Sports Premises Injuries and the Knight v. Jewett Evolution

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A. The Sports Injury Claim and its Primary Defense.

Injuries that occur during sporting events present a host of special problems for the practitioner. Since the California Supreme Court decided Knight v. Jewett (1992) 3 Cal.4th 269, 11 Cal.Rptr.2d 2, the primary assumption of the risk doctrine has presented a potent, often unfair, barrier to injury claims in sports settings.

However, in the decade since Knight was decided, many courts have sought to soften the impact of the primary assumption of the risk doctrine. Some of the softening has to do with an often overlooked Knight doctrine – secondary assumption of the risk.

Yet, even primary assumption of the risk has mellowed with age, and the doctrine reached a landmark of sorts this past September when our Supreme Court decided Kahn v. East Side Union High School Dist. (2003)31 Cal.4th 990, 4 Cal.Rptr.3d 103.

The message is clear. Counsel should perform careful research into the facts of potential sports premises injury claims when advising clients on whether legal action is appropriate. The answers to the liability question may not always be apparent without some careful research, and sometimes the answer may be surprising.

B. Knight and Primary Assumption of the Risk

The general rule is that a property owner is usually required to use due care to eliminate dangerous conditions on his or her property. See, e.g., Rowland v. Christian (1968) 69 Cal.2d 108, 70 Cal.Rptr. 97. Accordingly, a historical review of sport-related injury actions will necessarily uncover a long list of cases against baseball stadium operators, ski resorts and other sports facility owner/operators that seek recovery for negligence in connection with their operations.

However, during the 1990s, primary assumption of the risk as announced in Knight created a potent defense against sports premises liability by essentially placing a large portion of the onus for safety on sports participants themselves.

Knight involved a touch football game among social friends. Both plaintiff and defendant were participants in the game. Premises liability was not directly a part of the case.

In reaching its primary conclusions, the Supreme Court observed that "the question before us involves the circumstances under which a participant in such a sport may be held liable for an

injury sustained by another participant." This seemed at first blush to limit the analysis to participant versus participant claims.

Even so, the rule that "a participant in an active sport breaches a legal duty of care to other participants . . . 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" has expanded as a bar to premises liability claims under certain fact patterns involving sports activities.

So, in Nemarnik v. Los Angeles Kings Hockey Club, L.P. (2002) 103 Cal.App.4th 631, 127 Cal.Rptr.2d 10, where a young woman was injured by a stray hockey puck during pre-game warm ups, the owner/operators of the ice hockey venue were dismissed via nonsuit at the beginning of trial as immune under the primary assumption of the risk doctrine, effectively ending liability for such injuries under case law dating back to the 30's. See, Thurman v. Ice Palace (1939) 36 Cal.App.2d 364, 97 P.2d 999.

Clearly primary assumption of risk is a major factor in evaluating and prosecuting premises liability sports injury cases. Yet, contrary to what many might perceive, Knight is not an insurmountable hurdle. In fact, a recent decision by the California Supreme Court demonstrates that, after more than a decade, Knight may be easing down from its high horse.

C. The Wrath of Kahn.

Though Knight is most frequently cited as authority for the primary assumption of the risk doctrine, upon a close reading, the opinion actually points the way towards encouraging premises safety using common law tort theory.

Primary assumption of the risk is essentially a legal doctrine that cuts off liability by creating what is effectively a tort safe harbor for certain types of conduct. Under the doctrine, where the injured party is engaging in an activity such as touch football, her co-participants owe her no legal duty of care to protect her from the consequences of their own negligence.

A two-prong test focuses on two inquiries: "First, is the careless conduct of participants an inherent risk of the sport? Second, will imposition of a legal duty, with potential liability, alter the nature of the sport or chill participation in it?" Yancey v. Superior Court (1994) 28 Cal.App.4th 558, 565, 33 Cal.Rptr.2d 777.

The conduct in question must not be reckless or intentional. The Defendant must not have acted in a manner that elevates the inherent risks of the activity. Determination of the duty depends upon the nature of the activity. Knight, supra, 3 Cal.4th 315-316, 320, 11 Cal.Rptr.2d 2.

With Kahn v. East Side Union High School Dist. (2003) 31 Cal.4th 990, 4 Cal.Rptr.3d 103, we now have some better insight into just what kind of reckless behavior triggers liability with a primary assumption of the risk fact pattern in a sports setting.

