

YOU AND THE LAW

Going Down the River: Legal Concerns of a Tourist Injured While Inner Tubing

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Pellham v. Let's Go Tubing, Inc., 199 Wn. App. 399, 398 P.3d 1205, Washington Court of Appeals, Division III (June 27, 2017)

The case of *Pellham v. Let's Go Tubing, Inc.* (2017) is the result of the plaintiff striking a fallen log in the river after he fell off an inner tube he had rented from the defendants. The plaintiff sustained a ruptured eardrum, lower-disk problems in his back, a radiating foot pain, and eventually a neck fusion. The plaintiff alleged the defendants owed him a duty to warn about a fallen log in the river that was unseen but close to the entry site to the river that the defendants had chosen. The trial court provided summary judgment against the plaintiff that was later upheld in the Court of Appeals in the state of Washington.

Facts of the Case

Brian Pellham was invited to an unguided tubing excursion down the Yakima River in Washington state with some friends. Immediately before the start of the tubing activity, each member of the group, including a rushed Pellham, signed both an assumption of risk form and a release of liability form (*Pellham v. Let's Go Tubing*,

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Inc., 2017). These forms explicitly stated how hazardous river tubing is by listing rocks, logs, other watercraft, variations in speed, and depth of current as possible obstacles existing in the river environment (*Pellham v. Let's Go Tubing, Inc.*, 2017). Most importantly, they released, held harmless, and indemnified Let's Go Tubing, Inc., its agents, and subsidiaries from any and all liability claims connected with their equipment. It is important to note that not only had Pellham previously signed waivers for other activities, including rafting trips, but he also used release forms in his business (*Pellham v. Let's Go Tubing, Inc.*, 2017).

On the way to the launch site, Let's Go Tubing bus driver Steff Thomas informed members of Pellham's group to paddle to the center of the river as soon as possible as a tree had fallen into the river but could not be seen from the launch site. However, Pellham was not part of the group that was informed about the fallen tree (*Pellham v. Let's Go Tubing, Inc.*, 2017). Each person of the group was given a Frisbee to use as a paddle at the departure area. Additionally, Pellham had asked Thomas, the organization's bus driver, for a life jacket, but his request was disregarded.

After they entered the river, Pellham and his group tied their inner tubes together. However, they were soon confronted with fast-moving currents. As the group came around the river bend, they noticed a fallen tree, with numerous branches extending, that reached more than halfway across the river (*Pellham v. Let's Go Tubing, Inc.*, 2017). The group members frantically used their Frisbees to avoid the tree with no success. When Pellham grabbed the tree, the current jolted the inner tubes causing him to fall backward into the river (*Pellham v. Let's Go Tubing, Inc.*, 2017). As a result of the fall, Pellham incurred a ruptured eardrum. Moreover, the rapids pushed Pellham underwater, and when he resurfaced, he struck his head on one of the large branches, which caused a whiplash injury. After Pellham made it to shore, he informed Thomas about the incident. Although Thomas knew about the fallen tree, Let's Go Tubing was prohibited from removing it by law (*Pellham v. Let's Go Tubing, Inc.*, 2017).

Due to the incident, Pellham suffered damage to a lower disc in his spine, which generated pain to his left foot. He also had neck fusion surgery performed as a result of the episode (*Pellham v. Let's Go Tubing, Inc.*, 2017). Pellham filed a legal complaint against

Let's Go Tubing for negligent failure to warn. Furthermore, Pellham contended that he did not waive liability for the reason that Let's Go Tubing committed gross negligence. Additionally, he disputed that he expressly or impliedly assumed the risk of floating into a hazard (*Pellham v. Let's Go Tubing, Inc.*, 2017).

The trial court ruled that the inner tube rental company did not owe a duty to warn the renter about the fallen log because Pellham voluntarily participated in the tubing activity (*Pellham v. Let's Go Tubing, Inc.*, 2017). Additionally, the court pronounced that the rental company, Let's Go Tubing, did not have a duty to warn about or to prevent injury suffered by Pellham from trees in the river. As a result, the court reasoned that Pellham assumed the risks inherent in river tubing. The Court of Appeals later upheld the trial court's judgment (*Pellham v. Let's Go Tubing, Inc.*, 2017). Several issues were brought forth in this case: negligence, inherent risk, and assumption of risk.

