# CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

**ERNEST A. LONG**
**Alternative Dispute Resolution**
❖ Resolution Arts Building ❖
2630 J Street, Sacramento, CA 95816
ph: (916) 442-6739 • fx: (916) 442-4107
elong@ernestalongadr.com • www.ernestalongadr.com

## ***Amezcua v Los Angeles Harley-Davidson*** 10/27/11

**Primary Assumption of the Risk; Unsigned Release Agreement**

The Amezcuas sued Harley-Davidson for damages arising out of injuries they suffered in a collision which occurred while they were riding in the 2006 "Pursuit for Kids Toy Drive," a group motorcycle ride organized annually by Harley-Davidson. Participants could preregister or register immediately before the ride at the Harley-Davidson dealership on Paramount Boulevard in South Gate, where the ride began. Registration included a release, which stated: *"…I expressly agree to assume the entire risk of any accident or personal injury including death, which I might suffer as a result of my participation in the event whether such risk result from negligence (except willful neglect) on the part of any or all of the Released Parties*. "

Plaintiffs chose not to register, or sign the release. The group was led by a pair of LA County Police officers, one dressed as Santa Claus. While riding in a procession of about 200 motorcyclists headed to the Harbor UCLA Medical Center, an accident occurred in which plaintiffs, both seated on their motorcycle, were injured. They sued Harley-Davidson, alleging the collision was caused by the defendant's negligence in organizing the 2006 Toy Ride. Harley-Davidson sought summary judgment based on several theories, including the assertion the claim was barred by the assumption of risk doctrine. The trial court found that plaintiffs had participated in other similar events for which they registered, and they elected not to register in 2006, thereby avoiding the release. The court indicated the plaintiffs should not benefit from their failure to register and sign the waiver. The motion was granted and judgment was entered in February 2010. This appeal followed.

In its moving papers, the appellate court noted the defendant asserted that if it had known the plaintiffs had not signed the release they would not have been allowed to ride. No one from defendant escorted the ride, and the officer that led the ride had participated in every annual Toy Ride. Plaintiffs' opposing papers argued that none of the volunteers taking registration were instructed to bar those not signing from the ride, nor was it announced over the loudspeaker. Further, one of the defendant employees that organized the ride knew plaintiffs had not registered but said nothing. No one told plaintiffs they could not ride if they did not register. Plaintiffs argued on appeal that the primary assumption of the risk doctrine does not apply for two reasons: (1) a written exculpatory contract is required for it to apply, and there is none here; and (2) it applies only to sporting events and this was not such an event.

As a general rule, persons have a duty to use due care to avoid injury to others, and may be held liable if their careless conduct injures another person. (See Civil Code section 1714; *Knight v Jewett* (1992) 3 Cal.4th 296) Primary assumption of risk may be express or implied. Implied primary assumption of risk is founded not on an express agreement but on the nature of the activity and the relationship of the parties to that activity. (*Moser v Ratinoff* (2003) 105 Cal.App.4th 1211) Thus, the Second DCA held here that whether the plaintiffs signed the release agreement is not determinative of whether the assumption of the risk doctrine applies.

In the *Knight* case the California Supreme Court applied primary assumption of the risk to co-participants in a touch football game. It noted that application of the doctrine is not limited to competitive sports, or even co-participants. The court in *Ford v Gouin* (1992) 3 Cal.4th 339 reasoned that, like competitive sports, vigorous participation in noncompetitive sports would likely be chilled and the nature of the sport altered if liability were to be imposed for ordinary careless conduct. "….the general rule limiting the duty of care of a co-participant in active sports to the avoidance of intentional and reckless misconduct applies to participants engaged in noncompetitive but active sports activity …" (*Ford*, at p. 345)

In *Moser*, at page 1215, the primary assumption of risk doctrine was applied to an organized, noncompetitive, bicycle ride in which one rider collided

with another rider. The court reasoned that although riding a bicycle, like driving an automobile, can be a means of transportation, "organized, long distance bicycle rides on public highways with large numbers of riders involve physical exertion and athletic risks not generally associated with automobile driving or individual bicycle riding on public streets." Such rides are "activities done for enjoyment and physical challenge." In view of these considerations, the organized, long distance group bicycle ride qualifies as a "sport" for purposes of the application of the primary assumption of risk doctrine.

