

# **Exercising Good Judgment**

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# Just a Normal Day at the Gym...



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# Consumer Spending

- Americans spend \$65 billion per year on fitness
  - Gym memberships
  - Exercise equipment
    - 40% purchased sports / recreational footwear in 2015

Sources: "The Right Exercise Equipment for You," *Consumer Reports*, January 4, 2016.  
<http://www.consumerreports.org/sports-exercise-equipment/the-right-exercise-equipment-for-you>  
"2016 Participation Report," Physical Activity Council, page 15.

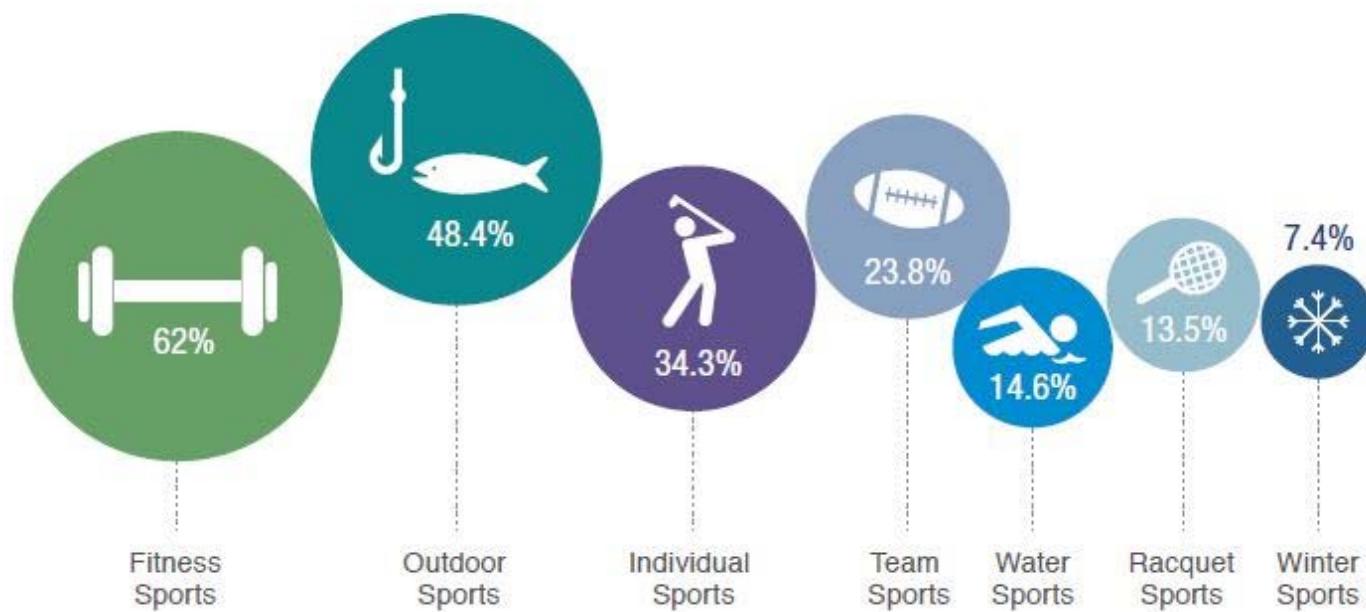
## Activity Level Trends

- 56% participate in at least one high caloric burning activity
  - Fitness and outdoor sports are most popular
- Largest drop in inactivity since 2010
  - 1.2 million who were inactive in 2014 became active in 2015

Source: "2016 Participation Report," Physical Activity Council, pages 6, 7 and 11.

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# Most Popular: United States



# Top 15 Activities: Overall Participation

RANK	SPORT/FITNESS ACTIVITY	2015 PARTICIPANTS
1	Walking for Fitness	109.8 million
2	Treadmill	50.4 million
3	Running/Jogging	48.5 million
4	Bowling	45.9 million
5	Free Weights (Hand Weights)	42.8 million
6	Bicycling (Road/Paved Surface)	38.3 million
7	Fishing (Freshwater/Other)	37.7 million
8	Hiking (Day)	37.2 million
9	Stretching	35.8 million
10	Stationary Cycling (Recumbent or Upright)	35.6 million
11	Weight/Resistance Machines	35.3 million
12	Free Weights (Dumbbells)	31.4 million
13	Elliptical Motion Trainer	28 million
14	Camping (Within 1/4 Mile of Vehicle/Home)	27.7 million
15	Swimming for Fitness	26.3 million

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# With Use Comes Risk: 2015 ER Visits

- Football: 399,873
- Weight Lifting: 107,655
- Baseball: 120,234
- Basketball: 493,011
- Bicycles: 497,134
- Snowboarding: 25,452
- Flying Discs and Boomerangs: 12,681
- Pogo Sticks: 2,200
- Table Tennis: 1,487



Source: CPSC's National Electronic Injury Surveillance System (NEISS) estimates.

