

## 13.00

### ASSUMPTION OF RISK

#### INTRODUCTION

Assumption of risk is one of the traditional defenses in a tort action based on negligence or willful and wanton misconduct. See W. Prosser & W. Keeton, *The Law of Torts* §68 (5th ed. 1984). In Illinois, it is also a damage-reducing factor in actions based on strict tort liability for defective products. In this state, these two branches of the doctrine are separate and distinct. Assumption of risk in strict product liability cases is governed by its own set of rules and the applicable instructions may be found in the product liability series (IPI 400.00); see IPI B400.03.

#### **Classification: Express and Implied**

There are two main categories of assumption of risk: express and implied.

#### **Express Assumption of Risk**

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

*Duffy v. Midlothian Country Club*, 135 Ill.App.3d 429, 433; 481 N.E.2d 1037, 1041; 90 Ill.Dec. 237, 241 (1st Dist.1985) (hereafter cited as "*Duffy II*"). This form of the defense is closely related to consent in the area of intentional torts, which is based on the theory that the plaintiff has agreed in advance to be exposed to the defendant's culpable conduct and to hold the defendant harmless for any injury that might result from that conduct. It is commonly found in written releases, waivers, or exculpatory clauses in lease agreements and other contracts between the parties. See, e.g., *Harris v. Walker*, 119 Ill.2d 542, 519 N.E.2d 917, 116 Ill.Dec. 702 (1988) (horseback rider).

Issues involving express assumption of the risk will usually be decided by the court as a matter of law. In those cases in which jury issues are presented--e.g., whether the release was procured by fraud or involuntarily, or under a mutual mistake of fact--the instructions to the jury will involve narrow fact issues and must be specifically tailored to the particular case. Therefore, this chapter does not include any instructions concerning express assumption of the risk.

#### **Implied Assumption of Risk**

Implied assumption of the risk is that which is unspoken but inferred from the plaintiff's conduct. It may also be subdivided into two categories: primary and secondary.

**Primary assumption of risk** is where "the risk of harm is not created by the defendant but is inherent in the activity which the plaintiff has agreed to undertake. The plaintiff is regarded as

tacitly or impliedly agreeing to take his own chances such as where he accepts employment knowing that he is expected to work with a dangerous horse.” *Clark v. Rogers*, 137 Ill.App.3d 591, 594; 484 N.E.2d 867, 869; 92 Ill.Dec. 136, 138 (4th Dist.1985). *Accord: Duffy II*, 135 Ill.App.3d at 433, 481 N.E.2d at 1041, 90 Ill.Dec. at 241. At one time the courts referred to these as the “ordinary risks” of the employment. *Burnett v. Caho*, 7 Ill.App.3d 266, 275; 285 N.E.2d 619, 626 (3d Dist.1972).

In this sense, primary assumption of risk is not really a defense to the defendant's negligence. Instead, it acts to negate liability on the ground that the defendant has no legal duty to protect the plaintiff from certain hazards. Therefore, like express assumption of risk, this form of the doctrine acts as a complete bar to recovery by the plaintiff. In Illinois, primary assumption of risk is recognized only in situations in which (1) the plaintiff is the defendant's employee or (2) there is some other contractual relationship between the parties under which the plaintiff's duties involve exposure to an inherent hazard. *Barrett v. Fritz*, 42 Ill.2d 529, 533-534, 248 N.E.2d 111, 115 (1969); *O'Rourke v. Sproul*, 241 Ill. 576, 89 N.E. 663 (1909); *Conrad v. Springfield Consol. Ry. Co.*, 240 Ill. 12, 88 N.E. 180 (1909); *B. Shoninger Co. v. Mann*, 219 Ill. 242, 76 N.E. 354 (1905); *Hensley v. Hensley*, 62 Ill.App.2d 252, 210 N.E.2d 568 (5th Dist.1965). It applies only to “ordinary” risks *not* created by the defendant's negligence. *See Burnett v. Caho*, 7 Ill.App.3d 266, 275; 285 N.E.2d 619, 626 (3d Dist.1972). (For convenience, we will refer to the defendant in these cases as the “employer.” This term is usually applicable in the contractual relationship cases, as well as in the employer-employee cases, because the plaintiff has been hired as an independent contractor to perform certain work for the defendant.)

***Secondary assumption of risk*** refers to the situation where the plaintiff is aware of and appreciates a danger that has been created by the defendant's negligence or other fault, but the plaintiff nevertheless voluntarily proceeds to encounter it. *Duffy II, supra*. Functionally, it is similar to contributory negligence; it is fault-based. *Id.*; *see Kionka, Implied Assumption of Risk: Does It Survive Comparative Fault?*, 1982 S.I.U.L.J. 371.

