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Laura Sedrish
JACOBY & MEYERS

Laura Davidson
JACOBY & MEYERS

Litigating against camps when children are injured

CAMPS MAY RELY UPON SUCH DEFENSES AS WAIVERS OF LIABILITY, ASSUMPTION OF THE RISK AND GOVERNMENTAL IMMUNITIES

Parents and guardians routinely send their minor children to day camps during summer, winter, and spring recesses so their children can have fun, develop a sense of independence, socialize with others, and enjoy new experiences, adventures, and activities away from home. For busy parents and guardians, who may have no other options for childcare during school breaks, camps are also supposed to provide the added benefit of providing a safe environment for their children while they develop new social, emotional, and physical skills.

Parents and guardians entrust camps with their most cherished and vulnerable loved ones and rely on camps to keep children safe when outside of their watch. Despite the various representations made by camps and their administrators regarding camper safety, campers are routinely injured, and sometimes fatally so, due to shocking and disturbing administrator and counselor negligence, improper counselor training and supervision, dangerous conditions at the camp property, deficient and/or lack of emergency preparedness. Surprisingly there is little oversight by governmental or administrative bodies. Many camps are liable per se for statutory violations of California law for failing to comply with mandatory licensing requirements concerning the operation of a childcare facility or children's camp. Now that the pandemic is coming to an end, even more children are returning to the world of camps with increased opportunity for injury and death.

Summer camps, both day camps and sleep-away camps, advertise expertise in areas of highly dangerous activities that appeal to kids: cliff diving, mountain climbing, trampolines, swimming, horseback riding, waterskiing, surfing, and whitewater rafting, among other activities, many of which are extremely dangerous when not conducted safely with appropriate safety measures and vigilant supervision by trained personnel. Every year children are killed and injured under the "watch" of camp counselors, administrators, and owners. We need to make sure we protect children against wrongful acts on the part of camp owners and operators, and that we hold camps, their owners, and their employees responsible for all harm caused by their conduct.

There are various legal issues that arise when a camper has been hurt and a claim for injuries or death is alleged. Following are some issues that frequently arise and tips on how to successfully prosecute those claims.

Written waivers and releases – Are they valid and enforceable?

When you register a child for camp, the camp usually asks the parent or guardian to sign a waiver before their child may attend and participate in camp activities. These waivers are usually broad in their descriptions of camp activities. Many defense attorneys argue that these waivers release defendants from all liability for ordinary negligence, negating liability for injuries suffered at camp. Civil Code section 1668 provides that waivers of liability are valid where the public interest is not implicated. However, California courts require a *high degree of clarity and specificity* in a waiver or release to find that it relieves a party from liability for its own negligence. (*Cohen v. Five Brooks Stable* (2008) 72 Cal.Rptr.3d 471, 481.) A release must be easily readable and conspicuous, and it must be, "clear, explicit and comprehensible in each of its essential details." The language that limits liability must be stated understandably, in words that are part of the working vocabulary of the average layperson. (*Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd.* (1983) 147 Cal.App.3d 309, 319.) A release does not have to be perfect, but it must be sufficient to apprise the party of the effect of signing the document. An agreement, read as a whole, must clearly notify the prospective releaser or indemnitor of the effect of signing the agreement. (*Id.* at 318.) Although an enforceable release does not need to recite every conceivable risk within its intended scope nor the specific risk that caused a plaintiff's injury, the act of negligence resulting in the plaintiff's injury must be reasonably related to the object or purpose for which the release was signed.

Defeat CACI 451 (Affirmative Defense - Contractual Assumption of Risk)

A contractual waiver is an affirmative defense for which the defendant has the burden of proof, and both the interpretation of a waiver agreement and application of its legal effect are generally resolved by the judge before trial. The existence of a duty is a question of law for the court as is the interpretation of a written instrument if the interpretation does not turn on the credibility of extrinsic evidence.

