On the Application of Assumption of Risk Regulations in China

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Abstract: The assumption of risk regulations is a new defense of exemption in the civil code in China. By analyzing the civil judgment documents related to the assumption of risk after the implementation of the civil code, it is found that the court has different understanding of the recreational and sports activities with certain risks, there are differences in the judgment of the participant's cognitive activity risk, and there are disputes over the determination of the offender's no intention or gross negligence, which destroys the unity of judicial application. Therefore, it is advisable to unify the limited contents of recreational and sports activities with certain risks, identify the judgment factors of the participant's cognitive activity risk, and criteria for determining that the participant has no intention or gross negligence, so as to promote the unity of judicial judgment.

Keywords: Assumption of Risk Regulations, Damage, Participant, Recreational and Sports Activities.

1. Introduction

Assumption of risk refers to the behavior that the participant knows in advance that recreational and sports activities may be accompanied by certain risks, but is not based on legal or professional obligations, nor is he voluntarily involved in dangerous activities under coercion or deception, and bears the possible damage. [1] Before the promulgation of the civil code of the People's Republic of China, China's legislation does not stipulate assumption of risk regulations, but judicial practice has long been widely applied in sports activities, trading activities, self-help tourism and other activities. Article 1176 of the Civil Code stipulates the assumption of risk regulations at the legislative level for the first time, but there are disputes on the understanding of the constituent requirements and specific contents of assumption of risk regulations. For recreational and sports activities with certain risks, Wang Liming believes that the risks of training, teaching, rehearsal and other activities can be controlled, so they should not be applied to assumption of risk regulations, [2] while Zhao Feng and others believe that assumption of risk regulations can be applied to sports guidance, training and other activities; [3] in terms of risk, Yang Lixin believe that the risk caused by other reasons of the activity can be applied to assumption of risk regulations, [4] while Liu Tieguang and others believe that the risk caused by the participants of the activity must be applied to assumption of risk regulations. [5] As for the judgment factors of the participant's cognitive activity risk, Zhang Xinxiao believe that the cognition of rational people who usually participate in such activities should be taken as the judgment factor, [6] and Wang Liming believe that the cognition of ordinary people in society should be taken as the judgment factor. [2] For the identification of the offender's intentional or gross negligence, Zhang Xinxiao believe that the offender's intentional foul in the sports competition should constitute intentional or gross negligence, [6] and assumption of risk regulations is not applicable, while Zhao Feng and others believe that not all fouls should be evaluated qualitatively. [3] Therefore, by analyzing the judicial judgment documents related to assumption of risk regulations after the implementation of the civil code, combined with the specific content of the constituent requirements of assumption of risk regulations in judicial practice, this paper understands the existing problems and puts forward relevant improvement suggestions in order to apply the rule accurately.

2. Overview of Assumption of Risk Regulations

2.1. the Origin of Assumption of Risk Regulations

Assumption of risk originated from Roman law and was initially mainly applicable to common law countries, afterwards some civil law countries such as Germany and France introduced it into their own legislation, which was mainly applicable to sports activities, so as to make it a reason to reduce or exempt tort liability.

Before the promulgation of the civil code of the people's Republic of China, China's legislation does not stipulate assumption of risk regulations, but it has been expressed directly or indirectly in China's judicial practice. [7] In many cases, it has been adopted by judges as an effective defense to reduce or exempt the offender's tort liability, with that legislators confirmed it by legislation.

2.2. the Constitutive Requirements of Assumption of Risk Regulations

Article 1176 of the Civil Code stipulates for the first time that "if you voluntarily participate in recreational and sports activities with certain risks and suffer damage due to the acts of other participants, the victim may not ask other participants to bear tort liability; however, except that other participants have intentional or gross negligence in the occurrence of damage." Therefore, the application of assumption of risk regulations should meet the following four requirements: "first, the activity should be a recreational and sports activity with certain risks; second, the participant recognizes the risk of the activity; third, the participant voluntarily participates in
the activity; fourth, the damage has a causal relationship with
the behavior, and the offender causes the damage without
intention or gross negligence."

3. Problems in the Application of
Assumption of Risk Regulations

The accurate application of assumption of risk regulations
needs to understand the specific contents of the constituent
requirements. Except for the “voluntary”, the other three
items are controversial, resulting in inconsistent judicial
decisions.

