

## YOU AND THE LAW

# Teenagers Suffer Traumatic Orifice Injuries While Using Personal Watercraft

*Nathan T. Martin*

Colombo et al. v. Bombardier Recreational Products, Inc. et al., 2014

## Abstract

*This article will highlight the details of Colombo et al. v. Bombardier Recreational Products, Inc. et al. in the context of how the three defendants could have better managed the safety and risks to their customers and their own liability. These recommendations will illustrate issues around negligence, product liability, employee training, inadequate warnings, waivers and participation agreements, and participant education and instruction.*

A San Diego County Superior Court decision was affirmed on appeal in California's 4th Appellate District, upholding the result that two minor females were traumatically injured while riding a personal watercraft (PWC) due to the direct and proximate cause of the negligent behavior of the defendants.

## Facts of the Case

On the date of the injuring event, 16-year-old Haley Colombo and 17-year-old Jessica Slagel (hereafter referred to by their last names or as a plaintiff) rode as passengers on a three-person Sea Doo (BRP model GFI 4-TEC) in Mission Bay, near San Diego, California.

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Brett Kohl (Kohl), a roommate of one of the plaintiffs' boyfriend and an employee of Mission Bay Jet Sports (MBSJ), piloted the PWC. Robert Adamson (Adamson) owned and operated MBSJ (hereinafter referred to by their last names or as a defendant).

During their excursion, the plaintiffs had reboarded the PWC after being thrown off during a high-speed maneuver by Kohl. Frustrated since they previously asked not be thrown from the PWC, at least one of the plaintiffs requested to be taken back to shore. Kohl obliged and applied full throttle to get going, which was his typical acceleration from a standstill position in open water. This full throttle acceleration resulted in plaintiffs sliding off the back of the PWC. Horribly, they both suffered significant orifice injury when the powerful jet thrust from the back of the PWC ripped their flesh.

The plaintiffs had no intention of piloting the PWC and did not have any idea how PWC worked and how fast water exited the jet-thrust nozzle underneath. Neither plaintiff was wearing a protective wetsuit, as instructed by the BRP operator's manual. Neither were they instructed to wear such protective equipment by either Kohl or MBSJ, and they did not read in any exculpatory or participation agreements about the severe injury that could occur if they did not wear such protective equipment. Kohl was neither trained by MBSJ on how to operate the PWC safely nor required to read the operator's manual, including how to protect himself or customers. However, Kohl had significant time and experience operating PWC. Also, Kohl's position as the pilot completely obstructed the plaintiffs' view of the placard on the front of the PWC warning of such risks. Furthermore, BRP's safety video for the PWC never mentioned the risk of orifice injuries from the jet-thrust nozzle and showed some passengers and pilots riding the PWC in nonprotective swimsuits. Finally, BRP had notice of similar injuries prior to the injuries to the plaintiffs.

## Complaint

While the injuries were sustained in federal navigable waters and thus traditionally subject to maritime law, under the *savings to suitors* clause a party may pursue a remedy for a maritime claim in a state court under certain conditions (28 U.S.C.S. § 1333, 2012). Therefore, land-based negligence under common law applies the same as maritime law for potential torts occurring on navigable wa-

ters (*Withhart v. Otto Candies*, 2005). As such, the plaintiffs brought suit in San Diego County Superior Court against BRP, Kohl, and Adamson for a claim of negligence. More specifically, Colombo and Slagel claimed that Kohl (employee of MBS) failed to operate the PWC in a safe manner, that Adamson (owner of MBS) failed to adequately train Kohl in the safe operation of PWC as well as to warn customers about the risks, and that the PWC on which they were injured was defective because it did not adequately warn riders of the risks of riding a PWC.

## **Court Analysis**

The superior court first noted that a PWC provider has a non-delegable duty to train, instruct, and supervise employees, as well as ensure that employees communicate about safety practices and equipment to customers and warn of the risks of participation. Furthermore, PWC operators have a duty to follow instructions and warnings provided in the PWC operator's manual. Finally, product manufacturers have a duty to adequately warn users when and how their product could cause injury and to instruct how to reduce or avoid such injury.

The superior court also considered the issue of reckless or callous disregard for plaintiffs' rights and safety, which would allow for punitive damages. Maritime law (*Atlantic Sounding v. Townsend*, 2009) differs dramatically from California law (California Civil Code, 1988) on the issue of punitive damages, as maritime law requires only proof by a preponderance of the evidence (i.e., showing recklessness or gross negligence), while California law requires proof by clear and convincing evidence (i.e., proof that the defendant acted with malice, oppression, or fraud). Under the aforementioned *savings to suitors* clause, parties who choose to have their case adjudicated in a state court rather than a maritime court are entitled to the maritime standard since state law may only supplement and not conflict with federal maritime law (28 U.S.C.S. § 1333, 2012).

## **Court's Ruling**

The defendants were found negligent and each one-third responsible because they breached their duty of reasonable care that was, in part, the direct and proximate cause of the injuries to the plaintiffs. First, Kohl failed to heed the PWC manufacturer's warning to

never rapidly accelerate the PWC with passengers on board. Second, Adamson failed to adequately train and instruct his employee in the safe operation of PWC, including warning of the risk of orifice injury and the need for protective clothing, as well as failed to warn of the risks of participation to customers. Third, BRP failed to adequately warn users when and how their product could cause injury, specifically by not providing multiple warning placards for pilots *and* passengers to view; thus, BRP's PWC was defective because of inadequate warnings. As such, the jury awarded Colombo \$3.385 million and Slagel \$1.063 million in damages, which included past and future medical expenses and past and future noneconomic losses.

