

Assumption of Risk and Adventure Sports

by Nicole Silk

Adventure sports are recreational activities that focus on personal challenge and individual effort. They often occur in a wilderness (or non-urban) setting. River rafting, parachuting, trekking and backpacking, bicycle touring, hang-gliding, skydiving, bungee-jumping, rock climbing, and kayaking are just some of the available adventure sports. The popularity of these sports has substantially increased over the last decade. Risk, the common thread that runs through all of these activities, is, in part, what draws people to adventure sports.

Why do people wish to expose themselves to risks unnecessarily? Perhaps they wish to challenge themselves, overcome personal fears, or gain a sense of accomplishment and personal satisfaction not ordinarily obtainable. They may also seek the novelty and adrenaline rush of the experience. For some, the rewards of participation are well worth any risk they may encounter. Some people claim their lives have been changed for the better as a consequence of participation in these activities.

J. R. L. Anderson believes there is a factor in humans, the "Ulysses factor," which explains why a few individuals are driven to undertake extremely adventurous exploits. However purposeless these risks may seem, Anderson states that they "are of value to the survival of the race." *The Ulysses Factor*, at p. 17 (1970). He suggests that something in the genetic make-up of all humans, though highly developed in relatively few, impels us towards first-hand physical discovery. *Id.* at 315.

Attractive as adventure sports may be, the risks are real. Bruises, scrapes, broken bones, concussions, and even death are possible, although safety precautions greatly decrease the probability of injury. Inevitably, outfitters and regulatory agencies involved with adventure sports are held accountable. When an adventurer or their representative attempts to hold one of these affiliates liable for their personal injuries, the ultimate question is raised: was the defendant negligent? Even if the defendant was negligent, the plaintiff still may not be able to recover if the plaintiff assumed the risk which caused his/her

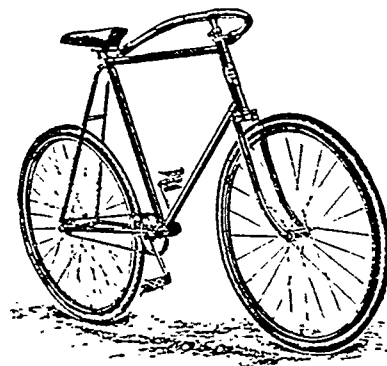
injury. Whether or not the plaintiff may recover in this type of a situation depends on the particular jurisdiction's disposition towards the "assumption of risk" doctrine.

In order to find liability under a theory of negligence, the following elements must be satisfied:

1. The defendant owed the plaintiff a duty of care.
2. The defendant breached this duty.
3. Injury resulted from this breach (for which the plaintiff seeks relief).
4. It is fair to hold the defendant liable for these injuries.

Determining the duty of care owed is essential in finding negligence. An adventure sports outfitter must observe a standard of care equal to that of a reasonably prudent outfitter or trip leader. The reasonably prudent outfitter must provide a thorough description of the activity, explain the risks which might be encountered, and provide adequate safety precautions. Furthermore, the outfitter and his or her employees must have the level of training and certification of the average professional in that sport.

Unfortunately, because the duty of care is based on the reasonably prudent outfitter standard, determination of the care owed is often difficult. As a result, determining whether a corresponding breach of the duty of care has occurred may also be difficult. Moreover, even if there was a breach by the outfitter it is often difficult to determine if the breach was the cause of the accident. Risks are inherent in adven-



ture sports and injuries may occur even in the absence of negligence.

Adventure sports have responded to these problems by developing a standard practice which requires that all participants sign a release of liability prior to engaging in the activity. The release discloses the risks of the activity in an attempt to relieve the outfitter or guide of liability for any injury the participant may suffer as a result of his or her participation. These releases are evidence that the participant expressly assumes the risks of the activity. In addition, most, if not all, adventure sports offer numerous opportunities during the course of the adventure for each person to actively choose whether or not to continue to participate. Participants who choose to continue with the activity after being exposed to the risks of the activity implicitly assume the risks of the activity.

