For the foregoing reasons, the judgment of the Court of Appeals is reversed . . . and the case is remanded to the trial court for a new trial in accordance with the dictates of this opinion.

DOBSON v. LOUISIANA POWER AND LIGHT COMPANY

567 So.2d 569 (La. 1990)

DENNIS, J.

This is a wrongful death action . . . by the surviving spouse and five minor children of a tree trimmer, Dwane L. Dobson, who was electrocuted on April 24, 1985 when his metallically reinforced safety rope contacted an uninsulated 8,000 volt electric power distribution line. The trial court awarded the widow and her children $1,034,054.50 in damages, after finding the deceased free from fault and holding the Louisiana Power & Light Company liable in negligence for failure to maintain its right of way, insulate its high voltage distribution line, or give adequate warnings of the line's dangerous nature. The Court of Appeal affirmed the decree as to the power company's negligence, but reversed in part, reducing the plaintiff's recovery by 70% based on a finding that the deceased had been guilty of fault to that degree. . . .

We see no error in the Court of Appeal's conclusion that LP & L was guilty of negligence that caused Dobson's death and should be held at least partially responsible for the damages occasioned by the accident [and that Dobson was contributorily negligent for using a metal reinforced safety rope near power lines]. But we granted certiorari because . . . we felt called upon to further elaborate a method for determining the degree or percentage of negligence attributable to a person for purposes of reducing recovery due to comparative fault. . . .

It assists us to concentrate here on the costs of the precautions necessary to avoid the accident because the magnitude of the danger caused by the conduct of either Dobson or LP & L was extreme. If the risk that a person might come into contact with the bare high voltage distribution line were to take effect, the anticipated gravity of the loss was of the highest degree. Dobson's conduct in lowering himself down the tree trunk with a metallically reinforced safety line dangling below near the electric wires substantially increased the possibility of such an accident. But so did LP & L's conduct. . . .

Confining ourselves to the factor of the cost of taking an effective precaution to avoid the risk, it appears to us that the cost or burden of eliminating the danger would have been greater for Dobson than for LP & L. As we have indicated, the power company had a number of relatively inexpensive, efficacious precautions available to it, e.g., inspection, maintenance, partial insulation, public education, and visible warnings. . . . On the other hand, the cost to Dobson, who was ignorant of the characteristics of the uninsulated distribution lines and therefore unaware of their special danger, exceeded the cost to a person with superior capacity and knowledge. An actor with "inferior" capacity to avoid harm must expend more effort to avoid a danger than need a person with "superior" ability. A person about to cause injury inadvertently must expend much more effort to avoid the danger than need one who is at least aware of the danger involved. For this reason courts have traditionally cited "awareness of danger" as a factor distinguishing mere negligence from the higher state of culpability commonly known as "recklessness" or "willful and wanton conduct."

In conclusion we believe that, while the magnitude of the risk of harm created by either Dobson or LP & L was great, under the circumstances of the present case, the cost of taking effective precautions to avoid the risk was greater for the tree trimmer than for the power company. This disparity is heightened by the fact that LP & L was clearly in a superior position to avoid the danger. Because the cost of taking effective precautions was significantly less for LP & L than for Dobson, the fault of LP & L was the greater of the two. We do not think that the unreasonable nature of LP & L's conduct was so great as to be double the fault of Dobson. But we conclude that a palpable majority of the fault should be attributed to the power company in order to achieve substantial justice in this case. Accordingly, we attribute 60% of the negligence herein to LP & L and 40% to Dobson. Consequently, the recovery of the plaintiffs, the surviving spouse and five minor children, will be reduced by 40%. . . .

NOTES TO McINTYRE v. BALENTINE AND DOBSON v. LOUISIANA POWER AND LIGHT COMPANY

1. ***Effect of Comparative Negligence.*** The court in *McIntyre* chose the 49 percent form of comparative negligence. Despite the fact that Tennessee was a contributory negligence jurisdiction and did not require apportionment of fault between the parties, the jury made a factual finding that the plaintiff and defendant were equally at fault. If the court had stayed with the traditional contributory negligence rule, would the plaintiff have recovered any damages? Under the 49 percent form of comparative negligence the court adopted, would the plaintiff recover any damages?

2. ***Asymmetry of Modified Comparative Negligence Systems.*** Modified comparative negligence retains some aspects of the "all or nothing" contributory negligence system, because recovering nothing is still a possible outcome for a negligent plaintiff who is harmed by a negligent defendant. For example, in a case where the plaintiff's degree of fault is 75 percent, what percentage of the total financial responsibility falls on the plaintiff? In a case where the defendant's degree of fault is 75 percent, what percentage of financial responsibility falls on the defendant?

3. ***Apportionment According to Relative Degrees of Fault.*** The comparative negligence rule requires factfinders to determine shares of liability. Court opinions and statutes refer to this finding by different names, such as "percentage of fault," "percentage of responsibility," "degree of fault," "relative degree of fault," or "degree of culpable conduct." It is never completely clear, however, how the factfinder is to calculate the percentages necessary to apportion damages, although the percentages of all the people who contributed to the harm must total 100 percent. In *Dobson,* the court used the Learned Hand approach to negligence, reasoning that since it can be used to determine *whether* a person was negligent, it can also be used to determine *how* negligent one person was compared to another.

