

Defenses: comp fault

Move from contributory fault = total bar to comp fault in most states

3 versions – straight comparison = CA

Modified 49% or 50% fault of P ousts case

How does jury allocate %s of fault?

Compare relative costs of avoiding injury?

Comparing incommensurables?

Egregiousness of breach, causal sequence, etc. as possible handles but wide jury discretion

A/R

Express vs. implied

Express – can include neg not just inherent risks

Upheld unless meets public policy exception -- see Tunkl factors

Implied a/r

Knowledge of risk

[appreciation of risk]

Voluntary exposure to risk/choice to confront risk

Problem of level of specificity at which defined

c/f = P didn't act as RPP; objective standard - knew or should have known -> if comp fault, get partial recovery

a/r = requires actual knowledge/acceptance – subjective state of mind of this P -> total bar

after comp fault, if there's an overlap between c/f and a/r, treat as c/f and allow partial recovery (“merger” cases)

CA: primary: complete bar – no duty/no breach. Based on class of activities – mostly recreational activities

Bar doesn't cover reckless or intentional harm

Only covers inherent risks of the activity

vs. secondary a/r = “merger” cases treat like c/f

damages

compensatory: back earnings, past medical expenses

future earnings/medical expenses

p & s

loss of enjoyment/hedonic damages

collateral source rule

statutory actions: wrongful death – to family for loss of services of person killed

survival actions: for losses person killed suffered before death

punitive: Ca: malice (intent or recklessness), fraud or oppression

reasons why might want

how much? Constitutional issues

\$1 m compensatory \$145 m punitive

Too much bc

Reprehensibility: physical vs economic, h &S, preying on vulnerability, repeated actions, intent/reckless? Must not be for general nastiness, only in this case

Disparity compensatory vs punitive: no bright line rule but generally single digits will be appropriate

Comparison to civil or criminal penalties – should be in line vs. whole point is other penalties won't deter