Therefore, it is important to read the waiver or release carefully and analyze it to determine whether it is sufficiently clear and specific, encompasses the specific activity that caused the injury, and that the act of negligence is reasonably related to the object or purpose for which the release was signed. Upon defendant's motion for summary judgment (MSJ), you may argue that the language of the waiver/release was not sufficiently clear and explicit and did not serve as adequate notification to the prospective releaser or indemnitor of the effect of signing the

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agreement (e.g., that the release was not clear as to the scope of activities in which the camper would participate, that the parent/guardian was not informed by the camp and/or the camp did not advertise or promote that such an activity would be offered, they had no knowledge that their child was to engage or participate in the activity causing harm, and gave no permission for their child to participate in that particular activity), that the release is expressly limited to a specific conduct that does not apply here, and/or that a reasonable person would conclude the camper is not among the category of people relieving the camp of liability. Enumerate the triable issues of material fact regarding these issues and argue that the defendant failed to meet its burden justifying dismissal of the cause of action.

Argue that the waiver is not enforceable

There may also be contract law defenses (such as fraud, lack of consideration, misrepresentation, duress, unconscionability) that could be asserted by the plaintiff to contest the validity of a waiver. For example, you could look for negligent misrepresentations made by the camp regarding the activities in which the campers would participate and/or negligent representations about experience, supervision, and/or training of its counselors, on which the parent relied when enrolling their child, which could render the waiver unenforceable or voidable. Defenses to contract formation typically depend on disputed material facts that must be considered by a jury, and therefore MSJ should fail.

Defeat CACI 336 (Affirmative Defense – Waiver)

Remember that a waiver is the intentional relinquishment of a known right after knowledge of the facts. For this defense to apply, the defendant must prove both of the following by *clear and convincing* evidence: (1) that the plaintiff knew the defendant was required to [do something; description of performance], and (2) that the plaintiff freely and knowingly gave up his/her right to have the defendant perform this/these obligation(s). Waiver is ordinarily a question for the trier of fact to determine unless there are no disputed facts and only one reasonable inference may be drawn. (*DuBeck v. California Physicians' Service* (2015) 234 Cal.App.4th 1254, 1265.)

Camp owners and operators have a duty to know the dangers associated with activities planned in order to mitigate risk, and parents have an expectation to be informed of any and all high-risk activities in which their children may engage. When fighting an MSJ on this issue, argue that the plaintiff did not "know" that the defendant was required to do something (e.g., provide lifeguards, train the campers prior to, and supervise the campers during, the activity, provide certain safety precautions or equipment, perform under the standard of care, comply with a certain law, etc.), and that he/she did not intentionally relinquish their right for defendant to perform these obligations. There can be no waiver "where the one against whom it is asserted has acted without full knowledge of the facts. It cannot be presumed, in the absence of such knowledge, that there was an intention to waive an existing right." (*Craig v. White* (1921) 187 Cal. 469, 498.) Convince the judge that the plaintiff has triable issues of material facts which would defeat this defense, and that the jury should determine the issue of waiver.

Argue gross negligence and/or willful misconduct

Although the law will uphold waivers relieving a defendant of liability for ordinary negligence, the parties *cannot* agree to waive liability for acts constituting *gross negligence or reckless and/or willful misconduct*. A waiver that attempts to preclude liability for extreme forms of conduct such as gross negligence, reckless misconduct, or willful and wanton conduct are against public policy. Express assumption of risk does not relieve the defendant of liability if there was gross negligence or willful injury (see Civ. Code, § 1668 and CACI 451 and 452), and the issue of gross negligence is for the jury to decide. (However, if gross negligence is alleged, the doctrine of primary assumption of risk may then become relevant if an inherently dangerous sport or activity is involved, as discussed in more detail below.)