Negligence

For a negligence claim to be litigated, four elements must be proven: (1) the existence of a duty owed; (2) a breach of duty occurred; (3) a proximate cause between the breach and the injury; (4) the party to whom a duty was owed was injured (*Tincani v. Inland Empire Zoological Society*, 1994). First is that a duty of care is owed. A duty is a special relationship between two or more parties that may be created by statute, contract, or common law (Dobbs, 2000). Duty may be denoted in other terms such as the duty of care, the standard of care, or standard of conduct (*Bitar v. Rahman*, 2006). According to the Restatement (Second) of Torts (2010), negligence is the inability to use reasonable care under every circumstance. Specifically, negligence is

the failure of one owing a duty to another to do what a reasonable and prudent person would ordinarily have done under the circumstances, or doing what such a person would not have done, which omission or commission is the proximate cause of injury to the other. (§ 3)

The second element, breach of duty, refers to the failure to use ordinary care. In other words, a person is negligent when they fail

to act as a reasonably prudent person would have performed under the same or similar circumstances (Miller & Schoepfer, 2018). The third element is the proximate cause. If an injury would not have occurred without the defendant's conduct, then the proximate cause is met. Proximate cause is referred to as "but for" test as in "but for the wrongful acts of the defendant, the injury would not have occurred." In the Let's Go Tubing case, Pellham alleged the organization knew of the danger in the form of the underwater log but did not warn him about it. As a result, he contended that his injury would not have taken place. Finally, for Pellham to claim negligence against Let's Go Tubing, he needed to have suffered significant harm, either physically or emotionally, to have a viable negligence claim (Miller & Schoepfer, 2018). While he was able to prove he was injured, when individuals voluntarily participate in an activity they assume the inherent risk of the activity. They are not allowed to recover from the activity's provider (Centner, 2006).

Inherent Risk

Inherent risks are those risks that are integral functions of any given sport or recreational pursuit (Miller & Wendt, 2012). Furthermore, inherent risks are foreseeable and often strongly connected with sport or recreational activities (*Morgan v. Ohio Conference of the Church of Christ*, 2012). Specifically, the Morgan court elucidated that the "rationale behind the doctrine is that certain risks are so intrinsic in some activities that the risk of injury is unavoidable" (p. 3).

Individuals participating in sports and recreation activities may pursue litigation even though they either know or have reason to know the inherent risks that may occur in all sport and recreation activities (VerSteeg, 2013). Certain courts have addressed the comprehension of inherent risks by implementing legal guidelines that do not enforce tort liability for negligence in sport and recreation events (Spengler & Burket, 2001). Instead, liability occurs in the sport and recreation environment when individuals suffer an injury as a result of reckless or intentional behavior on the part of the defendant. Centner (2006) stated, "Although most sport responsibility statutes do not prevent plaintiffs from bringing a lawsuit, plaintiffs with injuries caused by inherent risks of the sport may be expected

not to file suit because, under the statute, they cannot recover their damages” (p. 35).

The subject of inherent risk is meant to put the responsibility on individuals who voluntarily assume the risks. To that extent, the court in *Crace v. Kent State University* (2009) contended that “whenever gravity is at play with the human body, the risk of injury is inherent” (p. 913). Thus, unless Pellham could have shown that he involuntarily took part in the tubing activity or someone from Let’s Go Tubing intentionally pushed him into the water, the gravity that pulled him off the tube and into the water may be perceived as an inherent risk.

Assumption of Risk

The doctrine of assumption of the risk is a defense whereby a defendant does not owe a duty to protect a plaintiff against risks that are so inherent that they cannot be removed from the activity (*Bundschu v. Naffah*, 2002). Assumption of risk maintains that sport or recreation service providers are accountable for the damages incurred by the participants if and only if the injury is produced by reckless or intentional conduct (Hansen-Stamp, 1998). The rule asserts that when a plaintiff voluntarily participates with the knowledge of existing risks, that individual will not be permitted to seek recovery for damages that were suffered (Miller & Schoepfer, 2018). According to the Restatement (Second) of Torts (1965), “the word ‘known’ denotes not only knowledge of the existence of the condition or activity itself, but also an appreciation of the danger it involves” (§ 343A). Horton (2004) summarized the doctrine of assumption of risk to be “shorthand way of saying that a defendant owes no duty to protect plaintiffs from an activity’s inherent risks” (p. 612).

The assumption of risk defense may take two forms: express or implied. An implied assumption of risk occurs when a defendant does not owe a plaintiff a duty of care for an injury that arose from an inherent risk of a sport (Miller & Schoepfer, 2018). Implied assumption of risk happens when the plaintiff assumes a risk but behaves in a reasonable manner (*Kirk v. Washington State University*, 1987). An express assumption of risk takes place when participants must sign an assumption of risk form before being permitted to participate. Specifically, express assumption of risk arises when an individual explicitly consents to relieve another of a duty regarding specific

known risks (*Gleason v. Cohen*, 2016). It is notable that the Pellham court indicated that express assumption of risk as well as implied assumption of risk prevented any type of recovery by the plaintiff.

Conclusion

It is no secret that when individuals will incur injuries when they choose to participate in sport and recreation activities. Centner (2006) stated, “American sports participants experiencing a mishap are more likely to blame the sport provider for not implementing greater safety precautions” (p. 40). Since individuals increasingly blame others for their injuries, society has become more litigious. In fact, those involved in sport and recreation activities sue even though they either know or have reason to know the risks that are naturally inherent in all sport and recreation activities (Miller & Schoepfer, 2018). As such, participants need to understand that while a duty is owed to them, they may waive the right to pursue litigation because of the inherent risks in the activity and their assumption of risk.

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