Liability for injury in sports and recreational activities

Overcoming exculpatory clauses and assumption-of-risk arguments

By Tal Rubin

Those of us handling injuries that occur during participation in sports and/or recreational activities, encounter a tougher road, due to the doctrine of assumption of risk.

As a general rule, people have a duty to use due care to avoid injuring others. However, dangerous conduct or conditions are often an integral part of participating in recreational activities. The assumption of risk doctrine provides an exception to the general duty of care rule when a plaintiff is injured while participating in a risky activity.

Our Supreme Court has broken "assumption of risk" into two categories: (1) primary assumption of risk, where the issue is whether the defendant actually owed the plaintiff a duty of care to protect against an inherent risk (when applicable, serves as a complete bar to recovery); and (2) secondary assumption of risk, where the defendant had breached a duty of care but the issue is whether the plaintiff chose to face the risk of harm presented by the defendant's breach of duty. Under secondary assumption of risk, plaintiff's decision to face the risk would not operate as a complete bar to recovery, but rather, function as a form of contributory negligence, affecting the damages analysis only. (*Knight v. Jewett* (1992) 3 Cal.4th 296 and *Kahn v. East Side Union High School Dist*. (2003) 31 Cal.4th 990.)

Assumption of risk can be express (a waiver signed by the plaintiff), and it can be implied, from the voluntary participation in the activity. Health clubs and other organizers of recreational activities have been increasingly requiring members and participants to sign "waivers," indicating acknowledgment of the risks and an agreement to waive any negligence claims in the event of injury or death. In instances where the plaintiff signed such a waiver before the subject injury-producing incident, the defense can be expected to assert express and implied assumption of risk as affirmative defenses and as the grounds for a motion for summary judgment. The material provided here will address general principles related to assumption of risk, and then discuss waivers.

Assumption of risk – general principles

"The scope of the duty owed to participants in active recreation... depends not only on the nature of the activity but also on the role of the defendant whose conduct is at issue... under the primary assumption of risk doctrine, operators, sponsors and instructors in recreational activities posing inherent risks of injury have no duty to eliminate those risks, but do owe participants the duty not to unreasonably increase the risks of injury beyond those inherent in the activity." (*Nalwa v. Cedar Fair, LP* (2012) 55 Cal.4th 1148, 1162.) As a matter of policy, a duty should not be imposed where doing so "would require that an integral part of the sport be abandoned, or would discourage vigorous participation in sporting events." (*Kahn v. East Side Union High School Dist*., *supra*, 31 Cal.4th at p. 1004.)

In the course of litigation, you should first analyze whether the injury was caused by a risk that is an integral part of the activity and is thus an "inherent risk" (ultimately a question of law for the court). It is important to remember that the test is objective and not subjective, as "the question whether the defendant owed a legal duty to protect the plaintiff from a particular risk of harm does not turn on the reasonableness or unreasonableness of the plaintiff's conduct, but rather on the nature of the activity or sport in which the defendant is engaged and the relationship of the defendant and the plaintiff to that activity or sport." (*Knight v. Jewett, Supra,* 3 Cal.4th at p. 309.) Therefore, plaintiff's reasonableness in accepting the risks, or her actual knowledge of the nature and the magnitude of the risks are irrelevant.

The second step is to develop a discovery plan that will uncover how and why the defendant's actions increased the inherent risk of injury, or defendant failed to take actions that would minimize it, thereby proximately causing the injury. The argument is that defendant had a duty to undertake those steps and was able to do so without causing an integral part of the sport to be abandoned or discouraging vigorous participation in the particular event. Creating a triable issue of fact in that context, should eliminate primary assumption of risk and allow the case to proceed to trial.