Camps may be held liable for gross negligence or gross and/or willful misconduct regardless of the wording on liability waivers signed by participants or their parents. In *Santa Barbara v. Superior Court*, the court permitted the parents of a developmentally disabled girl who drowned at a summer camp run by the city of Santa Barbara to sue even though her mother had signed an agreement assuming "full responsibility for risk of bodily injury, death or property damage," based on the camp's alleged gross negligence. (*Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747; see also CACI 451.) The Court further found that exculpating the defendant from liability for acts of gross negligence exceeds the protection reasonably necessary to protect it in the operation of its camp and would remove its obligation to adhere to even a minimal standard of care. (Compare *Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, where the jury found no gross negligence and therefore the express contractual assumption of the risk applied.)

Under California law, a negligent act or omission rises to the level of willful misconduct if the following elements are shown: (1) actual or constructive knowledge of the peril to be apprehended;
(2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of danger; and
(3) conscious failure to act to avoid the peril. (*Morgan v. Southern Pacific Transportation Co.* (4th Dist.1974) 37 Cal.App.3d 1006, 1012.) The primary-assumption-of-the-risk defense does not apply where willful misconduct is shown.

Activities well-known to be perilous

The average person knows that many activities at camps are dangerous. Owners and operators of camps have knowledge of the dangers of these activities, and actual or

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constructive knowledge that injury from these activities is probable. Certain activities, such as rock climbing, cliff jumping, diving, and numerous others, are perilous and pose probable risks of harm. As a result, camps must actively train counselors and campers and ensure proper supervision and equipment usage while campers are in their care and engaged in any activity, particularly perilous ones. In a camp-injury case, a plaintiff might argue that subject activity causing harm was a highly dangerous activity that the camp knew or should have known the inherent perils, knew or should have known that injury was probable as a result of engaging in said activity, and yet was grossly reckless in preventing probable harm, or consciously failed to act to avoid the peril, which caused the resulting harm. Therefore, even if there is a seemingly valid waiver of a particular activity for ordinary negligence, plaintiff should always allege gross negligence or willful misconduct if the facts justify it.

Practice pointer

Carefully craft your complaint as a negligence cause of action and not as an intentional tort which may potentially cause defendant to lose coverage. Allege gross and/or willful misconduct along with punitive damages if possible. Then proactively take numerous depositions of the counselors (past and present, and not limited to only those actually working at the time of the incident), administrators and staff, maintenance workers, caretakers of the property, directors and owners of the camp, and all other potential witnesses about camp operations, the training and supervision of the counselors, the training and supervision of the campers, the maintenance of the camp grounds equipment, and those knowledgeable about the incident itself, to help prove gross negligence and/or willful misconduct. Expert witness testimony will likely be required to prove gross negligence. Setting forth the numerous facts you garnered though aggressive discovery, and attaching an expert declaration referring to violated standards, guidelines, and regulations, should be enough to defeat an MSJ on any purported waiver and release depending on the court's application of the assumption of risk doctrine, below.

General takeaway on "waivers"

Various arguments can be made to nullify the applicability of the waiver and release, or at a minimum, to exclude acts of gross negligence or willful misconduct. Do not buy into defense counsel's arguments that a waiver signed by the guardian or parent automatically invalidates all their child's claims for injuries or that the defendant is released from all liability simply because the guardian or parent signed some document purporting to be a waiver or release.

"Assumption of the Risk" as a bar to recovery – *Or is it*?

The current law in California of "assumption of the risk" for inherently dangerous activities traces its roots to *Knight v. Jewett* (1992) 3 Cal.4th 296. The *Knight* Court allocated different criteria to what it called "primary assumption of risk" versus "secondary assumption of risk."

"Primary assumption of risk" applies where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the *particular risk of harm that caused the injury* – the doctrine operates as a complete bar to the plaintiff's recovery.

This doctrine applies to certain sports or sports-related recreational activities where "conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself" and their removal would alter the nature of the sport. The overriding consideration in the application of primary assumption of risk is "to avoid imposing a duty which might chill vigorous participation in the implicated activity and thereby alter its fundamental nature."

The doctrine has been applied to numerous types of "hazardous" sports ranging from golf (where a player was hit by a golf ball), water skiing, horseback riding, figure skating, and the various team sports. The parent/guardian's lack of specific knowledge of the particular risk inherent in the activity is not relevant.