Courts have expanded the application of primary assumption of risk beyond "sports" to activities that might be accurately described as "recreational." In *Beninati v Black Rock City, LLC* (2009) 175 Cal.App.4th 650, the sole issue on appeal was whether the primary assumption of risk doctrine applied to the annual Burning Man Festival at which attendees are encouraged to engage in the ritual of depositing an item in the flames. The plaintiff, severely burned when he did so, argued the doctrine only applied to rule based sports, or at a minimum to active sports. The appellate court disagreed, finding the risk of injury to those who voluntarily decide to partake in the commemorative ritual at Burning Man is self-evident. Because the risk cannot be eliminated without altering the fundamental nature of the activity, the doctrine applied. (*Beninati*, at p. 658)

Here, the Justices stated they found no cases that consider primary assumption of the risk in connection with organized, non-competitive, recreational motorcycle riding. Still, they found the activity falls within those activities where the primary assumption of the risk does apply. Riding a motorcycle involves physical exertion and athletic risks not generally associated with automobile driving. The facts in this case are more similar to an organized bicycle ride, than to a lone motorcyclist. Like the risk of being burned while at the Burning Man Festival ritual, the risk of being involved in a traffic collision while riding in a motorcycle procession on a Los Angeles freeway is apparent. They concluded that riding a motorcycle in the 2006 Toy Ride qualifies for application of the primary assumption of risk doctrine.

Finally, the Appellate Court looked at the question of whether the defendant did anything to increase the risks inherent in the activity. The defendant does have a duty not to increase the risk of harm beyond what is

inherent in the activity. (*Luna v Vela* (2008) 169 Cal.App.4th 102) As explained in *Knight*, a co-participant could be held liable for intentionally injuring another player or engaging in "reckless conduct that is totally outside the range of the activity involved in the sport." (Knight, at p. 319) Whether a particular risk is an inherent part of an activity "… is necessarily reached from the common knowledge of judges, and not the opinions of experts." (*Rosencrans v Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072, 1083) Analyzing the liability of other than co-participants requires defining "…the risks inherent in the sport not only by virtue of the nature of the sport itself, but also by reference to the steps the sponsoring business entity reasonably should be obligated to take in order to minimize the risks without altering the nature of the sport." (*Ford v Polaris Industries, Inc.* (2006) 139 Cal.App.4th 755)

Where plaintiff suffered seizures after running a marathon and sued the organizers for not providing adequate water and electrolyte fluids on the course, the appellate court reversed summary judgment, reasoning the case did not fall within the primary assumption of the risk doctrine because the organizer of a marathon has a duty to produce a reasonably safe event, including the provision of adequate fluids. (*Saffro v Elite Racing, Inc.* (2002) 98 Cal.App.4th 173) In *Beninati*, however, the court rejected plaintiff's argument, noting there was no evidence or even a reasonable inference that any action by the organizer increased the harm to plaintiff, or that the risk could have been mitigated without altering the nature of the ritualistic Burning Man event in which he participated. (*Beninati*, at p. 661) Here, no expert testimony was needed to show that collision with other vehicles is an inherent risk of traveling on a Los Angeles freeway. Common sense dictates the risk is higher when traveling in a group of 200 motorcycles. Nothing that the defendant did or did not do increased this risk.

This case is not like *Saffro* in which there was evidence the runners expected the organizer to provide hydration stations and the failure to do so caused plaintiff's injuries. Here, there was no evidence that anything less than closing the freeway to other traffic would have mitigated the risks. But to close the freeway would alter the parade-like nature of riding in a motorcycle procession on a public highway. Under these circumstances, the primary assumption of risk doctrine barred recovery from Harley-Davidson.

The judgment is affirmed. Defendant shall recover its costs on appeal.