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New York's Highest Court Refuses to Expand the Doctrine of Assumption of Risk

In 1975, New York State abolished the doctrine of contributory fault, wherein a plaintiff's own culpable conduct or assumption of the risk was an absolute defense to liability. Despite the Court's ruling, the doctrine of primary assumption of the risk as an absolute bar survived depending on the specific circumstances of the matter at hand. The public policy justifying the doctrine's survival being that certain activities (such as athletic activities) possess enormous social value, and even while they involve significantly heightened risks, these risks may be voluntarily assumed to preserve these beneficial pursuits. Under what circumstances or activities the doctrine of primary assumption of the risk acted as an absolute defense split the Appellate Divisions.

On April 6, 2010, the New York Court of Appeals, in *Trupia v. Lake George Cent. School Dist.*, refused to expand the doctrine of assumption of the risk as a defense against liability beyond "athletic and recreative activities."

The plaintiff in *Trupia*, a 12 year old boy, slid down a banister during a school summer program and severely injured himself. The defendant, school district, sought to amend their answer to assert the defense of assumption of the risk. However, the Third Department denied the School District leave to amend and the Court of Appeals affirmed.

In a decision written by Chief Judge Jonathan Lippman, the Court of Appeals held that there was no compelling public policy justification to permit the assertion of assumption of the risk as a defense for injuries suffered during youthful "frolic" or "horseplay."

The Court also explained that the proposed amendment would undermine and displace the principals of comparative fault. The Court warned that an expansion of the assumption of the risk doctrine beyond the traditional athletic and recreative activities would edge the state back toward a time when contributory negligence was invoked as an absolute bar to liability.

All seven Judges of the Court of Appeals agreed that the expansion of the assumption of the risk doctrine should not be permitted. However, in a concurring opinion, three Judges expressed concern over the "sweeping pronouncements" made in the majority's opinion and characterized most of the majority's opinion as "extended dictum." The

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concurring opinion stated that the majority's holding that the assumption of risk defense is largely, if not entirely, limited to cases involving "athletic and recreative activities," invites too many questions, none of which the majority answers. In particular the concurring opinion felt the majority did not adequately define just what those activities are, such as why the youth's banister-sliding was not "recreative?"

Typically, when the Court of Appeals decides an issue, it is expected, or at least hoped, that the Court of Appeal's ruling will answer more questions than it raises. However, it remains to be seen whether this recent decision will settle questions involving assumption of the risk or further confound questions about what types of activities the doctrine of primary assumption of the risk applies. ■

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