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The coach's duty to student athletes and the assumption of the risk defense

SCHOOLS HAVE A SPECIAL RELATIONSHIP WITH STUDENTS, *IN LOCO PARENTIS*, THAT IMPOSES A HEIGHTENED DUTY OF CARE

Nearly every day, parents entrust the care and protection of their children to institutions of learning. More than entrust, under state law children between the ages of six and 18 are mandated to enroll and attend school, with limited exceptions. (Ed. Code, §§ 48293, 48400; Welf. & Inst. Code, § 601.) This mandated transfer of custody places school officials *in loco parentis* to students, with comparable powers and responsibilities to the parents. (*Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 932.)

Thus, above and beyond the general duty of care codified in Civil Code section 1714, as a matter of law, a special relationship exists between the school district and its students, creating an affirmative duty on the school district and its employees to take reasonable steps to protect students from foreseeable risks of harm (*C.A. v. William S. Hart Union H.S. Dist.* (2012) 53 Cal.4th 861, 869-870; *M.W. v. Panama Buena Vista Union School Dist.* (2003) 110 Cal. App. 4th 508, 517.)

School districts have "a heightened duty to make the school safe because of this special relationship." (*Constantinescu v. Conejo Valley Unified School Dist.* (1993) 16 Cal.App.4th 1466, 1472-1473, emphasis supplied.) "All students and staff of public [schools] have the inalienable right to attend campuses which are safe, secure and peaceful." (Cal. Const., art. I, § 28, sub. (f).) "California law has long imposed on school authorities a duty to 'supervise at all times the conduct of the children on the school grounds and to enforce those rules and regulations necessary to their protection.'" (*Dailey v. Los Angeles Unified Sch. Dist.* (1970) 2 Cal.3d 741, 747.) The special relationship between a school district and its students extends to post-classroom, school-sponsored activities, regardless of whether the activity is voluntary or mandatory. (*William S. Hart, supra,* 53 Cal.4th at 869-870; *J.H. v. Los Angeles Unified School Dist.* (2010) 183 Cal.App.4th 123, 142-143.)

California policy aims to protect vigorous participation in sports

The California Supreme Court has repeatedly made clear that student participation in athletics plays a valuable role in our society, in part, by challenging our youth, pressing them to their capacity and teaching them to push through discomfort and overcome fear. (See *Knight v. Jewett* (1992) 3 Cal.4th 296; *Khan v. East Side Union High School Dist.* (2003) 31 Cal.4th 900, 1003.) Accordingly, California has long recognized an affirmative defense to liability in the sports context based on primary assumption of risk, which is designed to safeguard robust participation in athletics. (See *Knight v. Jewett, supra,* 3 Cal.4th 296.)

When the law imposes civil liability on an activity, it has the likely, and usually intended, effect of fostering a more cautious and reticent attitude among those potentially held liable. In many situations, this is desirable. It is beneficial for operators of large mobile machinery to adopt a cautious attitude while wielding the machine, to avoid harming unsuspecting passersby. It is useful to give drivers cause to think twice before putting others' lives at risk when changing lanes and traveling at high speeds.

When athletes are engaged in play, however, reticence may be counterproductive to their development and the attraction of the sport. This is particularly true for those sports in which the very nature of the activity carries certain inherent risks. In that context, "[i]mposing a duty to mitigate those inherent dangers could alter the nature of the activity or inhibit vigorous participation." (*Khan v. East Side Union High School Dist.*, *supra,* 31 Cal.4th at 1003.)

The California Supreme Court thus held, "[T]hat the object to be served by the doctrine of primary assumption of risk in the sports setting is to avoid recognizing a duty of care when to do so would tend to alter the nature of an active sport or chill vigorous participation in the activity. This concern applies to the process of learning to become competent or competitive in such a sport." (*Id.* at 1011.)

Knight v. Jewett and the duty of a coach

Thirty years ago, the California Supreme Court in *Knight v. Jewett* (1992) 3 Cal.4th 296, articulated the doctrine of primary assumption of risk in the sports setting when two flag football players violently collided into each other. This case dealt with allegations of negligence levied against a co-participant in the sport. The Court held that despite the sport not allowing that kind of physical contact within the rules, "[l]iability properly may be imposed on a participant only when he or she intentionally injures another player or engages in reckless conduct that is totally outside the range of the ordinary activity involved in the sport." (*Id.* at 318.)