Legally, assumption of the risk refers to the plaintiff's knowing and voluntary election to encounter a subjectively acknowledged risk. At common law, assumption of the risk was an affirmative defense to a charge of negligence against the defendant. It also acted as a complete bar to recovery for the plaintiff.

There are three general species of assumption of the risk: express assumption of the risk (EAR), reasonable implied assumption of the risk (RIAR), and unreasonable implied assumption of the risk (UIAR). EAR occurs when the plaintiff gives express written or verbal consent to relieve a defendant of an obligation of conduct prior to commencement of an activity. The plaintiff agrees to take the chance of injury from a known risk arising from the activity. Prosser & Keeton, *Law of Torts* § 68 at 480 (5th ed. 1984). The signing of liability releases prior to participating in adventure sports is an example of EAR.

RIAR and UIAR arise when consent is demonstrated through the plaintiff's conduct. This conduct must clearly indicate that the plaintiff is willing to take the risk. Continued participation in a particular adventure sport after being exposed to the risks of the activity is an example of RIAR. In UIAR, plaintiffs knowingly expose themselves to unreasonable risks.



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The existence today of any of these species of assumption of the risk largely depends on whether a jurisdiction has adopted a contributory or comparative negligence standard. Contributory negligence completely bars a plaintiff's recovery if the plaintiff contributed to the injury by his or her own negligence. In contrast, comparative negligence does not bar recovery, but instead distributes liability proportionately between the parties causing the injury. California adopted the comparative negligence standard in 1975. *Li v. Yellow Cab*, 13 Cal.3d 804, 827 (1975).

The majority of comparative fault jurisdictions have held that comparative negligence subsumes unreasonable implied assumption of the risk (UIAR). Rosenlund and Killion, *Once a Wicked Sister: The Continuing role of Assumption of Risk Under Comparative Fault in California*, 20 USF L. Rev. 266 (1986); *Li v. Yellow Cab*, *supra*, at 829 (defense of assumption of risk is abolished "to the extent that it is merely a variant of the former doctrine of contributory negligence"). In a contributory negligence jurisdiction, UIAR is a complete bar to plaintiff's recovery because, like contributory negligence, the plaintiffs knowingly exposed themselves to unreasonable risks.

The other two species of assumption of the risk, express assumption and reasonable implied assumption of the risk, focus on consent and do not necessarily involve fault. The fate of these two forms of assumption of the risk under the California comparative negligence standard is unclear. Two California cases, *Nelson v. Hall*, 165 Cal.App. 3d 709 (3d Dist. 1985) and *Neinstein v. Los Angeles Dodgers, Inc.*, 185 Cal.App. 3d 176 (2d Dist. 1986), hold that these two forms of assumption of the risk are still affirmative defenses and may completely bar the plaintiff's recovery. However, the Fifth Appellate District, relying on *Li v. Yellow Cab*, *supra*, has held that all forms of implied assumption of the risk, UIAR and RIAR, have been eliminated. *Segoviano v. Housing Authority*, 143 Cal.App.3d 162 (5th Dist. 1983).

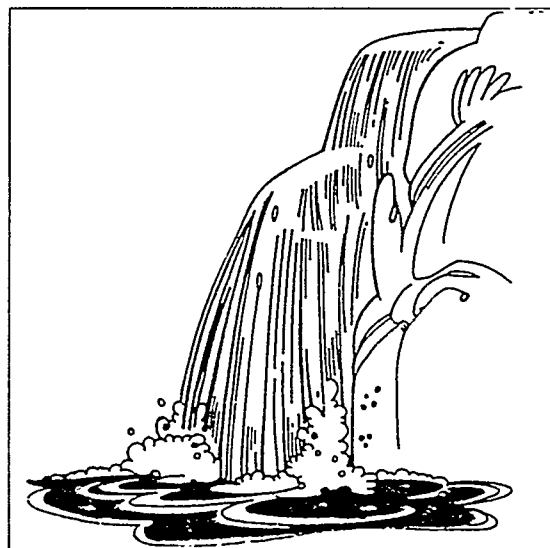
The trend in California has been to allow the use of RIAR and EAR as affirmative defenses to negligence. EAR is frequently used in cases involving adventure sports. *Hulsey v. Elsinore Parachute Center*, 168 Cal.App.3d. 333 (4th Dist. 1985) (contract signed by first time parachutist prior to activity barred