Knowing the logic of apportionment helps lawyers strategize about what evidence to present and how to structure their opening and closing arguments. *Dobson* offers an unusual glimpse into determining shares of liability. In most states, appellate courts would remand the issue of proper apportionment to the trial court and the factfinder. For this reason, the logic of apportionment is hidden in a jury's deliberations or the

mind of a trial judge (who does the apportionment if there is no jury). In *Dobson*, because Louisiana appellate courts are permitted to make such determinations, the court focused on the relative cost of precautions the two parties could have taken and found that the power company could have avoided the accident more easily.

The cost to avoid the accident is only one of the Hand factors (burden of avoiding the harm, or *B*, probability of the occurrence of the harm, or *P*, and extent of likely loss, or *L*). This approach works only if the parties have similar risks, measured in terms of the severity of the likely harms and the probability of the harms occurring if precautions were not taken. In *Dobson*, the court found that *P* and *L* were the same for the two parties. Similar logic would support giving a higher percentage to the party that created the greater risk. If one person created risks ten times as great as another, his or her share of liability should be ten times as great. See David W. Barnes and Mark Baeverstad, *Social Choices and Comparative Negligence*, 31 DePaul L. Rev. 273 (1982) (demonstrating that degrees of fault can be determined by reference to each party's ratio of *B* to *PL*).

Another approach would be to identify a large range of factors. The court in Watson v. State Farm Fire & Cas. Ins. Co., 469 So. 2d 967 (La. 1985) said:

> In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed. In assessing the nature of the conduct of the parties, various factors may influence the degree of fault assigned, including: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger, (2) how great a risk was created by the conduct, (3) the significance of what was sought by the conduct, (4) the capacities of the actor, whether superior or inferior, and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought.

4. *Apportionment Reflecting Relative Degrees of Causation.* States and commentators are divided on whether the relative causal contribution of the parties ought to be considered along with the relative negligence of the parties. William L. Prosser, *Comparative Negligence*, 51 Mich. L. Rev. 465, 481 (1953), for instance, argues that "once causation is found, the apportionment must be made on the basis of comparative fault, rather than comparative contribution" to the accident or injury. One state case that agrees with this view is Sandford v. Chevrolet Division of General Motors, 642 P.2d 624 (Or. 1982):

> There is no reference to causation, or any question how much the fault of each contributed to the injury [in the Oregon statute definition of "proportionate fault"]. Indeed, the reference to negligence "contributing to the injury" in former [Oregon Revised Statutes] 18.470 was removed in the 1975 amendment. We do not mean that the allegedly faulty conduct or condition need not have affected the event for which recovery is sought; as we have said, it must have been a cause in fact. But the statute does not call for apportioning damages by quantifying the contribution of several causes that had to coincide to produce the injury.

If relative degree of causal contribution is to be considered, the factfinder might examine the relative substantiality of each party's conduct as a factor in producing the harm, the relative foreseeability of the harm to the actor, or the relative directness of the connection between the actor's conduct and the harm.

Suppose a bicycle rider was hit by a truck on a dark night and was injured. How would these various approaches help you, if you were a juror, to apportion negligence if the truck driver had been driving at 45 miles per hour in a 35 mile per hour zone, and the cyclist ignored a stop sign, was wearing dark clothing, and was talking on a cell phone at the time of the collision?

Statute: COMPARATIVE FAULT

Fla. Stat. §768.81 (2002)

(2) Effect of contributory fault.—In an action to which this section applies, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

Statute: COMPARATIVE FAULT; EFFECT

Minn. Stat. §604.01 (2002)

Subdivision 1. Scope of application. Contributory fault does not bar recovery in an action by any person or the person's legal representative to recover damages for fault resulting in death, in injury to person or property, or in economic loss, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed must be diminished in proportion to the amount of fault attributable to the person recovering. The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each party and the court shall then reduce the amount of damages in proportion to the amount of fault attributable to the person recovering.

Statute: NEGLIGENCE CASES—COMPARATIVE NEGLIGENCE AS A MEASURE OF DAMAGES

Colo. Rev. Stat. §13-21-111 (2002)

(1) Contributory negligence shall not bar recovery in any action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is made.

NOTE TO STATUTES

Comparative Negligence. Many states' statutes establish systems of comparative negligence. In analyzing the preceding examples of these statutes, identify the form of comparative negligence (or comparative fault) adopted by each one. Determine how

each statute would treat a two-party case in which the shares of responsibility were the following:

	Plaintiff's Share of Responsibility	*Defendant's Share of Responsibility*
Case A	75%	25%
Case B	51%	49%
Case C	50%	50%
Case D	49%	51%
Case E	25%	75%

Perspective: Incentive Effects of Comparative Negligence

From an economic perspective, it is sensible to give to the party who can most easily avoid an accident the incentive to do so. Where both a negligent defendant and a negligent plaintiff contribute to an accident, contributory negligence creates an incentive for the plaintiff by imposing all of the liability on that party.

Comparative negligence gives incentives to both parties. The party paying the larger share of the damages is the party who had the greater degree of fault. If "degree of fault" corresponds to the ease with which the party could avoid the accident, a comparative negligence system gives a greater incentive to the party who could avoid the accident more easily. See David W. Barnes & Mark Baeverstad, *Social Choices and Comparative Negligence: Resurrecting* Galena, 31 DePaul L. Rev. 273 (1982).

JENSEN v. INTERMOUNTAIN HEALTH CARE, INC.

679 P.2d 903 (Utah 1984)

STEWART, J.