Examples of how to frame the argument can be found in *Saffro v. Elite Racing Inc*. (2002) 98 Cal.App.4th 173 (Organizer of a marathon race failed to provide water along the course, thus increasing the risks inherent in long distance running); *Eriksson v. Nunnink* (2011) 191 Cal.App.4th, 826 (horse riding coach increased the risks associated with the activity by providing the rider with an unfit horse); and *Morgan v. Fuji Country USA, Inc*. (1995) 34 Cal.App.4th 127, where despite the fact that being struck by an errant ball is an inherent risk in the sport of golf, the owner of a golf course owes a duty to golfers "to provide a reasonably safe golf course" which requires it "to minimize the risks without altering the

nature of the sport." The court concluded the case was one involving secondary assumption of risk, noting that if the defendant were the golfer who had hit the errant ball, the plaintiff's negligence action would be barred by the primary assumption of risk doctrine, but that the defendant owner of the golf course had an obligation to design a course that would minimize the risks that players would be hit by golf balls and affirmatively provide protection for players from being hit in the area of the course where the greatest danger existed. In that respect, the distinction between a co-participant and an organizer/ sponsor/owner is significant. A co-participant is responsible only when he "intentionally injures a co-participant or engages in behavior so reckless as to bring it totally outside the range of conduct ordinarily involved in the activity." (*Knight v. Jewett*, *supra*, 3 Cal.4th at p. 316-320.)

In support of these arguments, an expert must be retained and a declaration must be included with the opposition to the motion for summary judgment.

Waivers

• Validity – ordinary negligence

California cases have held that liability for ordinary negligence may be expressly released. The release, however, must be clear and unambiguous, the injury-producing act must be reasonably related to the object or purpose for which plaintiff signed the release, and the release cannot contravene public policy. You should be familiar with the self-explanatory requirements outlined in *Leon v. Family Fitness Center Inc.* (1998) 61 Cal.App.4th 1227. Additionally, counsel should be familiar with *Capri v. L.A. Fitness International, LLC* (2006) 136 Cal.App.4th 1078, where the court cited Civil Code section 1668 to invalidate a health-club waiver against the allegation of negligence per se, as a result of a violation of a statute/ordinance. When applicable, negligence per se and violation of a statute should be included in the complaint and pursued in litigation.

• Gross negligence – Background

In 2007, our Supreme Court decided *City of Santa Barbara v. Superior Court* (*Janeway*) (2007) 41 Cal.4th 747. That case set forth the law with respect to enforcing agreements purporting to release liability for future negligence:

> We conclude, consistent with dicta in California cases and with the vast majority of out-of-state cases and other authority, that an agreement made in the context of sports or recreational programs or services, purporting to release liability for future gross negligence, generally is unenforceable as a matter of public policy. Applying that general rule in the case now before us, we hold that the agreement, to the extent it purports to release liability for future gross negligence, violates public policy and is unenforceable.

(*Id.* at 751.)

In the past, courts mostly concentrated on the analysis done in *Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, and whether or not the waivers were related to activities which were "essential" to the general public. In *Santa Barbara, supra*, the Court shifted the analysis to the *defendant's conduct*:

> As we have observed...the out-of-state decisions and other authority holding agreements releasing liability for future gross negligence to be unenforceable are based, not on Tunkl's public interest, "transaction-focused" analysis, but instead, upon a separate and different public policy rationale focusing upon the degree or extent of the misconduct at issue, in order to discourage (or at least not facilitate) aggravated wrongs.

(*City of Santa Barbara v. Superior Court*, *supra*, 41 Cal.4th at p. 764.)

• Gross negligence – definition and related pleading issues

Gross negligence long has been defined in California and other jurisdictions as either a "want of even scant care or an extreme departure from the ordinary standard of conduct." (*Van Meter v. Bent Construction Co.* (1956) 46 Cal.2d 588, 594.) "The language used in the Van Meter court is in the disjunctive, indicating that gross negligence could consist of *either* want of even scant care *or* extreme departure from ordinary standard of conduct but not necessarily both." (*Gore v. Board of Medical Quality Assurance* (1980) 110 Cal.App3d 184, 197, Emphasis added.)

The court in *Gore* stated: "Negligence and gross negligence are relative terms. The amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk. As the danger becomes greater, the actor is required to exercise caution commensurate with it. (*Prosser, Law of Torts*, (4th ed. 1971) at page 180.)" (*Id.* at 198.)