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# CPSC Injury Tracking

- 460,000 ER visits a year for exercise equipment use
  - Most often treadmills
    - At least 24,000 ER visits each year
    - Broken bones, abrasions and burns



Source: "Brain-injury lawsuit highlights treadmill risks," *The Sacramento Bee*, September 26, 2016.  
<http://www.sacbee.com/news/local/health-and-medicine/article104138901.html>



# When Something Goes Wrong, Is It Misuse or Foreseeable Risk?

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# Foreseeable Use?



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# How Does the Law Define Misuse/Foreseeable Risk?

- The Restatement (Second)
  - Can be liability for harm from "**probable use**" and "**use in a manner and for a purpose for which it is supplied**"
- The Restatement (Third)
  - Limits design and warnings defects to "**the foreseeable risks of harm posed by the product**"
  - Bars recovery in design litigation for injuries that occur "[w]hen a product is put to an unforeseeable use"

# How Does the Law Define Misuse/Foreseeable Risk? (continued)

- Uniform Commercial Code
  - Builds misuse into the concept of a product's "merchantability,"
  - Defined in terms of a product's being fit for its "ordinary" purposes
  - If it isn't used for an ordinary purpose can argue no liability

# How Does a Product Manufacturer Defend Claims involving Misuse?

- 4 Defense Themes
  - Contributory (Comparative) Negligence
    - Negligence vs. Strict Liability
  - Assumption of Risk
    - Express vs. Implied
  - Misuse
    - Foreseeability Limitation
  - Sole Proximate Cause

# Contributory Negligence

- Is your jurisdiction contributory, comparative, pure comparative?
- Does your jurisdiction distinguish between strict liability and negligence claims or do they merge?
- Specific pleading requirements vary
  - Identify as a non-party at fault
  - Plead misuse as an Affirmative defense
  - Allege misuse as a counter claim
  - Fact specific pleading – identify the alleged misuse

# Assumption of the Risk

- 2 types: Express and Implied
  - Express
    - Based on waiver or disclaimer
    - Dependent upon theory of recovery:
      - Negligence – waiver must be clear and unequivocal
      - Strict Liability – void and no effect
      - Warranty – can an implied warranty be disclaimed in your jurisdiction?

## Assumption of the Risk (cont.)

- Implied
  - *Abolished or subsumed by comparative fault in many jurisdictions*
  - Elements
    - Knowledge
    - Appreciation of risk
    - Voluntary Encounter (exception for rescues and workplace)
- Is standard whether the P "should have known" of risk or what P "did in fact know?"

# Assumption of the Risk or Foreseeable Use?



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# Warnings Address Foreseeable Misuse

- A product is defective when the foreseeable risks of harm from the product could have been reduced or avoided by providing reasonable instructions or warnings, and the failure to provide those instructions or warnings makes the product unreasonably dangerous. FL. Stnd. Jury Inst. 403.8
  - Defend by showing warnings were sufficient and failure to read and heed warning can bar recovery
  - Can't warn against unforeseeable use



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# Assumption of the Risk: Examples from Case Law

- Did the plaintiff...
  - stick his hand into a meat grinder because it was "more convenient" than using the metal stomper that was provided?
  - continue to ride at high speed a motorcycle he knew to have a wobbly front end and then crash?
  - stick his arm through bars of a fork lift to activate the control lever to lower the bars, figuring he could get his hand out of the way before the forks hit?

# Misuse Defense

- No product can be made safe for every purpose, manner, or extent of use.
- "We cannot charge the manufacturer of a knife when it is used as a toothpick and the user complains because the sharp edge cuts."

*General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 349 (Tex. 1977), overruled on other grounds by *Turner v. General Motors Corp.*, 584 S.W.2d 844 (rex. 1979); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984).



# Misuse Defense

- How do you need to argue it?
  - No clear agreement
  - Affirmative defense or Plaintiff's burden to prove no misuse?
  - Manufacturer will always find a way to make the argument
- Issues to consider:
  - Is it merged into comparative fault in your jurisdiction?
  - Is there a misuse or misconduct statute?
  - Is it a complete bar to recovery or does it reduce damages?

# Misuse Defense: More Real Examples

- Is it foreseeable that...
  - use an exercise band around the ladder in a pool?
  - a person will insist on buying shoes that are too small for her feet causing foot injury?
  - a car will be driven at 115 mph?
  - a person will pour hot Wesson Oil from the skillet back into the bottle and then recap the bottle, causing it to explode?

