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ILLINOIS LAW MANUAL

CHAPTER IX SPECIAL DEFENSES

Few defenses now available under Illinois law completely bar a plaintiff's recovery of damages. The trend has been to reduce, rather than entirely eliminate, the plaintiff's damages by the percentage of his own fault in causing his injury. The Illinois General Assembly adopted a modified comparative negligence scheme in 1986, under which the plaintiff will recover zero (\$0) damages only if his or her own negligence or fault amounts to fifty-one percent (51%) or more of the total fault of all tortfeasors. (See Section D).

A. ASSUMPTION OF RISK

The assumption of risk defense in negligence cases was formerly a complete bar to the plaintiff's recovery. The rationale for this defense was that the plaintiff had voluntarily assumed an ascertainable risk, thereby relieving a defendant of all his legal duties. This defense has been modified to some extent by the adoption of comparative fault.

1. Express Assumption of Risk

A plaintiff expressly assumes a risk when both he and the defendant explicitly agree, in advance, that the defendant owes no legal duty. This can occur when a plaintiff signs a release or a waiver. In such a situation, a plaintiff will recover nothing unless: (1) the defendant has acted in a willful, wanton, or reckless manner; or (2), the release or waiver is considered contrary to public policy. Savino v. Robertson, 273 Ill. App. 3d 811, 818 (1995); Duffy v. Midlothian Country Club, 135 Ill. App. 3d 429, 433 (1985).

In Maness v. Santa Fe Park Ent., 298 Ill. App. 3d 1014 (1998), the widow of a stock car race driver sued the race track owner for wrongful death and other causes of action, alleging that the owner failed to provide prompt medical assistance after her husband suffered a heart attack during a race. The court dismissed the complaint holding that, because the driver signed the release before entering the race, he agreed to accept the risks associated with stock car racing, including negligent administration of medical attention.

Whether the terms of the agreement will bar plaintiff's recovery is often determined as a matter of law by a judge unless there are factual issues for a jury to decide. This generally occurs when there are disputed facts that concern the validity and/or existence of an agreement. Note, however, that these kinds of agreements are not favored by the courts and are always strictly construed against the release.

The assumption of risk defense must be contained in the defendant's answer.

Under express assumption of risk the defendant must prove that plaintiff and defendant explicitly agreed in advance that defendant owes no legal duty to plaintiff, and therefore, the plaintiff cannot recover for injuries caused either by risks inherent in the situation or by dangers created by defendant's negligence.

I.P.I. 13.00, et seq.

As a matter of public policy, an exculpatory release will not bar a plaintiff's cause of action for a defendant's willful and wanton misconduct. Bauer v. Giannis, 359 Ill. App. 3d 897, 903 (2d Dist. 2005). For example, in Downing v. United Racing Ass'n., the court held that the defendants' release of liability signed by the plaintiff did not bar the plaintiff's claim for injuries sustained at a midget track car race because the jury found the defendants guilty of willful and wanton misconduct. 211 Ill. App. 3d 877 (1991), abrogated on other grounds by Burke v. 12 Rothschild's Liquor Mart, Inc., 148 Ill. 2d 429, (1992); Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc., 40 F.3d 247, 252 (7th Cir. 1994) (applying Illinois law).

2. Implied Assumption of Risk

Implied assumption of the risk arises when a plaintiff's assumption of the risk is not contained in a written contract but is implied by the parties' conduct. The risk assumed must be inherent in the activity and not created by the defendant.

a. Primary Implied Assumption of Risk

A plaintiff assumes the known risks inherent in a particular activity or situation. The defendant does not create these risks. Savino, 273 Ill. App. 3d at 817. In Clark v. Rogers, 137 Ill. App. 3d 591 (4th Dist. 1985), the plaintiff, an experienced horse rider, assumed the risk of attempting to ride a stallion. She was barred from recovering from the owner of the horse and the owner of the stable where the horse was boarded. She never signed a release or waiver; however, the risk of harm was not created by either of the defendants. It was inherent in the activity of training and riding a stallion.

Primary implied assumption of risk is similar to express assumption of risk in that the defendant owes no legal duty to protect the plaintiff from certain hazards. This is typically recognized in situations where the plaintiff is the defendant's employee, or where there is some other contractual relationship between the parties by which the plaintiff voluntarily exposed himself to an inherent hazard. See e.g., Hanke v. Wacker, 217 Ill. App. 3d 151 (5th Dist. 1991).

b. Secondary Implied Assumption of Risk

A plaintiff implicitly assumes risks created by the defendant's own conduct if he is aware of and appreciates a danger, but nevertheless voluntarily proceeds to encounter that danger, even if that danger was created by the defendant. Hanke, 217 Ill. App. 3d at 160. However, this defense will not bar the plaintiff's recovery. It is similar to contributory negligence in that the percentages of the plaintiff's own conduct in assuming the risk and causing his injury will reduce the amount of his recovery. Id.

In Duffy, 135 Ill. App. 3d at 430, the plaintiff attended the Western Open golf tournament as a paying spectator. She was an experienced golfer and appreciated the risks inherent in attending a professional golf tournament. She purchased refreshments at a concession stand and then joined a group of spectators watching the first fairway. She was hit in the eye by a golf ball shot from the eighteenth tee by a professional golfer participating in the tournament. Her damages were reduced by 10% because she was aware of the risks involved in attending a professional golf tournament.