Prior to the adoption of comparative negligence in Illinois, risks created by the employer's negligence were referred to as “extraordinary risks.” *Burnett v. Caho*, 7 Ill.App.3d 266, 275; 285 N.E.2d 619, 626 (3d Dist.1972). There was some confusion in the case law as to whether an employee or contracting party could assume such risks and therefore whether this defense was available as to those risks. *Compare Stone v. Guthrie*, 14 Ill.App.2d 137, 148-150; 144 N.E.2d 165, 170 (3d Dist.1957), and *Burnett v. Caho*, 7 Ill.App.3d 266, 275; 285 N.E.2d 619, 626 (3d Dist.1972), with *Mack v. Davis*, 76 Ill.App.2d 88, 98; 221 N.E.2d 121, 126 (2d Dist.1966). As a practical matter, however, it made little difference, since the same conduct by the plaintiff was also contributory negligence, which (like assumption of risk) was also a complete bar to plaintiff's recovery.

After the adoption of comparative negligence in *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981), it became important to distinguish clearly between primary and secondary assumption of risk (or “ordinary” and “extraordinary” risks). *Duffy II, supra*. The distinction is that primary assumption of risk--which excuses an employer from any duty to the plaintiff with respect to certain risks--appears to remain a complete defense. *Id.* Secondary assumption of risk, however, is merely another form of plaintiff's negligence. With the adoption

of comparative negligence, to the extent that secondary assumption of risk has any vitality, it becomes merely another form of comparative (damage-reducing) fault. *Id.* Therefore, no separate instructions are necessary if the defense asserted is that the plaintiff voluntarily encountered defendant's negligently-created risk. The IPI instructions on contributory negligence, issues, burden of proof, damages, and forms of verdict can either be adapted or used as is, depending on whether the trial court rules that the term "assumption of risk" should be used or not. The instructions in this chapter should not be used in such cases. The instructions in this chapter are applicable only if there is a claim that the plaintiff assumed an inherent risk, not created by the defendant's fault, in an employment or contractual undertaking.

### **Primary Assumption of Risk**

Primary assumption of the risk is an affirmative defense. *Perschall v. Raney*, 137 Ill.App.3d 978, 985; 484 N.E.2d 1286, 1290; 92 Ill.Dec. 431, 435 (4th Dist.1985). The defendant has the burden of proof on each of four elements: (1) that the danger was not created by the defendant's negligence, but is normally incident to, or inherent in, the employment or contractual activity; (2) that the plaintiff voluntarily encountered the danger; (3) that the plaintiff was fully aware of, understood, and appreciated the danger; and (4) that the danger was the cause of the plaintiff's injury. *Stone v. Guthrie*, 14 Ill.App.2d 137, 148-150; 144 N.E.2d 165, 170 (3d Dist.1957); *Chaplin v. Geiser*, 79 Ill.App.3d 435, 398 N.E.2d 628, 631; 34 Ill.Dec. 805, 808 (2d Dist.1979).

***Inherent Danger.*** The law does not recognize the master's negligence as being an ordinary and usual risk incident to the employment. *Stone v. Guthrie*, 14 Ill.App.2d 137, 148; 144 N.E.2d 165, 170 (3d Dist.1957). Nor does an employee assume the risk of injury arising from the incompetence of a fellow servant. *Burnett v. Caho*, 7 Ill.App.3d 266, 275; 285 N.E.2d 619, 626 (3d Dist.1972).

***Voluntary Exposure.*** The doctrine is available only against a plaintiff who "voluntarily exposes himself to a 'specific, known risk.' Thus the doctrine ... is 'not a preclusion of recovery against a plaintiff whose occupation inherently involves general risks of injury.'" *Chaplin v. Geiser*, 79 Ill.App.3d 435, 398 N.E.2d 628, 631; 34 Ill.Dec. 805, 808 (2d Dist.1979), citing *Court v. Grzelinski*, 72 Ill.2d 141, 379 N.E.2d 281, 19 Ill.Dec. 617 (1978). Thus, the risks of falling after stepping on a dog's toy left lying on the floor was not a specific, known risk of a housekeeper's job. *Chaplin v. Geiser, supra*. But the doctrine was applied to a housekeeper who fell down a flight of stairs after tripping on a rug on the landing. In that case, the court said that the plaintiff knew of the danger from the rug and the risk involved in the use of the landing and stairs were normally incident to her employment. *Coselman v. Schleifer*, 97 Ill.App.2d 123, 239 N.E.2d 687 (2d Dist.1968).

Ordinarily, an employee who enters into an employment situation with knowledge of an inherent danger is presumed to have encountered that hazard voluntarily. *Chicago & E.I.R. Co. v. Heerey*, 203 Ill. 492, 495; 68 N.E. 74, 75 (1903). Mere economic duress does not vitiate the voluntariness. However, the voluntary character of the plaintiff's actions may be negated by a showing that the plaintiff "was induced by his employer to believe that a change would be made." *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417, 420 (1874).

