ISSN: 2637-6067 DOI: 10.6918/IJOSSER.202504_8(4).0044

Research on Application of the Assumption of Risk Rule in China's Civil Code

Litian Hu

School of Law, Anhui University of Finance and Economics, Bengbu, China

Abstract

The Civil Code of China has added the voluntary risk rule in the tort liability section, making it a legal exemption in the field of tort liability law in China. This rule provides a new remedy for infringement relationships arising from risk events that people participate in on a daily basis. However, as a new provision, the voluntary risk rule still has shortcomings such as unclear scope of application and unclear determination of "intentional or gross negligence" in the requirements. Therefore, it is necessary to clarify the scope of cultural and sports activities in legislation, introduce sports rules in judicial decisions to distinguish between general and major negligence, coordinate the application of exemption reasons such as self risk and negligence offset, and fair liability.

Keywords

Assumption of risk, Tort liability, China's Civil Code, Litigation Cases.

1. Tracing the Source of Assumption of Risk Rules

1.1. The development history of the assumption of risk theory

The concept of assumption of Risk first appeared in the principle of "volunti non fit injury" in Roman law, which originally meant that if a person voluntarily participates in risky activities, any resulting harm should be borne by themselves. The extensive use of the assumption of risk rule should turn our attention to 18th century England, where there were numerous cases of workers being injured by large machinery in factories. In order to avoid their liability for compensation, factory owners often used assumption of risk as a defense. The reason for this is that workers should recognize the risk of personal injury caused by working in factories with heavy machinery, and participating in work means voluntarily assuming the possible damage consequences of this risk. According to the assumption of risk rule, workers should bear the damage consequences themselves. In order to accelerate the promotion of the production form of large factories, the assumption of risk rule was widely cited by British courts during this period.

In the 19th century, some precedents in the United States also began to apply the assumption of risk rule, and were no longer limited to work-related injury cases, but formally applied the assumption of risk rule as an exemption in judicial practice. However, in the late 19th and early 20th centuries, the comparative negligence system gradually emerged. This system proposes to reduce the compensation liability of the perpetrator in cases where the victim is also at fault for the occurrence and expansion of the damage. Compared to the voluntary risk rule, the practice of judges sharing responsibility based on their authority rather than completely exempting the perpetrator from compensation liability is more easily accepted by the public. In addition, at this time, the British court reinterpreted the voluntary risk rule applied in a large number of work-related injury cases, believing that a large number of workers had to bear the risk of entering the factory to engage in dangerous occupations in order to maintain their livelihoods. The voluntary risk rule applied at this time violates the fairness concept expected

ISSN: 2637-6067 DOI: 10.6918/IJOSSER.202504_8(4).0044

by the law. Taking into account various reasons, the development of the voluntary risk theory has entered a low point.

In modern society, many cultural and sports activities, especially in competitive sports, pose risks and infringe upon the rights of participants. At the same time, those who participate in competitive sports often voluntarily engage in risky activities, and the specific infringement behavior is difficult to restore, and the proportion of damage sharing is also difficult to determine. In this case, adopting the principle of offsetting negligence to analyze the infringement process and confirm the proportion of damages often makes other participants in competitive sports events bear personal injury compensation liability or other compensation liability, which is not conducive to the development of competitive sports over time and deviates from the trend of a risk society. At this point, the rule of self acceptance of risk reveals its unique advantages. Under the premise that the actor is fully aware of the risk of the behavior, they participate in specific civil activities and bear the risk themselves, which combines efficiency and fairness in the relief of such cases under the tort liability law.

1.2. The assumption of risk rule under the framework of China's Civil Code

In 2002, there was a proposal in the academic community in China to incorporate the assumption of risk rule into the civil law legal system. The most representative one is Professor Yang Lixin's proposed draft of the Tort Liability Law, which proposes the "voluntary assumption of damages and consequences rule". However, the Tort Liability Law promulgated in 2009 did not have relevant provisions on assuming risks. Until December 2018, the Civil Code Tort Liability Part (Draft) reviewed by the Constitution and Law Committee of the National People's Congress first appeared the rule of "self imposed risk". Then, the Civil Code Tort Liability Part (Draft) reviewed and published in August 2019 narrowed the scope of application of the rule of self imposed risk to "certain risk cultural and sports activities", and added the question whether event organizers should apply the rule of self imposed risk when organizing cultural and sports activities. The final adoption of Article 1176 of the Civil Code in May 2020 shows no difference from the content of the third review. The assumption of risk rule has been officially included as an exemption reason applicable to cultural and sports activities in the Civil Code.

