# A new name for assuming risk

By John A. Hribar

Every lawyer knows something about the "assumption of risk" defense in negligence cases. Why? Probably because it has a catchy name (as far as legal doctrines go). And probably because "assumption of risk" seems to perfectly describe the logic behind the legal rule. Unfortunately, there is often confusion rather than clarity, because whether an injured plaintiff "assumed the risk" is not very helpful for determining whether there is a valid primary assumption of risk defense under California law. Justice Felix Frankfurter's comment in *Tiller v. Atlantic Coast Line*, 318 U.S. 54 (1943), that assumption of risk is "an excellent illustration of the extent to which uncritical use of words bedevils the law," is an apt description of California's current assumption of risk doctrine.

We have at least two distinct legal doctrines in California sharing the "assumption of risk" label. Primary assumption of risk (the noncontractual type) means that the defendant does not owe the plaintiff a duty of ordinary care for the inherent risks of an activity based on the nature of the activity and the relationship of the parties to the activity. Thus, primary assumption of risk provides a complete defense to a negligence claim in a personal injury lawsuit. Because primary assumption of risk is a question of law that can end a case at summary judgment, it shapes the scope of negligence law in significant ways. There are more than 100 published California decisions addressing the issue.

Secondary assumption of risk, on the other hand, comes into play when the defendant has a duty and is at fault but the plaintiff is also at fault for knowingly participating in a risky activity. In such cases, you might appropriately say that the plaintiff "assumed" a risk of injury. Secondary assumption of risk is not a complete defense, it is a form of comparative fault, which reduces the defendant's responsibility for damages by the plaintiff's proportional fault.

It is confusing that primary assumption of risk, unlike secondary assumption of risk, does not turn on whether the plaintiff chose to encounter a known risk (i.e., assumed a risk). For example, I went skiing at Mammoth in January. Suppose another skier had negligently crashed into me and broken my leg. Can I recover damages from the other skier? No. Primary assumption of risk would be a complete defense. The traditional explanation has been that I know skiing is a risky sport and I know other skiers can be negligent, yet I voluntarily decided to ski. I must have implicitly agreed to accept the risk of being injured. In other words, I assumed the risk. But at least since the landmark decision of *Knight v. Jewett*, 3 Cal. 4th 296 (1992), this is not the legal rationale for primary assumption of risk.

One reason why this rationale was abandoned is that the scope of the primary assumption of risk doctrine does not extend to every situation where a plaintiff voluntarily encounters a known risk. Otherwise, primary assumption of risk could apply to activities such as automobile travel, where public policy favors maintaining a duty of reasonable care. Also, suppose the skier who had crashed into me had acted recklessly instead of negligently. This is also a known risk that I voluntarily encountered by getting out on the slopes. I assumed the risk of being hit by a reckless skier. Nonetheless, there is no primary assumption of risk defense. Despite the obvious risk that some skiers will be reckless on the slopes, skiers still have a legal duty to avoid reckless behavior.

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Instead, the application of primary assumption of risk reflects a concern about the negative impact of tort liability. Because the line between reasonably aggressive skiing and careless (negligent) skiing is difficult to draw, imposing legal liability for negligent skiing would chill vigorous participation, and the nature of skiing could be fundamentally altered in a negative way. By providing the primary assumption of risk defense for skiing, California courts have essentially decided that aggressive skiing is a worthwhile activity that deserves protection from the potentially harmful effects of negligence liability. At the same time, the courts do not protect reckless skiing, even though a similar argument about chilling vigorous participation could be made. Thus, the application of primary assumption of risk to negligent skiing reflects a value judgment that a certain amount of aggressiveness and danger in skiing (though not too much) is a benefit that would be threatened by the imposition of liability. In other words, we don't want to discourage or eliminate risky behavior that is beneficial.

To better reflect the policy consideration at its core, California's primary assumption of risk doctrine should be renamed the "beneficial risk" doctrine. Under the beneficial risk doctrine there is no duty to avoid, reduce or eliminate risks that enhance, rather than harm, our enjoyment of recreation. Perhaps a new name will assist appellate courts in confronting the heart of the matter, such that coherent limits to primary assumption of risk will develop.

The fairly recent decision in *Nalwa v. Cedar Fair, L. P.*, 55 Cal. 4th 1148 (2012), should help illustrate the point. The court agreed with previous appellate decisions that primary assumption of risk is not limited to sports but also applies to active recreational pursuits that are not sports (in this case, amusement park bumper cars). The *Nalwa* opinion strongly suggests that primary assumption of risk should apply to all recreational activities.

Yet the court's reasoning about preventing negative impacts on the essential aspects of recreational opportunities implies an important limitation: The defense should not be applicable to activities that do not benefit from aggressive and risky conduct that borders on negligence. In such cases, there is not the same concern that recreation will be negatively affected by tort liability. Accordingly, in a footnote, the court agreed with an earlier appellate decision that denied primary assumption of risk for recreational boating because requiring a duty of care would enhance, not harm, recreational boating. Unfortunately, as long as the defense is called "primary assumption of risk," litigants and courts following *Nalwa* will be less likely to focus on the core policy consideration: whether allowing aggressive and risky conduct in a certain activity provides a benefit (similar to allowing aggressive and risky bumper car driving) such that special protection from tort liability is warranted.

The *Nalwa* decision also reconfirmed the general rule that the risks protected by the defense are only those "inherent" in the activity. In *Nalwa*, the court found primary assumption of risk applicable because the risk of a minor injury from a head-on bumper car collision is part of the basic or essential nature of bumper cars. But courts struggle with determining inherent risks because identifying the risks that are currently present in the activity is not enough. Rather, to determine what is essential versus nonessential, a court must make a value judgment about the benefits and harms of the various risks and the costs of reducing or eliminating them. Simply stated, the inherent risks are the risks that a court believes should be protected from tort liability because they enhance rather than harm our enjoyment of recreation.

In *Nalwa*, the court felt that the risk from allowing head-on collisions should be protected from tort liability while at the same time noting that the risk from allowing faster collisions would be a risk unworthy of protection. The court reasoned that some, but not all, risks must remain because bumper cars would be unexciting and would disappear if we eliminate all risk of injury. At its heart, *Nalwa* is a decision to protect a risky behavior that the court perceived as beneficial.

If lawyers and courts do not recognize the essence of the rule because it is hidden behind terms like assumption of risk and inherent risk, the primary assumption of risk doctrine will likely continue to expand beyond activities that benefit from aggressive and risky conduct. For example, in *McGarry v. Sax*, 158 Cal. App. 4th 983 (2008), the court invoked primary assumption of risk to defeat a claim for injuries the plaintiff suffered while attempting to catch a product tossed into the crowd at a skateboard exhibition. The court noted that the risk was self-evident and inherent but never directly addressed how the risk from aggressive fighting over a prize would enhance, rather than harm, the experience of catching a prize.

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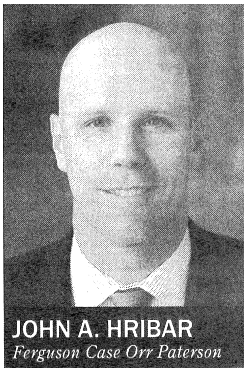

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