New Developments in the Law of Releases and Primary Assumption of Risk

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I. Introduction.

Preinjury written releases and the doctrine of primary assumption of risk commonly pose significant hurdles for plaintiffs injured while engaging in sports and related activities. In this program we discuss some recent developments in these areas, including the Supreme Court's extension of the doctrine of primary assumption of risk beyond "sports" to non-sport "recreational activities," as well as some ramifications electronic releases, where the plaintiff does not physically sign a written document. In addition, we discuss some strategies for proving gross negligence in order to avoid the application of a release.

II. The Primary Assumption of Risk Doctrine.

A. Application to "sports" and "sporting activities."

In *Knight v. Jewitt* (1992) 3 Ca1.4th 296, the seminal primary assumption of risk case, the plaintiff was injured while playing in a co-ed touch football game when another player stepped on her hand. She sued the other player. A plurality of the California Supreme Court declared that under the primary assumption of risk doctrine a defendant generally has no legal duty to eliminate or protect a plaintiff against risks inherent in a sport. (*Knight v. Jewitt, supra*, at pp. 315-316.) In a footnote, the *Knight* court observed, "In addition to the sports setting, the primary assumption of risk doctrine also comes into play in the category of cases often described as involving the 'firefighter's rule.'" (3 Cal.4th at p. 309, fn. 5, cits. omitted.)

In *Ford v. Gouin* (1992) 3 Cal.4th 339, the companion case to *Knight*, the court applied the doctrine to the noncompetitive sport of waterskiing. (At pp. 342-343.)

Since the *Knight* and *Ford* decisions, the doctrine has been applied to a wide range of sporting activities. Until recently, most courts seemed to assume that, putting aside the "firefighter's rule" cases, the doctrine could apply only to an activity that could be classified as a "sport" or "sporting activity." For example, an early case held that the doctrine did not apply to a suit by a plaintiff who slipped and fell on a dance floor because recreational dancing was "not a sport within the ambit of *Knight*." (*Bush v. Parents Without Partners* (1993) 17 Cal.App.4th 322, 328.)

As a result, subsequent courts grappled with the problem of identifying the defining characteristics of a "sport." In *Record v. Reason* (1999) 73 Cal.App.4th 472, 482, the court, after reviewing the case law, concluded, "Compiling all of the distinguishing factors, it appears that 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." The court held that the activity of riding an inner tube being towed by a motorboat came within this definition. (*Ibid.*)

In *Shannon v. Rhodes* (2001) 92 Cal.App.4th 792, 794, the minor plaintiff fell from a motorboat during a recreational boat ride on a lake with family and friends. The court held that the use of a boat in such circumstances did not "reasonably implicate[] a 'sport' within any understanding of the word. There is nothing in this record to indicate the boat here was anything more than a mode of transportation." (At p. 800.) A similar conclusion was reached in *Kindrich v. Long Beach Yacht Club* (2008) 167 Cal.App.4th 1252, where a boat passenger was injured while jumping from the boat to the mooring dock. The court held that primary assumption of risk "does not come into play except when plaintiff and defendant are engaged in certain types of activities, such as an 'active sport.' That was not the case here; plaintiff was merely the passenger on a boat." (At p. 1258.) The court rejected the notion that the fact that the plaintiff suffered the injury while "jumping" transformed the activity into an "active sport." (At p. 1262.)

Conversely, in *Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, the court held that an organized long-distance bicycle ride on public highways with large numbers of riders constituted a "sport" to which primary assumption of risk could apply. (At p. 1221.) In *Moser*, the plaintiff participated with some 600 other bicyclists in a 200-mile noncompetitive bicycle ride over public highways. He was injured when another participant swerved into him, causing him to fall. The court acknowledged that bicycle riding can be a means of transportation similar to automobile driving, which is not covered by the assumption of risk doctrine even though it requires skill, can be done for enjoyment, and entails risks of injury. (*Ibid.*) Nevertheless, it pointed out that "organized, long-distance bicycle rides on public highways with large numbers of riders involve physical exertion and athletic risks not generally associated with automobile driving or individual bicycle riding on public streets or on bicycle lanes or paths." (*Ibid.*, fn. omitted) The court concluded. "[T]he organized, long-distance, group bicycle ride qualifies as a 'sport' for purposes of the application of the primary assumption of risk doctrine." (*Ibid.*)