In Wheeler v. Roselawn Memory Gardens, 188 Ill. App. 3d 193 (5th Dist. 1989), the plaintiff sued his landlord for back injuries suffered when he slipped on the steps of his rental home and fell, allegedly because of a loose handrail. Plaintiff claimed that the landlords negligently allowed a handrail to remain loose. Plaintiff had rented the house from the defendants for three and a half years, and he knew that the handrail was loose. The defendants argued that the plaintiff encountered a known risk by using that entrance to his house. The court permitted the defendants to argue that the plaintiff's knowledge and use of the defective stairway should reduce his damages by his percentage of the total fault.

3. Assumption of Risk in Strict Tort Liability Cases

In a product liability case based upon strict product liability, a plaintiff assumes the risk of his own injury if he knows that a product is in a dangerous condition, yet proceeds to use it in

disregard of this known danger. Simpson v. General Motors Corp., 108 Ill. 2d 146 (1990). This determination is subjective. A jury decides whether a particular plaintiff has assumed the risk based upon his knowledge, understanding, and appreciation of the danger, and not the knowledge, understanding, or appreciation of the danger of the reasonably prudent person.

If a plaintiff merely fails to discover a defect in a product, or fails to guard against the possibility of the defect's existence, his recovery will not be reduced. Even if a plaintiff is unobservant, inattentive, ignorant, or awkward in failing to discover or guard against a defect, his damages will not be reduced. Simpson, 108 Ill. 2d at 152. The plaintiff's age, experience, knowledge and understanding, as well as the obviousness of the defect and the dangers it poses, can be considered when determining whether he has assumed the risk.

Even if a plaintiff denies that he was aware of the danger, he may have assumed the risk if all evidence in the case demonstrates the contrary. Plaintiff's damages were significantly reduced by his assumption of the risk in Erickson v. Muskin Corp., 180 Ill. App. 3d 117 (1st Dist. 1989) (overruled, in part, on other grounds). The plaintiff in that case dove into an above-ground swimming pool, striking his head on the bottom and fracturing his fifth cervical vertebra. He denied that he knew the depth of the water in this particular pool, yet he admitted that he had walked around in the water for at least an hour before the accident. He was 25 years old and worked as an air traffic controller. He was 6'5" and weighed over 200 pounds. He took swimming lessons at the age of six (6) and had been swimming for many years. He admitted that he had dived from both low and high diving boards, and he knew about the relationship between water depths and the angle of dives. He knew that he could get hurt if he were to dive into water that was too shallow. The court held that the jury was entitled to evaluate all of this evidence in concluding that the plaintiff assumed the risk of serious injury from a head-first dive into shallow water.

Likewise, in Calderon v. Echo, Inc., 244 Ill. App. 3d 1085 (1st Dist. 1993), the plaintiff sued the manufacturer of a lawn trimmer for injuries suffered when a flying object ejected by the trimmer struck him in the eye. He claimed that he had worked for a landscaping service for approximately one year, had never received any instructions to use safety glasses when operating the trimmer, and was not wearing safety glasses at the time of the accident. The court held that the jury was entitled to disregard the plaintiff's testimony when they heard from three of the plaintiff's co-workers that the plaintiff had used eye protection on many occasions before the date of the occurrence, and that he had been told to wear safety glasses. The jury was properly allowed to determine that he was 90% responsible for his own injuries.

It is important in this type of case for a defendant to show that the plaintiff's conduct amounted to more than negligence. Otherwise, the defendant will be precluded from asserting assumption of risk as a defense. There must be evidence that the plaintiff deliberately decided to encounter a known risk or was, for example, willing to take a chance. The defendant has the burden of proving that the plaintiff was actually aware of the defective nature of the product and appreciated its unreasonably dangerous character but voluntarily chose to disregard that known danger.

4. Summary

EXPRESS ASSUMPTION OF RISK

- * Explicit agreement between plaintiff and defendant that plaintiff cannot recover for injuries caused by either risks inherent to the activity or risks created by the defendant's own negligent conduct.
- * Acts as a complete bar to recovery.
- * Not favored by the courts as against public policy to shelter a defendant from his own negligent/culpable conduct.

- * If not decided as a matter of law, jury instructions must be drafted to be specifically tailored to the issues concerning the agreement at issue; no standard IPI's.

IMPLIED ASSUMPTION OF RISK

- * Implied from Plaintiff's conduct.

A. Primary Implied Assumption of Risk

- * Risk is inherent in the activity that plaintiff voluntarily encounters or agrees to engage in.
- * Defendant's negligence does not create the risk.
- * In Illinois, can occur either when plaintiff is defendant's employee or when plaintiff has entered into some other type of contractual relationship that involves being exposed to an activity with an inherent risk.
- * Acts as a complete bar to recovery
- * IPI Assumptions of Risk instructions apply.

B. Secondary Implied Assumption of Risk

- * Defendant's negligence created the risk but plaintiff, who knows and appreciates the risk, encounters it anyway.
- * May not be a complete bar to recovery; follows rules of comparative fault.
- * IPI Contributory Negligence instructions apply.



Querrey & Harrow, Ltd.
175 W. Jackson Blvd., Chicago, IL 60604
www.querrey.com

Illinois offices: *Chicago, Joliet, Waukegan*
Indiana offices: *Merrillville*