recovery from defendant for plaintiff's injuries); *Coates v. Newhall Land and Farming, Inc.*, 191 Cal.App.3d 1 (2nd Dist. 1987) (dirt bike rider signed contract prior to his fatal injury, barring heirs from recovery); *Madison v. Superior Court of the County of Los Angeles and Sulejmanagic*, 203 Cal.App.3d 589 (2nd Dist. 1988) (scuba diver signed contract prior to drowning, which was sufficient to cover the risk of the injury and barred his heirs from recovery); *Kurashige v. Indian Dunes*, 200 Cal.App.3d 606 (1988) (contract signed by motorcyclist prior to personal injury barred his recovery from defendants for his injury). The allowance of EAR as a complete bar to a plaintiff's recovery is justified by principals of contract law. EAR is merely an enforcement of an agreement manifesting the plaintiff's intent to relieve defendants of any duty and to assume the entire risk of injury.

Logically, RIAR also is an appropriate defense in adventure sport cases. If we allow EAR where a plaintiff's consent is manifested by spoken or written words, then we should also allow it where consent is shown by conduct. This is particularly true where a sport offers opportunities during the course of the adventure for the participant to choose to continue or stop the activity.

Regarding the contracts and exculpatory clauses that form the basis of EAR, certain criteria must be met before they are enforceable. The contracts must be sufficiently explicit and unambiguous. They must "clearly notify the prospective releasor or indemnitor of the effect of signing the agreement." *Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd.*, 147 Cal.App.3d 309 (1983). The contract must not be unconscionable. Absent fraud or excusable neglect, the person who signs the contract is held responsible for having read the contents of the instrument. *Madden v. Kaiser Foundation Hospitals*, 17 Cal.3d 699, 710 (1976). Finally, the contract must not be against the public interest. Contracts involving services of great importance and necessity to members of the public can not include express assumptions of risk provisions. *Kurashige, supra*, at 612. However, adventure sports do not fall within this category as they are recreational opportunities by their nature and not necessities of life.

As discussed above, danger and injury are inherent to adventure sports. The responsibility for possible injury shifts from the defendant to the plaintiff when the parties have an express contract and, logically,



when they have an implied contract. Fairness dictates that we should follow the intent of the parties. Thus, where assumption of risk is present, the parties intend that a negligent or non-negligent outfitter should not be held liable for injuries arising out of the activity.

If outfitters were to be held liable for all injuries, both minor and major, the public would be denied the opportunity to engage in such activities with qualified professionals because:

(1) The price of trips would rise precipitously, beyond an affordable range for most people due to increased insurance and liability costs on the part of the outfitter; or

(2) The number of outfitters would decrease dramatically, because increased costs would greatly reduce or eliminate business profits.

Of course, people may always engage in adventure sports without the assistance of professional outfitters. However, it is likely that without professional guidance, the number of adventure sport participants will go down, but the proportionate number of accidents will increase.

During the last two decades, the number of individuals participating in adventure sports has increased dramatically. With the increased number of participants has come substantial gains in safety. Advances in technology and design, funded by higher sales and business entrepreneurs, have led to better equipment. Greater knowledge and understanding of the dynamics of risks encountered has been gained through experience. As a result, individuals participating in whitewater rafting or other organized adventure sports are substantially safer today