

An Empirical Examination of the Judicial Application of the 'Assumption of Risk' Doctrine in the Civil Code

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Abstract: Prior to the promulgation of the Civil Code, there was no formal legal provision on tort cases in cultural and sports activities, and this legal gap has led to the lack of a unified judgement standard in judicial practice, which has triggered in-depth discussions on related issues in the academic community. Among them, the "the Assumption of Risk doctrine", as an independent cause of liability exemption in tort law, is the focus of the discussion. The Civil Code has newly established the Assumption of Risk doctrine. The author has preliminarily identified some issues in the judicial application of this doctrine through the analysis of 209 relevant cases, which primarily manifest in the expansion of its scope, inconsistent application of liability principles, and vague standards for intentional acts and gross negligence. Based on these findings, in order to enhance the precision of this system's adjustment function, the author proposes to restate the elements of the Assumption of Risk and attempts to clarify the responsibilities and liabilities of organizers under such circumstances, as well as the effectiveness of exemption clauses.

1. Introduction

In recent years, as recreational and sporting activities have become increasingly diverse, incidents involving injuries in outdoor sports, competitions, and adventure tourism have occurred with increasing frequency, necessitating the application of the Assumption of Risk doctrine to distinguish responsibilities in such cases. On May 22, 2021, a severe accident occurred during the Baiyin marathon in Gansu, resulting in the deaths of over twenty participants. This incident brought the Assumption of Risk doctrine into the spotlight, sparking widespread societal discussion and prompting in-depth academic research.

In theoretical discourse, the academic community has extensively engaged in doctrinal analysis of the assumption of risk doctrine. At the institutional design level, Article 1176 of the Civil Code introduces: "Individuals who voluntarily participate in cultural and sports activities that carry inherent risks, and are harmed due to the actions of other participants, shall not claim tort liability against such participants; however, this does not apply if the other participants act with intentional misconduct or gross negligence. The liability of the organizers shall be governed by the provisions of Articles 1198 to 1201 of this Code, which has established a distinctly Chinese assumption of risk

system. [1]This system confines the voluntary participation of victims to "cultural and sports activities" where, in the absence of intentional or gross negligence by the perpetrator, the victim cannot demand liability for torts. However, judicial practice often diverges from theoretical research and institutional design, resulting in inconsistencies in rulings for similar cases. Drawing upon a systematic review and analysis of judicial cases over a period, this study uses the legal provisions of the assumption of risk as a foundational text. It seeks to dissect the critical elements of the doctrine and its interplay with organizer liability, aiming to refine the effectiveness of its regulatory functions within the legal landscape.

2. Examination of Issues in Judicial Practice

To investigate the application of the assumption of risk doctrine in judicial practice, this study primarily utilizes publicly accessible resources such as "China Judgments Online" and the "Wusong" case database. A keyword search for "assumption of risk" initially yielded over a thousand cases. Through a secondary filtering process, irrelevant cases were excluded, resulting in a selection of 209 judicial documents post-enactment of the Civil Code as research samples. Each document was meticulously examined to compare the original intent of the system's design with the focal points and challenges identified in scholarly discussions. This preliminary analysis aims to understand the current status of the judicial application of the assumption of risk doctrine and to explore potential issues arising during its application.

2.1. Expansion of Application Scope

According to the provisions of Section 1 of Article 1176 of the Civil Code, the assumption of risk doctrine can only be applied within the context of cultural and sports activities to exempt the perpetrator from civil liability. Therefore, judges should exercise cautious judgment when referencing this doctrine. However, the judicial documents reviewed indicate an expansion in the application of assumption of risk. For instance, in the case "Wang et al. Health Rights Dispute"(2023 Liao 0115 Min Chu 6412 Civil Judgment), the court characterized Wang's act of jumping into a fish pond as "assumption of risk" and cited Article 1176 of the Civil Code in the legal application. Similarly, in the case "Wang, Jia et al. Right to Life, Personal Rights, and Health Rights Dispute"(2023 Gan 0702 Min Chu 9221 Civil Judgment), the court applied the assumption of risk principle from the Civil Code to Wang's act of drunk driving.

It is evident that there are instances of inappropriate application of the "assumption of risk" principle in judicial practice. The author understands that the assumption of risk clause has a clearly defined scope of application. Misuse or improper citation of this clause can lead to an unwarranted expansion of its application scope, which may mislead the public.