However, the Court also planted the seed for a more modest standard, stating that, "it is thoroughly unrealistic to suggest that, by engaging in a potentially dangerous activity or sport, an individual consents to (or agrees to excuse) a breach of duty by others that increases the risks inevitably posed by the activity or sport itself, even where the participating individual is aware of the possibility that such misconduct may occur." (*Id.* at 311.) Thus, the methodology for discerning the scope of one's duty to others in the sports setting remained somewhat unclear – is it 'intentionally or recklessly injuring another' or 'unreasonably increasing the risk of harm to others above the inherent dangers of the sport'?

In *Kahn v. East Side Union H.S.* (2003) 31 Cal.4th 990, the Supreme Court revisited the primary assumption of risk doctrine, specifically in the context of alleged liability against coaches or

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instructors. In that case, a 14-year-old on the defendant school district's junior varsity swim team participated in a swim meet two weeks after the commencement of the swim season. While taking a practice dive into the shallow racing pool before a race, she struck the pool floor and broke her neck. The plaintiff brought suit, alleging negligent instruction and supervision. The trial court had granted the school district's motion for summary judgment on the basis of primary assumption of risk, and the Court of Appeal affirmed.

The Supreme Court granted review and reversed, applying the same standards it used to evaluate the duties of a co-participant in *Knight*. The Court ruled that the trier of fact properly could determine that the coach's conduct was reckless.

In particular, the plaintiff presented evidence that suggested the coach never provided the student with instruction on shallow-water diving. An expert declaration was submitted to establish the hazardous nature of shallow-water diving and the appropriate progression of instruction that should have been followed by coaches. Moreover, the student-athlete specifically voiced concerns about being unable to execute the dive, and the coach promised there would be no shallow-water diving during the meet.

Nonetheless, the coach changed his mind mid-competition and issued an ultimatum: Dive or do not compete. Naturally, the student wanted to practice the shallow dive before the race began, and a catastrophic injury occurred. There was also evidence the coach never instructed the student to practice only in his presence. (*Id.* at 1012-1013.)

Both in *Knight* and *Kahn*, the Supreme Court employed a somewhat vague framework for ascertaining whether a defendant in the sports context has acted 'totally outside the range of the ordinary activity involved in the sport' or has 'unreasonably increased the risk above and beyond those inherent in the sport,' writing that "the question of duty depends not only on *the nature of the sport*, but also on '*the role of the defendant* whose conduct is at issue in a given case.'" (*Id.* at 1004, emphasis supplied.)

These two factors provide the anchors for reasoning through this inquiry and invite a fact-intensive argument by all parties in virtually each case.

The nature of the sport

"[C]onditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself." (*Kahn v. East Side Union H.S.*, *supra*, 31 Cal.4th at 1004.) "[A]s a matter of policy, it would not be appropriate to recognize a duty of care when to do so would require that an integral part of the sport be abandoned or would discourage vigorous participation in sporting events." (*Ibid.*)

Additionally, the nature and scope of those dangers inherent to one sport will not necessarily carry over to another sport. Understanding what risks are *inherent* to a particular sport requires an understanding of the nature and rules of the game, customs and practices by participants, any instructional standards for training, the environment in which the sport takes place, and limitations of the human performance in attempting and accomplishing tasks the sport demands, as well as timing constraints within the sport.

Obviously, the dangers inherent in baseball, for example, are different from those inherent in skiing and water polo. (See e.g., *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148 [intentionally hitting the batter with a pitch to deter crowding the plate]; *Souza v. Squaw Valley Ski Corp.* (2006) 138 Cal.App.4th 262 [colliding into plainly visible snow-making equipment].)

In developing this evidence for a particular case, parties will want to conduct discovery of athletic governing bodies, retain experts in the relevant fields, and interview those who have participated and competed in the sport. While some activities may involve intense levels of ballistic movements and violent contact (e.g., rugby, lacrosse, football), others are less aggressive in nature (e.g., golf, tennis, bowling). The duties of all parties will be tailored according to the nature of the sport itself.

