Andrew B. Downs
San Francisco,
Shareholder

Direct Dial: 415.352.2716
Fax: 415.352.2701
Email Attorney

California Supreme Court's Holiday Gift to Recreational Activity Operators: Expansion of "Primary Assumption of the Risk" Defense

By Andrew B. Downs

California courts are often maligned as the home of plaintiff-friendly juries, expansive tort remedies and exorbitant damages awards. On New Year's Eve, however, California's Supreme Court gave defendants a last-minute holiday gift−a judicial decision expanding California's already broad primary assumption of the risk defense, and making it much more difficult to sue successfully the owners, operators and organizers of sports and recreational facilities/events for negligently caused personal injuries.

In *Nalwa v. Cedar Fair, L.P.*, the plaintiff, Dr. Smriti Nalwa fractured her wrist while riding with her nine-year-old son in an amusement park's bumper car ride. Dr. Nalwa's car was struck head-on by another bumper car, leading to her wrist fracture. She sued the amusement park owner, alleging that it had negligently failed to minimize the ride's risks. The California Supreme Court concluded the primary assumption of the risk doctrine applied not only to sporting activities, but also to other inherently risky recreational activities. It reinstated a summary judgment the amusement park owner had won in the trial court.

In deciding to apply primary assumption of the risk to recreational activities that are not sports, the Supreme Court reviewed prior assumption of the risk decisions dismissing liability claims against apparently negligent sporting event organizers. These earlier decisions had applied the defense to the sports of skiing, sailing, speed-boating, swimming, golf and baseball. It was logical, the Supreme Court believed, to extend sports precedents to recreational activities, because: (1) recreational activities such as bumper car riding also involved inherent and practically unavoidable risks of injury; (2) the risks of the activities could not be eliminated without altering the fundamental nature of the activity; and (3) allowing unfettered tort liability would likely "chill" participation in the recreational activity−*i.e.*, who would want to drive a bumper car where there would be no risk of being bumped? The Supreme Court suggested that the following recreational activities (not an exclusive list) would properly invoke the primary assumption of the risk defense: amusement park rides, organized group bicycle trips, riding on a commercially operated river raft and "tubing" (being pulled by a motor boat, while sitting in an inner tube).

As with sporting activities, the organizers, operators and sponsors of most recreational activities only owe participants what has been described as a "limited" duty of care: They have no duty to eliminate risks, or prevent injuries, inherent in the activity, but "do owe participants the duty not to unreasonably increase the risks of injury beyond those inherent in the activity."

Even after *Nalwa*, not all inherently risky activities are subject to the primary assumption of the risk defense. Automobile accidents and medical negligence, for example, involve daily activities which are essential and unavoidable parts of modern life. Injured plaintiffs do not "choose" to participate in such activities. Therefore, ordinary negligence and comparative negligence principles properly determine the scope of defendants' duties. Recreational activities, on the other hand, are not "important" parts of our daily lives. They are voluntary, amusing, entertaining and sometimes frightening. No one forces or obligates a person to participate in them.

As legal commentators have noted, California has led the state courts in the expansion of the primary assumption of the risk defense. States like Nevada, Washington, New Jersey and New York, for example, have followed California's lead. Oregon, on the other hand, has statutorily done away with assumption of the risk, reducing the doctrine to a form of comparative

negligence (ORS 31.620(2)). Similarly, federal maritime law emphatically rejects assumption of the risk as a total defense to any sort of negligence claim. This has resulted in widely different results for similar maritime recreational accidents, depending upon whether the accident took place on an "admiralty" waterway governed by federal maritime law (which does not recognize assumption of the risk) or an inland state waterway (which does). For example, a negligently caused speed-boat death on San Francisco Bay, where federal maritime law applies, would likely give rise to many thousands, if not millions, of dollars in damages. Conversely, a potential multi-million dollar wrongful death claim caused by negligent speed-boating on California's landlocked and governed by state law Coyote Lake was dismissed on summary judgment because being tossed from a boat by wave and wake action is a risk that the teen-aged rider in a speedboat race assumes. See *Truong v. Nguyen* (2007) 156 Cal.App.4th 865. Knowing which law to apply to any given waterway is therefore very important.

The expansion of primary assumption of the risk is also noteworthy because for twenty years, California's most senior Supreme Court justice, Justice Kennard, has criticized the steady expansion of California's primary assumption of the risk doctrine in favor of defendants as a "radical transformation of California's tort law." She has dissented each time the doctrine was extended to cover coaches, as well as sports participants, broadened to cover event sponsors and organizers, and expanded now to include recreational activities. Notwithstanding her vigorous dissents, California's Supreme Court majority shows no interest in limiting or restricting the primary assumption of the risk defense. In fact, given the breadth of the *Nalwa* decision, it would be reasonable to expect the defense to be extended to other recreation-related activities in the future.