

## ASSUMPTION OF RISK - BACKGROUND MEMORANDUM

Senate Bill No. 2379 (attached as an appendix) directs the Legislative Council to study the doctrine of assumption of risk and the impact of the reenactment of the doctrine on other state laws. Senate Bill No. 2379 as introduced would have reintroduced the doctrine of assumption of risk into the state's doctrine of modified comparative fault. Testimony in opposition to the introduced bill indicated that the modified comparative fault standard under which the state currently operates is an equitable process. According to the testimony, the bill would be a regression of 30 years of tort law. The testimony contended that the bill would operate to preclude recovery if a jury determines that the injured party is responsible even in a minuscule amount and that defendants would raise "assumption of risk" in every case as an attempt to completely bar recovery. A Senate amendment provided for this study.

### BACKGROUND

The doctrine of assumption of risk is a common law theory that a plaintiff may not recover for an injury to which the plaintiff has consented. Under the doctrine, a plaintiff is barred from recovering under a theory of negligence if it is proven that, with appreciation and knowledge of an oblivious danger, the plaintiff purposely elects to abandon a position of relative safety and chooses to reposition himself or herself in the place of obvious danger and by reason of that repositioning is injured. According to *Black's Law Dictionary*, the requirements for the defense of assumption of risk are that: (1) the plaintiff has knowledge of facts constituting a dangerous condition; (2) the plaintiff knows the condition is dangerous; (3) the plaintiff appreciates the nature or extent of the danger; and (4) the plaintiff voluntarily exposes himself to the danger.

The general principle underlying the defense of assumption of risk is that a plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for the harm. The defense may arise in a situation in which a plaintiff, by contract or otherwise, expressly agrees to accept a risk of harm arising from the defendant's conduct. It may also arise in a situation in which a plaintiff who fully understands a risk of harm caused by the defendant's conduct voluntarily chooses to enter or remain within the area of the risk. Assumption of risk is an affirmative defense that must be pleaded and proven by the defendant. If the defendant would otherwise be subject to liability to the plaintiff, the burden of proof of the plaintiff's assumption of risk

is upon the defendant. Generally, the question whether a party has assumed a risk is a determination to be made by a jury.

The defense of assumption of risk as a total bar to recovery has been abandoned in a number of jurisdictions, including New Mexico, Kentucky, New Hampshire, Pennsylvania, and Texas. In a number of other jurisdictions, including North Dakota, Alaska, Arizona, Arkansas, Colorado, Connecticut, Idaho, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Montana, New York, Oregon, Utah, and Washington, the doctrine of assumption of risk is used to reduce a plaintiff's recovery rather than serving as a total bar to recovery. Other states have eliminated assumption of risk as a defense in particular actions, such as employer-employee suits and automobile-guest cases.

### NORTH DAKOTA LAW History

In 1973 the Legislative Assembly adopted the doctrine of comparative negligence. As a result of this legislation, the North Dakota Supreme Court, in *Wentz v. Deseth*, 221 N.W.2d 101 (N.D. 1974), held that the affirmative defenses of assumption of risk was no longer the law of North Dakota. The 1973 legislation, which was codified as North Dakota Century Code (NDCC) Section 9-10-07, provided:

**Comparative negligence.** Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering. The court may, and when requested by either party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence attributable to each party; and the court shall then reduce the amount of such damages in proportion to the amount of negligence attributable to the person recovering. When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each; provided, however, that each shall remain jointly and severally liable for the whole award. Upon the request of any party, this section shall be read by the court to the jury and the

attorneys representing the parties may comment to the jury regarding this section. (Repealed by 1987 S.L. 1987, Chapter 404, Section 13, as amended by 1993 S.L. 1993, Chapter 324, Section 1.)

### Current Law

In 1987 the Legislative Assembly passed House Bill No. 1571, which significantly revised tort liability law in this state. The legislation, codified as NDCC Chapter 32-03.2, shifted the focus for determining tort liability from traditional, doctrinal labels to the singular, inclusive concept of "fault." Section 32-03.2-02 includes not only negligence, but also malpractice, absolute liability, dram shop liability, failure to warn, reckless or willful conduct, assumption of risk, misuse of product, failure to avoid injury, and product liability within the definition of "fault" to be compared in an action for damages.

