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Focus

Blood Sport

By Gary A. Watt and Teresa Li

Summer is here and the mountains, lakes, rivers and trails are crowded with vacationers engaging in recreational activities. Accidents will happen. Some of the injured will sue the businesses and individuals involved in the mishap. After all, everybody has a duty to use ordinary care in their conduct, right? But when it comes to recreational sports, the question of duty actually turns on the nature of the activity and the parties' relationship to it. If the defendant owes no duty of ordinary care to the plaintiff, it is a primary assumption of risk case. And primary assumption of risk can be express or implied.

The issue is not whether the particular risk of injury is inherent in the recreational activity at issue, but rather the scope of the release.

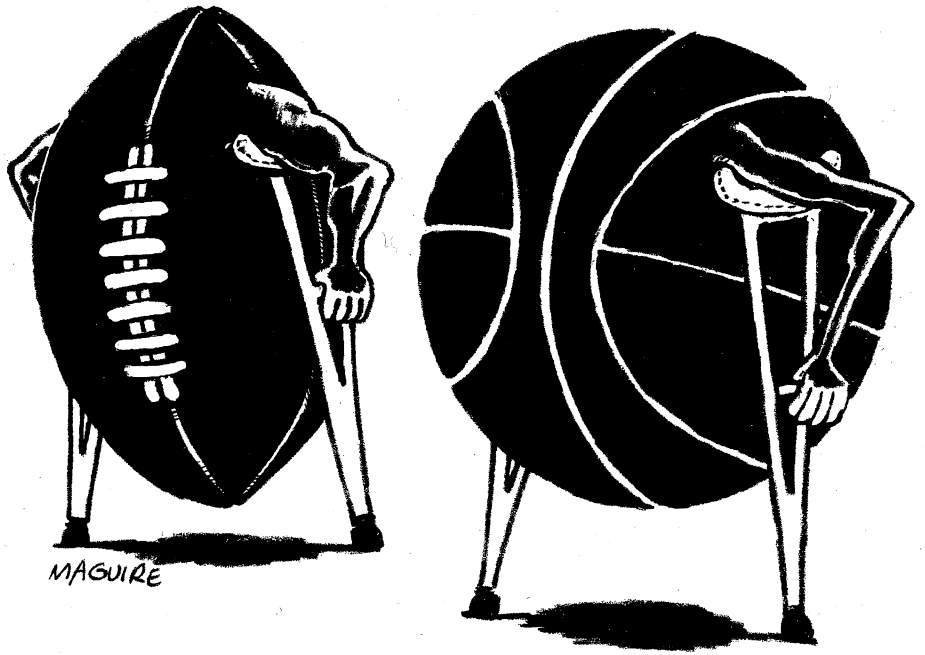
In the recreational context, express primary assumption of risk applies via the releases often utilized by resorts, outfitters and guides. Written releases may relieve a party from future negligence. *Benedek v. PLC Santa Monica*, 104 Cal.App.4th 1351 (2002). And such releases are not void on public policy grounds.

Benedek is instructive. A health club member was injured when he tried to reposition a television but it slid off of its rack. He sued. *Benedek* affirmed summary judgment on express primary assumption of risk grounds. To bar negligence, the release must be clear and unambiguous in expressing the parties' intent. The issue is one of contract interpretation. Ambiguity exists if a party can identify an alternative, semantically reasonable meaning to the release. If ambiguity exists, it will normally be construed against the drafter.

The question then, absent extrinsic evidence issues, is whether the scope of the release covers the injury in question. As *Benedek* explains, the terms of the release must apply to the defendant's alleged negligence, but not every possible act of negligence has to be enumerated. Indeed, the release need not even include the word "negligence," so long as the intent to relieve the defendant's negligence is clear. Such intent is present when a release expressly waives "any liability," "all liability" or similar terms.

And it is not necessary that the plaintiff actually understand the particular risk causing the injury. As *Benedek* states, the act of negligence only needs to be reasonably related to the purpose of the release. The issue is not whether the particular risk of injury is inherent in the recreational activity at issue, but rather the scope of the release.

Turning to the release, *Benedek* found it clear, unambiguous and explicit. It released the owner from liability for any personal injuries suffered while on the premises, "whether using exercise equipment or not." In exchange, the release allowed Benedek "access" to the club's "facilities and services." Despite the pedestrian nature of the injury, moving a television, the injury occurred on the premises. Nothing more, contractually speaking, was required.



But what if no release is involved? The case law reveals that *implied* primary assumption of risk is subject to wider and more varied judicial application. The California Supreme Court explained the doctrine in *Knight v. Jewett*, 3 Cal.4th 296 (1992). In *Knight*, the plaintiff was injured during a touch football game and eventually lost her little finger. The Supreme Court found that the defendant owed no duty of care, because his careless conduct is an *inherent* risk in football. A defendant is liable only if he intentionally injures the plaintiff or engages in conduct that is "so reckless as to be totally outside the range of the ordinary activity involved in the sport."

The rationale for such a strict requirement is that "[dangerous] conditions or conduct ... often are an integral part of the sport itself." Thus, imposing liability "might well alter fundamentally the nature of the sport by deterring participants from engaging in [such] activity." The doctrine also applies to claims against coaches, trainers and instructors. *Kahn v. East Side Union High School District*, 31 Cal.4th 990 (2003).