"Secondary assumption of risk" applies where the defendant does owe a duty of care to plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty – the doctrine is merged into the comparative fault scheme" (*Knight*, at pp. 314-315).

Argue primary assumption of risk does not apply

Defense counsel and insurance companies will likely argue that a camper who participates in a dangerous activity at camp and is injured as a result has assumed the risk and is the same as a minor participating in competitive sports. However, plaintiffs should argue that primary assumption of risk is not applicable because the camp had an inherent duty to keep the campers safe; if anything, secondary assumption of the risk would apply (which gives rise to merely comparative fault). You could also argue that conduct went beyond the range of normal activity involved in the sport, and unlike sports, the particular activity would not be altered if administrators were required to exercise due care. (See *Shannon v. Rhodes* (2001) 92 Cal.App.4th 792, 795.) It is up to the jury to decide whether secondary assumption of risk applies.

Argue that the doctrine does not apply because of public-policy concerns

Similar to schools and coaches, camps owe a duty of care to the campers in their charge. When parents and guardians send their children off to camps, they entrust others with their children's safety, and there is a reasonable expectation that there will be a safe camping experience for them. Since Courts perceive a total bar of recovery as extreme, they tend to restrict applying the primary assumption of the risk doctrine, particularly outside the sports and recreation context; the courts have also excluded certain recreational activities from its application, where there are policy related concerns. (See *Childs v. County of Santa Barbara*, *infra*.) As applied to recreational activities at camps, plaintiffs should argue that the doctrine should not be applied at all

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because of policy considerations, the nature of the setting, and the paramount concern for protection of children.

Argue that the defendant's conduct increased the risk of injury

If a plaintiff can demonstrate the defendant unreasonably increased the risks to plaintiff over and above those inherent in the activity itself, then the defense will not apply and liability will attach. In *Fazio v. Fairbanks Ranch* the assumption of risk doctrine did not apply because there was a triable issue of fact as to whether the defendant's conduct increased the plaintiff's risk of injury.

Argue that the defendant's conduct amounted to willful misconduct or was in violation of law

The defense does not extend to conduct by the defendant that is in violation of the law, nor to actions by a defendant that were intentional or amounted to willful misconduct, or were so reckless as to be totally outside of the range of the ordinary activity involved in the sport.

Government immunity for injury at public camps and/or on public lands

Many camps are run by cities, parks and rec departments and other government entities, though they may subcontract with local businesses to actually operate the camps. Note that public entities and their employees are absolutely immune from liability for injuries caused by a "natural condition" on "unimproved public property" (including but not limited to natural conditions in lakes, streams, bays, rivers and beaches). (Gov. Code, § 831.2.) As a matter of public policy (notably, the exorbitant cost of putting such property in a safe condition and defending claims for injuries), the Legislature has determined it is not unreasonable to expect persons who voluntarily use unimproved public property in its natural condition to assume the risk of injuries arising therefrom "as a part of the price to be paid for benefits received." (See *County of San Mateo v. Sup.Ct.* (*Rowe*) (2017) 13 Cal.5th 724, 730-731, 221 CR3d 138, 143, quoting Leg. Comm. Comments to Gov. Code, § 831.2.)

Public beaches are deemed in an unimproved natural condition, imparting absolute immunity to its governmental owner, whether or not the entity provides safety services such as lifeguards, police or sheriff patrols, medical services, fire protection services, or signs. Courts have also found that blanket immunity applies in a variety of other circumstances, e.g., injuries caused by a decaying tree on unimproved public property; the drowning of a man who was swept in current under a rush of water and the strong currents generated by the public entity to aid the passage of fish through a dam; and injuries occurring on bike paths, stone stairways in hillsides, and paved walkways through parks, as they were considered "recreational trails."