Under NDCC Section 32-03.2-02, this state has adopted modified comparative fault. Modified comparative fault means that contributory fault does not bar recovery in an action by any person to recover damages for death or injury to persons or property unless the fault was as great as the combined fault of all the persons who contributed to the injury. In other words, a claim is not barred unless a person is 51 percent at fault. The damages allowed are reduced by the proportion of contributing fault of the person recovering. Section 32-03.2-02 provides:

Contributory fault does not bar recovery in an action by any person to recover damages for death or injury to person or property unless the fault was as great as the combined fault of all other persons who contribute to the injury, but any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering. The court may, and when requested by any party, shall direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each person, whether or not a party, who contributed to the injury. The court shall then reduce the amount of such damages in proportion to the amount of fault attributable to the person recovering. When two or more parties are found to have contributed to the injury, the liability of each party is several only, and is not joint, and each party is liable only for the amount of damages attributable to the percentage of fault of that party, except that any persons who act in concert in committing a tortious act or aid or encourage the act, or ratifies or adopts the act for their benefit, are jointly liable for all damages attributable to their combined percentage of fault. Under this section, fault includes negligence, malpractice, absolute liability, dram shop liability, failure to

warn, reckless or willful conduct, assumption of risk, misuse of product, failure to avoid injury, and product liability, including product liability involving negligence or strict liability or breach of warranty for product defect.

Under NDCC Section 32-03.2-02.1, notwithstanding modified comparative fault, in an action to recover damages for injury to property, the damages may not be reduced by contributing fault if three conditions are met. The party must be seeking damages as a result of a two-party motor vehicle accident, the direct physical property damages sought are not more than \$5,000 and the indirect damages do not exceed \$1,000, and the percentage of fault of the person against whom recovery is sought is over 50 percent.

North Dakota law also contains several instances in which the assumption of risk defense is specifically prohibited. For example, in the area of workers' compensation law, NDCC Section 65-09-02 provides, in part:

An employee whose employer is in violation of section 65-04-33, who has been injured in the course of employment, or the employee's dependents or legal representatives in case death has ensued, may file an application with the organization for an award of compensation under this title and in addition may maintain a civil action against the employer for damages resulting from the injury or death. **In the action, the employer may not assert the common-law defenses of:**

1. The fellow servant rule.
2. **Assumption of risk.**
3. Contributory negligence.

In the area of railroad corporation liability, NDCC Section 49-16-04, provides, in part, that "[i]n any action brought against any railroad corporation . . . to recover damages for injuries to, or death of, any of its employees, such employee shall not be held to have assumed the risk of the employee's employment in any case where the violation by such railroad corporation of any state or federal statute enacted for the safety of employees contributed to the injury or death of such employee." In addition, NDCC Section 49-16-08 provides that "[a]ny employee of a railroad corporation who, while in the performance of the employee's duty and while engaged in any commerce subject to the regulative power of this title, may be injured or killed by any locomotive, car, structure, or obstruction used or retained contrary to the provisions of this title, shall not be deemed to have assumed the risk . . . ."

### North Dakota's No-Fault Automobile Insurance System

It does not appear that the reenactment of the assumption of risk doctrine would impact the state's no-fault automobile insurance system. Under the

state's no-fault system there are limitations on the right of a victim to sue if injured in a motor vehicle accident. North Dakota Century Code Chapter 26.1-41 precludes tort actions by injured parties for damages covered by no-fault insurance. The insured person is exempt from paying for economic loss to the extent that an injured person has been paid or will be paid basic no-fault benefits. In addition, Chapter 26.1-41 prohibits all tort actions for the bodily injury unless there is a serious injury. A serious injury means an accidental bodily injury that results in death, dismemberment, serious and permanent disfigurement, or disability beyond 60 days, or which results in medical expenses in excess of \$2,500.

### **2003 LEGISLATION**

House Bill No. 1263 clarified NDCC Section 32-03.2-02.1 and provided that the section applies regardless of whether the person seeking damages also seeks damages for personal injury; however,

personal injury damages are not available under the section.

### **SUGGESTED STUDY APPROACH**

The committee, in its study of the doctrine of assumption of risk and the impact of the reenactment of the doctrine on other state laws, may wish to approach this study as follows:

- Receive information and testimony from the Insurance Commissioner on the impact the reenactment of the assumption of risk doctrine may have on the state's insurance law;
- Receive testimony from the judiciary and trial attorneys on the impact of the reenactment of the doctrine on personal injury claims in the state; and
- Develop recommendations and prepare legislation necessary to implement the recommendations.

ATTACH:1