Furthermore, the court also found BRP demonstrated reckless disregard for the rights of others. Because BRP was aware of at least nine cases where orifice injuries had occurred to passengers on their PWC, the concept of foreseeability was established that similar injuries could occur in the future and they should have taken measures to enhance warnings to users. Although BRP was also aware that passengers may not see a warning on the front of the PWC due to it being obstructed by the pilot, BRP decided against placing additional warning labels for passengers elsewhere on the vessel for concern of what they called a *dilution effect*, whereby a user might not pay attention to any one warning if there are too many warnings. However, other manufacturers of PWC (e.g., Yamaha) utilized three labels to warn, suggesting that a single warning was inadequate. These facts, along with the fact that adding warning placards elsewhere on the PWC would have been an inexpensive fix and would have helped ensure the warning of passengers even if a PWC operator failed to do so, further supported the plaintiffs' claim of reckless disregard for the rights of others. The final piece of evidence was BRP's safety video, which failed to mention orifice injury due to the powerful jet thrust and most appallingly showed operators and passengers not wearing protective clothing such as wetsuits. As such, the jury also awarded Colombo and Slagel each \$1.5 million as punitive damages against BRP for its reckless disregard for the rights of others.

## Discussion

Based on the sound risk management approach of developing and implementing layers of protection, this section offers specific recommendations on how the three defendants could have better

managed their own liability and, most important, the safety of their customers. These recommendations are framed beyond the case's immediate details so that they can be applied across a breadth of practitioners' own managerial and operational practices. Finally, the layers of protection are described broadly as (1) participant safety, (2) establishing assumption of risk, (3) using agreements designed to limit lawsuits, and (4) transfer of risk.

The first and most obvious layer of protection rests at keeping participants safe, since litigation such as this case never arises without injury. Obviously, such safety could have been enhanced herein through the provision of adequate employee training and participant education. This includes an employee orientation for each piece of equipment as well as a review of operational manuals specific to the safety of the user within such orientation. When an employee has such knowledge, it makes it easier for them to communicate it during a participant safety briefing via checklist, which is also recommended. Such training and participant briefing should not only enhance participant safety, but also bolster the second layer of protection by establishing both primary and secondary assumption of risk principles (discussed below). Finally, requiring and making available for free or for a fee personal protective equipment such as a wetsuit to participants is a simple mitigation device that is recommended by PWC manufacturers, much like a Coast Guard–approved personal flotation device.

Supplemental to the assumption of risk principles in the second protection layer, *assumption of risk agreements* and *agreements to participate* help formalize a participant's knowledge, understanding, and appreciation of the risks of participation and how to keep themselves as safe as possible. Once established, these principles can serve as part of a legal defense when a participant decides to initiate litigation if injured. Armed with such information from reviewing and signing such documents, a participant is much more likely to keep themselves safe.

In the third protection layer, a *waiver* (aka *release of liability*) is a tool that is generally supported by public policy, but differs in its effectiveness as a protection mechanism across jurisdictions. Such a tool is based in contract law and allows parties to agree to an exchange of value in which the value of an opportunity to participate is

exchanged in return for the value of a promise not to bring litigation for an injury due to a claim of ordinary negligence. While such a tool does not ever help a participant be safer, it does provide a layer of protection from the threat of litigation or to an organization's financial assets.

The fourth layer of protection is the practice of risk transfer. While insurance is the most common and well understood tool in risk transfer, the use of *indemnification* agreements or clauses is not nearly as ubiquitous. Indemnification is a tool that helps transfer the risk of financial loss to another party. The other party is most often the participant themselves and they take responsibility for any costs incurred by the provider to defend itself in court or for financial settlements or awards to a plaintiff. Similar to releases of liability, indemnification is also based in contract law and, while it never helps a participant be safer, it does provide another layer of protection from the threats of litigation or to an organization's financial assets.

While most readers of this article are not product manufacturers, the behavior of the PWC manufacturer in this case (BRP) can be constructive in the development of layers of protection across broad operational settings. Under the first layer of keeping participants safe, organizations that develop safety videos in lieu of providing in-person participant safety briefings must do so using safety, not marketing, as the premise for creating the video's content. A safety video in this case not only failed to warn viewers of a significant risk of participation but also showed participants not following safety advice that was important enough to include in an operator's manual; this suggests that the content was not designed for safety. Such an oversight might also be found in marketing collateral such as flyers and brochures or in an online environment since they are not intended to provide safety information, and this too sets up participants with an inaccurate portrayal of the risks they might encounter. As such, practitioners should review all marketing collateral for consistency with safety and risk factors.

Furthermore, the use of warnings to enhance participant knowledge, understanding, and appreciation of the activity and risks they may encounter is an important mechanism to keep participants safe and to establish assumption of risk as a legal defense. This case demonstrates that one warning in one place is not nearly enough and that

not heeding warnings from seeing *too many* is not nearly as likely to occur as is injury from not seeing warnings at all.

Finally, and while all too obvious, when a practitioner receives notice of injury due to its management, operations, or equipment, foreseeability is established that the injury could happen again. As such, practitioners should debrief all injuries and investigate the antecedents to that injury to inform constructive changes of training manuals and videos, processes, warnings, checklists, and other related factors.

## References

28 U.S.C. § 1333 (2012).

Atlantic Sounding v. Townsend, 129 S. Ct. 2561 (2009).

California Civil Code § 3294 (1988).

Colombo et al. v. Bombadier Recreational Products, Inc. et al., 230 Cal. App. 4th 1442 (2014).

Withhart v. Otto Candies, L.L.C., 431 F.3d 840, 842, 5th Cir. (2005).