

# 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.

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## 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 Tiegua 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 Xinbao 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 Xinbao 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 be 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 wounding 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 can not 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. [14] 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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