The injured party in Kahn was a 14-year-old high school student-athlete, a novice member of the defendant's junior varsity swim team. The athlete was participating in a competitive swim meet being held on the defendant's property.

During a practice dive into a shallow pool she struck her head and broke her neck. A lawsuit followed.

The complaint stated various claims against both the swim coach and the coach's school district employer. The complaint alleged that the coach negligently failed to train, supervise, or control the swim team members to protect them adequately against diving accidents and that the coach negligently directed the student to dive off a starting block during competition without giving her adequate training or supervision, thus proximately causing her injury. (The complaint also alleged a cause of action for premises liability against the school district for a defect in the starting block, but this claim was not pursued at the high court level)The trial court dismissed the action on summary judgment relying in Knight v. Jewett and primary assumption of the risk. The Court of Appeal affirmed.

The Supreme Court reversed, holding that under the facts of the case, the defendant coach's failure to provide any instruction regarding shallow water diving could lead the trier of fact to determine that such conduct was reckless and, therefore, actionable.

If a jury were to find that defendant coach directed plaintiff . . . to perform a shallow racing dive in competition without providing any instruction, that he ignored her overwhelming fears and made a last-minute demand that she dive during competition, in breach of a previous promise that she would not be required to dive, we believe the trier of fact could determine that such conduct was reckless in that it was totally outside the range of the ordinary activity involved in teaching or coaching the sport of competitive swimming. Kahn, 4 Cal.Rptr.3d 103.

What is surprising about the Kahn rationale is that it marks the first time the high court has enunciated just what type of specific conduct constitutes reckless conduct that, in turn, will impose a duty giving rise to liability in a primary assumption of risk fact pattern. See e.g., Ford v. Gouin (1992) 3 Cal.4th 339, 11 Cal.Rptr.2d 30; Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal.4th 532, 34 Cal.Rptr.2d 630; Cheong v. Antablin (1997) 16 Cal.4th 1063, 68 Cal.Rptr.2d 859.

Also significant is that the Supreme Court announced in Kahn that expert testimony regarding customary practices in a given sport is relevant in providing a guidepost for the trial court from which to measure reckless behavior. This holding clarifies the role of expert testimony in these sorts of proceedings and fills a gap in the law first bemoaned by the Court of Appeal in 1996. See, Staten v. Superior Court (1996) 45 Cal.App.4th 1628, 1635-1637, 53 Cal.Rptr.2d 657.

Since premises liability actions involving sports injury claims often revolve around vicarious liability (cf., Rodrigo v. Koryo Martial Arts (2002) 100 Cal.App.4th 946, 122 Cal.Rptr.2d 832), Kahn must be considered in evaluating any potential premises action where an instructor, coach or team is the primary actor in the injury chain.

Yahn is especially helpful to the practitioner when read in tandem with Yancey v. Superior Court (1994) 28 Cal.App.4th 558, 33 Cal.Rptr.2d 777, a decision which also found duty leading to liability, albeit without reaching a conclusion on recklessness.

In Yancey, the plaintiff was struck in the head by a discus thrown by the defendant during a college physical education class. The plaintiff had walked onto the field to retrieve a discus she had just thrown when the defendant threw his discus without first observing the field or warning the plaintiff he was about to throw.

Reversing the trial court's order granting the defendant's motion for judgment on the pleadings based on primary assumption of the risk, Yancey noted that the rationale behind the Knight v. Jewett rule that participants in sports have a limited duty towards co participants focuses on two inquiries: "First, is the careless conduct of participants an inherent risk of the sport? Second, will imposition of a legal duty, with potential liability, alter the nature of the sport or chill participation in it?"

Yancey noted that while the risk that a discus will hit someone in the general area of play is an inherent risk of disc throwing, the issue posed by the alleged facts of that particular case was "much more specific -i.e., is the careless conduct of a participant in throwing the discus without first ascertaining if the target area is clear an inherent risk of the sport?"

The Court of Appeal concluded it was not. It reasoned that requiring discus throwers to check the target area before throwing would not alter or destroy the inherent nature of discus competition, and imposing legal liability on a participant for injuries caused by failure to check the target area before throwing would not chill vigorous participation in the sport.