B. Extension to non-sporting activities.

In *Beninati v. Black Rock City, LLC* (2009) 175 Cal.App.4th 650, the First District Court of Appeal turned a new page in primary assumption of risk law, applying the doctrine to an obviously non-sporting activity. In *Beninati*, the plaintiff was injured while participating in the annual Burning Man Festival.

The culmination of the festival involves the burning of a 60-foot tall wood sculpture of a man held upright by wire cables. Attendees can participate "more fully" in the experience by throwing objects into the fire. The plaintiff walked into the remnants of the fire to throw in the picture of a deceased friend. He tripped on something—possibly a downed cable wire—and was burned when he fell into the burning rubble.

The First District held that the doctrine of primary assumption of risk "applies not only to sports, but to other activities involving an inherent risk of injury to voluntary participants like Beninati, where the risk cannot be eliminated without altering the fundamental nature of the activity." (175 Cal.App.4th at p. 658.) The court explained, "[T]he risk of stumbling on buried fire debris, including the cables which necessarily had collapsed along with the sculpture, was an obvious and inherent one. Thus, the risk of falling and being burned by the flames or hot ash was inherent, obvious, and necessary to the event, and Beninati assumed such risk." (*Id.* at p. 659.)

The Supreme Court recently embraced the *Beninati* holding in *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148. In *Nalwa*, the plaintiff was injured while participating in a bumper car ride at an amusement park. The court held that the "primary assumption of risk doctrine is not limited to activities classified as sports, but applies as well to other recreational activities "involving an inherent risk of injury to voluntary participants … where the risk cannot be eliminated without altering the fundamental nature of the activity.'" (At p. 1156, quoting *Beninati, supra*, 175 Cal.App.4th at p. 659.)

Although the Supreme Court did not undertake to define what constitutes a "recreational activity," it did state,

> While inherent risks exist, for example, in travel on the streets and highways and in many workplaces, we agree with the lower court that "the primary assumption of risk doctrine in its modern, post-*Knight* construction is considerably narrower in its application." … But active *recreation*, because it involves physical activity and is not essential to daily life, is particularly vulnerable to the chilling effects of potential tort liability for ordinary negligence. And participation in recreational activity, however valuable to one's health and spirit, is voluntary in a manner employment and daily transportation are not.

(*Nalwa, supra*, 55 Cal.4th at p. 1157, original italics.)

The ruling in *Nalwa* threatens to add even more uncertainty and subjectivity to the limits and application of the primary assumption of risk doctrine. The question is no longer merely whether an activity constitutes a "sport," but whether it constitutes "recreation"—a question that would seem

likely to turn in many cases upon the *purpose* for which the activity was undertaken and hence upon the actor's state of mind.

C. Establishing liability in a sports or recreational activity.

What the plaintiff must prove in order to establish liability in a particular sports or recreational-activity case is not always clear. The plurality in *Knight* stated, "Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty to use *due care* not to increase the risks to a participant over and above those inherent in the sport." (3 Cal.4th at pp. 315-316, italics added.) This would appear to suggest that if a defendant may be liable if it *negligently* creates—or even fails to eliminate or protect against—a risk that is not inherent in the sport.

Later, however, the plurality concluded that a *participant* in an "active sport" could be liable only for intentional or reckless conduct: "a participant in an active sport breaches a legal duty of care to other participants—i.e., engages in conduct that properly may subject him or her to financial liability—*only if* the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport." (*Knight, supra*, at p. 320, italics added.)

The *Knight* plurality observed that it had no occasion to determine whether the same limited duty "should be applied to other less active sports, such as archery or golf." (*Id.* at p. 320, fn. 7.) Subsequently, however, the Supreme Court held that the same intentional/reckless standard applied to participants in the sport of golf. (*Shin v. Ahn* (2007) 42 Cal.4th 482, 497.) In *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 996, the Supreme Court applied the same duty to a sports instructor teaching a student athlete.