The role of the defendant

Whatever the inherent risks of the sport may be, "[d]uties with respect to the same risk may vary according to the *role* played by particular defendants involved in the sport." (*Ibid.;* see also *Knight*, *supra*, 3 Cal.App.4th at 318 ["in the sports setting, as elsewhere, the nature of the applicable duty or standard of care frequently varies with the role of the defendant whose conduct is at issue in a given case."].)

In *Kahn*, the Supreme Court offered a guiding example: while a baseball player may not have a duty to avoid carelessly throwing the bat after getting a hit, a stadium owner may have a duty to take reasonable measures to protect spectators from carelessly thrown bats because "*[f]or the stadium owner*, reasonable steps may minimize the risk without altering the nature of the sport." (*Kahn v. East Side Union H.S.*, *supra*, 31 Cal.4th at 1004, emphasis supplied.)

Courts have repeatedly held that, "[a]s a general rule, where an operator can take a measure that would increase safety and minimize the risks of the activity *without also altering the nature of the activity*, the operator is required to do so." (*Grotheer v. Escape Adventures, Inc.* (2017) 14 Cal.App.5th 1283, 1300, emphasis in original; see also *Knight*, *supra*, 3 Cal.4th at 317; *Quinn v. Recreation Park Assn.* (1935) 3 Cal.2d 725, 728-729; *Saffro v. Elite Racing, Inc.* (2002) 98 Cal.App.4th 173, 179; *Morgan v. Fuji Country USA, Inc.* (1995) 34 Cal.App.4th 127; *but cf. Souza v. Squaw Valley Ski Corp.* (2006) 138 Cal.App.4th 262 [finding that if a risk can be mitigated without altering the nature of the activity, then it is not an inherent risk of the activity].)

In *Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072, a motorcyclist on a motocross track fell and when he stood to pick up his motorcycle

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he was hit by another motorcyclist and then again by another motorcyclist. A caution flagger was not standing on the platform next to the location where the plaintiff fell, and the plaintiff filed suit alleging negligent training and supervision.

While the court found that "[g]iven the racetrack setting, speed involved, and jumping maneuvers, it follows that coparticipants will fall down, and while down, be struck by other riders whose views are obscured by the blind corners, blind ramps, dust, and/or other riders" nonetheless an owner/operator of a sports facility has a duty to provide a reasonably safe course or track and "to minimize the risks without altering the nature of the sport." (*Id.* at 1083-1084.) In motocross racing, while a coparticipant may not have a duty to exercise reasonable care to avoid hitting others, "an *owner/operator of a track* has a duty to minimize the risk of a coparticipant crashing into a second coparticipant who has fallen on the track." (*Id.* at 1084, emphasis supplied.)

The primary assumption of risk doctrine does not bar liability merely because a plaintiff suffers injury arising from the inherent risks of an activity voluntarily undertaken. A predicate inquiry must be made into the role of the defendant (e.g., organizers, sponsors of the activity, owner of the premises, co-participant) and the extent to which imposing a duty to mitigate the particular risk of harm at issue would chill vigorous participation in the activity or otherwise alter the sport.

The role of the coach

As a general rule, "[a] coach or sport instructor owes a duty to a student not to increase the risks inherent in the learning process undertaken by the student." (*Kahn v. East Side Union H.S., supra,* 31 Cal.4th at 1005-1006; see, e.g., *Tan v. Goddard* (1993) 13 Cal.App.4th 1528 [horse jockey school]; *Galardi v. Seahorse Riding Club* (1993) 16 Cal.App.4th 817 [horse-jumping instruction]; *Fortier v. Los Rios Community College Dist.* (1996) 45 Cal.App.4th 430 [football class]; *Regents of University of California v. Superior Court* (1996) 41 Cal.App.4th 1040 [mountain-climbing class]; *Rodrigo v. Koryo Martial Arts* (2002) 100 Cal.App.4th 946, 956 [martial arts]; *West v. Sundown Little League of Stockton, Inc.* (2002) 96 Cal.App.4th 351, 358 [baseball]; *Kane v. National Ski Patrol System, Inc.* (2001) 88 Cal.App.4th 204, 212 [voluntary ski patrol]; *Lupash v. City of Seal Beach* (1999) 75 Cal.App.4th 1428, 1436 [lifeguard]; *Lilley v. Elk Grove Unified School Dist.* (1998) 68 Cal.App.4th 939, 944 [wrestling team]; *Balthazor v. Little League Baseball, Inc.* (1998) 62 Cal.App.4th 47, 50 [baseball]; *Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1369 [ski school]; *Bushnell v. Japanese-American Religious & Cultural Center* (1996) 43 Cal. App.4th 525, 532 [martial arts].)