# Recent Caselaw: Misuse

- *Sandifer v. Hoyt Archery, Inc.*, 2015 WL 5138271, No. 12-322-SDD-RLB (M.D. La. Aug. 31, 2015)
  - Compound Bow. Left temple of deceased impaled. No witnesses/user was alone.
  - Court denied D's SJ based on theory of misconduct. D's argued P's must eliminate misuse.
  - Held:
    - Jury could conclude reasonable anticipated use
    - P's experts produced sufficient evidence to find a genuine issue of material fact
    - No requirement alternative designs must be built and tested
- Misuse is an issue that typically gets to a jury

# If It's Foreseeable, It Isn't Misuse

- Foreseeability Limitation
  - Easier to define than apply
  - Most courts define as "reasonably foreseeable"
  - 3 categories
    - Bizarre and Clearly Unforeseeable
    - Clearly Foreseeable
    - Reasonable minds could disagree (most cases?)



# Foreseeable Use? Misuse?



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## Recent Caselaw: Misuse

- *Keevil v. Life Time Fitness, Inc.*, Not Reported in N.E.3d (2016)  
2016 IL App (1st) 151551-U
  - Used exercise band in pool at gym by putting it around ladder and did upper body exercises by bracing body against ladder. Band snapped and struck P in the eye.
  - Member agreement release found enforceable
  - P performed unauthorized exercise which he was specifically warned by staff. Failed to seek instruction.
  - SJ granted for Defendant Gym
- Facts are key to argue misuse

# When Are You at Higher Risk for Misuse of Your Product?

- Simple v. Complex product? Have the use expectations been well defined?
  - Consumers have reasonable expectations about the use limits of some products, but not others
  - Innovative or new products – a rush to market can result in failure to identify "foreseeable" uses
  - New types of unexpected use as trends change

# Sole Proximate Cause: Back to Basics

- No matter the product or the use, Plaintiff must still establish that a defect is a proximate cause of the harm.
- A plaintiff's or other's negligence sometimes is so significant a factor in producing an injury that it may amount to the sole proximate cause of the harm.
- Intervening or Superceding Cause Defense

# Causation is King

Sole Proximate cause may be a complete bar to recovery where:

- substantial misconduct is overwhelmingly the predominant force in causing the harm; and
- the role of any product defect was trivial by comparison

# Sole Proximate Cause

- Closing Argument from a diving board defect case:  
"You must find that this defect proximately caused the accident. The clear testimony here from [defense expert] and using your common sense is that if someone steps on the board with about an inch of their foot on it, they will fall off the side. That was the proximate cause, the way the board was used, not the design of the board. I am not willing to concede for a moment that there is anything defective about the board when you use the standards which are customary in the industry and any governmental regulations. Even if you feel there was, I ask you to find that the proximate cause was the way [plaintiff] used it, not the way it was designed."

*Sheehan v. Anthony Pools* 440 A.2d 1085 (Md. Ct. Spec. App. 1982).

# What is the Sole Proximate Cause Here?



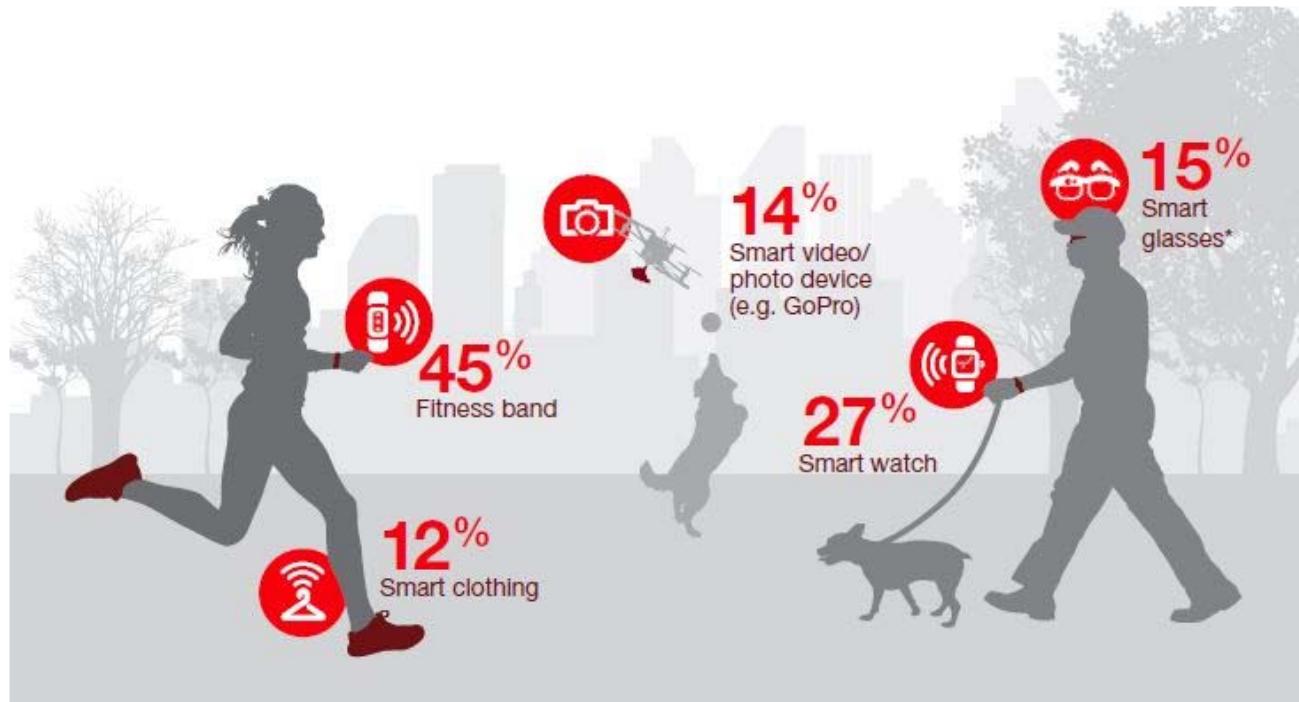
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# Foreseeable Use vs. Misuse in New and Innovative Products

