Cycling and the Doctrine Of Assumption of the Risk

Daniel Flanzig Contact All Articles

New York Law Journal

January 31, 2012

Daniel Flanzig

It is no mystery if you live in New York; there are a growing number of bicycles on our streets. In addition, New York is about to launch its new Bike Share Program similar to those seen in Paris, London and Oregon. This is expected to add another 600 bicycles to New York City. Some of these riders will be experienced, while others will be less comfortable riding around town. Although collisions between bicycles and motor vehicles are the most common type of accidents, street defects including potholes and street hardware also cause accidents for bike riders. The issue that will be presented here is whether the cyclist "assumes the risk" of injury when he or she encounters such a condition and whether that "assumption of risk" will bar a cyclist's right of recovery when such an accident occurs.

Primary Assumption of Risk

In general, when a person voluntarily participates in certain sporting events or athletic activities and generally consents by his or her participation in those injury-causing events to the risks, which are inherent in the activity, an action to recover damages for resulting injuries is barred by the doctrine of primary assumption of risk. *Morgan v. State of New York*, 90 N.Y.2d 471, 662 N.Y.S.2d 421 (1997), *Turcotte v. Fell*, 68 N.Y.2d 432, 439, 510 N.Y.S.2d 49 (1986).

Risks inherent in a sporting activity are those that are known, apparent, natural or a reasonably foreseeable consequence of the participation. *Morgan*, supra. at 484, CPLR

1411. As such, it is expected that a defendant, such as the City of New York, Consolidated Edison, or other contractors will argue that the rider assumed the risk of injury and therefore the action should be dismissed under that doctrine.

Recreational Riding

There are no concrete decisions outlining what sports are considered so inherently dangerous as to have the participant automatically assume the risk of injury. However, it appears the courts are trending toward recognizing road cycling as a recreational activity rather than a high-risk sport.

In *Cotty v. Town of Southampton*, 64 A.D.3d 251, 880 N.Y.S.2d 656 (2d Dept. 2009) the court addressed whether or not a bicyclist was barred by the doctrine of primary assumption of risk while he struck a defect on a negligently maintained public roadway.

Plaintiff, Karen Cotty was a member of a bicycle club that engaged in long-distance rides. Cotty was the last bicyclist in one of several groups of eight riders engaged in a 72-mile ride. She had previously ridden on the same roadway and was aware of construction activity on various portions of the road. While riding, a bicyclist in front of her attempted to avoid a defect in the road and swerved into Cotty's path causing her to lose control of her bike and slide into the roadway, where she was struck by a vehicle. Cotty commenced a personal injury action against multiple defendants including the Town of Southampton, the Suffolk County Water Authority and CAC Contracting Corp. with regard to the work being performed on the roadway and the defective condition they were alleged to have caused.

The defendants moved to dismiss plaintiff Cotty's cause of action based upon the doctrine of implied assumption of risk. The Supreme Court denied the defendant's motions, and the Appellate Term affirmed. The court addressed the issue of whether a bicycle rider has subjected himself or herself to the doctrine of primary assumption of risk when the rider is engaged in the sport of cycling upon the public roadway.

The Appellate Division held, "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-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." "The doctrine was not designed to relieve a municipality of its duty to maintain its roadway in a safe condition" citing *Sykes v. County of Erie*, 94 N.Y.2d 912 (2000).

The court further reasoned that just because the roadway happened to be used by a person operating a bicycle as opposed to some other means of transportation—like an automobile—does not alleviate the municipality of its duty to maintain its roadways. See also, *Caraballo v. City of Yonkers*, 54 A.D.3d 796, 865 N.Y.S.2d 229 (2d Dept. 2008).

Courts have also reasoned that cyclists who are injured while riding their bicycles on paved pathways in public parks cannot be said as a matter of law to have assumed risks of being injured as a result of a defective condition on a paved pathway merely because they participate in the activity of bicycling. *Moore v. City of New York*, 29 A.D.3d 751, 816 N.Y.S.2d 131 (2d Dept. 2006), *Vestal v. The County of Suffolk*, 7 A.D.3d 613, 776 N.Y.S.2d 491 (2d Dept. 2004).