And implied primary assumption of risk applies to more than competitive team sports. It also applies to recreational activities such as waterskiing, snow skiing, off-road vehicles, skateboarding, figure skating, cycling, horseback riding and jet skis. As one court explains, "an activity falls within the meaning of 'sport' if the activity is done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury." *Record v. Reason*, 73 Cal. App.4th 472 (1999).

Courts use a two-step framework to analyze a summary judgment motion on implied primary assumption of risk. Step one focuses on evidence of intentional injury or conduct so reckless as to be outside the range of the ordinary activity of the sport. Defendants shift the burden by demonstrating with affirmative evidence (discovery responses, deposition excerpts, etc.) involvement in a "sport" encompassed by primary assumption of risk and lack of evidence of intentional injury or the requisite level of recklessness. If that showing is made, the burden shifts to plaintiffs to demonstrate triable issues of fact as to intentional injury or such recklessness. Ordinary negligence will not suffice. Cases involving intentional injury are rare, so assessment of the recklessness evidence is the key. If a court finds no genuine issue of material fact as to intentional injury or recklessness, the plaintiff loses. Otherwise, the plaintiff is still not home free yet. Step two asks whether allowing the suit to proceed will "alter fundamentally the nature of the sport by deterring participants from engaging in [such] activity." If the answer is yes, a suit will still be barred.

Courts should strictly adhere to the two-step process, but do not always do so. Sometimes they merge the two steps together, or worse, start with the step two question. A hypothetical example easily demonstrates the problems. In hockey, high-sticking and slashing incidents are common. Such infractions are penalized. But a judge, especially one unfamiliar with hockey, could allow a suit to proceed, believing that liability for a particularly nasty high-sticking incident might actually improve the game and not deter vigorous participation. If the court forgoes step one, it is not difficult to conceive of vigorous participation without high-sticking and slashing. While some judges might find the outcome desirable, that is not how primary assumption of risk works.

Rather, courts must take the sport as they find it. The judge must first answer the conduct question. Properly analyzed, hockey's roughest conduct would still fall within primary assumption of risk because as the high court put it, courts should not be used to enforce the rules of the game. Regardless of one's position on the physical aspects of hockey, even fighting can hardly be characterized as outside the range of ordinary activity.

Another example is snow skiing. A court could forgo step one, and simply ask the step two question. As such, a suit may be allowed to proceed even though it does not pass muster under step one. After all, what harm would it be to require skiers to watch where they are going?

But courts generally adhere to the two-step framework. As a result, excessive speed for conditions and failure to watch where you are going have been found to be conduct well within the ordinary range of skiing. Cases that have addressed these issues include *Cheong v. Antablin*, 16 Cal.4th 1063 (1997); *Towns v. Davidson*, 147 Cal. App.4th 461 (2007); and *Mastro v. Petrick*, 93 Cal.App.4th 83 (2001). So what would it take for a court to find conduct so outrageous as to prevent the no-duty finding? Well, for example, drunken skiers, and snow ball fights. See *Mammoth Mountain v. Graham*, 135 Cal.App.4th 1367 (2006); and *Freeman v. Hale*, 30 Cal.App.4th 1388 (1994).

Take, for example, a skier who streaks into the rest area at the bottom of the slope, plowing into another skier, inflicting multiple broken bones. Or a guest on a private yacht, who, assisting in docking, jumps from the craft to the dock, breaking his leg. Or a golfer, who while standing to the side of the tee and talking on his cell phone gets whacked in the head with a golf ball from an errant tee shot.

As to the skiing accident, speed alone or in combination with inexperience, weather conditions or even lack of attention is insufficient conduct to meet the step one "so reckless" standard, right? At least one court disagrees. The court in *Lackner v. North*, 135 Cal.App.4th 1188 (2006), found that racing into a rest area coupled with severity of injuries leaves triable issues of fact as to recklessness. Did the court deviate from the proper analysis? What if the injury occurred further up the slope? What if the skier racing into the rest area was a beginner instead of the star of a high school ski team? Isn't careless conduct by coparticipants the touchstone of the doctrine? Is skiing too fast for conditions outside the ordinary range of activity?

As to the golfing example, being hit by an errant shot sounds like an inherent risk of the sport, right? Yet despite agreeing that it is, the Supreme Court found triable issues barred summary judgment. The court in *Shin v. Ahn*, 42 Cal.4th 482 (2007), found the record "too sparse" to support summary judgment. And as for leaping to the dock, the 4th District held that primary assumption of risk did not even apply. *Kindrich III v. Long Beach Yacht Club*, 167 Cal. App.4th 1252 (2008). But what was the sport at issue? To the majority, none, the plaintiff was just a passenger. To Justice William Bedsworth, it was leaping from the untethered yacht to the dock. As he put it, "jumping ... off the side of a boat ... because portable steps had not been put in place — is no more an integral part of 'boating' than diving out a window — because no one has yet opened the door is an integral part of visiting a house."

As Sergeant Esterhaus used to say in "Hill Street Blues," "Hey, let's be careful out there." After all, the person on the jet-ski, boat, mountain bike or horse who is barreling toward you most likely owes you no duty at all.

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