In *Nalwa*, on the other hand, the court appeared to hold that the lesser, negligence standard applies to any defendant involved in a recreational activity—including participants and instructors: "Where the doctrine [of primary assumption of risk] applies to a recreational activity, operators, instructors and participants in the activity owe other participants only the duty not to act so as to increase the risk of injury over that inherent in the activity." (55 Cal.4th at p. 1154.)

III. Preinjury releases of liability.

A. The validity of electronic releases.

On June 30, 2000, Congress enacted the Electronic Records in Global and National Commerce Act (15 U.S.C. §7001 et seq.), commonly referred to as the "E-Sign Act." In general, the E-Sign Act provides that a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form or because an electronic signature was used in its formation. (Annot., Construction and Application of Electronic Signatures in Global and National Commerce Act (E-Sign Act), 15 U.S.C.A. §§7001-7006 (2008) 29 A.L.R.Fed.2d 519.)

The E-Sign Act permits states to enact their own laws on electronic transactions provided they do not conflict with the Act. (15 U.S.C. §§7001, subd. (a) & 7002.) California has adopted a somewhat modified version of the Model Uniform Electronic Transactions Act promulgated by the National Conference of Commissioners on Uniform State Laws. The California UETA, codified at Civil Code, section 1633.1 et seq., took effect on January 1, 2000.

With specified exceptions, the California UETA applies to "electronic records and electronic signatures relating to a transaction." (Civ. Code, §1633.1, subd. (a).) It applies to a transaction between parties that have agreed to conduct the transaction by electronic means; whether the parties have so agreed "is determined from the context and surrounding circumstances, including the parties' conduct." (*Id.*, §1633.5, subd. (b).)

The UETA also includes provisions concerning the retention of electronic records. Civil Code section 1633.12, subdivision (a) provides that if a law requires that a record be retained, that requirement is satisfied by retaining an electronic record of the information, provided the electronic record "reflects accurately the information set forth in the record at the time it was first generated in its final form as an electronic record or otherwise, and the electronic record remains accessible for later reference." Subdivision (d) of this section provides, "If a law requires a record to be retained in its original form, or provides consequences if the record is not retained in its original form, that law is satisfied by an electronic record retained in accordance with subdivision (a)."

The UETA provides that a record or signature may not be denied legal effect or enforceability solely because it is in electronic form and that a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation. (Civ. Code, §§1633.7, subds. (a) & (b), 1633.13.) It further provides that if a law requires a record to be in writing, an electronic record satisfies the law. (*Id.*, subd. (c).)

Similarly, "If a law requires a signature, an electronic signature satisfies the law." (Civ. Code, §1633.7, subd. (d).) An "electronic signature" is defined as "an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record." (*Id.*, §1633.2, subd. (f).) An electronic record or electronic signature is attributable to a person if it was the "act of the person," which may be shown "in any manner." (*Id.*, §1633.9, subd. (a).) This definition appears broad enough to include the act of clicking on an "I agree" or "I accept" button on a web page.

To date, only one reported case has construed the California UETA. (*Rickards v. United Parcel Services, Inc.* (2012) 206 Cal.App.4th 1523.) In *Rickards*, the plaintiff sued his employer under the Fair Employment and Housing Act (FEHA) (Gov. Code, §12900 et seq.), which required him, as a prerequisite to the suit, to exhaust his administrative remedies by filing a verified complaint with the Department of Fair Employment and Housing (DFEH) (*Id.*, §§ 12960, subd. (b), 12965, subd. (b).) Under existing law, a written DFEH complaint did not have to be personally verified by the complainant but could instead be verified by an attorney provided the attorney signed with his or her name. (*Rickards, supra*, 206 Cal.App.4th at p. 1527, citing *Blum v. Superior Court* (2006) 141 Cal.App.4th 418, 428.)