Before the introduction of the assumption of risk rule into China's Civil Code, in judicial practice, rules such as victim consent, fault offsetting, and fair liability were generally invoked to address infringement issues arising from cultural and sports risk activities. After the introduction of the assumption of risk rule, it provides a more detailed remedy for resolving infringement liability in the cultural and sports field. However, in specific application, these rules may be confused with the assumption of risk rule. The principle of offsetting negligence refers to the fact that if the victim is also at fault for the occurrence or expansion of the damage, and the causes and facts of the damage are mixed, then the principle of offsetting negligence can be applied to reduce the liability of the perpetrator. The Civil Code of our country stipulates the rule of offsetting negligence in Article 1173.

Although the rule of offsetting negligence is also a rule for balancing liability in special cases of infringement, compared to assuming risk and the victim's consent mentioned above, the rule of offsetting negligence is not an exemption, but a tort damage compensation rule used by judges ex officio in the field of liability sharing. There are also many differences between offsetting negligence and assuming risk in terms of constituent conditions. Firstly, the composition of fault offsetting requires the victim to be at fault. If the victim only has causal force for the occurrence of the damage result in their behavior, but does not have intentional or negligent behavior subjectively, it does not constitute fault offsetting. In the case where the assumption of risk meets the requirements, the actor is generally not at fault because they have a clear understanding of the risk. In addition, in the process of offsetting negligence, the victim does

ISSN: 2637-6067 DOI: 10.6918/IJOSSER.202504_8(4).0044

not require a clear understanding of the risk. For example, if a person intrudes into a dangerous area such as a construction site and is injured by machinery or falling objects on the construction site, even if the victim intentionally enters the area, they cannot be required to recognize the risks of trespassing into the dangerous area and apply the voluntary risk rule.

Before the introduction of the assumption of risk rule in China, fair liability was often applied in judicial practice to address infringement issues in the cultural and sports field. Article 1186 of the Civil Code of China stipulates that "if neither the victim nor the perpetrator is at fault in the occurrence of the damage, the losses shall be shared by both parties in accordance with the provisions of the law." This principle is generally referred to as the principle of fair liability, which provides judges with greater discretion in the allocation of responsibilities. The principle of fairness provides a method of sharing responsibility that is not limited to elements effects, in situations where the perpetrator is not at fault or lacks the ability to identify, or where there are flaws in the causal relationship, reflecting the protection of the weaker party [1]. Therefore, before the assumption of risk rule was clarified, fair responsibility was extensively applied to personal injury cases arising from sports activities. Especially in cases of infringement disputes arising from sports activities where it is difficult to determine whether the perpetrator is at fault in general or gross, judges often use fair responsibility to evenly distribute the liability for damages, or disregard the duty of care that the perpetrator has already fulfilled and assign the majority of the liability for damages.

The abuse of fair responsibility that occurred in practice before the establishment of the voluntary risk rule not only easily leads judges to develop preconceived and biased thinking habits towards the weak and victims, but also hinders the promotion of sports activities and the cultivation of people's risk awareness. Participants in sports may become overly nervous and distrustful of other participants during the process of participating in sports, as they cannot be exempted from responsibility even after fulfilling their duty of care. They may also find it difficult to develop awareness of cognitive risks and risk taking.

2. The Problems of the Assumption of Risk Rule under the Civil Code of China

2.1. The specific scope of "cultural and sports activities" is unclear

Firstly, compared to the second review, the Civil Code has narrowed the scope of application of voluntary risk from "dangerous activities" to "cultural and sports activities with certain risks". Among them, there are relatively few types of artistic activities that meet certain risks, such as ordinary dance, drama, and singing performances, which generally do not have risks. The artistic activities that meet this definition are acrobatics, which includes acrobatics such as tightrope walking and lion dance. Whether during training or performance, there will be a certain risk of falling or injury. There are many risky projects in sports activities, which are also the most researched fields by scholars. Typical application scenarios include football, basketball, and combat sports that involve physical confrontation during exercise. However, in judicial practice, there are also cases that appear to be risk-free but actually cause personal injury to participants. For example, when play badminton is played, the badminton accidentally hits the eyes, when skiing, skiers collide, and when participating in the marathon cross-country competition, temperature loss occurs. Different scholars have different views on whether the tort liability that occurs in these sports without physical confrontation of participants can be applied to the voluntary risk rule. Cao Quanzhi believes that sports that participants do not directly engage in physical contact, such as badminton, baseball, and even kicking shuttlecock, can also be regarded as sports activities with certain risks. Similarly, informal sports activities such as shooting exercises between two people, or recreational cultural activities such as outdoor reality shows, with the possibility of causing injury, can also be considered within the