In her concurrence, Justice Werdegar provided an apt description of the unique role coaches play in the lives of student athletes:

> [A] coach or instructor stands somewhat apart from the fray; the coach's role includes observing and directing the competition, and he or she is expected to keep a cooler head than the competitors themselves. When the instructor or coach is a school teacher, moreover, the safety of the minor students will usually be a primary consideration. Society expects – legitimately, in my view – more from instructors and coaches than merely that they will refrain from harming a student intentionally or with wanton disregard for safety.

(*Kahn v. East Side Union H.S., supra,* 31 Cal.4th at 1019.)

CACI No. 471. Primary Assumption of Risk – Instructors, Trainers, and Coaches

The California Civil Jury Instructions (CACI) No. 471 specifies *the plaintiff* must prove, in relevant part:

> 2. [That [*name of defendant*] intended to cause [*name of plaintiff*] injury or acted recklessly in that [*his/her*] conduct was entirely outside the range of ordinary activity involved in teaching or coaching [*the sport or activity*] in which [*name of plaintiff*] was participating;]
>
> [or]
>
> [That [*name of defendant*] unreasonably increased the risks to [*name of plaintiff*] over and above those inherent in [*the sport or activity*].

The instructions create a disjunction, implying these standards are not the same and that there are occasions in which it is appropriate to use one instead of the other. The CACI "Directions for Use" explicitly direct trial courts to give CACI No. 400, *Negligence*, if the second option is selected, implying that ordinary negligence is the appropriate standard for the reasonableness inquiry it demands.

In *Khan*, the majority opinion appears to have applied the first standard when it concluded that "the trier of fact properly 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 v. East Side Union H.S., supra,* 31 Cal.4th at 1012-1013, emphasis supplied.) But why did the Supreme Court not utilize the second standard listed in the CACI instructions? The Court had, in fact, recited both standards as good law. (*Id.* at 1005-1006.)

If possible, plaintiffs would certainly always opt to choose the lower standard. The question arises, then, under what circumstances would plaintiffs be unable to avail themselves of the lower standard when alleging liability against a trainer, instructor, or coach? Why did the Supreme Court in *Kahn* not apply the lower standard?

Kahn held that when the basis of liability is "that a sports instructor has required a student to perform beyond the student's capacity or without providing adequate instruction"; *in such cases* "it must be alleged and proved that the instructor acted with intent to cause a student's injury or that the instructor acted recklessly in the sense that the instructor's conduct was 'totally outside the range of the ordinary activity' [Citation] involved in teaching or

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coaching the sport." (*Kahn v. East Side Union H.S., supra,* 31 Cal.4th at 1011, emphasis supplied.)

It is worth noting that, in her concurrence, Justice Werdegar clarified that the "reckless" standard the court adopted in this context is not the traditionally referenced, 'willful or wanton misconduct' that is used in other contexts. It is more akin to gross negligence. "A coach or instructor departs from the range of ordinary instructional activities . . . when his or her conduct constitutes a gross or extreme departure from the instructional norms.'" (*Id.* at 1019, Werdegar, J., concurring.)

The Court of Appeal in *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, clarified the application of the two standards in the context of imposing liability on coaches or instructors by focusing on the basis for liability alleged by the plaintiff:

> To the extent a duty is alleged against a coach for 'pushing' and/or 'challenging' a student to improve and advance, the plaintiff must show that the coach intended to cause the student's injury or engaged in reckless conduct – that is, conduct totally outside the range of the ordinary activity involved in teaching or coaching the sport. [Citation] Furthermore, a coach has a duty of ordinary care not to increase the risk of injury to a student by encouraging or allowing the student to participate in the sport when he or she is physically unfit to participate or by allowing the student to use unsafe equipment or instruments.