3.1. Differences of Understanding of
Recreational and Sports Activities with
Certain Risks

First, there are different opinions on the applicable
occasions of recreational and sports activities. Some courts
believe that the risks of training, teaching, rehearsal activities
can be controlled, so assumption of risk regulations should
not be applied. For example, Xicheng District People's Court
of Beijing held that there were significant differences between
the participants' risk control ability and daily recreational and
sports activities when they signed up for the special training
activities of sports events, so it held that assumption of risk
regulations should not be applied to the training of
recreational and sports events. [8] However, some courts
disagree. Such as Beijing third intermediate people's Court, it
believes that there are also confrontational and dangerous
facts in the training, if the victim signs up for the training
camp and suffers damage in the training competition, assumption of risk regulations should be applied. [9]

Second, there is a different understanding of whether the
damage is triggered by other participants. Some courts held
that risks caused by other reasons of the activity can applied
to assumption of risk regulations. In some cases, as long as
the court recognizes the dangerous activities, the victim's
cognition and voluntary facts, the court will generally apply
assumption of risk regulations, regardless of whether the
damage is caused by other participants or not. But most courts
believe that assumption of risk regulations can be applied
only when the risk caused by the participants of the activity.
For example, Chengdu Intermediate People's Court ruled that
the cause of the victim's injury was not caused by other
participants in the activity, so assumption of risk regulations
is not applicable. [10]

3.2. Differences of Judgment of Participants'
Cognitive Activity Risk

As for the judgment factors of the participant's cognitive
activity risk, some courts believe that they should be the
cognition of rational people who usually participate in such
activities, but some courts held that the cognition of ordinary
people in society should be taken as the judgment factor. For
instance, some courts believe that the actor's cognition of
activity risk requires the actor to be fully aware of the
abnormal risk of special activities and the possible damage.
Most courts held that the participant can apply assumption of
risk regulations as long as he can realize that the recreational
and sports activities he participates in have certain risks and
the risk has the possibility of being realistic. It is not necessary
to require the participant to be fully aware of the possible
damage caused by the risk, because the damage caused by the
risk are unexpected and can't be fully predicted by even a
highly experienced expert.

3.3. Controversies of Determination of the
Participant's no Intention or Gross
Negligence

Some courts believe that the participant's intentional foul
in sports competition should constitute intentional or gross
negligence, and assumption of risk regulations is not
applicable, but other courts believe that not all fouls should
be evaluated qualitatively. For example, Dalian intermediate
people's Court rules that if participants participate in
recreational and sports activities with certain risks, the
violation causes personal and property damage to others, it is
intentional or gross negligence and should be liable for
compensation, assumption of risk regulations shall not apply.
[11] However, Guangzhou intermediate people's Court
believes that whether the participant constitutes intentional or
gross negligence should not be judged by whether he violates
the competition rules, the violation of the competition rules
can only prove that the participant should bear the
responsibility for violation, but not the responsibility for
infringement. Therefore, it should be judged by whether the
participant has intentional or gross negligence of winding
people subjectively. [12] The first intermediate people's Court
of Shanghai held that it is necessary to make a comprehensive
analysis and judgment in combination with the specific
behaviors of other participants, the types and characteristics
of sports activities and so on. [13]

4. Suggestions on the Application of
Assumption of Risk Regulations

Once assumption of risk regulations is applied as an
exemption, it means sacrificing the legal relief rights and
interests of the victims. Therefore, the application
requirements of assumption of risk regulations should be
strictly limited and standardized in order to promote judicial
justice.

4.1. Unify the Limited Contents of
Recreational and Sports Activities with
Certain Risks

First, clarify the applicable occasions of recreational and
sports activities. Recreational and sports activities with
certain risks should have inherent risks, and the inherent risks
of in advance rehearsal, teaching and training activities still
exist, what is weakened is only the probability of activity
damage. Therefore, if other requirements are met, assumption
of risk regulations should be applied. Moreover, for some
special informal recreational and sports activities, such as
participants competing to throw volleyball like throwing
basketball or playing an abandoned can like playing football,
if there is a high possibility of damage, assumption of risk
regulations can also be applied.

