PARTICIPANT ASSUMES RISK OF CHALLENGING INSTRUCTION

BUSHNELL v. JAPANESE-AMERICAN RELIGIOUS AND CULTURAL CENTER
COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION ONE
March 11, 1996

In this case, plaintiff Gary Bushnell suffered a broken leg while attempting to perform an exercise during a judo class at the Japanese American Religious and Cultural Center's Judo Club. (Hereafter, the defendants will be referred to collectively as the "Club.") The facts of the case were as follows:

> The Club provides instruction in judo. George Tamori is the director and head of instruction at the Club. Daniel Tamori is a volunteer instructor. Bushnell, 35 years old at the time of his injury, had been attending judo classes on a weekly basis for about one year. Bushnell was practicing a "tai otoshi" throw, a relatively simple maneuver learned early in judo training. Daniel Tamori was acting as Bushnell's practice partner, meaning that Tamori would allow himself to be thrown, or to some extent would "jump" through the throw. As the class progressed Bushnell and Tamori worked more and more quickly, attempting to work up to performing the exercise at full speed.
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> Bushnell successfully completed the maneuver approximately two dozen times throughout the evening. On his last attempt, however, he fell or was driven backwards over his left leg, causing the leg to break. Neither Bushnell nor anyone else could state exactly how the injury occurred. Bushnell speculates that the injury was at least in part the result of the speed at which Daniel Tamori approached him.

The trial court granted summary judgment to the Club on the basis that the assumption of risk defense of provided a complete defense to Bushnell's negligence claims. Bushnell appealed.

On appeal, **Bushnell contended that the assumption of risk defense for sport participants did not apply in this particular instance because "he was not injured by an amateur co-participant in an unsupervised sport, but by an instructor in a sport organized by the Club and supervised by another instructor employed by the Club."**

As a general rule, the appeals court noted that "**persons have a duty of care to avoid injury to others, and may be held liable if their careless conduct injures another person.**" However, as described by the appeals court, "**the doctrine of primary assumption of the risk acts as a limitation to this general rule.**" Specifically, **in certain situations, such as sports participation, "the nature of the activity at issue is such that the defendant does not owe a legal duty to the plaintiff to act with due care"**:

> [I]n the heat of an active sporting event like baseball or football, a participant's

> normal energetic conduct often includes accidentally careless behavior. Even when a participant's conduct violates a rule of the game and may subject the violator to internal sanctions, imposition of legal liability for such conduct might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule.
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> **[I]t is improper to hold a sports participant liable to a co-participant for ordinary careless conduct committed during the sport** for example, for an injury resulting from a carelessly thrown ball or bat during a baseball game and that l**iability properly may be imposed on a participant only when he or she intentionally injures another player or engages in reckless conduct that is totally outside the range of ordinary activity involved in the sport.** The rationale behind excusing participants from liability in sports cases is grounded in the notion that **legal liability would inhibit the natural play of the game, interfere with the natural fervor of the participants and alter the game's essential nature...**

The appeals court noted further that "the **relationship between the plaintiff and the defendant is a factor to be considered in determining if the defense of primary assumption of risk applies.**" In particular, the appeals court acknowledged that "**instructors may be held liable when their actions have increased the inherent risks in an activity.**" However, in the opinion of the court, the application of the doctrine "does not turn on whether the defendant was a co-participant or whether the activity at issue was competitive rather than co-operative."

Rather, in all cases **the nature of the activity, the relationship of the defendant to the activity and the relationship of the defendant to the plaintiff must be examined.** It must then be determined, **in light of the activity and these relationships, whether the defendant's conduct at issue is an "inherent risk" of the activity such that liability does not attach** as a matter of law.

> **General rules of liability attach when the defendant's conduct is not an inherent risk of the activity or when the defendant's conduct increased the inherent risks in the activity.** A defendant also may be charged with the duty to take such precautions as will prevent the risk without having a chilling effect on the nature of the activity...
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> [For example,] a ski resort could not be held liable for failing to eliminate moguls on a ski run because the challenge and risks posed by the moguls are part of the sport of skiing. Nonetheless, because defendants generally have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport, a ski resort clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm.

