Appellate Reports and Cases in Brief

Recent cases of interest to members of the plaintiffs' bar

By Jeffrey Isaac Ehrlich

Nalwa v. Cedar Fair, LP

(2012) __ Cal.4th __ (Cal. Supreme)

Who needs to know about this case: Lawyers litigating cases involving injuries sustained in "recreational activity" likely to involve an assumption-of-risk defense

Why it's important: Holds that the assumption-of-risk defense applies to "recreational activities," not just sports. Applies the defense to a claim involving injuries on an amusement park "bumper car" ride.

Synopsis: Plaintiff Nalwa was a passenger in a bumper car driven by her nine-year-old son. Toward the end of the ride, plaintiff's car was bumped from the front and then from behind. Feeling the need to brace herself, plaintiff put her hand on the car's "dashboard" and suffered a fractured wrist. Plaintiff sued the park owner. The trial court granted the park's motion for summary judgment based on the defense of primary assumption of the risk. A divided Court of Appeal reversed, finding that the doctrine of primary assumption of the risk did not apply to bumper car rides, which were "too benign" to be considered a "sport." The Supreme Court granted review and reversed.

The public policy underlying the Court's adoption of the primary assumption-of-risk doctrine was to prevent common-law tort rules from undermining Californians' recreational opportunities. Accordingly, the primary assumption-of-risk doctrine is not limited to activities classified as sports, but applies as well to other recreational activities involving an inherent risk of injury to voluntary participants where the risk cannot be eliminated without altering the fundamental nature of the activity.

"The policy behind primary assumption of risk applies squarely to injuries from physical recreation, whether in sports or nonsport activities. Allowing voluntary participants in an active recreational pursuit to sue other participants or sponsors for failing to eliminate or mitigate the activity's inherent risks would threaten the activity's very existence and nature."

The Court cautioned that it was not expanding the doctrine to "any activity with inherent risk." Travel on streets and highways, for example, poses some inherent risks, as do many workplaces, but the modern assumption-of-risk doctrine is considerably narrower in its application. The doctrine applies to "active recreation" because it involves physical activity and "is not essential to daily life" and is therefore particularly vulnerable to the chilling effects of potential tort liability for ordinary negligence. "And participation in recreational activity, however valuable to one's health and spirit, is voluntary in a manner employment and daily transportation are not."

The Court rejected dissenting Justice Kennard's suggestion that the determination of which risks are inherent in a recreational activity is fact intensive and unsuitable for resolution as a matter of law on demurrer or motion for summary judgment. It noted that trial courts deciding questions of inherent risk could consider not only their own or common experience with the recreational activity involved but may also consult case law, other published materials, and documentary evidence introduced by the parties on a motion for summary judgment.

Finally, the Court rejected the argument that because amusement park rides are subject to state safety regulations and inspections, that the assumption-of-risk doctrine does not apply. State regulation to avoid grave risks does not mean that amusement park rides do not present some risk of minor injury, and the goals of those who participate in amusement park rides is not to avoid all injuries. "A small degree of risk inevitably accompanies the thrill of speeding through curves and loops, defying gravity or, in bumper cars, engaging in the mock violence of low-speed collisions. Those who voluntarily join in these activities also voluntarily take on their minor inherent risks. As for the rest: 'The timorous may stay at home.'"


Ehrlich

Jeffrey Isaac Ehrlich is the principal of the Ehrlich Law Firm, *with offices in Encino and Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. His practice emphasizes appellate support for the Southern California trial bar and insurance bad-faith litigation. He is the editor-in-chief of the CAALA Advocate magazine and a contributing author of the Rutter Group's Insurance Litigation practice guide.*