ISSN: 2637-6067 DOI: 10.6918/IJOSSER.202504_8(4).0044

scope of application. But illegal sports activities, such as underground boxing and illegal racing on public roads, cannot be subject to the voluntary risk rule [2]. Professor Zhao Feng believes that some low-intensity sports activities, such as golf and bowling, do not have confrontation, competition, conflict and other factors, so the risk adjustment rules in such sports do not conform to the risk category described in the self imposed risk rules. He also gave an example of a sailing competition: during the sailing competition, if the participating ships collide with each other and cause the death of the contestant, such cases should exclude the application of voluntary risk, because participating in general sailing competitions does not pose a risk to life [3]. Huang Lu, on the other hand, cited the concept of "inherent risk" in English and American case law, believing that the scope of risk should be comprehensively judged based on the participants' understanding and level of competition. For example, in amateur basketball games, sports participants generally only foresee general sprains and abrasions, while for more serious and uncommon consequences such as sudden death and comminuted fractures, they should comprehensively consider the sports scenario, the injured person's own health condition, and their cognitive level to determine whether they belong to the "category of certain risks". The combination of sports form and damage consequences should be considered to avoid rigid applicability [4].

In practice, besides the sailing competition case mentioned above, there are many cases related to cultural and sports activities where the court's judgments apply to voluntary risks and involve sports disputes. For example, in the case of Tongdu Elementary School's playful play, both the plaintiff and defendant were fourth grade students at the school. During break time, when the plaintiff was running in the hallway, the defendant extended their foot from the side, causing the plaintiff to trip and resulting in the plaintiff's front teeth breaking. Diagnosed with crown fracture by Huangshi City Hospital. The accepting court believes that the behavior between the plaintiff and the defendant belongs to playful activities during break time, and is not a certain risk cultural and sports activity as referred to in the Civil Code, and therefore cannot be subject to the assumption of risk rule. The court also believes that minors are naturally lively and active, and the law does not explicitly prohibit minors from chasing and playing. Therefore, the play between classmates should not be criticized [5].

2.2. Unclear definition of the elements of "intent or gross negligence"

In Article 1176 of the Civil Code, the clause of the assumption of risk rule states: "However, except where other participants have intentional or gross negligence in causing harm." Intention refers to intentional infringement of the right to health of others, while gross negligence refers to failure to fulfill basic duty of care. The difficulty in practice lies in how to determine whether the perpetrator's behavior is intentional, gross negligence, or general negligence. Due to the diversity of cultural and sports activities, different sports require varying degrees of physical confrontation and different scales of movement amplitude. The actions that cause injury to the victim often occur in an instant, even on the professional basketball court where there are professional referees and precise video replays, controversial decisions regarding the athlete's actions often occur. In practice, most cases occur on amateur sports fields, and it is difficult to reconstruct the process of infringement and determine the nature of the behavior and share responsibility without even surveillance footage.

In response to this issue, the intentional form generally needs to comprehensively consider the relationship between the victim and the perpetrator, whether there was any conflict before the infringement occurred, the perpetrator's civil capacity, the specific extent of the infringement action, etc., and consider the possibility of the perpetrator using sports activities to harm others. The determination of whether the perpetrator has gross negligence or only general negligence generally adopts the standard of duty of care, that is, to judge whether the action is within the reasonable scope of duty of care and within the limits allowed by the competition.