> For similar reasons, a baseball player does not have a duty to avoid throwing a bat carelessly, but the owner of the stadium may have a duty to take such precautions as reasonably will protect spectators from injuries resulting from carelessly thrown bats. If the baseball player were required to pay attention to the bat his attention to the game would suffer, adversely affecting the nature of the activity. Requiring an owner to erect a screen, however, could not adversely affect the nature of the activity so long as play can be seen through the screen. In both the ski resort and baseball examples, the **question is whether a precaution taken to protect the plaintiff from injury including acting with due care would interfere with the activity in question.** If so, **the failure to take the precaution cannot result in liability, because the risk is an inherent part of the activity.**

In addition, the appeals court found the doctrine of primary assumption of risk "can apply even if the defendant was in some manner in control of the situation and thus in a better position than the plaintiff to prevent the plaintiff's injury."

> [I]mposing such liability might well deter friends from voluntarily assisting one another in such potentially risky sports. Accordingly, **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..**. [The issue] simply is **whether vigorous participation in the sport might be chilled if liability attached for careless conduct**

Applying these principles to the facts of the case, the appeals court determined that "**Bushnell's injuries were not the result of the breach of any duty owed to him."** Specifically, under the circumstances of this case, the appeals court found "**no evidence that any employee or agent of the Club increased the risks inherent in the activity of learning judo":**

> Bushnell was engaged in an active sport. In addition, the uncontradicted evidence is that he was attempting to improve his skills by working more and more quickly through the "tai otoshi" maneuver. That activity required Daniel Tamori's assistance and, of course, required Tamori to move more and more quickly. There is **no evidence or allegation that Tamori acted recklessly or with an intent to cause injury.** Bushnell's theory, rather, appears to be that Daniel Tamori moved more quickly than Bushnell had expected, or that Tamori miscalculated the speed at which Bushnell would be able to respond.

Accordingly, the court found it "cannot sanction the imposition of liability in such circumstances without causing the type of chilling effect."

> Instruction in an activity such as judo necessarily requires pushing a student to move more quickly, attempt a new move, or take some other action that the student previously may not have attempted. **That an instructor might ask a student to do more than the student can manage is an inherent risk of the**

> **activity. Absent evidence of recklessness, or other risk-increasing conduct, liability should not be imposed simply because an instructor asked the student to take action beyond what, with hindsight, is found to have been the student's abilities. To hold otherwise would discourage instructors from requiring students to stretch, and thus to learn, and would have a generally deleterious effect on the sport as a whole.**

As characterized by the appeals court, "Bushnell contends that because Daniel and George Tamori were instructors the situation is one where primary assumption of the risk does not apply." While relevant, the appeals court found "defendant does not owe a duty of care to the plaintiff simply because one can be labeled an instructor and the other a student."

> Since the defense of primary assumption of the risk requires a consideration of the nature of the activity itself, the relationship of the parties to the activity and to one another, the fact that the defendant is an instructor is relevant to the question of liability.

Accordingly, the appeals court rejected the notion that "an instructor always owes a duty of care to his or her students and thus becomes an insurer of their safety." Specifically, "absent reckless conduct or an intention to cause injury," the appeals court rejected Bushnell's claim that "an instructor who asks a student to take on a challenge in order to better his or her skills will be liable for injuries resulting from the student's failure to meet that challenge."

In determining the applicability of the assumption of risk defense for sport participants, the appeals court found **the issue was "whether the imposition of liability would chill vigorous participation in the activity":**

> The question, as always, is whether, given the activity in question and the relationship of the defendant to the activity and to the plaintiff, the imposition of liability would have a chilling effect on the conduct required by the nature of the activity... **To instruct is to challenge, and the very nature of challenge is that it will not always be met. It is not unreasonable to require a plaintiff who has chosen to be instructed in a particular activity to bear the risk that he or she will not be able to meet the challenges posed by the instructor, at least in the absence of intentional misconduct or recklessness on the part of the instructor. Any other rule would discourage instructors from asking their students to do anything more than they have done in the past,** would therefore have a chilling effect on instruction, and thus would have a negative impact on the very purpose for seeking instruction: mastering the activity... It follows that the imposition of liability on instructors or their employers in such situations would adversely effect the activity.

Having found "**no evidence that Bushnell was injured by anything other than an inherent risk attending the activity of attempting to learn or improve the skills used in judo**, the appeals court held that "[t]he doctrine of primary assumption of risk applies and summary

judgment properly was entered" in favor of defendants. The appeals court, therefore, affirmed the judgment of the trial court in favor of the Club.