This is an appeal from the dismissal of a medical malpractice action in which the plaintiffs' decedent Dale Jensen died as a result of negligence on the part of an emergency room physician and the hospital. The plaintiffs settled with the defendant doctor and went to trial against the hospital. The jury returned a special verdict, finding plaintiffs' decedent 46 percent negligent in causing his own death; Intermountain Health Care, Inc., 36 percent negligent; and the doctor, 18 percent negligent. Judgment was entered in favor of plaintiff Shirley J. Jensen and against the defendant hospital. The trial court then set aside the original award and entered a judgment of no cause of action. We reverse.

The issue in this case is one of first impression. It is whether the Utah Comparative Negligence Act requires the negligence of each defendant in a multi-defendant case to be compared individually against the negligence of the plaintiff or whether the total negligence of all the defendants should be compared to that of the plaintiff to

determine whether a particular defendant is liable. Under the latter approach, or the "unit" rule, the negligence of all defendants is taken together in making the comparison; under the "Wisconsin" rule, the negligence of each defendant is compared against the plaintiff's negligence to determine whether a particular defendant is liable.

Thus, under the "unit" rule, the plaintiffs' decedent's 46 percent negligence in this case is compared with the combined 54 percent negligence of the defendants, and the plaintiffs would therefore be entitled to recover against the defendant. Under the "Wisconsin" rule, which was applied by the trial court, the negligence attributed to plaintiffs is greater than that of Intermountain's negligence by itself, and plaintiffs would not recover. . . .

The Utah Comparative Negligence Act . . . provides . . .

> Section 1. Actions based on negligence or gross negligence — Contributory negligence.
> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence or gross negligence resulting in death or in injury to person or property if such negligence was not as great as the negligence or gross negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering. As used in this act, "contributory negligence" includes "assumption of the risk."

. . . [T]he language of Section 1, as such, is not necessarily inconsistent with the unit rule. That section only refers to a plaintiff's negligence not being "as great as the negligence or gross negligence of *the person* against whom recovery is sought. . . ." (Emphasis added.) The statutory language is not the "negligence of *any* person against whom recovery is sought"; rather the language used was intended to mean "the person or persons" so as to include both single-defendant and multi-defendant cases. That construction is suggested by the text and is in full harmony with U.C.A., 1953, §68-3-12, which provides rules for construction of Utah statutes. Subparagraph (6) states, "The singular number includes the plural, and the plural the singular." Application of §68-3-12 makes Section 1 of the Utah Comparative Negligence Act harmonious with the rest of the Act. Graci v. Damon, 374 N.E.2d 311, 317 (1978), applied a comparable Massachusetts statutory provision to the precise word at issue here, thereby requiring that the statute be read to mean "persons" in a multi-defendant case so that the plaintiff's negligence was compared against the aggregate of all the defendants.

The meaning that emerges from Section 1 by applying §68-3-12(6) is consistent with the rulings of a number of courts which have held that the singular term *defendant* (or other synonymous nouns) also means the plural.

The Wisconsin rule is the minority position in this country. . . .

The refusal of the majority of the states that have dealt with the subject to adopt the Wisconsin rule indicates a widespread perception that that rule is not sound. Almost without variation, those states that have adopted the Wisconsin rule have done so on the rather wooden analysis that the Legislature must have intended to adopt the court decisions construing the Wisconsin statute as a part of that state's law.

Even apart from the evident meaning and effect of the sections which were added to the first section of the act to provide a comprehensive treatment of the subject matter, we would be reluctant to construe the Act to enact a policy that is so inequitable that even the Wisconsin Supreme Court, based on much experience with that policy, has severely criticized it.

The defects of the Wisconsin rule suggest why the Legislature undertook to remedy the defects of that rule. First, it is axiomatic that there can be no more than 100 percent negligence when the negligence of all defendants and the plaintiff is added up. But that would never be the case in multi-defendant cases in which a defendant is excused from liability under the Wisconsin rule. Thus, for example, if a plaintiff is 20 percent negligent in stopping on a highway and each of four defendants who rear-end the plaintiff is 20 percent negligent, the plaintiff under the Wisconsin rule will recover nothing because the plaintiff's 20 percent negligence is not measured against the total negligence of the defendants. If it were, there would be a total of 100 percent negligence when plaintiff's and defendants' negligence are combined. [U]nder the Wisconsin rule, plaintiff's negligence is used four different times to cancel out each of the defendants' negligence. By the magic of the formula employed, his 20 percent becomes an effective 80 percent of negligence, and the total percentage of negligence in the case, combining that attributable to the plaintiff and that attributable to the defendants, totals 160 percent!

The unfairness of the Wisconsin rule is also apparent in a situation where a plaintiff is 33⅓ percent negligent and each of two defendants is also 33⅓ percent. Under those circumstances, the plaintiff could recover nothing. However, if the same injury were inflicted by the same cause but only one defendant were responsible for producing the injury, the plaintiff would recover 66⅔ percent of the damages inflicted.

In short, one of the anomalous consequences of the Wisconsin rule is that the more defendants who inflict an injury, the less likely a plaintiff will be to recover. Thus, if 50 riparian landowners are responsible for polluting a stream and are negligent in equal percentages for causing 98 percent of the damage to the property of a downstream owner who is only 2 percent contributorily responsible, the plaintiff recovers nothing! The Utah Act was not intended to adopt a rule that would permit such extraordinary consequences.[44]

It may be that Wisconsin has reason to live with such a rule, but Utah does not, and the Legislature in effect has said so.

