Assumption of the Risk: Effective Application of this Defense In Personal Injury Actions

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Assumption of the risk is a defense available for most personal injury and negligence lawsuits. If the plaintiff has assumed such a risk, the defense will bar or reduce a plaintiff's right to recover damages for any harm resulting from a negligent defendant. In order to prove the defense of assumption of the risk, the defendant must show:

1) The plaintiff had *actual knowledge* of the risk involved in the conduct or activity; and

2) The plaintiff *voluntarily accepted the risk*, either expressly through agreement or implied by his words and conduct.

Additionally, it is usually necessary to prove the danger was obvious or the nature of the conduct was inherently dangerous.

What is "Primary" Assumption of the Risk?

Primary assumption of the risk occurs when the plaintiff has either expressly or implicitly relieved the defendant of the duty to protect the plaintiff from the particular risk causing the injury. Generally, primary assumption of the risk will operate as a complete bar to plaintiff's recovery. There is *no longer a duty of care* running from the defendant to the plaintiff, thus no negligence on the defendant's behalf. The landmark decision in *Knight v. Jewett* (1992) 3 Cal. App. 4th 296 set the precedent for primary assumption of the risk. Here, the Court held a player in a touch football game had no duty to prevent injuries resulting from the inherent risk of playing this sport. Traditionally, in California, this doctrine commonly barred recovery for injuries incurred in sport and other recreational activities.

Included within this category is "express assumption of the risk." This often arises where there is an express (written) agreement between plaintiff and defendant, although it can also be a verbal agreement. Because of this agreement, the defendant owes *no duty* to protect the plaintiff from an injury-causing risk. See *Knight v. Jewett*, supra, 3 Cal. App. 4th at 308–309. A prime example is where a plaintiff engages in a dangerous activity, such as scuba diving. The plaintiff may be required to sign a waiver stating he is assuming all the risks associated with the activity, therefore relinquishing his right to pursue litigation if he is injured.

On the other hand, "implied assumption of the risk" does not involve a written agreement. Rather, the plaintiff acts in such a way to indicate he understood the risk and voluntarily agreed to accept the risk anyway. This is usually seen by the plaintiff's conduct. A leading example is spectators at a sporting event. In *Lowe v. California League of Professional Baseball* (1997) 56 Cal. App. 4th 112, 114, the plaintiff was injured when struck in the face by a foul ball while attending a professional baseball game. The Court held being hit by a foul ball is one of the inherent risks a baseball spectator assumes when sitting in an unprotected area. However, the team owners have a duty not to increase the risk.

In *Knight,* the court explained the reasonableness of the plaintiff's conduct is irrelevant when analyzing whether the plaintiff has assumed the risk. Instead, the court *must look to the nature of the activity and the relationship of the parties to the activity*. This involves a fact-specific, case-by-case analysis, which is done by the court rather than the jury. Therefore, when proving assumption of the risk, it is

necessary for the court to examine *all the facts* surrounding the injury in order to determine the scope of the defendant's duty of care.

What is "Secondary" Assumption of the Risk?

Secondary assumption of the risk refers to situations where the defendant *owes the plaintiff a legal duty* to protect the plaintiff from a particular risk or harm, but the plaintiff proceeds to encounter the risk imposed by the defendant's breach of duty. See *Knight v. Jewett*, supra, 3 Cal. App. 4th at 308–309. Cases involving secondary assumption of the risk are merged into comparative negligence. Comparative negligence is a legal standard dealing with situations where both parties to an action are partially at fault. The plaintiff's total damages are not recoverable to the extent his *own negligence* contributed to his injuries, and the awardable damages will be proportionately reduced to reflect the percentage of the plaintiff's fault. *See* CACI 405.

California follows what is known as the "pure" comparative negligence standard. This means the plaintiff will still recover damages after his percentage of fault has been deducted, even if the plaintiff has engaged in a greater degree of negligence than defendant. *Zavala v. Regents of Univ. of Calif.* (1981) 125 Cal. App. 3rd 646, 647. Other jurisdictions require the plaintiff to be no more than 50 percent at fault in order to recover any damages, otherwise known as "modified" comparative negligence. Additionally, it is important to remember the comparative negligence doctrine only applies to cases where the plaintiff's conduct is *anything less than intentional. Li v. Yellow Cab Co.* (1975) 13 Cal. App. 3rd 804, 828–829.

Extension of the Doctrine

California courts recently extended the assumption of risk doctrine beyond sports. In *Nalwa v. Cedar Fair, L.P.* (2012) 196 Cal. App. 4th 566, the California Supreme Court held the primary assumption of the risk doctrine applies not only to traditional sports, but also to recreational activities. In *Nalwa,* the plaintiff injured her wrist while riding in a bumper car when she collided with another car. The trial court granted summary judgment against her, finding her claim was barred by assumption of the risk. The Supreme Court agreed and, in reaching its conclusion, stated "the policy behind primary assumption of the risk applies squarely to injuries from physical recreation, whether in sports or *non-sport activities.*"

Similarly, in *Beninati v. Black Rock City, LLC* (2009) 175 Cal. App. 4th 650, 658, the plaintiff fell into a fire pit during the Burning Man festival held in Nevada. The plaintiff argued the doctrine of primary assumption of the risk was inapplicable because it was limited to rule-based or active sports. The Court rejected this argument, holding the doctrine applies not only to sports, but "to other activities involving an inherent risk of injury to voluntary participants, where the risk cannot be eliminated without altering the fundamental nature of the activity." The Court focused on the fact the activity itself had the inherent risk of being burned, and this risk was readily apparent to the plaintiff.

The Court in *Gregory v. Cott* (2013) 213 Cal. App. 4th 41 further extended the primary assumption of risk doctrine beyond sports and recreational activities to workplace injuries. In *Gregory*, the plaintiff worked for an in-home agency providing care to clients with Alzheimer's disease. In the past, the plaintiff provided services to Alzheimer's patients and knew they could become violent based on an injury from a previous patient. In this case, the plaintiff had a knife in her hand when the patient reached for the knife, causing the plaintiff to cut her wrist and suffer significant injuries. The plaintiff filed an action for battery, negligence, and premises liability. The trial court granted the defendant's motion for summary judgment. The Court of Appeal affirmed, stating "the primary assumption of risk doctrine…applies to activities involving an inherent risk of injury to voluntary participants…where the risk cannot be eliminated without altering the fundamental nature of the activity." There is an inherent risk of injury which cannot be eliminated when treating Alzheimer's patients.

It is clear there is a growing trend to expand the assumption of the risk doctrine outside its application in the sports context. As shown above, it appears to be increasing its scope in the non-sporting and non-professional realms as well. Courts focus on whether the activity itself has an inherent danger and what the injured party's participation was in that activity. As stated in the *Nalwa* opinion, judges deciding inherent risk questions may consider "not only their own or common experience with the recreational activity involved but may also consult case law, other published materials, and documentary evidence introduced by the parties on a motion for summary judgment." The defense bar certainly views these recent decisions as positive developments, the hope being they may open the door for injuries suffered in other realms to fall under the assumption of risk doctrine.

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