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SWIMMER BREAKS NECK PRACTICING SHALLOW WATER RACING DIVE

James C. Kozlowski, J.D., Ph.D.

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Does a young competitive swimmer necessarily assume the risk of injury when performing a racing dive into shallow water? This was the issue before the appeals court in the *Collier* case described herein. In addressing the assumption of risk issue, the court distinguished between two types of assumption of risk (primary and implied) as a defense to negligence liability.

In primary assumption of risk, the provider of recreational opportunities owes no legal duty to protect individuals from inherent, unavoidable risks in an activity. Absent a legal duty of care, there can be no negligence liability. Under such circumstances, defendant should be entitled to a summary judgment. In layman's parlance, a summary judgment "throw's plaintiffs case out of court" without consideration by a jury.

By contrast, implied assumption of risk is a voluntary encounter with a known hazard which can be inferred from the surrounding circumstances. Under such circumstances, the provider of recreational opportunities may still owe a legal duty of reasonable care to the recreational user. Specifically, the provider may have to make the user aware of risks and their significance where such dangers are not inherent or obvious in the activity. In so doing, the individual is provided with the necessary information to look out reasonably for his own safety.

However, if an individual chooses to encounter a known and appreciated risk, such unreasonable conduct would establish the implied assumption of risk defense. In considering this defense, the jury must determine plaintiff's knowledge and appreciation of specific risks under the circumstances. In those jurisdictions which have adopted comparative negligence statutes, the jury will then "compare" or weigh plaintiff's own negligence against defendant's negligence to either reduce or preclude liability.

PRIMARY OR IMPLIED RISK

In the case of *Collier v. Northland Swim Club*, 35 Ohio App.3d 35, 518 N.E.2d 1226 (1987), plaintiff Christina Collier was injured July 19, 1983 while diving from the side of a pool operated by defendant Northland Swim Club. The facts of the case were as follows:

Collier was eleven and one-half years old at the time of the accident and was already an experienced swimmer. She began to swim when she was five or six and had been swimming at Northland's pool since she was eight or nine years of age.

Collier joined Northland's competitive swim team in June 1983. As part of her

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two-and-one-half to three hour practice sessions, Collier was required to practice her strokes, timing and diving. The diving was usually done from blocks erected at the side of the five-foot section of the pool. Collier made over one hundred dives during the summer of 1983. Although she had dived extensively the summer before, she was instructed only that she was to keep her hands in front of her when making a dive.

Northland's one written rule regarding diving was that divers were allowed anywhere in the deck area, except from the side of the pool in the area of the diving board. The deck area was roped off and included those areas deeper than two feet. Northland's unwritten rule was that dives had to be safe and into areas of the pool that were not crowded.

In preparation for a swim meet, Collier was practicing her dives on the night of the accident. She was diving from the side of the pool into an area that was three and one-half feet deep. The depth was clearly marked on the side of the pool and Collier was aware of the depth. The dives were accomplished under the observation of a volunteer swimming instructor for the team and in view of a lifeguard employed by Northland. On her last dive, Collier struck her head on the bottom of the pool and fractured her cervical vertebrae.

Collier alleged that Northland was negligent "in failing to warn of the risks associated with diving from the side of the pool" and "in failing to adequately supervise Collier in her diving."

Under the circumstances of this case, the trial court found that "Northland was relieved of any duty that may have been owed to Collier due to the doctrine of primary assumption of risk." Consequently, the trial court granted Northland's motion for summary judgment. In so doing, the trial court disposed of Collier's case without consideration of the facts by a jury. Summary judgment is appropriate where the agreed upon facts lead to only one legal conclusion, making jury consideration unnecessary. Collier appealed.

On appeal, Collier argued that "the trial court had erred in granting Northland's motion for summary judgment because assumption of risk is a question of fact for the jury." Specifically, Collier contended that "reasonable minds could come to different conclusions as to any negligence or knowledge of any risk allegedly assumed by Christina Collier due to her age." Where reasonable minds can differ regarding the significance of material facts governing liability in a case, the trial court should deny summary judgment and allow the case to proceed to the jury.

As defined by the appeals court "primary assumption of risk" involves an unavoidable, inherent risk in an activity.

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The effect of raising primary assumption of risk as a defense is to state, as a matter of law, that defendant owes no duty to plaintiff. Underlying this judicially created doctrine is the notion that certain risks are so inherent in some activities that they cannot be eliminated. The doctrine rests on the fiction that plaintiff has tacitly consented to the risk, thereby relieving defendant of any duty owed to him. The leading example of primary assumption of the risk is that class of cases involving spectators at baseball games. Since baseballs are batted with great swiftness and no precise accuracy, spectators who may be hit by errant fly balls assume that risk as a part of the sport.

In addition to the inherent risks in an activity, the appeals court found that assumption of risk can also be implied from the circumstances of a case. As defined by the court, implied assumption of risk involves a voluntary encounter with a known danger. However, for implied assumption of risk, the knowledge and acceptance of a particular risk are ordinarily a question of fact to be resolved by a jury, rather than summary judgment.