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[44] There are three situations sometimes asserted to demonstrate that the unit rule leads to unfair results. The first is the situation presented by the instant case; the plaintiff's negligence is less than the cumulative negligence of all the tortfeasors but is more than a particular defendant's. That is said to be unfair because a plaintiff should not be able to recover from a defendant who is less negligent than the plaintiff. See Bd. of County Comm'rs v. Ridenour, Wyo., 623 P.2d 1174 (1981). The second situation is where there are two defendants and one plaintiff; all parties are 33⅓ percent at fault. Under the unit rule, the plaintiff recovers 66⅔ percent of his or her total damages. That is said to be unfair because if there were only one defendant who is 50 percent liable, the plaintiff would recover nothing. However, the plaintiff is not the primary cause of the injuries in either of the two situations discussed and therefore should be entitled to recover. The defendants, meanwhile, are required to do nothing more than compensate the plaintiff for the injury in proportion to their fault, with the plaintiff absorbing his own proportion of fault.

The third alleged inequitable result under the unit rule arises when one defendant is judgment proof. For example, suppose plaintiff is 15 percent negligent, defendant A is 10 percent negligent, and defendant B is 75 percent negligent; B, however, is judgment proof. Under the Utah statute, A might be liable for 85 percent of plaintiff's damages. That situation, however, is a product of the rule of joint and several liability — not comparative fault. Prior to adoption of the comparative negligence statute, a plaintiff free from contributory negligence could recover the entire amount of damages from a defendant whose negligence was slight. And the problem of the judgment-proof defendant exists under the Wisconsin rule as well. Suppose plaintiff is 10 percent at fault, defendant A is 15 percent at fault, and defendant B is 75 percent at fault; B is judgment proof. Under the Wisconsin rule, defendant A is liable for 90 percent of plaintiff's damages, a result no less inequitable than that reached by the unit rule.

Reversed and remanded for entry of judgment on the verdict. Costs to appellants.

NOTES TO JENSEN v. INTERMOUNTAIN HEATH CARE, INC.

1. *Unit Rule in Modified Comparative Negligence Jurisdiction Only.* In a modified comparative negligence jurisdiction, the plaintiff's degree of fault is compared to the defendant's degree of fault. A plaintiff can recover some damages only if the plaintiff's fault is less than (or, in some states, not greater than) the single defendant's. If there are multiple defendants, a state may chose to compare the plaintiff's fault to each defendant separately, applying its modified rule to each pair of parties. Under this approach, a defendant may escape liability altogether. Alternatively, a state may treat the defendants as a unit, comparing the plaintiff's relative degree of fault to the total of the defendants' fault. No defendant escapes liability under this approach. This problem never arises in a pure comparative negligence jurisdiction because in pure systems no defendant escapes liability on the basis of having a lesser (or equal) degree of fault.

2. *Applying the Unit Rule.* The opinion in *Jensen* reported the relative degrees of fault of the plaintiff and each defendant. If damages in that case totaled $100,000, what is the total amount the plaintiff could collect from the defendants if there were no unit rule? If there were a unit rule? Does it matter what form of modified comparative negligence the state has adopted? What result if the state were a pure comparative negligence jurisdiction?

3. *Is the Unit Rule Fair?* A motivation for switching from contributory negligence to comparative negligence was eliminating the harsh bar to recovery under contributory negligence. Another was the belief that parties should pay damages in proportion to their degree of fault. Is the unit rule consistent with these justifications for switching to comparative fault?

C. Reckless Conduct

Contributory negligence jurisdictions developed a number of rules that moderated the impact of that doctrine. When a negligent plaintiff sought damages from a reckless defendant, the negligent plaintiff was protected from the ordinary recovery-barring effect of his or her negligence. Another doctrine, the "last clear chance" doctrine, allowed a negligent plaintiff to recover if injured in circumstances where the defendant's failure to act carefully was especially egregious. Comparative negligence jurisdictions have had to decide whether to preserve special treatment for cases involving these types of conduct. These issues are treated in Coleman v. Hines (in a contributory negligence jurisdiction) and Downing v. United Auto Racing Association (in a comparative negligence jurisdiction).

COLEMAN v. HINES

515 S.E.2d 57 (N.C. Ct. App. 1999)

HORTON, J.

Although plaintiff and Mr. Hines raise a variety of issues in their briefs, the central question before this Court is whether Ms. Musso contributed by her own actions to her

own death so that plaintiff's claim for wrongful death is barred. . . . Plaintiff contends that there were material questions of fact as to Ms. Musso's knowledge of Wirt's being under the influence of intoxicating liquor, so that the trial court erred in granting summary judgment on the issue of contributory negligence. . . .

Evidence forecast by defendants included the following undisputed facts: (1) defendant Wirt Hines was drinking early on the afternoon of the accident when he stopped by to see Ms. Musso at her place of employment at Domino's Pizza; (2) according to Ms. Hansma, Ms. Musso's employer, Ms. Musso knew Wirt was drinking when he stopped by Domino's, and Ms. Musso also stated that they planned to drink that evening on their way to an engagement party, during the party, and following the party; (3) Ms. Hansma begged Ms. Musso not to ride with Wirt that night, and repeatedly offered to pick them up at the party and drive them home, no matter how late they stayed at the party; (4) when Wirt picked up Ms. Musso later that evening, they went to a convenience store and purchased a 12-pack of beer, which they drank in each other's presence over the evening; (5) the only alcohol Wirt drank that evening was consumed in Ms. Musso's presence; (6) at the time of the accident, Wirt's blood-alcohol content was at least .184, more than twice the legal limit, according to the treating physician, Dr. Anderson; and (7) it was obvious to the officer investigating the accident, Officer Melee, who arrived about three minutes after the accident, that Wirt was under the influence of alcohol at the time of the accident.