ISSN: 2637-6067 DOI: 10.6918/IJOSSER.202504_8(4).0044

The "Zhao Xi and Wang Wenkai Health Right Dispute Case" is a typical example of judges determining general or gross negligence based on general duty of care and situational reconstruction. The plaintiff and defendant are teammates in badminton doubles. When the defendant was vigorously dunking the ball, the plaintiff happened to turn around to check the condition of the ball. The defendant's racket hit the plaintiff's glasses, causing them to rupture. The lens fragments entered the eye, causing conjunctival laceration and corneal damage in the left eye. The judgment states in the argument section: Firstly, the plaintiff and the defendant did not know each other before participating in the badminton doubles competition, and had no grudges or grievances; The plaintiff and defendant also formed a temporary team to participate in doubles. Therefore, it can be concluded that the defendant has no subjective motive to harm the plaintiff. Secondly, 'gross negligence' refers to the failure of the perpetrator to fulfill the basic duty of care of an ordinary person. In this case, the defendant used a draw and hit attack in the backcourt without considering or judging the time in an instant. Moreover, the defendant is not a professional athlete and does not have the ability to accurately control the landing point of the shuttlecock. There is also no obvious violation of the game rules. In addition, the plaintiff turned around in front of the net to check the condition of the ball, which resulted in the glasses they were wearing being shattered by the shuttlecock and causing eye injuries; And after the plaintiff was injured, the defendant promptly sent the plaintiff to the hospital for treatment. Therefore, the defendant's behavior, which fulfilled the ordinary duty of care in the involved accident, cannot be considered as gross negligence [6].

In contrast, in the case of Zhang Jinghan and Beijing Wanlong Bayi Sports Co., Ltd.'s dispute over the right to life, body, and health, the second instance court determined during the trial that the skiing collision was the perpetrator's gross negligence. The reason was that "according to the accident video, Bai Qing (the plaintiff) was sliding ahead at a slower speed, and Zhang Jinghan (the defendant) did not reasonably choose a safe sliding route when starting from the ski slope. When overtaking Bai Qing at a faster speed, he did not maintain a sufficient safe distance, resulting in a collision accident and causing Bai Qing to fall to the ground and be injured, which constitutes gross negligence [7].

2.3. Incorrect application of the assumption of risk rule in non literary and sports infringement relationships

The assumption of risk rule has been in effect for more than a year, but there are still problems of abuse of assumption of risk in areas outside of literary and sports, as well as the mixing of assumption of risk rules with other responsibility allocation rules (such as fault offsetting and fair liability). The screening criteria of the China Judgments Online were set to the judgment date of January 1, 2021 to March 1, 2022. The full text search for "assumption of risk" was conducted to exclude the possibility of erroneous application of assumption of risk by the parties, and only the court's application of assumption of risk rules was retained. Therefore, only judgments with the term "assumption of risk" appearing in the reasons section of the judgment were presented. A total of 273 documents were searched. From the number of cases, it can be seen that the assumption of risk rule has been correctly applied in a considerable number of personality rights disputes and infringement liability disputes. However, there are still cases of incorrect application of the assumption of risk rule in contract disputes, property disputes, and even criminal cases.

These erroneous applications can be divided into two categories. Firstly, they are used in non infringing relationships such as contracts and property rights. Using the original text, such as "... continuing to buy Kangmei Pharmaceutical stocks after that, constitutes an investment behavior that knowingly assumes risks despite Kangmei Pharmaceutical's disclosure of false information [8]. "The act of planting after government assessment belongs to voluntary risk behavior [9]." These risk situations are common in modern society, and their risk consequences

ISSN: 2637-6067 DOI: 10.6918/IJOSSER.202504_8(4).0044

are generally property damage, which is different from the damage that may be caused in the context of voluntary risk. Secondly, the applicable case is a liability dispute for infringement, but it is not an infringement that occurs in the field of culture and sports. Some sports activities also do not have "other participants", and the original text is incorrectly applied, such as "... falling into a pit on a closed road while riding a bike is a voluntary risk [10]."

The misuse of the term "assumption of risk" in practice illustrates that the concept of "assumption of risk" in China's past legal discourse system was a relatively broad one, while the "assumption of risk" stipulated in the Civil Code is a very specific and limited legal rule. Chief Justice Frankfurter of the United States Supreme Court once said, "The term 'self assumed risk' is a good example of how its misuse in practical use demonstrates the extent to which the careless use of proprietary terminology in the law can cause disorder in the legal system. It was initially a literary expression, but due to its refined wording, people repeatedly used it. This repeated use soon became a universal legal norm, used arbitrarily to express various opinions, sometimes even completely opposite ones." If the usage of the concept is not carefully examined, it is likely to be seen as mitigating or exempting the perpetrator's responsibility, causing problems in the judgment.