2.2. Variability in the Application of Liability Attribution Principles

As stipulated by the Civil Code, the doctrine of assumption of risk serves as an autonomous exoneration from liability, absolving the offender of any reparative duties once prerequisites are met. This doctrine is distinctly separated from concepts such as contributory negligence or consent of the victim, and it operates independently of the fairness principle. Despite these clear delineations, judicial enactments frequently demonstrate an initial application of the assumption of risk doctrine, followed by a recalibration of responsibilities among the parties involved, utilizing alternate legal principles. For instance, in the case "Qi vs. Liu on Rights to Life, Health, and Bodily Integrity"(2023 Ji 0130 Min Chu 2600 Civil Judgment), where both parties sustained injuries during a team-building exercise involving arm-wrestling, the court, after recognizing the assumption of

risk, adjudicated that both parties were at fault, hence each bore 50% liability. Similarly, in "Zhu vs. Li and Taibai Company Tort Liability Dispute"(2023 Shan 0103 Min Chu 8208 Civil Judgment), involving a skiing collision, the court invoked the assumption of risk alongside fault liability principles, resulting in the plaintiff bearing 30% and the defendant 70% of the liability. This variability underscores a judicial tendency to blend foundational legal doctrines with situational fairness in adjudicating cases involving assumption of risk.

From the typical cases above, it is apparent that in China's judicial practice, some judges did not adopt an absolute exemption from liability as the basis for judgment since applying the assumption of risk doctrine. This approach has led to frequent occurrences of divergent rulings in similar cases.

2.3. Ambiguity in Determining Intent and Gross Negligence

The assumption of risk clause in the Civil Code posits that for other participants to be exempt from liability, situations involving intent or gross negligence must first be ruled out. In judicial practice, the exclusion of these circumstances is a critical factor in determining whether a defendant is exempt from liability. However, in reality, establishing the subjective intent or gross negligence of other participants in tort cases remains a challenging aspect in specific cases. For instance, in the case "Zhang et al. Dispute Over the Right to Life, Bodily Integrity, and Health"(2021 Hu 01 Min Zhong 732 Civil Judgment), plaintiff Zhang and defendant Wei participated in a basketball game, during which Wei's foul caused Zhang to fracture. The first-instance court deemed Wei's actions as negligent, thus liable for the injury inflicted on Zhang, and held Wei accountable. Dissatisfied, Wei appealed the decision. The appellate court, after review and detailed discussion, determined Wei's actions constituted ordinary negligence rather than gross negligence, aligning with the criteria for assumption of risk. Consequently, the appellate court overturned the first-instance judgment and ruled that Wei was completely exempt from liability. This example underscores the complexities and the need for clear guidelines in adjudicating intent and negligence within the context of assumption of risk.

In practice, due to the specialized nature of cultural and sports activities, particularly athletic events, and the variability in judges' perceptions and understandings of the same cases, it is difficult for judges to determine whether other participants have acted with intent or gross negligence presents significant challenges for judges.

3. Analysis of the Constituent Elements of Assumption of Risk

Since the enactment of the Civil Code, the academic community has conducted in-depth studies on the constituent elements of the assumption of risk, proposing various models such as two-element, three-element, and four-element theories[2] . The two-element theory posits that assumption of risk should consist of a foundational relationship and a risky behavior, or it should encompass both subjective and objective aspects. The three-element theory argues that the criteria should include the presence of risk, voluntary participation by the party, and the absence of intentional or gross negligence by other participants. The four-element theory suggests that assumption of risk should satisfy four criteria: the party is aware of and voluntarily participates in a risky cultural or sports activity, and the injuries caused by other participants do not involve intentional or gross negligence.

Combining these classifications, this paper supports the four-element theory, which encompasses: participation in a cultural or sports activity with inherent risks, awareness and voluntary acceptance of such risks by the participant, harm caused by other participants, and the exclusion of intentional or gross negligence scenarios.

3.1. Cultural and Sports Activities with Inherent Risks

3.1.1. Cultural and Sports Activities

Article 1176 of the Civil Code designates the assumption of risk as a specific exemption from tort liability primarily within the context of cultural and sports activities. The establishment of the assumption of risk doctrine is intended to encourage public participation in these activities by alleviating concerns about potential liabilities; it also serves as a reminder to participants to be aware of the risks involved. The law does not aim to minimize or eliminate risk altogether but allows for a reasonable degree of risk while preventing excessive danger.

