in cases involving sporting activity. The court in *Trupia, supra*, has signaled its intent, however, not to allow broad application of the defense to activities other than sporting or recreational ones. Further cases defining what constitutes recreational as opposed to leisure activities within the scope of this defense should be expected.

12 Id