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# Wearables Lead the Pack



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## **Wearables and Other Innovative Products are on the Rise**

- Fitbit gross sales rose 174% to \$745 million in 2014
- Since GoPro's initial public offering in 2014, 100% increase from its top-of-the-range IPO price-per-share
- According to Statista, "the global wearable device market is expected to grow from \$5 billion in 2014 to \$12.6 billion by 2018"

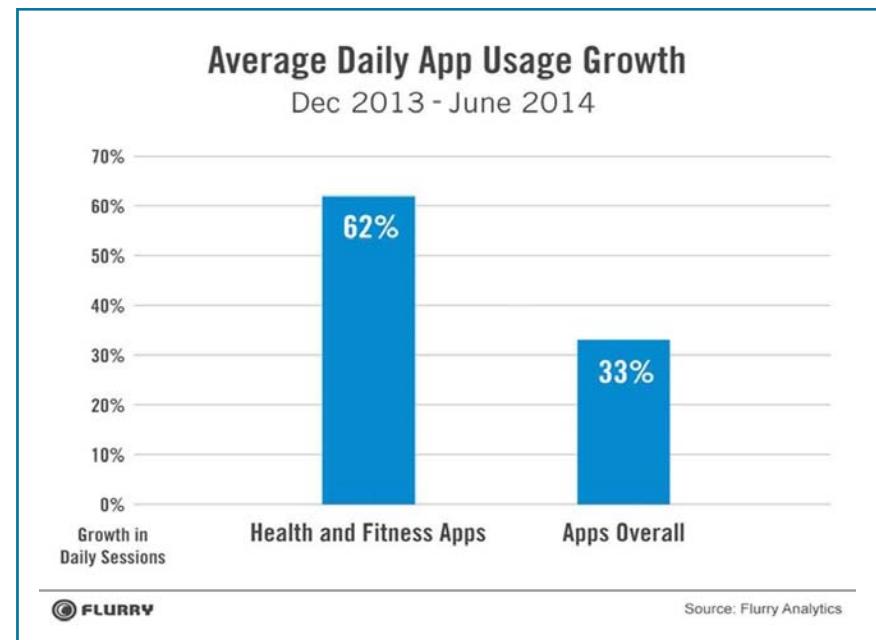
# Explosive Growth

- PricewaterhouseCoopers survey
  - "Explosive growth" in wearable tech. ownership
    - 49% own at least one wearable device
    - Up from 21% in 2014
    - 36% own more than one



# Health and Fitness Apps

Health and fitness app use has doubled other app use since 2014



# With Innovation Comes Risk and Regulation

- Privacy
  - Cyber security
    - Personal/Medical information hacked or data mined without consent
    - Capturing data of non-consenting individuals
- Regulatory
  - Apps being considered "medical devices" and potential regulation by FDA (Final Guidance; July 2016)
  - HIPPA concerns

# Claims and Legal Implications with New Products

- Class action for false advertising: Fitbit provides inaccurate data re: sleep tracking
- Class action for skin irritation from wearable devices
- Hoverboard fires and falls
- Is data collected from Fitness/Sports Apps and Wearable Devices an invasion of privacy? Reliable enough to be admissible evidence?

# Future Risk – Lawsuits and Claims

- Product Liability
  - Electrical shock/Fires
  - User reaction to wearing product
  - Long term use – radio frequency exposure, radiation, cumulative effect with multiple devices?
  - Reliance on product to detriment of user
- Employer Vicarious Liability
  - User distraction

# Anticipate and Defend Use of Your Product

- Misuse and Foreseeable use is often gray area: anticipate, warn and know how to set up the best defense
- New Technology requires a full risk review of potential liability and regulatory risks

# Thank You!

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