2.4. The mixing of the assumption of risk rule with other exemption reasons in judicial practice

Assumption of risk is a defense to exempt the tortfeasor from liability for compensation, therefore this rule cannot be arbitrarily used in conjunction with other rules that reduce the tortfeasor's liability for compensation, otherwise there will be a contradiction between the applicable rules and the actual effect. For example, in the case of Quan and Li 's right to health and life, which was ruled in February 2022, Quan and Li were playing badminton doubles together. When Quan received the opponent's serve, he did not receive it. When Li approached to receive it, he did not use his racket carefully and hit Quan, causing both of his upper front teeth to break. In the court judgment, it was stated that "given that both parties voluntarily participated in this badminton activity, according to the principle of assumption of risk, it is appropriate for Li to compensate Quan for a total loss of 3840 yuan at a rate of 30% [11]." The court's judgment followed the assumption of risk rule, but did not exempt the perpetrator from compensation liability. Instead, it "at its discretion" ordered Li to compensate for 30% of their loss, causing a conflict and confusion between the applicable rules and the final effect.

3. Comparison of Out of Territory Rules for Self Acceptance Risk

3.1. Classification of Assumption of risk Rules in the United States

In the United States, assumption of risk is traditionally classified into three types under customary law: explicit assumption of risk, primary implied assumption of risk, and secondary implied assumption of risk. The explicit assumption of risk refers to the effectiveness of the exclusion clause of the obligations assumed by the victim in the form of a contract, but it should be noted that this contract must comply with legal provisions and abide by public order and good customs. If the victim does not express themselves clearly but participates in dangerous behavior through actual actions, it is the main implied self acceptance risk. The initial implied assumption of risk was a primary type of implied assumption of risk, while the later developed new type was secondary implied assumption of risk [12]. According to the previous division, the commonality between the implied self assumed risk of "primary" and "secondary" is that the victim knows their own danger and assumes the risk in a default commitment. The difference between the two is that the perpetrator has a duty to protect the victim. In the primary implied self assumed risk, the perpetrator does not have a duty of care or has not violated the duty of care. In the context of secondary implied assumption of risk, the perpetrator

ISSN: 2637-6067 DOI: 10.6918/IJOSSER.202504_8(4).0044

did not fulfill their duty of care well, but the victim was still willing to bear the risk, thus exempting the perpetrator from the duty of care. Among them, secondary implied assumption of risk can be divided into reasonable and unreasonable. Reasonable secondary assumption of risk refers to the victim having a clear understanding of the risk, while unreasonable secondary assumption of risk is the opposite, with a wrong understanding of the risk.

The United States adopts this classification mainly to clarify the boundary between assumption of risk and comparative negligence. The concept of assumption of risk emerged in the United States with the contradiction between the master servant and labor relations. When workers are injured at work, employers often use this to exempt themselves from compensation liability. In the 20th century, the theory of comparative negligence emerged in the United States, and there was a trend in academia to fully replace assumption of risk with comparative negligence. Previously, the widespread use of assumption of risk rules resulted in a large number of vulnerable groups bearing the consequences of risk, and comparative negligence was considered a more equitable way of sharing responsibility. Some state courts have begun to fully replace assumption of risk with comparative negligence, but soon found that in some modern social activities with risk elements, not exempting other participants from liability is not conducive to the development of these social activities. Therefore, most state courts now adopt this classification method and retain assumption of risk as an independent defense.

3.2. The Development History of Germany's Self Acceptance Risk Rules

As a representative country of the civil law system, Germany did not initially have a theory of voluntary risk, but it was inevitably involved in the handling of sports injury incidents. This theory first became a similar customary law in German civil law, and then developed into a principle of civil liability through practice. Initially, the German Imperial Court understood assumption of risk behavior based on the victim's commitment, that is, assumption of risk as a reason for illegal obstruction, and when the victim engages in assumption of risk behavior, the perpetrator is not responsible for compensation. Subsequently, in its 1961 judgment, the Federal Supreme Court of Germany made significant adjustments to the theory of assumption of risk, stating that the previous rule of using assumption of risk as a ground for preventing illegal activities from exempting liability should be abandoned, and assumption of risk should be analogized and applied to Article 254 of the German Civil Code, to be understood under the concept of fault. Since then, German scholars have classified assumption of risk into "true assumption of risk behavior" as a deterrent to illegal acts, and "non true assumption of risk behavior" with negligence. The evolution of this change and classification process is very similar to the US court's classification of implied assumption of risk as "primary implied assumption of risk" and "secondary implied assumption of risk".