The duty, Yancey declared, is the duty to use due care not to increase the risks to the participant over and above those inherent in the sport. Similar holdings appears in Campbell v. Derylo (1999) 75 Cal.App.4th 823, 89 Cal.Rptr.2d 519 (an untethered, runaway snowboard that struck a sitting skier constituted a sufficient increase in the inherent dangers of skiing to impose liability) and Lowe v. California League of Prof. Baseball (1997) 56 Cal.App.4th 112, 65 Cal.Rptr.2d 105 (which teaches that where a baseball team's mascot distracts a fan who is then hit with a foul ball, summary judgment is not appropriate).

D. Primary versus Secondary Assumption of the Risk.

In analyzing sports premises liability cases, the practitioner should also be careful not to overlook the distinction noted in Knight v. Jewett between primary and secondary assumption of the risk. While the former is generally utilized to cut off liability, the later is actually an avenue for a case to reach the trier of fact following the principles of comparative fault.

As our Supreme Court explained:
In Knight . . . we examined the doctrine of assumption of the risk in light of the principal of comparative fault. We observed that the term "assumption of the risk" had been used in connection with two classes of cases: those in which the issue to be resolved was whether the

defendant actually owed the plaintiff a duty of care (primary assumption of the risk), and those in which the defendant had breached a duty of care but where the issue was whether the plaintiff had chosen to face the risk of harm presented by the defendant's breach of duty. In the latter class of cases, we concluded, the issue could be resolved by applying the doctrine of comparative fault, and the plaintiff's decision to face the risk would not operate as a complete bar to recovery. In such a case, the plaintiff's knowing and voluntary acceptance of the risk functions as a form of contributory negligence.
Kahn, 4 Cal.Rptr.3d at 112-113.

Recognizing a secondary assumption of risk fact pattern requires a review of the cases, along with some application of analogy and common sense.

For example: The Court of Appeal in Safro v. Elite Racing, Inc. (2002) 98 Cal.App.4th 173, 119 Cal.Rptr.2d 497 reversed summary judgment by applying secondary assumption of the risk where a race organizer was alleged to have failed to take necessary safety precautions. The duty imposed was the duty to produce a reasonably safe event, which was allegedly violated when the organizer failed to have water available for participants at refreshment stations, leading to one runner suffering a grand mal seizure.

In Huffman v. City of Poway (2000) 84 Cal.App.4th 975, 101 Cal.Rptr.2d 325, an actor was injured during rehearsal when he fell through a trap door. Summary judgment was reversed, apparently using a secondary assumption of risk rationale.

In Branco v. Kearny Moto Park, Inc. (1995) 37 Cal.App.4th 184, 43 Cal.Rptr.2d 392, summary judgment was reversed where a bicycle racer was injured after encountering a negligently designed jump that created an extreme risk of injury.

In Morgan v. Fuji Country USA, Inc. (1995) 34 Cal.App.4th 127, 40 Cal.Rptr.2d 249, summary judgment was reversed using secondary assumption of the risk where the claim was that a golfer was injured by an errant ball due to the owner's negligent design and maintenance of the course.

In Bush v. Parents Without Partners (1993) 17 Cal.App.4th 322, 21 Cal.Rptr.2d 178, summary judgment was reversed where the owners and operators of a dance hall increased the risk of falling by adding a slippery substance to the dance floor. Held: Doctrine of primary assumption of the risk does not apply to recreational dancing.

In Galardi v. Seahorse Riding Club (1993) 16 Cal.App.4th 817, 20 Cal.Rptr.2d 270, secondary assumption of the risk applied where the complaint alleged a horse riding club and instructor negligently deployed jumps at unsafe heights and intervals and precluded summary judgment.

What these cases seem to tell us is that, when analyzing a sports premises case, the sports activity will take a back seat to the regular duties of a premises owner/operator when negligent in design, maintenance, or operation can be shown and where that negligence does not impact the core activities of the sport.

E. Conclusion.

Premises cases are always difficult, challenging cases. Yet, they can also be some of the most intellectually stimulating matters you can handle.

If a sports premises injury comes through your door, take some time in your analysis. Knowing where the boundaries of primary and secondary assumption of the risk, as well as what constitutes reckless behavior in sports or what might have been done to unreasonably increase inherent risks, can make all the difference in both your efforts and the life of your client.

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