Although plaintiff argues that there is a question of material fact as to whether Ms. Musso knew or should have known that Wirt was under the influence, that argument does not refute the clear evidence of Ms. Hansma, Officer Melee, and Dr. Anderson. As a result, we conclude that there is no question of material fact about either Wirt's condition at the time of the accident, nor Ms. Musso's knowledge of his condition. The trial court properly entered summary judgment on the issues of Wirt's negligence and Ms. Musso's contributory negligence.

Plaintiff further contends, however, that even if Ms. Musso was found to be contributorily negligent, Wirt was willfully and wantonly negligent as evidenced by his plea to manslaughter in the death of Ms. Musso, so that contributory negligence on the part of Ms. Musso would not bar plaintiff's claim. "It is well settled that contributory negligence, even if admitted by the plaintiff, is no defense to willful and wanton injury." Pearce v. Barham, 156 S.E.2d 290, 294 (1967) (quoting Brendle v. R.R., 34 S.E. 634, 635 (1899)). We agree with plaintiff that under the facts of this case Wirt was willfully and wantonly negligent in operating a motor vehicle while under the influence of intoxicating liquor. Defendants contend, however, that Ms. Musso's own negligence in riding with a person whom she knew to be under the influence of intoxicating liquor rose at least to the same level as that of Wirt, so that a claim for her death is barred as a result. See Coble v. Knight, 130 N.C. App. 652, 655-56, 503 S.E.2d 703, 706 (1998), and Sorrells v. M.Y.B. Hospitality Ventures of Asheville, 332 N.C. 645, 648, 423 S.E.2d 72, 74 (1992).

In *Sorrells,* our Supreme Court reinstated the trial court's dismissal of a Rule 12(b)(6) claim in an action against a dram shop and stated that while they recognized

> the viability of the rule [that the defendant's willful or wanton negligence would avoid the bar of ordinary contributory negligence], we do not find it applicable in this case.

> Instead, we hold that plaintiff's claim is barred as a result of decedent's own actions, as alleged in the complaint, which rise to the same level of negligence as that of defendant. . . . In fact, to the extent the allegations in the complaint establish more than ordinary negligence on the part of defendant, they also establish a similarly high degree of contributory negligence on the part of the decedent. Thus, we conclude that plaintiff cannot prevail.

Sorrells, 332 N.C. at 648, 423 S.E.2d at 74.

Likewise, in the present case (heard in the context of a motion for summary judgment), to the extent that the evidence establishes willful and wanton negligence on the part of Wirt, it also establishes a "similarly high degree of contributory negligence on the part of" Ms. Musso. The same point is made in *Coble,* where the decedent and the driver of an automobile had been drinking together for several hours. At one point, the driver locked the keys inside the car and called his father to bring an extra set of keys. The father did so and the young men unlocked the car and drove off, and a tragic accident followed, resulting in the passenger's death. The estate of the passenger sought to recover from the driver's father for negligently entrusting the car keys to the driver. In affirming summary judgment for the father, we held in part:

> Indeed, if, as [decedent's] estate argues, the intoxicated condition of the son was, or at least should have been apparent to his father when he handed the spare keys to his son, then under the facts of this case, the only conclusion to be drawn is that the son's intoxicated state was equally obvious to [decedent] when he got into the vehicle with the son. The record shows that [decedent] and the [son] drank alcoholic beverages for hours prior to stopping at the gas station. Thereafter, they waited together until [the son's] father arrived. These facts show conclusively that [decedent's] negligence in riding with the intoxicated son rose at least to the level of the father's alleged negligence in entrusting the automobile to his son. Such negligence on [decedent's] part, of course, acts as a bar to any claim his estate has against the father's negligence.

Coble, 130 N.C. App. at 656-57, 503 S.E.2d at 706. . . .

Applying the logic of the cases cited above, we hold as a matter of law that under the facts of this case, the actions of the decedent, Ms. Musso, rose to the same level of negligence as that of Wirt. Tragically, Ms. Musso consciously assumed the risk of entering a vehicle, and riding as a passenger in that vehicle while it was being driven by a person under the influence of alcohol. She was with the driver, Wirt, when they purchased alcohol and she consumed alcohol along with him at a party. She knew in advance that they planned to consume alcohol and that Wirt intended to drive the vehicle home after drinking alcohol, and yet did not accept her employer's offer to drive them home regardless of the hour of the morning. We know of no principle of logic nor any overriding social policy which would militate in favor of allowing a recovery of damages under these facts.

Finally, we have carefully considered plaintiff's argument that the doctrine of last clear chance would operate to preserve her claim, but find that the doctrine would not apply under the facts of this case. In order to show last clear chance a plaintiff must allege and prove that

> (1) [p]laintiff, by [her] own negligence, placed [herself] in a position of peril from which [she] could not escape; (2) defendant saw, or by the exercise of reasonable care should have seen and understood, the perilous position of plaintiff; (3) defendant had the time and the means to avoid the accident if defendant had seen or discovered

plaintiff's perilous position; (4) . . . defendant failed or refused to use every reasonable means at his command to avoid impending injury to plaintiff; and (5) plaintiff was injured as a result of defendant's failure or refusal to avoid impending injury.