Although the German Federal Supreme Court has combined the concept of assumption of risk by victims with the concept of fault since 1961, in its 1974 judgment on football injury incidents, it held that the perpetrator is not liable for damages resulting from the assumption of risk by the victim, such as damages caused by dangers commonly found in sports competitions. The Supreme Court of the United States has held that in accidents involving injuries caused by high-risk intense sports, if a participant abides by the rules of the competition or only slightly violates the rules, then one of the participants in such a competition may be injured. If the participant does not have a clear violation of the rules of the competition, then the victim's self risk is the excuse for the perpetrator to be exempt from liability [13]. Although other participants in low-risk competition activities are also exempt from liability, the reason for their exemption is based on the fact that the participant is willing to participate according to their own wishes, and it should be assumed that they are willing to bear the risk of inevitable harm that may be incurred due to normal competition. If the victim requests compensation later, the behavior before and after is contradictory, and therefore loses their right to defense. In this case, the legal

ISSN: 2637-6067 DOI: 10.6918/IJOSSER.202504_8(4).0044

principle of victim consent does not apply, nor does the theory of voluntary risk apply [14]. From the above, it can be seen that the German Federal Court does not entirely adopt the concept of "truly self assumed risk behavior" to prevent illegal reasons in sports injury liability, nor does it fully cover the application of "non truly self assumed risk behavior" with fault.

3.3. Rules related to infringement in the cultural and sports field in Taiwan, China

There is no clear rule in Taiwan's written law regarding self acceptance of risk. In sports infringement cases, Wang Zejian believes that "in baseball, when a ball is thrown into the opponent's arm, it is illegal to obstruct it because of their prior consent; if the audience is injured by a flying ball, it is also illegal to obstruct it because of their prior consent; but when a flying ball hits a pedestrian outside the field, they must admit to violating the rules, and whether there is negligence will be determined based on the safety measures of the field." This means that the defense is based on the victim's commitment rather than self acceptance of risk. In practice, courts in Taiwan generally adopt this statement. For example, in a case where a participant in basketball accidentally suffered a splenic rupture due to impact, the Banqiao District Court in Taiwan wrote in its judgment: "Participating in a competition for the purpose of sports competition itself carries a certain degree of danger. Participants in the competition should be able to foresee the certain dangers that may arise under normal competition activities and still be willing to participate in the competition activities. Even if there is no explicit promise, it can be regarded as implying that others are willing to endure the damage usually caused by sports or games without violating the rules of the sport or game. This is the victim's prior promise, which can prevent illegal activities.

Some scholars also advocate introducing assumption of risk as an independent defense, such as Professor Huang Li's belief that assumption of risk can have legal effects such as preventing illegality, exempting liability, and reducing damages [15]. Professor Zeng Shixiong believes that assumption of risk can serve as an exemption requirement for infringement [16]. Some scholars also advocate referring to American law, believing that if the injury caused by the victim belongs to the damage caused by inherent risks in sports activities, it can be considered that the victim has implied a commitment and is willing to bear the inherent risks of the activity on their own, thereby preventing the illegality of the defendant's behavior.

4. Suggestions for the Improvement of The Assumption of Risk Rule in China's Civil Code

4.1. Clarify the scope of cultural and sports activities

The Civil Code stipulates the principle of assumption of risk and limits its application to cultural and sports activities, which actually reflects the cautious use of exemption defenses. However, there is no other interpretation of the "cultural and sports activities" that limit its application, and there is controversy in the theoretical and practical circles regarding this issue. We need to explain the concept of "cultural and sports activities" in order to effectively define its scope of application. To address this issue, guidance cases on self acceptance risk cases can be released, especially for non direct physical contact sports such as badminton and table tennis, as well as detailed regulations on whether event organizers will apply to other participants such as cross-country and marathon who will not exert influence during the competition.

