"Jumping from moving vessel" case reflects confused state of "assumption of the risk" defense in California

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No Good Deed Goes Unpunished

Federal maritime law generally prohibits the defense of "assumption of the risk," on the grounds that comparative fault principles are fairer to both plaintiff and defendant. Nonetheless, California state courts are increasingly imposing California's complicated and often incomprehensible two-tier assumption of the risk rules to boating and marina personal injury actions. Most recently, a split panel of the California court of appeal held that a Marina, which had kindly (and without charge) allowed the son of a member access to the Marina and a Marina-owned vessel to scatter his father's ashes at sea, was unable to claim the benefit of the assumption of the risk defense because the son was allegedly a "passive" passenger, rather than an "active" participant in sailing the vessel. The son was injured while jumping onto the Marina dock from the still-moving vessel, rather than while actually sailing. See Kindrich v. The Long Beach Yacht Club, California Court of Appeal, published 10/28/08. The Kindrich court ignored federal maritime law, applying only California precedents, in reaching its decision.

California's "primary" assumption of the risk doctrine is designed to insulate potential defendants from liability for risks which are inherent in a specific sport or physical activity. A defendant has no duty under this doctrine to eliminate or reduce risks of harm, which are unavoidable in the activity, and cannot be eliminated or reduced without changing the nature of the activity - i.e. the risk of a swinging sail or boom hitting a sailboat crewmember, or a foul ball hitting a baseball player. See Ford v. Gouin (1992) 3 Cal 4th 339. Under "secondary" assumption of risk principles, defendant still owes the participant in an activity a duty of care, but plaintiff's right of recovery against defendant is reduced because the plaintiff has unreasonably undertaken to encounter a specific risk that is known to him. The test for determining whether a specific activity, or a particular plaintiff, is governed by either the primary or secondary assumption of risk doctrine is fact-specific. The test focuses not only on the nature of the activity in question ("is it an active sport?"), but also plaintiff's relationship to the activity, the phase of the activity or the timing of the injury. More than 100 California court of appeal decisions have wrestled with the primary/secondary assumption of the risk question, and reached markedly different conclusions as to when a defendant will or will not be held liable for injuries arising out of competitive sports or and other physical activities. The split decision in Kindrich reflects the confusion of the courts. Based upon the same facts, the majority found that the plaintiff was a mere passenger on a sailing trip at the time of his injury and thus (despite his "voluntary" decision to jump off a moving vessel) subject only to secondary assumption of the risk defenses. The minority justice looked at the precise jumping activity the plaintiff was engaged in, found it to be an "athletic endeavor," and stated that he would have upheld the trial court's summary judgment in favor of the defendant on primary assumption of the risk principles.

A Properly Drafted Release Would have Prevented the Problem

This problem could have been avoided completely, however, if the Marina had required each passenger before boarding the vessel to execute a written waiver, releasing the Marina from any injuries arising from their gratuitous use of the Marina's dock and vessel. Numerous maritime cases hold that advance waivers of liability, if clearly drafted and properly executed by vessel passengers or marina visitors, can act as a complete bar to any personal injury damages suits arising out of the activity at issue. See e.g. Whalen v. BMW of North America Inc. 864 F Supp 131 (SDCA 1994) and Hopkins v. The Boat Club Inc. 2004 AMC 664 (FL App 2004). Accordingly, to avoid becoming entangled in California's "assumption of the risk" briar

patch, it would be prudent for marinas, yacht owners, diving and jet ski services etc. to obtain advance written releases of liability from persons entering their premises or using their services.