Williams v. Lee Brick and Tile, 88 N.C. App. 725, 728, 364 S.E.2d 720, 721 (1988). In reviewing the complaint, plaintiff presented no allegations that Ms. Musso had placed herself in a position of peril from which she could not escape. Indeed, evidence from the depositions tends to show that Ms. Musso had opportunities to avoid riding with Wirt, but declined to follow through with them and, instead, chose to ride with him. . . .

We reverse the action of the trial court and find that no issues of material fact exist as to whether Wirt was grossly negligent and whether Ms. Musso was grossly contributorily negligent. In all other respects, we affirm the order of the trial court.

Affirmed in part and reversed in part.

DOWNING v. UNITED AUTO RACING ASSOCIATION

570 N.E.2d 828 (Ill. App. Ct. 1991)

McMorrow, J.

Plaintiff was injured on August 12, 1978, during a midget car race at Joliet Memorial Stadium. Defendant Willis leased the track to promote, organize and supervise such races. Under the agreement, defendant Willis was to provide a safe, adequate, and properly prepared track for the races, including personnel to supervise activities near the track and in the pit area. Defendant UARA agreed to sanction races held by defendant Willis at the stadium.

At the time of his injury, plaintiff was a member of a pit crew for Richard Pole (Pole), a midget car driver. Plaintiff helped others in the crew to prepare the car and push it onto the track. As plaintiff waited on the track for the car to be pushed into a warm-up race, he noticed that the car being driven by Guess bicycled in the turns nearer to plaintiff. "Bicycling" occurs when the car's inner wheels lose contact with the track surface.

According to plaintiff's trial testimony, Guess' car bicycled approximately two feet off the asphalt in these turns. After Guess' car passed through the turns, plaintiff and other members of the crew pushed Pole's car onto the track to participate in the warm-up race. Thereafter, plaintiff began to walk off the track toward the pit area. He was accompanied by George Boban (Boban), who was also a pit crew member for Pole. Both plaintiff and Boban noted that Guess' car again bicycled a few feet in the air when the car made the two turns at the far end of the track. Plaintiff testified that he mentioned to Boban, and to David Valentino (Valentino), a pit crew member for another driver who was nearby, that Guess' car should be blackflagged off the track. "Blackflag" occurs when the racing steward waves a black flag to a driver to signal to the driver that his car should leave the track. Valentino also testified at trial that he noticed that Guess' car bicycled when making turns around the track. . . .

Boban and Valentino testified that as Guess' car reached the turns nearer to the pit area, the car again bicycled. It then flipped over and began skidding toward the area where plaintiff, Boban, and Valentino were located. Although Boban and Valentino avoided injury, plaintiff was struck by the car and pinned against the fence next to the track straightaway. He sustained injuries requiring extensive surgery and lengthy post-operative care.

Plaintiff contended that defendants UARA and Willis were guilty of willful and wanton conduct because they (1) failed to extend the guardrail near the pit area and (2) failed to provide a pit steward to ensure that persons did not remain in the exposed area near the pit. In addition, plaintiff claimed that defendant UARA was guilty of willful and wanton misconduct because it failed to blackflag Guess' car off the track once it began to bicycle. . . .

Defendants presented evidence to show that none of the alternatives suggested by plaintiff was reasonably necessary, and that none would have prevented plaintiff's injuries. Testimony from experts detailed these points. Defendants also presented testimony to establish that they had warned pit crew members, including plaintiff, not to stand in the area where the plaintiff's injuries occurred.

Based upon this evidence, the jury returned a verdict against defendants UARA and Willis. It awarded plaintiff $1.5 million in damages, reduced to $615,000 for plaintiff's comparative fault, which the jury assessed at 59%. The trial court entered judgment in conformity with this verdict. Defendants UARA and Willis appeal, and plaintiff cross-appeals.

Defendants argue that the jury's finding of willful and wanton misconduct was not supported by the evidence of record. They contend that the trial court should have granted their motion for judgment notwithstanding the verdict or in the alternative for a new trial. . . .

A review of the record reveals sufficient basis to justify the jury's verdict that defendants UARA and Willis were willful and wanton. Plaintiff produced evidence that showed defendants were aware that the exposed area near the pit presented a substantial risk of serious injury to persons who stood there, and that defendants knew pit crew members were often located in the vicinity during warm-up and hot laps. . . . We cannot say, as a matter of law, that this evidence was insufficient to prove that defendants' omissions constituted willful and wanton conduct. . . .

. . . In addition, the plaintiff's understanding of the scope of harm associated with remaining in the exposed area near the pit was considered by the jury with respect to plaintiff's comparative fault, and we cannot say upon review that the jury's apportionment of comparative fault between the parties was erroneous as a matter of law. . . .

In a cross-appeal, plaintiff challenges the apportionment of damages between the parties. Specifically, plaintiff argues that his ordinary negligence could not be considered by the jury as an offset in the assessment of compensatory damages for the defendants' willful and wanton misconduct.

