

# Almost Safe and Proud of It!

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# Disclaimer

This presentation is designed to deliver general information only – not to provide opinions regarding specific state law. For such opinions seek the counsel of an attorney familiar with your operation and the laws which apply to it.

# The Title. Really?

- What does it mean?
- How safe/not safe are we?
- How much risk- of injuries and of legal liability- do we want/can we stand?

# Risk in Perspective

If safety is the absence of risk, what is risk?

Risk: “The possibility of harm or loss”.

Compare *risicare* (Italian verb) – “to dare”

*And so.....a choice, balancing value  
against possible loss.*

# Achieving the Balance

- The quality program.
- Protecting the client and the organization.

But even good programs make mistakes and can be sued. And so.....the Law.

# New Developments in the law

- The value of an informed clientele.
- Parents signing for minors.
- A new look at the inherency of risks.
- A new understanding of the value of our industry. The law says “yes” to us.

## The Law's "Yes":

In some sport and recreation activities, the legal duty of care owed by an organization may be relaxed, in recognition of the societal value of vigorous participation in play (and instruction). This is the doctrine of Primary Assumption of Risks. Of which more, later.

# Managing your legal liability

- It's "duty" all the way down.
- Perhaps a low bar (ask Caroline) but....
- Why duty matters. The core of a negligence claim.

# Negligence revisited:

Negligence as conduct: carelessness.

Negligence as grounds for legal liability :

Duty

Breach

Loss

Causation

No duty? No negligence.

# What is our legal duty of care:

Generally: To protect our clients from unreasonable risks of harm. (Yes, there are reasonable risks of harm, including those which are inherent, and assumed.)

# Was a duty owed in this case?

## Factors to consider:

- Foreseeability of the general nature of the harm suffered.
- Public policy: is the public better served by the court's finding, or not finding, a duty under these circumstances? (Munn)

# And consider:

- Relationships
- Activities
- Representations and expectations
- Law, regulations and standards

# Was the duty met?

The jury will be asked: did you act as a reasonable person (organization) would have acted in the same or similar circumstances?

(Note: objectivity and reasonableness – not perfection or best practices.)

# Reducing the legal duty of care:

By Agreement: releases and expressed assumption of risks

By case law: inherency as a reasonable risk; no duty to protect from; public policy

By statute: immunities, inherent risk statutes, etc.

# The Doctrine of The Primary Assumption of Risks (PAR)

The inherent risks of a sporting or recreation activity are assumed - no duty of protection from such risks is owed.

In many states such risks include the negligence of co-participants, instructors and even organizers. The activity is so important that.....

# Abuaita v. Abuaita

## 2019 Mich App Lexis 1361

Purse snatching skit. “One who engages in a recreational activity is temporarily adopting a set of rules that define that particular pastime. That person is also suspending the rules that normally govern everyday life. For example a fight over an orange in a grocery store would be a breach of etiquette, but quite within the rules of basketball to battle for a rebound.”

## Abuaita (continued)

“When people engage in a recreational activity, they have voluntarily subjected themselves to certain risks inherent in that activity. When one of those risks results in an injury, the participant has no ground for complaint.”

# Angland v. Mountain Creek Resort

2013 N.J. Lexis 570.

Skiing collision. “The common law standard of care that ordinarily applies between individuals involved in recreation is not breached by mere negligence. The duty is to avoid reckless or intentional conduct.”

# Davis v, Dungeons of Death 2019 Ohio 1457

Haunted house. “Where individuals engage in recreational or sports activities they assume the ordinary risks of the activity and cannot recover for an injury unless it can be shown that the other party’s actions were reckless or intentional.”

# Trupia v. Lake George Central School District 2010 NY Lexis 344

A slide down a bannister. “PAR as a bar to recovery is most justified for its role in facilitating free and vigorous participation in athletic activities.” (But banister sliding was considered by this court to be horseplay.)

# Nalwar v. Cedar Fair CA (2012)

Bumper cars. “To allow suit for failing to eliminate or mitigate inherent risks would threaten the activity’s very existence and nature”. Bumper cars bump! “The timid may stay at home.”

## Eriksoin v. Nunnick 2011 Cal App Lexis 29.

- Horse tripped and rider fell. “A significant part of the coach’s role is to challenge or push the student...to advance his or her skill level.. and fulfillment of that role would be improperly chilled by too stringent a standard of potential legal liability. (PAR) is appropriate if the claim is that he or she challenged the player beyond his or her capacity or failed to provide adequate instruction or supervision.” (In this case, the claim was that the instructor failed to supply a fit animal.).

## Regents of U. of CA v. Superior Court, 1999.

- Top rope climbing. “The risk (in this case, falling) was not beyond that inherent in any top rope climbing. A fall can occur at any time regardless of the negligence of one’s co-participant.”

# Important:

- Under the PAR doctrine, a duty nevertheless exists to NOT increase the inherent risk of the mechanism of the injury. In The Regents case: falling is inherent, but was the risk of falling increased by the protection setting error? Or is that error also an inherent risk?.

# Anglund (continued)

“One might conclude that something is terribly wrong with a society in which the most commonly accepted aspects of play- a traditional source of a community’s conviviality and cohesion - spurs litigation. The heightened recklessness standard recognizes a common sense distinction between excessively harmful conduct and the more routine rough and tumble of sports and should not be second guessed (in court).

# Conclusion

The relationships among participants, staff, activities and environments strongly influence the duty of care owed.

The bundle of duties will change as these relationships change.

Understand your duty of care, even as it shifts.

If you adhere to the legal standard of care you will survive to work and play another day!