Second, certain risks should be the risk caused by the
participants. Long term single player sports such as
weightlifting and diving also have the risk of physical
function damage, but it is not caused by other participants, so
assumption of risk regulations should not be applied.
Moreover, the audience, judges and photographers are not
directly involved in the activity and do not belong to the
participants of the activity. If they are accidentally injured or
injured the participants of the activity due to recreational and
sports activities, the assumption of risk regulations shall not
apply.

4.2. Identify the Judgment Factors of the Participant's Cognitive Activity Risk

First, the civil capacity can be used as a judgment factor to determine the risk of the participant's cognitive activities. People with full civil capacity who have reached a certain age and mental state have the ability of self-determination and control, and their level of cognitive activity risk should be determined. People with limited civil capacity should be carefully presumed in combination with their age, intelligence, types of recreational and sports activities and risk level. Although people with no capacity for civil conduct may have a certain ability to judge the risks of some recreational and sports activities, the law stipulates that they cannot independently implement civil legal acts. Therefore, assumption of risk regulations should be not applicable to people with no capacity for civil conduct.

Second, the participant's professional level of recreational and sports activities can be used as a judgment factor to determine the participant's cognitive activity risk. Participants with different professional levels of recreational and sports activities have very different cognitive abilities of the inherent risks of recreational and sports activities, which can be used as a supplementary factor to judge the risk of actors' cognitive activities. For example, athletes and coaches in competitive sports activities participate in sports activities or guide sports activities for a long time, have a clear understanding of the rules of relevant sports, and have a relatively higher cognitive ability of sports risks than ordinary people. In addition to professionals, in fact, the accumulated experience of participants who have participated in recreational and sports activities for a long time will also make them have a deep understanding of the inherent risks of recreational and sports activities. In case of damage caused by recreational and sports activities, it should be judged that they have a certain cognitive ability of the risks of recreational and sports activities and apply assumption of risk regulations.

4.3. Criteria for Determining that the Participant has no Intention or Gross Negligence

The offender's violation causing reasonable damage shall be deemed as no intentional or gross negligence. The premise for the offender to bear the tort legal liability is that the offender has the subjective fault of causing damage, while the foul behavior may cause damage to other participants or may not cause damage. Obviously, the foul behavior cannot reflect the offender's subjective fault of causing damage, so all fouls should not be recognized as intentional or gross negligence. In fact, in some confrontational activities, such as basketball games, participants are in a high state of physical tension during the game, and fierce behaviors such as collision, blocking and snatching occur frequently. The reasonable damage caused by the foul behavior is in line with the participant's cognition and expectation of the risk of the activity, and does not exceed the tolerance scope that the recreational and sports activities can carry. Therefore, the foul behavior causing reasonable damage should not be recognized as intentional or gross negligence.

However, the offender's violation causing abnormal damage shall be deemed as intentional or gross negligence. Fouls are prohibited in recreational and sports activities, and have also brought certain damage to other participants, which may result in the disability or death of other participants, blindly tolerating them is not in line with legal justice. Therefore, the damage caused by the offender's behavior beyond the scope of reasonable behavior and the major abnormal damage caused by the violation should be recognized as intentional or gross negligence. For example, if the act of kicking someone in a basketball game exceeds the reasonable scope of basketball activities and causes personal injury to others, it belongs to intentional injury to others' body in the name of basketball activities, which should be recognized as intentional infringement and assumption of risk regulations is not applicable. If the participant deliberately violate the rules and collide with the opponent in the basketball game, causing the opponent to fall and cause casualties can be recognized as general negligence, and assumption of risk regulations applies, but if the opponent dies, it should be recognized as gross negligence, assumption of risk regulations is not applicable.

5. Conclusion

The assumption of risk regulations established in article 1176 of the civil code ends the confusion of the application of assumption of risk in previous judicial practice, which is of great significance. But at the same time, it can also be seen that there are still disputes about the specific content of the constituent requirements of the assumption of risk regulations in judicial practice. Therefore, we should unify the applicable activity occasions and the understanding of certain risks; The risk of the participant's cognitive activities should be inferred from the actor's civil capacity and professional level of recreational and sports activities; For the injury caused by the offender without intention or gross negligence, the damage caused by the foul should be recognized as reasonable damage, and the foul causing abnormal damage by the offender should be excluded. Of course, the civil code has come into force. The different understandings of the assumption of risk regulations should be supplemented and improved through judicial interpretation, so as to realize the unity of judicial application of assumption of risk regulations and promote judicial justice.

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