**Subjective Knowledge and Appreciation of Danger.** The plaintiff must not only have actual knowledge of the danger, he must also *appreciate* the danger and the risks connected with it. *Fox v. Beall*, 314 Ill.App. 144, 147; 41 N.E.2d 126, 128 (2d Dist.1942). The test is a subjective one; not what plaintiff should have known, but what he *in fact* did know and appreciate. *Russo v. The Range, Inc.*, 76 Ill.App.3d 236, 238-239; 395 N.E.2d 10, 13-14; 32 Ill.Dec. 63, 66-67 (1st Dist.1979); *Maytnier v. Rush*, 80 Ill.App.2d 336, 349; 225 N.E.2d 83, 90 (1st Dist.1967). However, a plaintiff cannot elude application of the doctrine with “protestations of ignorance in the face of obvious danger.” *Russo v. The Range, Inc.*, 76 Ill.App.3d 236, 238-239; 395 N.E.2d 10, 13-14; 32 Ill.Dec. 63, 66-67 (1st Dist.1979). “A person of sufficient age and experience is chargeable with knowledge of the ordinary risks and hazards of his employment, and will be presumed to have notice of and to have assumed such risks which, to a person of his age and experience, are, or ought to be, obvious.” *Mack v. Davis*, 76 Ill.App.2d 88, 98; 221 N.E.2d 121, 126 (2d Dist.1966). Ordinarily, this is a fact issue for the jury unless the facts are so clear that reasonable persons could not differ as to whether the plaintiff appreciated the danger. *Fox v. Beall*, 314 Ill.App. 144, 147; 41 N.E.2d 126, 128 (2d Dist.1942); *Hinrichs v. Gummow*, 41 Ill.App.2d 428, 434-435; 190 N.E.2d 610, 612-613 (2d Dist.1963).

**Causation.** The defense is only applicable if the plaintiff's injury was caused by the danger the risk of which the plaintiff is claimed to have assumed. Therefore, it is important that the danger be clearly identified, since there may be other risks as to which the defense would not apply.

**Violation of Statute.** Assumption of risk cannot be used as a defense to a limited group of statutes that are intended to protect a certain class of persons from dangers against which they are deemed less able to protect themselves. In such cases, it is the policy of the law to impose upon the defendant a nondelegable duty to comply with the statute.

It is often proper to instruct the jury that assumption of the risk is not a defense to such claims, even though the defendant did not make assumption of the risk an issue in the case. *Gilmore v. Toledo, P. & W. R. Co.*, 64 Ill.App.2d 218, 212 N.E.2d 117, 120 (3d Dist.1965), *aff'd*, 36 Ill.2d 510, 224 N.E.2d 228 (1967) (F.E.L.A.); *Vandaveer v. Norfolk & W. Ry. Co.*, 78 Ill.App.2d 186, 222 N.E.2d 897 (5th Dist.1966) (same). Such an instruction should be given “when the issue of assumption of risk is expressly or implicitly before the jury, even though not explicitly raised at trial . . . . The issue of assumption of the risk is before the jury whenever there is any evidence from which it could be inferred that the employee had assumed the risk.” *Hamrock v. Consolidated Rail Corp.*, 151 Ill.App.3d 55, 501 N.E.2d 1274, 1279; 103 Ill.Dec. 736, 741 (1st Dist.1986).

For an example of such instructions, see IPI 160.09 (FELA).

### **Instructions on Primary Assumption of Risk**

In order for primary assumption of the risk to become an issue, the defendant must assert it as an affirmative defense. The risk must be an inherent danger associated with the employment or activity which is the subject of the contract between the parties, and it cannot be a risk created

by the defendant's negligence. Thus, when the plaintiff claims negligence in that the defendant (employer) negligently failed to protect him against an inherent risk, not created by the defendant's negligence, the defendant may invoke the assumption of risk defense. If, after presentation of the evidence, fact issues remain concerning this defense, then IPI 13.01 or 13.02 may be appropriate.

On the other hand, when the plaintiff alleges that the defendant (whether an employer or not) is negligent with respect to a risk created by the defendant's negligence, the proper defense is contributory/comparative fault. In that case, the instructions in this chapter do not apply.

### **13.01 Assumption of Risk--Contractual Relationship--Burden of Proof**

[As to Count \_\_\_\_,] The defendant has raised the affirmative defense that the plaintiff assumed the risk of injury from the danger which the plaintiff claims caused his injury. To prove this defense, the defendant has the burden of proving each of the following propositions:

First, that the defendant and the plaintiff had [an agreement] [a contract] under which the plaintiff was to participate in activities which exposed him to the danger that resulted in the injury of which he complains[,] [namely, describe danger].