Using this rationale, government defendants will often argue that they are immune for all injuries on public lands. However, the absolute immunity does not apply to every situation; if there is no absolute immunity, governmental entities can be held liable under a theory of Dangerous Condition of Public Property under Government Code section 835. With respect to public camps and camps operating on public lands, you must consider and try to distinguish the Government Code immunities and related case law from your situation. Remember, if absolute immunity does not apply, your governmental defendant might be held liable under a theory of Dangerous Condition of Public Property under Government Code section 835. In addition, if the camp operator is a private entity, independent liability may be found for negligent supervision, training, etc. as per the above, despite the injury occurring on public lands.

Accreditation, certification, and licensure: What you need to know and learn

Accreditation and certification

In the United States, the American Camp Association ("ACA") is the primary camp-accreditation organization. Accreditation is a voluntary peer review process in which a camp's practices are compared to the standards established by the ACA. In California, camps are not required to be accredited.

Practice pointer

When drafting discovery, carefully review the standards set by the ACA on topics related to your client's claims. Subpoena documents from the ACA or other accrediting body on all trainings, communications, applications, advertisements, and documents related to the subject camp.

Counselors may have certifications related to certain dangerous activities at camp. The American Red Cross, American Heart Association, and other organizations offer CPR, lifeguard, and other types of certifications relevant to camp training. Explore the background, training, and experience of all of counselors, administrators, and owner operators involved in your camp case.

Licensure

California does not have specific laws regarding the licensure or regulation of day camps. However, California law does regulate "childcare facilities" and requires the licensing of all providers of child day care. (See California Child Day Care Facilities Act, Health & Saf. Code, § 1596.70 et seq.) The purpose of this licensure requirement is to protect the health and safety of children receiving care outside the home and to ensure a quality childcare environment. Child daycare facilities are not limited to programs operated out of brick-and-mortar structures but include any place or building "in which less than 24-hour per day nonmedical care and supervision... are provided to children in a group setting."

Most day camps fall within the definition of a "child day care facility" under California law. However, day camps often operate unlawfully without the requisite license in violation of Health and Safety Code section 1596.80. If the Department of Social Services finds that a camp or other childcare center is operating without a license and is not exempt from licensure, the Department will refer the case for criminal prosecution and/or civil proceedings, and has the authority to issue a civil penalty.

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California requires licensing for overnight/sleepaway camps five days or more. Permitting is done by local or county health departments. (See Los Angeles County Code section 11.08.010.) If this Code section applies, certain requirements must be met. Other jurisdictions have similar rules for sleepaway camps.

Practice pointer regarding per se liability for failure to comply with California licensing laws

In the case of California day camps, it is important to research whether the camp has a day care license. If it does not, and it is not exempt from licensure, you can argue negligence per se, and perhaps can even extinguish any assumption-of-risk defense. In addition, negligence per se arguments may be made if the subject overnight/sleepaway camp is not compliant with the relevant laws. Research all applicable camp laws where the camp was operating, and the injury occurred to determine if the camp potentially violated any licensing requirements.

Conclusion

California camps must be held accountable for any failure, within their reasonable control, to ensure camper safety, and there must be sufficient safeguards to protect our children when outside of our direct supervision. The California Legislature is currently considering enacting stricter laws and explicit licensing requirements concerning the operation of children's day and sleepover camps. Until those new laws are in effect, it is up to us, as plaintiffs' lawyers, to regulate and enforce safe standards for the protection of the most vulnerable, our children, who simply want to have fun.

Laura F. Sedrish is a Partner at Jacoby & Meyers *in Los Angeles. Ms. Sedrish serves on the Boards of CAALA and CAOC, and is a member of AAJ. Ms. Sedrish is a member of the State Bars of California and Nevada, and obtained her J.D. from U.C.L.A. Law School, after obtaining her B.S. degree from Duke University in Durham, NC. lsedrish@jacobyandmeyers.com.*

Laura Lynn Davidson is a Partner at Jacoby & Meyers. *She earned her JD from USC Gould School of Law, after her BA from UCLA. Her practice focuses on catastrophic personal injury, wrongful death, slip and fall and motor-carrier liability cases. ldavidson@jacobyandmeyers.com.*