

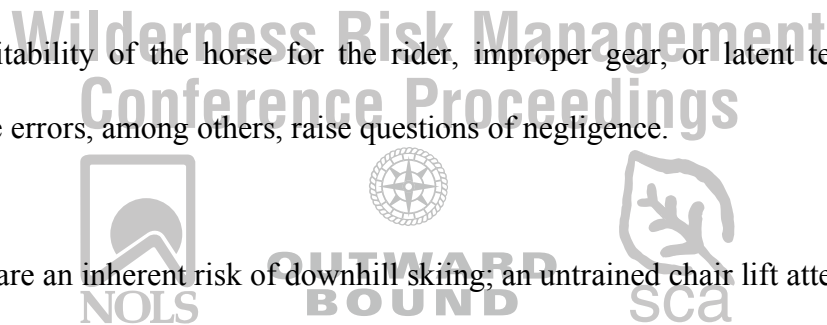
Inherent Risks
Eliminating the Duty Element of a Negligence Cause of Action

Inherent risks are those so integral to an activity that, without them, the activity loses its basic character and appeal. These are risks of injury or loss which cannot be reduced or avoided without changing the basic nature of the activity.

For example, some (but not all) falls 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....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; an untrained chair lift attendant is not.

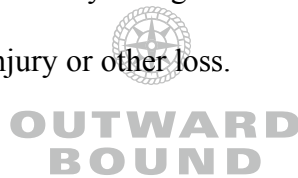
Inherency is also found in subsets of familiar activities: the teaching or coaching of an active sport, for example. The duties of and to persons within the “orbit” of the activity (sponsors, instructors, co-participants, and spectators) may be relaxed to a degree. Simple carelessness, or negligence, may be regarded as inherent to instruction, co-participation or observation of a recreational activity. The rationale is that to punish one for a merely careless act in this context would “chill” the nature of the activity and it would lose its appeal and basic character. Reckless or intentional wrongful conduct is not excused.



A service provider has no duty to eliminate or reduce inherent risks and cannot be liable for failing to do so.

As noted, inherent risks may be enlarged by circumstances or conduct. 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. Examples from recent cases of an enlargement of the inherent risks of an activity include: placing small children on the floor of a white water raft; no sequential learning for a horseback ride, or ski activity; 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.

The breach of a duty to reasonably manage the enlarged risks 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.

The assumption of inherent risks and the expressed assumption of non-inherent risks may be referred to as Primary Assumption of Risks. Both relieve the service provider of a duty of

care.

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. A finding of a Secondary Assumption is often an after-the-fact analysis. The Court initially determines that 1) what caused the loss was not an inherent risk, 2) the provider 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, 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.) The Plaintiff's fault does not eliminate the provider's duty of care.

Wilderness Risk Management Conference Proceedings



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