(*Eriksson v. Nunnink*, *supra*, 191 Cal.App.4th at 845.)

Express waiver of liability

When an individual signs an express waiver of liability, she "promises not to exercise the right to sue for harm caused in the future by the wrongful behavior of a potential defendant, eliminating a remedy for wrongdoing." (*Coates v. Newhall Land & Farming, Inc.* (1987) 191 Cal.App.3d 1, 7.) However, "an agreement made in the context of sports or recreational programs or services, purporting to release liability for future *gross negligence*, generally is unenforceable as a matter of public policy." (*City of Santa Barbara v. Superior Court*, *supra*, 41 Cal.4th at p. 751, italics added.) "Thus, in the recreational context, while a waiver of liability and assumption of risk can serve as a bar to liability based on negligence, it cannot serve as a bar to liability based on gross negligence." (*Brown v. El Dorado Union High Sch. Dist.* (2022) 76 Cal. App.5th 1003, 1024.)

Secondary assumption of risk

The fundamental justification for the assumption-of-risk doctrine lies in the plaintiff's voluntary assumption of risk – that is, the principle that the plaintiff knew, or should have known, that this kind of harm would come naturally from participating in the activity. Ordinarily, this simple rule invokes the *secondary* assumption-of-risk doctrine. In contrast to the *primary* assumption-of-risk doctrine, the secondary assumption of risk refers to those instances in which the defendant owes a duty of care, but the plaintiff knowingly and voluntarily encounters a risk created by the breach of a duty. (*Knight v. Jewett, supra,* 3 Cal.4th at 310.)

Unlike primary assumption of the risk cases, secondary assumption-of-the-risk cases are subsumed into comparative fault, and a plaintiff's assumption of the risk does not act as a bar to the action, but only diminishes the plaintiff's recovery. (*Am. Golf Corp. v. Superior Ct.* (2000) 79 Cal.App.4th 30, 36.) Accordingly, secondary assumption of risk affects damages and does not alter the duty analysis. (*Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072.)

A recommended synthesis

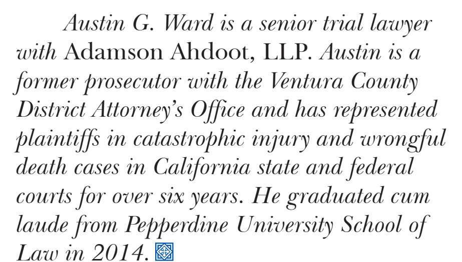
To bar a plaintiff's recovery under the primary assumption-of-risk doctrine, it is not enough for the defendant to demonstrate that the plaintiff was harmed by the foreseeable and inherent risks of an activity he or she voluntarily participated in; the defendant must demonstrate no duty was owed to the plaintiff.

Coaches have a duty in every instance not to increase the risks inherent in the learning process undertaken by the student, and "[a]n instructor's gross or extreme lack of care for student safety is not an inherent risk of school athletics programs." (*Kahn v. East Side Union H.S.*, *supra*, 31 Cal.4th at 1019, Werdegar, J., concurring.) Thus, whether the coach engages in gross lack of care, or otherwise negligently increases the risk of harm beyond that which is inherent in the sport, the primary assumption-of-risk doctrine will not bar recovery in those cases where the plaintiff is harmed from instructional or supervisory misconduct.

California encourages vigorous participation in sports, and coaches will not be held liable for student injuries occasioned by the ordinary activities of coaching and training when the coach is merely negligent in 'pushing' or 'challenging' the student to improve and advance, yet instructors, coaches, and trainers have a special relationship to the students they coach and an attendant duty to refrain from unreasonably increasing the risk of harm above that which is inherent to the sport and may not exhibit gross or extreme lack of care for student safety.

Conclusion

Understanding the limitations of the primary assumption-of-risk defense will embolden advocates to more confidently prosecute these cases and ensure that those entrusted with the health and safety of our children do not disregard their obligations under the false assumption that California affords them blanket immunity for neglecting them in the name of sport. It does not.



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