Illinois precedent is in conflict with respect to this question. In State Farm Mutual Automobile Insurance Co. v. Mendenhall (1987), 517 N.E.2d 341, the court determined that a plaintiff's ordinary negligence could be considered by the jury to reduce the compensatory damages assessed for the defendant's willful and wanton conduct. The court's ruling in *Mendenhall* was expressly reaffirmed in Yates v. Brock (1989), 547 N.E.2d 1031, *appeal denied* (1990), 553 N.E.2d 403. Relying on *Mendenhall,* the trial court judge in the instant cause permitted the jury to consider the plaintiff's ordinary negligence in reducing the damages assessed for the defendants' willful and wanton conduct.

However, the decisions of *Mendenhall* and *Yates* were subsequently rejected in Burke v. 12 Rothschild's Liquor Mart, Inc. (1991), 568 N.E.2d 80, wherein the court

determined that the plaintiff's ordinary negligence could not reduce the damages recovered for the defendant's willful and wanton acts. Cases from other jurisdictions also represent a split of authority on this question.

The decisions of *Mendenhall* and *Burke* founded much of their analysis on the Illinois Supreme Court's adoption of comparative fault in Alvis v. Ribar (1981), 421 N.E.2d 886. The courts noted that prior to Alvis, Illinois adhered to the contributory negligence rule. Under this rule, a plaintiff was prevented from any recovery for compensatory damages from a negligent defendant, if the plaintiff's ordinary negligence also contributed to his injuries. However, the plaintiff was permitted full recovery of compensatory damages, irrespective of the plaintiff's ordinary negligence, if the defendant's acts amounted to willful and wanton conduct. The advent of comparative fault in *Alvis* eliminated the harsh effect of the contributory negligence rule upon a negligent plaintiff's recovery of compensatory damages from a negligent defendant. Under *Alvis*, compensatory damages are assessed according to an apportionment of the parties' respective negligence in proximately causing the plaintiff's injuries. The supreme court in *Alvis* did not resolve the collateral issue of whether the jury should be permitted to apportion damages between the negligent plaintiff and the willful and wanton defendant.

The courts in *Mendenhall* and *Burke* adopted divergent views with respect to the significance that should be accorded to the equitable principles underlying comparative fault. The *Mendenhall* court concluded that equitable principles of comparative fault outweigh the social opprobrium associated with willful and wanton acts, because of the "thin line" between ordinary negligence and willful and wanton conduct. The *Burke* court determined that the social stigma attached to willful and wanton conduct overrides the equitable principles of comparative fault, because of the significant difference in the degree of culpability associated with ordinary negligence as compared to willful and wanton acts. Thus, the divergent views expressed in *Mendenhall* and *Burke* reflect the hybrid nature of willful and wanton conduct, which under the facts of one case may be only degrees more than ordinary negligence, while under the facts of another case may be only degrees less than intentional wrongdoing. . . .

Under the facts of the instant cause, we conclude that the trial court properly permitted the jury to consider the plaintiff's comparative fault, based upon principles of ordinary negligence, as an offset to the compensatory damages awarded for the defendants' willful and wanton conduct. In light of the hybrid nature of the concept of willful and wanton conduct, and the circumstance that such behavior may not amount to an intentional tort per se, we agree with the court in *Mendenhall* that "the fact finder's ability to prorate the damages between plaintiff and defendant best serves justice and is most consistent with the reasons for comparative negligence. . . ." (164 Ill. App. 3d at 61, 115 Ill. Dec. 139, 517 N.E.2d 341.) Although we agree with the court's observation in *Burke* that there is a distinction in the degrees of culpability associated with ordinary negligence and willful and wanton conduct, we are unable to conclude that this distinction should preclude an equitable apportionment of compensatory damages between the plaintiff and defendants in the case at bar. . . .

For the reasons stated, the judgment of the circuit court of Cook County is affirmed.

NOTES TO COLEMAN v. HINES AND DOWNING v. UNITED AUTO RACING ASSOCIATION

1. ***The Effect on Damage Recovery of Reckless Conduct.*** Coleman v. Hines, Downing v. United Auto Racing Association, and Burke v. 12 Rothschild's Liquor Mart, Inc. (discussed in *Downing*) describe three alternative methods for determining the damages a defendant must pay when one or more parties has been reckless. How are damages calculated under each rule if the plaintiff is negligent and the defendant is reckless? How are damages calculated under each rule if both parties are reckless?

2. ***Problem: Recklessness as a Defense.*** The plaintiff was crossing trolley tracks when he noticed a trolley approaching from his left and a fire engine approaching from the direction he was facing. He stood on the tracks and waved his arms at the trolley to get it to stop. The trolley driver sounded the trolley's horn, but the plaintiff did not move. When the trolley finally stopped after hitting the plaintiff, the driver got down from his seat and said, "Why didn't that man get off of my tracks?" How would these cases be decided under each of the three alternative methods for determining damages described above? See Elliott v. Philadelphia Transp. Co., 53 A.2d 81 (Pa. 1947).

3. ***Last Clear Chance as a Rebuttal to Contributory Negligence.*** The North Carolina Appellate Court in Coleman v. Hines described the *last clear chance doctrine.* The plaintiff may recover full damages upon showing that the defendant had the last clear chance to avoid the injury to the plaintiff but failed to take that chance. The court in *Coleman* found that the last clear chance doctrine did not apply because the plaintiff could have extricated herself from the perilous situation.