Through guiding cases, on the one hand, the court can infer and determine whether a difficult to understand and define risky behavior falls within the scope of activities covered by the voluntary risk rule based on similar cases in previous judicial practice. On the other hand, it enables judges to fully exercise their discretion in the trial of cases without infinitely expanding the legal application scope of the voluntary risk rule. Therefore, standardizing practical

ISSN: 2637-6067 DOI: 10.6918/IJOSSER.202504_8(4).0044

operations through guiding cases issued by the Supreme Court is a positive way. Guiding cases can promote the concretization of legislative regulation through practice, fill the gaps in current legal rules, ensure the correct application of laws in similar cases, provide reference templates and judicial experience for interpreting and reasoning, safeguard judicial fairness, and reduce the occurrence of different judgments in the same case.

4.2. Introducing sports rules in judicial practice to distinguish between general and gross negligence

When distinguishing between "intentional or gross negligence" in the voluntary risk rule, in addition to using general duty of care to judge, it can be seen that the concept of "foul" is widely present in various sports. Therefore, combining the rules of the sport itself to determine general and gross negligence also provides an important idea. The rules corresponding to a wide variety of sports provide strong support for judicial rulings. It is worth noting that fouls in sports rules are generally divided into technical and tactical fouls and malicious fouls. Taking basketball as an example, technical and tactical fouls include hitter fouls caused by negligence, cover fouls, and tactical fouls for tactical purposes such as transferring possession and delaying time. This type of foul action usually has a relatively small amplitude and a relatively gentle force, within a reasonable duty of care and within the limits allowed by the game. Malicious fouls, which are referred to as violations of sportsmanship in basketball rules, are defined in the FIBA Rules Manual as players who do not make an effort to grab the ball and make contact, such as pushing, hitting, or causing excessive contact while attempting to grab the ball, which are considered physical fouls. In layman's terms, it refers to a malicious foul in football as a "direct free kick foul", which includes actions such as kicking or attempting to kick an opposing player, tripping or attempting to trip an opposing player. Such malicious foul actions, or non malicious use of uncontrollable large movements, will be subject to severe punishments such as warnings or even bans during the game, and are also very likely to cause injury to the opposing player. Therefore, if such foul actions occur in infringement cases in the field of cultural and sports activities, the court can use rules to prove that the perpetrator's behavior is intentional or grossly negligent, thereby excluding the application of the voluntary risk rule.

In fact, in recent years, some courts have cited sports rules in their judgments and achieved good results. For example, in the case of the ship collision damage liability dispute between Nanshan Civil Defense Engineering Protection Equipment Co., Ltd. and Yuehexing Laser Knife Model (Shenzhen) Co., Ltd. in Shenzhen, during the 10th China Cup Sailing Competition, the yacht "White Shark" collided with the yacht "China Cup 24", causing damage to both parties' ships. Regarding the issue of whether the accident involving the "White Shark" yacht was intentional or caused by gross negligence. The court cited Article 14 of the International Sailing Federation's Rules for Sailing Competitions 2013-2016 (RRS), which states: "If reasonably possible, a ship should avoid contact with another ship, but a ship with navigation rights, a ship with space or circumnavigation space may not need to take avoidance actions until it is clear that the other ship is not avoiding or giving space or circumnavigation space, and if the contact does not cause damage or injury, the violator of this rule can be exempted from punishment." Therefore, it was determined that the restrictions on the avoided ship in the competition were reasonably possible, and the "Jaws" yacht did not have intentional or gross negligence [17].

It should be noted that sometimes a participant's behavior constitutes a foul, which does not necessarily mean that the participant has intentional or gross negligence subjectively. Specific analysis is needed based on the specific situation, and the subjective psychological state of the participant when committing a foul in sports cannot be simply equated with intentional or gross negligence as a subjective element in the general elements of infringement. Intention refers to a subjective psychological state in which the perpetrator knowingly acts with the intention of infringing upon the civil rights and interests of others. Gross negligence is the most

ISSN: 2637-6067 DOI: 10.6918/IJOSSER.202504_8(4).0044

serious type of negligence, which refers to the failure of the perpetrator to fulfill even the most basic duty of care, or in other words, the perpetrator violated necessary care in an unusual way. This behavior is a particularly significant and subjectively unforgivable violation of obligations, which has significantly exceeded the usual level of negligence. Therefore, when using rules to determine intent or gross negligence, it is also necessary to take into account the participant's psychology, professional level of the competition, and awareness of risks, and adopt a cautious attitude.