It is generally recognized cultural and sports activities are generally understood to encompass both cultural events and sporting events[3][4]. Activities such as live-action CS (combat simulation) entertainment are also considered within the scope of cultural and sports activities applicable under this legal provision. However, activities that are illegal, such as organized fights or bare-knuckle boxing, due to their inherent danger, are not protected by law and thus do not fall under the purview of this article.

3.1.2. Activities with Inherent Risk of Injury

According to legal stipulations, cultural and sports activities eligible for the application of the assumption of risk principle must inherently possess certain risks[5]. Most competitive sports involve direct physical contact among athletes and typically carry inherent risks, such as in football, basketball, and rugby. Other non-contact competitive sports, like badminton, volleyball, and tennis, also present risks of injuries such as sprains, strains, and being struck by the ball, thus qualifying as activities with inherent risks. Furthermore, individual sports like skiing and ice skating, where participants may still encounter collisions despite exercising due caution[6], are generally considered under judicial practice to fall within the ambit of the assumption of risk clause.

For cultural and sports activities which is relatively safe, such as yoga and square dancing, there is generally no risk of injury caused by others, and injuries are rarely reported in everyday life. Such activities are not covered under the protection of the assumption of risk doctrine. In cases of injury disputes arising from these activities, it is appropriate to consider the fault of both parties involved and apply the principle of fault liability to determine responsibility.

3.2. Participants' Awareness of Risks and Voluntary Participation

The assumption of risk applies only when participants voluntarily engage in an activity[7], reflecting the principle of free will in civil law and ensuring the normal conduct of the activity. Typically, for common sports such as soccer and basketball, it is assumed that participants are aware of the inherent risks. Regarding the extent of risk awareness, it is sufficient that the risks meet the judgment standards of a reasonably prudent person, rather than requiring participants to be fully aware of all potential risks.

Regarding the issue of minors' risk awareness, due to their limited capacity for action and inadequate self-protection awareness, the determination of whether minors have a sufficient understanding of the risks associated with an activity should be based on the cognitive abilities expected of their age group[8]. For example, in the case "Dispute over the Right to Life and others at a certain primary school in Huaning County"(2019 Yun 04 Min Zhong 1447 Civil Judgment), an injury incident occurred during a soccer game involving minors. The court determined that both parties, despite being minors, had an adequate understanding of the intensity of the sport, physical confrontation, and injury risks associated with soccer, typical for their age group. Consequently, the

court applied the assumption of risk doctrine to exempt the defendant from liability.

3.3. Injuries Caused by Other Participants

In the practical application of the assumption of risk, it is generally required that the injurious act be carried out by other participants in the activity, meaning that all involved parties are participants in the activity. The term "actions of other participants" as stipulated in the Civil Code typically refers to the inherent risks of the activity itself, i.e., risks arising unavoidably from the actions of other participants in group activities. Additionally, some high-risk individual activities, due to sharing the same venue, may also present potential risks of injury among participants, as illustrated in the previously mentioned examples of collisions at skating rinks and ski resorts. In such cases, the parties involved are generally also considered to fall within the category of "participants."

3.4. Exclusion of Intentional Acts or Gross Negligence

In cultural and sports activities, the assumption of risk principle does not apply when injury to another is caused by a participant's intentional act or gross negligence. The legal rationale is clear: the risks assumed by participants are those that can be foreseen as inherent to the activity itself[9]. Risks arising from intentional acts or gross negligence are unpredictable to the victim and thus fall outside the scope of the assumption of risk principle.

Concerning intentional acts, the behavior of intentionally harming others is often unrelated to the nature of the activity and exhibits a strong degree of subjective culpability, making it relatively straightforward to assess in judicial practice. As for gross negligence, it is comparatively difficult to judge. The distinction between "gross" and "ordinary" negligence is often blurred since common fouls accepted by all participants can also result in severe injuries, and basing judgments solely on outcomes can be unreasonable. It is argued that determining gross negligence should involve a comprehensive assessment that considers the regulations of the activity, the level of risk, and the nature of the participants' actions.