In *Rickards*, the plaintiff's attorney used the DFEH's online automated system to file the DFEH complaint. The system included a screen stating, "By submitting this complaint, I am declaring under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge except as to matters stated on my information and belief …," followed by a "CONTINUE" button, which the attorney clicked. (*Rickards*, 206 Cal.App.4th at pp. 1527-1528.) The automated system, however, did not require input of the attorney's name. (*Rickars, supra*, 206 Cal.App.4th at p. 1528.)

The DFEH subsequently changed its regulations in 2011 to provide that a verified complaint did not need to be signed as long as the verification "confirmed the truth of the allegations, including by submitting the allegations under penalty of perjury." (*Ibid.*)

The employer in *Rickards* argued that the 2011 regulations did not apply retroactively and hence did not dispense with the requirement that an attorney may verify a DFEH complaint only by *physically* signing his or her own name. The court rejected the argument. Citing Civil Code, section 1633.7, subd. (a) (electronic signature is attributable to a person if it was act of the person and such act may be shown in any manner), the court held, "In the

same way, the attorney's verification of an online complaint is the act of the attorney." (*Rickards, supra*, 206 Cal.App.4th at p. 1529.)

B. Avoiding a valid release: Proving gross negligence.

It is of course now well established that a preinjury release of liability cannot exempt a defendant from liability for gross negligence. (See *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 777.) Thus, even if a release is valid it may be possible to avoid its application by proving gross negligence.

The concept of gross negligence, however, is a bit nebulous. It is defined in the alternative as either the lack of any care or an "extreme departure from the ordinary standard of conduct." (*City of Santa Barbara, supra*, 41 Cal.4th at pp. 753-754.) CACI 425 frames the definition as follows: "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."

Arguably, the second prong of this definition encompasses the first prong because presumably the lack of *any* care would necessarily constitute an "extreme departure" from the standard of care.

The second prong opens the door to alternative strategies for proving gross negligence. Thus, an "extreme departure" might be established by showing that the defendant's conduct was especially egregious and hence fell far below the ordinary standard of care. Alternatively, however, such a departure might be established by *elevating* the standard of care and thus showing that the defendant's conduct, though not particularly egregious when viewed in the abstract, fell far below the heightened standard.

There is some legal support for this approach. In *Gore v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d 184, the court noted:

> 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 p. 180.)

(At p. 198; see also Prosser & Keaton, Torts (5th ed. 1984) § 34, p. 208.)

In short, to establish gross negligence the plaintiff should focus not only on the egregiousness of the conduct but also the *gravity of the risk* posed by the conduct.

Two cases illustrate this approach in their results if not in the court's actual analysis. In *Pratt v. Western Pacific Railroad Co.* (1963) 213 Cal.App.2d 573 a passenger was injured when a train struck a large boulder on the tracks. It had been raining and the railroad knew of the risk of slides. It had issued a "slow order" reducing the maximum speed through the area to 20 miles per hour. The opinion does not state the speed of the accident train, but its description of the force of the collision suggests it was greater than 20 miles per hour. The evidence indicated that, had the train engineer been looking, he could have seen the boulder from a distance of 500-600 feet. The court held it was for the jury to determine whether the engineer had committed gross negligence. (*Id.* at p. 578.)

In *Walther v. Southern Pacific Co.* (1911) 159 Cal. 769, a switch foreman left a switch open while he and his crew worked on the tracks. He neglected to keep himself informed of the whereabouts of the train. As a result, the train derailed when it was shunted onto a sidetrack with a curve that could not be negotiated at the speed at which the train was traveling. The court held the evidence supported a finding of gross negligence. (*Id.* at pp. 775-776.)

In the abstract, the *misconduct* in *Pratt* and *Walther* is not that egregious. In *Pratt*, the engineer went faster than he should have and failed to keep a proper lookout—fairly run of the mill negligence in most contexts. In *Walther* the foreman simply forgot to keep track of where the train was. But in each case, these lapses had disastrous consequences. The conclusions reached by the appellate courts in these cases support the notion that the existence of gross negligence does not depend simply on the egregiousness of the misconduct but also on the gravity of the risk of harm posed by it.