

Inherent Risks
Eliminating the Duty Element of a Negligence Cause of Action
(Climbing Wall Association – 2008)

Inherent risks are those so integral to an activity that, without them, the activity would lose its value and appeal. These are risks of injury or loss which cannot be reduced or avoided without changing the basic nature of the activity. The presumption is that participants in such activities understand their inherent risks, and those participants are considered to have assumed them voluntarily. This is sometimes referred to as the Primary Assumption of Risk Doctrine. (The Doctrine applies also to the express assumption of risks.)

For example: some (but not all) falls from a horse are an inherent risk of horseback riding. Inherent risks arise from the unpredictable nature of the horse, including a tendency to spook for no apparent reason. Inherent risks may include slipping from a saddle, or falling in the event of sudden starts or stops. Falling is not an inherent risk if it results from errors of the equine service provider...the unsuitability of the horse for the rider, improper gear, or latent terrain issues, for example. These errors, among others, raise questions of negligence.

Moguls are an inherent risk of downhill skiing; but an untrained chair lift attendant is not.

A fall from a climbing wall or natural rock face is an inherent risk of climbing. But what if that fall is the result of the inattentiveness of a belayer, an improperly attached handhold, swinging into the wall or another climber, the failure of an auto-belay system, or the placing of redundant protection in the same crack system?

In a number of states the inherent risks of participation in an active sport include the simple negligence (but not the recklessness or intentionally wrongful conduct) of co-participants, teachers and coaches, and even organizers. The reason for this allowance is that to punish a person for an apparent careless act in this context would “chill” participation in the activity and

would destroy the every reason for participating in it. In addition, in active sports, it would be very difficult to draw a line between simply vigorous participation and negligence. One of the very early applications of the doctrine arose out of a claim of injury when a participant in a game of touch football complained that his hand had been stepped on.

The significance of the inherency doctrine is that a service provider has no duty to eliminate or reduce inherent risks (which might include simple negligence) and cannot be liable for failing to do so. In short: liability for negligence can be avoided.

A provider has a duty not to enlarge the inherent risks of an activity, and to control any such enlargement to avoid injury or loss. Recent court opinions finding an enlargement of the inherent risks of an activity include: placing small children on the floor of a white water raft; a lack of sequential learning for a horseback ride or ski activity or a competitive racing dive; a wrangler releasing a horse's lead rope; inadequate liquids for a marathon event; a troublesome dog on a trail ride; failure of and inadequate equipment; inadequate training and supervision of staff; and inadequate supervision of a novice trail rider.

Other examples of incidents, closer to the climbing industry, might include the misplacement or separation of mats below a wall, the failure to clear a down-climb route, and a belayer's disregard for her duties in lowering a climber.

The breach of a duty to reasonably manage the enlarged risks of an activity could lead to a claim of negligence if the breach causes an injury or other loss.

A client may, with knowledge of the enlarged risks, expressly (not by mere participation, usually) agree to assume an enlargement of risks and engage in the activity in spite of the enlargement. A client's expressed assumption of an enlargement of the inherent risks of an activity relieves the service provider of the duty to protect the client from a loss caused by that

enlarged risk. A service provider has no duty, in most states, to protect a client from an expressly assumed risk.

A client may choose to engage in an activity and confront known enlarged risks, without expressly agreeing to assume them. This is often referred to as Secondary Assumption of Risk. The Court might initially determine that 1) a claimed loss was not caused by an inherent risk, 2) the provider (therefore) had a duty to protect the client, and 3) the provider failed that duty. The Court or jury may then compare the client's negligence (unreasonableness) in deciding to participate, in the face of the risks and duty to protect, with the service provider's negligence in failing to reasonably manage the enlarged risks. Any recovery for the client may be adjusted accordingly. ("Comparative fault" in some states.)

Incidents do not usually fall clearly into an inherent risk or enlargement of inherent risk category. We will be discussing some such incidents in this seminar. They include the following: an inadvertent lost belay while lowering a climber; attachment of a belay cable to a gear loop; a boulder thrown or pushed from the top of a climbing site in celebration of the completion of a climb; a student struck by a boulder inadvertently dislodged by a staff member who had instructed the student to move to another location; an injury caused by leaning on and dislodging a boulder; redundant protection in a single crack system which failed when "the mountain moved"; construction at the top of a climbing site which allegedly increased the danger of rock fall; and other "rolling stones" and falling climbers.

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