Second, that the danger was one that ordinarily accompanies the activities contemplated in the [agreement] [contract].

Third, that the plaintiff had actual knowledge of this danger and understood and appreciated the nature and extent of the risk;

Fourth, that the plaintiff voluntarily subjected himself to this danger; and

Fifth, that this danger was the cause of the plaintiff's [alleged] [injuries] [damages].

If you decide that each of these propositions has been proved, then your verdict should be for the defendant [as to Count \_\_\_\_]. If, on the other hand, you decide that any of these propositions has not been proved, then the defendant has not proved the affirmative defense of assumption of the risk.

#### **Notes on Use**

This instruction may be used only when a defendant has affirmatively raised the issue of assumption of risk by his pleadings.

This instruction is proper only when the specific danger in question was inherent in the employment or activity and was *not* created by the defendant's negligence. *See* Introduction (IPI 13.00). If the danger allegedly was created by the defendant's negligence, then the contributory/comparative negligence instructions should be used.

If the plaintiff has other allegations of negligence (or other fault) besides the charge that the defendant failed to protect him against the danger which is the subject of this defense, then it will be necessary to include the bracketed phrase naming the particular danger of which the plaintiff allegedly assumed the risk, so that the jury does not use this defense against claims to which it does not apply. In such a case, this claim should be identified as a separate count to keep it distinct from such other claims.

Optionally, the bracketed phrase identifying the specific danger may also be used in any case, even one involving a single risk, to insure that the jury is focused on the *specific* danger in issue and not on *general* risks inherent in the activity. The doctrine does not apply to the latter. *Chaplin v. Geiser*, 79 Ill.App.3d 435, 398 N.E.2d 628, 631; 34 Ill.Dec. 805, 808 (2d Dist.1979).

If the court rules that one or more propositions are undisputed or are established as a matter of law, those propositions can be omitted from the instruction and the remaining paragraphs renumbered.

This instruction does not apply to the defense of assumption of the risk in strict product liability cases. See IPI Chapter 400.

**Comment**

*See* Introduction (IPI 13.00), *supra*, for a discussion of this defense.

### **13.02 Assumption of Risk--Employer-Employee Relationship--Burden of Proof**

[As to Count \_\_\_\_,] The defendant has raised the affirmative defense that the plaintiff assumed the risk of injury from the danger which the plaintiff claims caused his injury. To prove this defense, the defendant has the burden of proving each of the following propositions:

First, that at the time of the occurrence in question, the plaintiff was the defendant's employee;

Second, that performing the duties of his employment exposed the plaintiff to the danger that resulted in the injury of which he complains[,] [namely, describe danger];

Third, that the danger was one that ordinarily accompanies the employment;

Fourth, that the plaintiff had actual knowledge of this danger and understood and appreciated the nature and extent of the risk;

Fifth, that the plaintiff voluntarily subjected himself to this danger; and

Sixth, that this danger was the cause of the plaintiff's [alleged] [injuries] [damages].

If you decide that each of these propositions has been proved, then your verdict should be for the defendant [as to Count \_\_\_\_]. If, on the other hand, you decide that any of these propositions has not been proved, then the defendant has not proved the affirmative defense of assumption of the risk.

#### **Notes on Use**

This instruction may be used only when a defendant has affirmatively raised the issue of assumption of risk by his pleadings.

This instruction is proper only when the specific danger in question was inherent in the employment or activity and was *not* created by the defendant's negligence. *See* Introduction (IPI 13.00). If the danger allegedly was created by the defendant's negligence, then the contributory/comparative negligence instructions should be used.

If the plaintiff has other allegations of negligence (or other fault) besides the charge that the defendant failed to protect him against the danger which is the subject of this defense, then it will be necessary to include the bracketed phrase naming the particular danger of which the plaintiff allegedly assumed the risk, so that the jury does not use this defense against claims to which it does not apply. In such a case, this claim should be identified as a separate count to keep it distinct from such other claims.

Optionally, the bracketed phrase identifying the specific danger may also be used in any case, even one involving a single risk, to insure that the jury is focused on the *specific* danger in issue and not on *general* risks inherent in the activity. The doctrine does not apply to the latter. *Chaplin v. Geiser*, 79 Ill.App.3d 435, 398 N.E.2d 628, 631; 34 Ill.Dec. 805, 808 (2d Dist.1979).



If the court rules that one or more propositions are undisputed or are established as a matter of law, those propositions can be omitted from the instruction and the remaining paragraphs renumbered.

This instruction does not apply to the defense of assumption of the risk in strict product liability cases. See IPI Chapter 400.

**Comment**

*See* Introduction (IPI 13.00), *supra*, for a discussion of this defense.