

*Gregoire (Edward) v. City of Oak Harbor*

No. 81253-5

CHAMBERS, J. (concurring) — I agree with the lead opinion. I write separately because I believe the learned trial judge—and perhaps others—has misapprehended the application of implied primary assumption of risk. The difference between express assumption of risk and implied primary assumption of risk is “ceremonial and evidentiary.” *Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 453, 746 P.2d 285 (1987) (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 496 (5th ed. 1984)). The elements of implied primary assumption of risk and express assumption of risk are identical. *Id.*; see also *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 496-98, 834 P.2d 6 (1992). The effect of implied primary assumption of risk and express assumption of risk is also identical— both result in a complete bar to recovery with regard to the specific risk assumed. *Scott*, 119 Wn.2d at 498. While express assumption of risk requires evidence that the claimant has expressly assumed a specific risk, implied primary assumption of risk requires evidence that, if the claimant failed to expressly assume a specific risk, the claimant’s actions were tantamount to expressly assuming a specific risk. See *id.* at 497-98. Because the evidentiary standard is so high, this court has never applied implied primary assumption of risk to bar

*Gregoire v. City of Oak Harbor*, No. 81253-5

recovery in any case. Implied primary assumption of risk should accordingly be applied with caution and with a proper understanding of the principles underlying the doctrine.

AUTHOR:

Justice Tom Chambers

---

WE CONCUR:

---

---

---

---

---