4. Determining Organizer Responsibility in the Context of Assumption of Risk

4.1. Internal Relationship of the Legal Provisions

As previously discussed, Section 1 of Article 1176 of the Civil Code specifies the scenarios applicable to the assumption of risk; whereas Section 2 of Article 1176 primarily addresses the responsibilities of organizers under the assumption of risk, directing to the obligations laid out in Articles 1198 to 1201 regarding organizer safety guarantees. Consequently, scholars have described Section 2 of Article 1176 as a guiding provision, with Articles 1198 to 1201 being the directed provisions[10]. Article 1198 generally outlines the safety obligations of organizers, while Articles 1199 to 1201 specifically address the safety obligations of educational institutions.

For instance, in the case "Lei vs. Juan Company and Li Company, Liability Dispute of Mass Activity Organizers"(2023 Yu 0118 Min Chu 7524 Civil Judgment), it is directed that the organizer's responsibility under assumption of risk should be guided by the provisions of Article 1198: "Operators, managers, or organizers of places such as hotels, shopping centers, banks, stations, airports, sports venues, entertainment venues, or other business or public places who fail to fulfill their safety obligations, causing harm to others, shall bear tort liability. If a third party's actions cause harm, the third party is liable; if the operator, manager, or organizer fails to fulfill their safety obligations, they shall bear corresponding supplementary liability. After fulfilling the supplementary liability, the operator, manager, or organizer may seek compensation from the third

party." In this case, the plaintiff Lei participated in a parent-child activity organized by the defendant Ju Company and was injured due to uneven ground, resulting in a level ten disability. The court held that although Lei assumed risk by participating in the activity, this did not exempt Ju Company from its safety obligations. Lei's injury was partly due to the inherent risks of the activity, which Lei had chosen to assume; however, another cause of the injury was the uneven terrain provided by Ju Company at the activity site, which posed an increased safety risk during competitive activities. Therefore, it was determined that Ju Company had not fully met its safety obligations and should bear corresponding responsibility. Consequently, the court ultimately held both the plaintiff and the defendant each responsible for 50% of the liability.

4.2. Effectiveness of Organizer's Exemption Clause

In practice, organizers often attempt to mitigate their liability by stipulating, through standard terms or notices, that they will not be responsible for certain types of accidents that may occur during cultural and sports activities. The validity of such prior exemption clauses should be governed by Article 506 of the Civil Code: "The following exemption clauses in contracts are invalid: (1) those that cause personal injury to the other party; (2) those resulting from intentional or gross negligence causing property loss to the other party.", which categorically renders them invalid. Generally, exemption clauses are part of the standard terms, and participants, being in a weaker position, are entitled to special legal protection. However, the effectiveness of these clauses should not be uniformly denied in court, as this could unduly increase the duty of care required of organizers; nor should they be universally deemed valid, as this may allow organizers to unduly reduce their liability by exploiting their position. In judicial practice, most judges have upheld the validity of exemption clauses in common cultural and sports activities, such as soccer matches. It is argued that when assessing the validity of exemption clauses, a comprehensive judgment should be made based on the nature of the activity, the content of the clause, and whether the organizer has fulfilled their duty to inform. This balanced approach ensures both the protection of participants' rights and the reasonable limitation of organizers' liabilities.

5. Conclusion

The doctrine of assumption of risk was codified for the first time in the Civil Code, and its application in judicial practice still presents numerous challenges that need to be clearly addressed. Through the study of a series of cases, it has been preliminarily observed that there are issues in the judicial application of the assumption of risk doctrine, such as an expanded scope of application, inconsistent application of liability principles, and vague standards for determining intent and gross negligence. Based on this, the paper provides a doctrinal analysis of the constituent elements of assumption of risk, advocating for its accurate application under the conditions of: participation in inherently risky cultural or sports activities, with participants being fully aware and voluntarily involved, and excluding scenarios involving intentional or gross negligence by other participants. Additionally, the paper briefly discusses the internal relationship of the provisions in Article 1176 of the Civil Code, the responsibilities that organizers must assume, and the measures to limit the misuse of exemption clauses by organizers.

As society progresses and policy advocacy increases, public participation in cultural and sports activities continues to rise, inevitably raising issues related to the application of the assumption of risk doctrine. This article aims to serve practical needs: on one hand, it benefits judicial practice by providing clearer guidelines for adjudicatory bodies dealing with accidental injuries in inherently risky cultural and sports activities; on the other hand, it supports the healthy and orderly development of these activities by providing legal support and assistance. Furthermore, this study

aims to enhance the awareness of risks associated with such activities among organizers and participants. By promoting rational organization and participation in these activities, it helps individuals objectively approach disputes and swiftly resolve conflicts when they arise.

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