Leisure, Sport, and Assumption of Risk

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If you are injured while on a club ride, have you assumed the risk of your injury? This is the question a New York appellate court addressed recently.

As Bob explained in Bicycling & the Law, "assumption of risk" is a legal doctrine holding that sports participants assume the inherent risks of their sport. This means that if an athlete is injured during a sporting event, and the injury results from an "inherent risk" of the sport, the athlete cannot sue for ordinary negligence (but note that injuries arising from reckless or intentional acts are not covered by the doctrine). The rationale behind the doctrine is one of public policy—by barring suits for injuries received from inherent risks of the sport, the policy seeks to enable "vigorous and active participation in athletic activities." By removing the threat of lawsuits arising from incidents involving only ordinary negligence, it is believed that athletes will feel free to participate vigorously in their sport, without fear of being sued if somebody is injured. So what is an "inherent risk"? It would be a risk that one would expect to encounter in a particular sport. Thus, as Bob has explained, getting tackled is an inherent risk of playing football, while colliding with another cyclist is an inherent risk of bicycle racing. Getting tackled would not be an inherent risk of bicycle racing, nor would colliding with a cyclist be an inherent risk of football.

Now, suppose you're not engaged in a sporting activity—have you assumed the risks of injury simply by getting on your bike and going for a ride? No. If that were the law, nobody could ever be held liable for their own negligence, because they would simply be able to claim that by getting out of bed that morning, you assumed the risk that you might be injured. The dividing line between where assumption of risk applies, and where it doesn't, was at issue before the New York court that heard the appeal of a cyclist who was injured while on a club ride.

In the summer of 2002, the Suffolk County Water Authority had a trench dug along the edge of Deerfield Road, in Southampton, Long Island, in order to install a conduit for a water main. On July 24, 2002, CAC Contracting Corp., the Water Authority's contractor, began filling in and paving the trench. The paving was planned to be completed in two stages; the contractor would fill in the trench, and pave over the trench with asphalt, followed by a second layer of asphalt to bring the paving level with the surface of the roadway. The first stage of paving was completed, leaving a one-inch lip between the pre-existing roadway and the new asphalt. There were no barricades or traffic cones marking the lip between the roadway and the new paving.

Three days later, on July 27, a bicycle club set out on a 72-mile ride, with a route that took them along Deerfield Road in Southampton. The riders were split into several groups of eight; the last rider in the last group was Karen

Cotty, an avid amateur athlete who is competitive in running, cycling, duathlon, and triathlon events. The paceline was traveling at about 18 miles per hour, and about one to two feet from the edge of the road. As the paceline approached the road work, the riders began to hop up the lip between the new paving and the roadway. Riding a wheel length ahead of Cotty was Peter Deutch; as Deutch attempted to hop the lip, he fell, and Cotty swerved to avoid him. Cotty herself fell, and slid across the roadway, where she collided with an oncoming car and was injured.

Seeking to recover damages for her injuries, Cotty filed suit against the Town of Southampton, the Suffolk County Water Authority, and CAC Contracting Corp.; Peter Deutch, the cyclist whose fall precipitated the crash, was brought into the lawsuit by the Suffolk County Water Authority. All of the defendants moved to dismiss the lawsuit, arguing that Cotty "had assumed the risks commonly associated with bicycle riding." The motions to dismiss were denied, and the defendants appealed.

After laying out the facts of the case, and the law regarding assumption of risk, the court turned to the question at hand: Had Cotty assumed the risks commonly associated with bicycle riding when she set out on the club ride that day? The court began by observing that

> In determining whether a bicycle rider has subjected himself or herself to the doctrine of primary assumption of risk, we must consider whether the rider is engaged in a sporting activity, such that his or her consent to the dangers inherent in the activity may reasonably be inferred. In our view, it is not sufficient for a defendant to show that the plaintiff was engaged in some form of leisure activity at the time of the accident. If such a showing were sufficient, the doctrine of primary assumption of risk could be applied to individuals who, for example, are out for a sightseeing drive in an automobile or on a motorcycle, or are jogging, walking, or inline roller skating for exercise, and would absolve municipalities, landowners, drivers, and other potential defendants of all liability for negligently creating risks that might be considered inherent in such leisure activities. Such a broad application of the doctrine of primary assumption of risk would be completely disconnected from the rationale for its existence. The doctrine is not designed to relieve a municipality of its duty to maintain its roadways in a safe condition…and such a result does not become justifiable merely because the roadway in question happens to be in use by a person operating a bicycle, as opposed to some other means of transportation…

The court then reviewed a number of cases in which the doctrine of assumption of liability had been applicable, and a number of cases in which the doctrine had not been applicable. Attempting to find some rationale by which some cyclists had were held to have assumed the risks, and other cyclists were not held to have assumed the risks, the court noted that

> These decisions recognize that riding a bicycle on a paved public

> roadway normally does not constitute a sporting activity for purposes of applying the primary assumption of risk doctrine. By contrast, mountain biking, and other forms of off-road bicycle riding, can more readily be classified as sporting activity. Indeed, the irregular surface of an unimproved dirt-bike path is "presumably the very challenge that attracts dirt-bike riders as opposed to riding on a paved surface"

"Of course," the court observed, "the distinction between using a bicycle to engage in a sporting activity and using a bicycle for some other purpose will sometimes be elusive." Nevertheless, the court determined that it was important to draw that line:

> In sum, it cannot be said, as a matter of law, that merely by choosing to operate a bicycle on a paved public roadway, or by engaging in some other form of leisure activity or exercise such as walking, jogging, or roller skating on a paved public roadway, a plaintiff consents to the negligent maintenance of such roadways by a municipality or a contractor. Adopting such a rule could have the arbitrary effect of eliminating all duties owed to participants in such leisure or exercise activities, not only by defendants responsible for road maintenance, but by operators of motor vehicles and other potential tortfeasors, as long as the danger created by the defendant can be deemed inherent in such activities. We decline to construe the doctrine of primary assumption of risk so expansively.

The court then held that the defendants had failed to show that assumption of risk is applicable to the activity in which Cotty had been engaged, and had also failed to establish "as a matter of law that the unbarricaded lip created by the road construction was not a 'unique and . . . dangerous condition over and above the usual dangers that are inherent'…in the activity of bicycle riding on a paved roadway."

With that holding, Cotty's suit can now proceed to trial, where a jury will decide the merits of her case…unless the appellate decision is appealed. Attorney Jonathan Dachs, representing the Water Authority and CAC Contracting, said he will recommend that the Water Authority seek leave to appeal the decision to New York's highest court,noting that the appellate decision "has not defined what constitutes a sporting event that would trigger assumption of risk."

Thus, it remains to be seen if this is the final word on whether Cotty assumed the risk of her injuries. For now, at least, the law in New York is the very sensible rule that people who are participating in a sport have assumed the risks inherent to their sport, while people who are partaking of recreation have not assumed the risks of sport.