In *Donnelly v. Southern Pacific Co.* (1941) 18 Cal.2d 863, the Court explained that the distinction between ordinary and gross negligence "amounts to a rule of policy that a failure to exercise due care in those situations where the risk of harm is great, will give rise to legal consequences harsher than those arising from negligence in less hazardous situations." (*Id.* at 871.)

The cases cited above make clear the analysis that must be conducted when assessing whether or not defendant's conduct rises to the level of gross negligence. Courts deem an extreme departure from the ordinary standard of conduct to be gross negligence, and outside the scope of the release.

For pleading purposes, gross negligence is not a separate cause of action, but unlike ordinary negligence, must be pleaded with further specificity. (See *Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072, 1082.) When drafting the complaint, counsel should use language from CACI 425, and include as many facts as possible in support thereof. That instruction states, "Gross negligence is the lack of any care or an extreme departure from what a reasonably careful

person would do in the same situation to prevent harm to oneself or to others. A person can be grossly negligent by acting or by failing to act." In the event that the initial complaint erroneously lacked gross negligence allegations, it should be amended prior to the motion for summary judgment.

• Gross negligence – litigation, discovery, summary judgment and trial

Discovery should be conducted, bearing in mind both the *Santa Barbara* public policy considerations, and the distinction between gross and ordinary negligence.

An expert should be retained early, and assist in analyzing the details of the incident which produced the injury. Since gross negligence is "an extreme departure from what a reasonably careful person would do in the same situation to prevent harm to oneself or to others," (CACI 425), the expert should assist in establishing safety principles that are generally accepted in the industry, in order to establish violation of those principles and therefore a triable issue of fact as to gross negligence, to enable a successful opposition of the motion for summary judgment. The opposition to the motion for summary judgment must include a declaration from the expert, setting forth the safety principles that the defendant violated, thus supporting the arguments of "extreme departure." Some defense attorneys argue that in order to prove gross negligence, plaintiff must prove *both* "want of even scant care" *and* "an extreme departure" but the cases cited above make clear that proving *either* one *or* the other will suffice. (See also *City of Santa Barbara v. Superior Court*, *supra*, 41 Cal.4th at p. 754.)

In order to support gross negligence, specific attention should also be given to the foreseeable risk of serious harm that exists when defendant ignores or violates the established safety principles. The defendant's actions cannot be analyzed in a vacuum, but rather, in the context of the specific circumstances and the risk of serious injury. For example, in *Santa Barbara*, *supra*, a negligent camp counselor, assigned to watch over an epileptic child, took her eyes off the child in a swimming pool for only 15 seconds, during which the child drowned. Scrutinized in a vacuum, one may not deem looking away for only 15 seconds as gross negligence. However, in light of the circumstances, and the fact that the child was in the swimming pool, and the great risk of danger that can occur if she stopped breathing for just a few seconds, the Supreme Court found a triable question of fact as to gross negligence. In the same fashion, counsel should identify the risks and then correlate them to the defendant's actions, since the defense will most likely try to isolate the actions and argue that they can not, as a matter of law, rise beyond ordinary negligence (which is barred by the release).

Once the summary judgment has been successfully opposed, and the case proceeds to trial, counsel must file a motion in limine to exclude the entire release agreement, based on Evidence Code section 352. Argument should be made that all legal issues related to the signed waiver have been resolved by the court at the summary judgment hearing, as a finding of gross negligence by the jury would defeat the affirmative defense of express assumption of risk as a matter of law. So long as plaintiff briefly admits on the stand that she was aware of certain risks associated with the activity, the introduction of, or any reference to the signed waiver would be irrelevant and also mislead and confuse the jury.


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Tal Rubin is a sole practitioner in Calabasas. He has litigated hundreds of personal injury cases including serious injury and wrongful death. He has tried numerous cases to a verdict, including a recent ground breaking published verdict against a health club which dealt with the difficult areas of gross negligence and assumption of risk.

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