In contrast to primary assumption of risk is the concept of secondary, or implied, assumption of risk. Implied assumption of risk is defined as plaintiff's consent to or acquiescence in an appreciated, known or obvious risk to plaintiff's safety. This variety of assumption of risk includes those situations where the risk is so obvious that plaintiff must have known and appreciated the risk. Under this approach to assumption of risk, defendant owes to plaintiff some duty, but it is plaintiff's acquiescence in or appreciation of a known risk that acts as a defense to plaintiff's action. It follows then that this form of assumption of risk invokes factual questions that are generally to be resolved by a jury.

Applying these definitions to the facts of the case, the specific issue was whether Collier's injury was an inherent risk in diving or an obvious risk to be implied from the circumstances of this particular dive. As noted by the appeals court, the state supreme court had found that "the defense of assumption of risk as applied to diving accidents is one of implied, rather than primary assumption of risk."

There are chiefly two reasons which support the primary-implied distinction. First and foremost, is the rationale for primary assumption of risk. As noted above, some risks are so inherent in certain activities that the risk of injury is unavoidable. Clearly, there is a risk of injury while diving into a shallow pool. The risk, however, is not so inherent as to relieve pool operators from any duty whatsoever to all divers. A rule stating that a risk is inherent would imply that all divers know of and accept the risk, regardless of whether the dive is their first or fifty-first. We cannot believe that such a rule attends aquatic activities as it does baseball games. Rather, proper instruction, warnings and supervision on diving can, and do, minimize the risk.

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The second reason for the distinction between primary and implied assumption of risk is that when a plaintiff impliedly assumes a risk, it is a voluntary acknowledgment that the potential exists for injury. It is not a consent to suffer any injury. Viewed in this manner, implied assumption of risk more closely resembles contributor, negligence [i.e. plaintiff's negligent failure to look out reasonably for his own safety] than primary assumption of risk.

Applying these principles to the facts of the case, the appeals court found that implied assumption of risk was the appropriate defense.

Here, the record does not reveal that Collier had any knowledge of the potential risks associated with diving. Far from relieving Northland of any duty owed to Collier, the record merely suggests that Collier may have carelessly proceeded with her diving without actually agreeing to accept the risk. This conduct is not the equivalent of a spectator who knows he may be injured by an errant fly ball, but consents to the risk as part of the game. Accordingly, Collier's conduct here can be better evaluated by application of the standard negligence concepts upon which implied assumption of risk rests, rather than by resort to a "no duty owed" standard [i.e. primary assumption of risk].

In applying standard negligence concepts, the appeals court noted that state comparative negligence statute had effectively merged the implied assumption of risk defense with the defense of contributory negligence. In other words, a voluntary encounter with a known danger (i.e. implied assumption of risk) was simply a specific manner in which an injured party could fail to look out reasonably for his own safety (i.e. contributory negligence). In each instance, such unreasonable conduct on the part of the plaintiff which contributes to his injury would simply reduce, but not preclude, defendant's liability. However, if plaintiff's fault is found to be greater than defendant's, the comparative negligence statute would preclude liability.

As noted by the appeals court, the state comparative negligence statute required the trial court "to apportion relative degrees of fault between plaintiff and defendant in deciding the issue of negligence." According to the appeals court, this apportionment of fault "being necessarily a question of fact, is generally to be done by the jury in a jury trial." Since implied assumption of risk is ordinarily a question for the jury, the appeals court concluded that the trial court had erred by granting summary judgment to Northland under the circumstances of this case.

The appeals court also considered whether Collier "used the degree of caution required of a child of like age and intelligence under similar circumstances." As described by the appeals court, "a child is presumed able to appreciate the obvious risks incident to any sport or activity in which he or she is able to engage with intelligence and proficiency." In the opinion of the appeals court, this issue presented a

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"jury question" because reasonable minds could differ as to whether shallow diving presented an obvious risk to Collier given her age and the circumstances of this case.

Here, Collier claims she was just learning how to dive for competitive swimming. It can be inferred from this that she was not able to engage in the conduct with the requisite intelligence and proficiency which attend the capable performance of diving. Moreover, the fact that Northland allowed diving from the side of the pool into areas of more than two feet arguably suggests that diving in these areas is safe... Accordingly, whether Collier assumed the risks of diving into shallow water from the side of the pool, whether Collier's age and experience precluded her awareness or knowledge of the risks incidental to diving, and whether Northland was negligent in permitting diving from the deck area into three-and-one-half-foot-deep water are questions for the jury.

The appeals court, therefore, reversed the summary judgment for defendant Northland Swim Club and remanded (i.e. sent back) this case to the trial court "for further proceedings consistent with this opinion." On remand, the trial court would have a jury consider the issue of Northland's negligence, including the assumption of risk defense.