Even while riding on a sidewalk (which is in violation of New York City Administrative Code), one is not necessarily bound by the doctrine. In *Torres v. The City of New York*, 235 A.D.2d 416, 652 N.Y.S.2d 105 (2d Dept. 1997), a 13-year-old boy was riding his bicycle on the sidewalk in front of a housing complex owned by the New York City Housing Authority when his bike struck a crack and he lost control, fell, and fractured his wrist. The Second Department held that the lower court's refusal to charge the jury on implied assumption of risk was not reversible error. See also, *Maddox v. City of New York*, 66 N.Y.2d 270, 496 N.Y.S.2d 726 (1985).

Off Road Riding

While the courts seem to not consider riding on the roadway an assumption of risk, the doctrine may apply once you leave the road, recognizing "the very challenge that attracts dirt-bike riders as opposed to riding on paved surface can imply an assumption of risk." *Schiavone v. Brinewood Rod and Gun Club Inc.*, 283 A.D.2d 234, 726 N.Y.S.2d 615 (1st Dept. 2001).

In *Calise v. The City of New York*, 239 A.D.2d 378, 657 N.Y.S.2d 430 (2d Dept. 1997), the plaintiff was riding on a mountain bike in a park on an unpaved dirt path when his bike hit an exposed tree root and he was thrown from the bike. The Second Department found that the plaintiff's action was barred by the doctrine of primary assumption of risk reasoning that "An exposed tree root is a reasonably foreseeable hazard of the sport of biking on unpaved trails and one that would be readily observable." See also, *Rivera v. Glen Oaks Village Owners Inc.*, 41 A.D.3d 817, 839 N.Y.S.2d 183 (2d Dept. 2007), where the court applied the primary assumption of risk to an injured bicyclist who struck a hole in a dirt trail located in a wooded area, *Restaino v. Yonkers Bd. of Educ.* 13 A.D.3d 432, 785 N.Y.S.2d 711 (2d Dept. 2004), where the doctrine applied to a plaintiff whose bicycle struck a pothole or rut in a closed parking lot/driveway area of a public school, and *Goldberg v. Town of Hempstead* 289 A.D.2d 198, 733 N.Y.S.2d 691 (2d Dept. 2001), where the doctrine applied to a plaintiff when her bicycle struck a hole in the ground as she rode on a dirt-based path of a baseball field.

Competitive Riding

It is fair to assume that the courts will not extend the limitations of liability under the doctrine of implied assumption of risk to those avid cyclists who voluntarily engage in racing activities, such as road races, biathlons and triathlons.

A plaintiff engaged in an athletic activity is deemed to assume fully comprehended and openly obvious risks. The policy underlying the doctrine of primary assumption of risk is "to facilitate free and vigorous participation in athletic activities," *Benitez v. New York City Bd. of Educ.*, 73 N.Y.2d 650 (1989). As long as the defendant's conduct does not unreasonably increase the risks assumed by the plaintiff, the defendant will be shielded by the doctrine of primary assumption of risk. "It is not necessary to the application of assumption of risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results." *Maddox*, supra. However, although "knowledge plays a role" "for purposes of determining the extent of the threshold duty of care," the inherence of the risk "is the sine qua non." *Morgan*, supra., *Rosati v. Hunt Racing Inc.* 13 A.D.3d 1129 (4th Dept. 2004).

For instance, a professional athlete who is injured while participating in the dangerous sport of racing is presumed to have greater understanding of the dangers involved and is deemed to have consented—by his participation—to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation. *Verro v. NYRA*, 142 A.D.2d 396 (3d Dept. 1989). However, if a condition or event not reasonably assumed by the participant causes the injury, courts will be reluctant to dismiss. *Rosati*, supra. It is fair to assume that the courts will not extend the protection to experienced racers, absent some rare instance that could not be foreseen by the participant.

Conclusion

Like all assumption of risk cases, the court will look to whether the injury was assumed by the rider as being inherent in the activity. The location of the rider at the time of the accident, together with the purpose and nature of the ride, will shape the defense of the doctrine of primary assumption of the risk in the world of cycling.

Daniel Flanzig *is a partner at Flanzig and Flanzig in Mineola. He can be reached at DFlanzig@NewYorkBikeLawyer.com.*