4.3. Coordinate the application of self acceptance risk and other rules

When adjudicating cases, it is necessary to strictly follow the constitutive elements of the principle of assumption of risk. On the basis of determining the difference between the principle of assumption of risk, the principle of fairness, and the principle of offsetting negligence, strictly follow the legal judgment approach. In cases involving cultural and sports activities, if the principle of assumption of risk is met, adjustments to the principle of assumption of risk should be applied. For situations that do not belong to assumption of risk, they cannot be recognized as assumption of risk; In the case of applying the principles of offsetting fault and fairness, the principles of offsetting fault and fairness shall apply. The existence of the assumption of risk principle, the principle of offsetting fault, and the principle of fairness are all aimed at achieving a balance between the legitimate rights and interests of the victim and the legitimate rights and interests of the infringing party. The rule of offsetting negligence should not be applied together with the rule of assumption of risk, otherwise the legal effect of assumption of risk will be rendered meaningless. In judicial practice, it is sometimes believed that assumption of risk can be absorbed by offsetting negligence, and there is an overlap in the scope between the two, even using the victim's assumption of risk behavior as a measuring factor to determine whether the victim is at fault. However, at the level of jurisprudence, the prerequisite for applying the rule of offsetting negligence is the establishment of fault, which usually only produces a partial exemption effect for the perpetrator, completely different from the complete exemption effect of assuming risk. The effect of self acceptance of risks is enormous, so it is stricter for victims. However, from the nature of the behavior, participating in cultural and sports activities is a legal act that should be encouraged by law, and there is no theory of negligence. In the field of cultural and sports activities, according to legislative theory, when resolving disputes, the first consideration should be whether it is more appropriate to apply assumption of risk to resolve infringement disputes among participants in the field. In its normative domain, other legal rules can be prioritized to prevent the weakening of the role of assumption of risk rules in judicial practice.

References

[1] Feng D. Review of the Application of Fair Responsibility in Sports Competitions [J]. Application of Law, 2019 (10): 21-31.

[2] Cao Q. Research on the Article of "Self assumption of Risk" in the Civil Code [J]. Oriental Law, 2021 (04): 121-138.

[3] Zhao F.,Liu Z. On the Scope of Application of Self Acceptance Risk in Sports Activities [J]. Legal Application, 2021 (11): 37-45.

[4] Huang L. Regulation and Limitations of the Application of the Self assumption Risk Clause in Sports Activity Infringement: An Analysis Based on Article 1176 of the Civil Code [J]. Journal of Hebei Sport University, 2021, 35 (02): 6-13.

[5] Civil Judgment of 2022E0204MinChu No.185 issued by People's Court of Xialu District，Huangshi city.

ISSN: 2637-6067 DOI: 10.6918/IJOSSER.202504_8(4).0044

[6] Civil Judgment of 2022Yue08MinZhong No.968 issued by Zhanjiang Intermediate People's Court, Guangdong Province.

[7] Civil Judgment of 2021 Jing02MinZhong No.15845 issued by Beijing Second Intermediate People's Court.

[8] Civil Judgment of 2021Yue01MinChu No.726 issued by Guangzhou Intermediate People's Court, Guangdong Province.

[9] Civil judgment 2020YueMinZhong No.2821 issued by Guangdong Provincial High People's Court.

[10] Civil judgment of 2021JiMinShen No. 2827 issued by Jilin Provincial High People's Court.

[11] Civil Judgment of 2022Xiang1003MinChu No.339 issued by Suxian District People's Court, Chenzhou City.

[12] Liang Y.,Li Y. Research on the Principle of Voluntary risk-taking [J]. Hebei Law, 2007 (3): 186-190.

[13] Wang W.,Tang C. Volume 5-7 of the European Model Civil Code Draft [M]. Beijing: Law Press, June 28, 2014.

[14] Von B Comparative Tort Law in Europe (Volume 2) (Translated by Jiao Meihua) [M]. Beijing: Law Press, June 9, 2004.

[15] Huang L. General Introduction to Civil Code Debt Compilation [M]. Taipei: Yuanzhao Publishing Company, 2006.

[16] Zeng S. How should infringement be regulated? [J] Yuedan Law Journal, 2007 (145): 152

[17] Civil judgments of 2019YueMinZhong No.635 and No.636 issued by Guangdong Provincial High People's Court.