A LOOK AT ASSUMPTION OF THE RISK IN CALIFORNIA

By Kristine K. Meredith

In gyms and on sports fields throughout the country, the scene repeats: An adrenaline-pumped competitor and an overprotective parent pull a coach in opposite directions with performance-related questions. The nature of the questions varies: Can the wrestler make his weight? Should the diver attempt a new maneuver? Has the pitcher recovered from his elbow injury? Does the helmet narrow the player's peripheral vision? But generally the issue is the same: how to challenge the athlete without compromising safety.

When the coach gets it wrong, players may suffer tragic injuries and even death. Then parents may seek to hold the coach responsible.

Coaches enjoy various legal defenses such as express waivers, governmental immunities, and comparative fault. But the defense that coaches assert most frequently is the doctrine of assumption of the risk, which generally absolves a defendant of a duty of care toward a plaintiff with regard to injury incurred in the course of a sporting activity.[1] California courts have found that a sporting participant has assumed the risk, so they will not impose liability on the basis of a coach's ordinary careless conduct whenever doing so would likely chill vigorous participation in the sport.[2]

Although this approach is broad, California courts have carved out a few important exceptions. For example, assumption of the risk is no defense when a coach intends to cause injury or when his or her conduct is so reckless that it can be said to be entirely outside the range of ordinary coaching or teaching activities.[3] And generally, a coach has a duty of ordinary care not to increase the risk of injury beyond that inherent in the sport. Courts may find that a coach has increased the risk if he or she challenged the player to perform beyond the player's capacity or directed a player to perform a maneuver without first providing adequate instruction or supervision. In those situations, assumption of the risk will be no defense.

Last year, a California court held that a coach may not "increase the risk" by allowing the athlete to use unsafe equipment. In *Eriksson v. Nunnink*, 17-year-old equestrian Mia Eriksson was killed when the horse she was riding, Kory, tripped over a hurdle.[4] Although Eriksson's parents owned Kory, they testified that the coach, Kristi Nunnink, was "completely responsible for the horse" and was required "to make sure the horse was fit and ready to go before an event." They alleged that Nunnink knew Kory had fallen during competition two weeks earlier and had suffered a concussion and other injuries.

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The court of appeal held that the parents' evidence was sufficient to raise a triable issue of whether Nunnink had control over the horse, and whether Nunnink had provided Ericksson with a horse that was unfit. If so, the assumption of the risk doctrine would not apply and the coach could be held liable.[5]

The court distinguished the *Eriksson* case from several earlier cases in which instructors were held not responsible for injuries that resulted when they challenged their students to improve their skills or failed to provide adequate instruction.[6] One court noted, "Learning any sport inevitably involves attempting new skills. A coach or instructor will often urge the student to go beyond what the student has already mastered; that is the nature of (inherent in) sports instruction."[7] Thus, to prevail in cases where an instructor pushes the athlete too far, the injured athlete generally must show that the instructor either intentionally injured him or her or engaged in conduct that was reckless in the sense that it was "totally outside the range of the ordinary activity" involved in teaching or coaching the sport.[8]

The coach in *Eriksson* neither intentionally nor recklessly caused Eriksson's death. The court nonetheless allowed the case to proceed because by providing an unfit horse to the rider, the coach may have increased the risk to her beyond the risks inherent in the sport. The court ruled that imposing liability under those circumstances would not alter the nature of the sport or chill vigorous participation in the activity.

In light of *Eriksson*'s holding, in April 2012 the California Judicial Council invited comments on the proposed modification of California's Jury Instruction on Liability of Coaches and Instructors,[9] and the council adopted the modification on June 21. The new instruction asks whether the coach increased the risk to the player beyond that inherent in the sport. The alternative instruction will apply in cases such as *Eriksson* when plaintiffs allege that the coach or trainer's failure to use ordinary care increased the risk of injury to the plaintiff, such as by allowing an athlete to use unsafe equipment or to participate in the activity when physically unfit.

While most states have not yet carved

out the narrow exceptions California has, they generally share the conflicting policy interests of promoting vigor in sports while not subjecting players to risks beyond those inherent in the sport.[10] Illinois, Maryland, and Massachusetts courts are among those that have concluded, like California courts, that coaches are exempt from the duty of ordinary care not to cause injury, but still charged with a duty not to increase the inherent risks in the sport.[11] Such rulings attempt to balance the interests that players, parents, and coaches struggle with each day: pushing players to maximize their performance and addressing safety needs, but not chilling participation in the sport.

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Notes

1. *Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992).
2. *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30, 38–39 (Cal. 2003); *see also Knight*, 834 P.2d at 709.
3. *Kahn*, 75 P.3d at 32–33.
4. 120 Cal. Rptr. 3d 90, 112 (Cal. App. 4th Dist. 2011).
5. *Id.* at 110.
6. *Bushnell v. Japanese-Am. Relig. & Cultural Ctr.*, 50 Cal. Rptr. 2d 671, 674 (Cal. App. 1st Dist. 1996); *Allan v. Snow Summit, Inc.*, 59 Cal. Rptr. 2d 813 (Cal. App. 4th Dist. 1996); *Kane v. Natl. Ski Patrol Sys., Inc.*, 105 Cal. Rptr. 2d 600, 604–05 (Cal. App. 4th Dist. 2001).
7. *Allan*, 59 Cal. Rptr. 2d at 820.
8. *Kahn*, 75 P.3d at 32–33.
9. Cal. Civ. Jury Instr. vol. 1, 409 (2011).
10. "Numerous other courts have voiced the same concern and have stated that a primary justification for limiting liability in the sports context is to avoid fundamentally altering, or discouraging participation in, the sport at issue." *Karas v. Strevell*, 884 N.E.2d 122, 130 (Ill. 2008) (citing *Knight v. Jewett*, 3 Cal. 4th 296, 318 (1992); *Ross v. Clouser*, 637 S.W.2d 11, 14 (Mo. 1982); *Bowman v. McNary*, 853 N.E.2d 984, 992 (Ind. App. 3d Dist. 2006).
11. *Karas v. Strevell*, 884 N.E.2d 122 (Ill. 2008); *Kelly v. McCarrick*, 841 A.2d 869, 890 (Md. Spec. App. 2004); *Kavanagh v. Trustees of Boston Univ.*, 795 N.E.2d 1170, 1179 (Mass. 2003).