4. ***Problem: Last Clear Chance.*** Moreno, the victim, and Bass, the defendant, were picking cotton. Bass was driving the cotton picker, which moved forward as it dumped cotton into an adjacent metal trailer. Moreno walked along the top of the cotton in the trailer to tamp down the cotton as the trailer filled. Bass negligently drove the cotton picker into a power line, electrocuting Moreno. Moreno was contributorily negligent for failing to notice the power line, which was in front of the trailer and picker when Moreno jumped into the back of the trailer. Bass admitted that there was no way Moreno could have seen how close the power line was once he was in the back of the trailer. Should the plaintiff's recovery be completely barred? Should the last clear chance doctrine negate the plaintiff's contributory negligence? See Kenan v. Bass, 511 S.E.2d 6 (N.C. Ct. App. 1999).

5. ***Last Clear Chance Concept Under Comparative Negligence.*** The last clear chance doctrine is an "all or nothing" doctrine because, if the plaintiff asserts it successfully, the plaintiff is allowed full recovery despite any contributory negligence. If the plaintiff fails, the plaintiff is denied any recovery. Comparative negligence balances the plaintiff's and defendant's fault, allowing only a reduction in recovery under the pure version, and under the modified versions only when the plaintiff's negligence is relatively small. Upon adoption of comparative negligence rules, many courts have formally abandoned the last clear chance doctrine because comparative negligence is not an "all or nothing" doctrine and does not need special rules designed to ameliorate the harshness of contributory negligence.

Perspective: Last Clear Chance in Modern Practice

The doctrine is still useful to tort lawyers as a way of comparing the fault of plaintiffs and defendants. The facts related to when each party could have avoided the injury may affect the relative shares of fault assigned to each party:

> As with any other evidence, either party may argue the temporal factors important to the application of the last clear chance doctrine (e.g., plaintiff's helplessness which led to predicament, defendant's subsequent discovery and negligent failure to avoid accident) to the trier of fact, and it may properly consider those factors in apportioning fault. In addition, either party may attempt to persuade the trier of fact that the other party should bear a greater percentage of liability for an accident because he or she had the last clear chance to avoid injury. However, "last clear chance" becomes only one of many factors to be weighed by the trier of fact in assessing and comparing the parties' relative fault, instead of an inflexible "all or nothing" doctrine of liability.

Laws v. Webb, 658 A.2d 1000 (Del. 1995). In some comparative negligence states, the plaintiff may request the court to give a special instruction to the jury identifying the elements that make up a last clear chance situation, but telling the jury that these elements are only factors to be considered, among others, when evaluating the parties' relative degrees of fault. See, e.g., Spahn v. Town of Port Royal, 499 S.E.2d 205 (S.C. 1998).

Statute: EFFECT OF CONTRIBUTORY FAULT; DEFINITION

Alaska Stat. §§09.17.060; 09.17.900 (2001)

Sec. 09.17.060. In an action based on fault seeking to recover damages for injury or death to a person or harm to property, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for the injury attributable to the claimant's contributory fault, but does not bar recovery.

Sec. 09.17.900. Definition. In this chapter, "fault" includes acts or omissions that are in any measure negligent, reckless, or intentional toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages.

Statute: JOINT TORTFEASORS, LIABILITY

Miss. Stat. §85-5-7(1) (2002)

(1) As used in this section "fault" means an act or omission of a person which is a proximate cause of injury or death to another person or persons, damages to property, tangible or intangible, or economic injury, including but not limited to negligence, malpractice, strict liability, absolute liability or failure to warn. "Fault" shall not

include any tort which results from an act or omission committed with a specific wrongful intent.

Statute: COMPARATIVE FAULT

Wy. St. §1-1-109 (2005)

(iv) "Fault" includes acts or omissions, determined to be a proximate cause of death or injury to person or property, that are in any measure negligent, or that subject an actor to strict tort or strict products liability, and includes breach of warranty, assumption of risk and misuse or alteration of a product.

NOTES TO STATUTES

1. Downing *and the Illinois Statute.* Four years after Downing v. United Auto Racing Association was decided, the Illinois Supreme Court reaffirmed that apportioning fault was appropriate between a negligent plaintiff and a reckless defendant but not between a negligent plaintiff and a defendant who had committed an intentional tort. See Poole v. City of Rolling Meadows, 656 N.E.2d 768 (Ill. 1995). States have taken various positions on this issue. How do the Alaska and Mississippi statutes resolve the issue raised in *Downing*?

2. *Negligence and Recklessness Compared.* In Danculovich v. Brown, 593 P.2d 187, 193-94 (Wyo. 1979), the Wyoming Supreme Court distinguished between negligence and recklessness to explain the rationale of the Wyoming statute. Negligence is based on acts done while one is unaware of risks, on inadvertence, on lack of attention to risks. Recklessness is based on acts done while one is aware of serious risks, on the conscious ignoring of serious risks, on ignoring the reasonable conclusion from known facts that there is a serious risk associated with one's conduct. Under traditional rules, contributory negligence was not a defense if the defendant was reckless. The Wyoming Supreme Court concluded that in the comparative negligence context, where a defendant has been reckless, a plaintiff's contributory negligence should continue to be ignored, since comparative negligence was designed to ameliorate the harsh effects of traditional contributory negligence as a complete bar.

Perspective: Balancing Reckless and Negligent Conduct

Can the problem of how to treat reckless conduct in a comparative system be resolved by considering the characteristics a jurisdiction associates with recklessness and the purposes for which a jurisdiction adopted comparative fault?

> After considering the reasons underlying the adoption of comparative fault in the jurisdiction, the court should balance these against the policies underlying the jurisdiction's recklessness doctrine. . . .
>
> On the recklessness side of the equation, the element militating in favor of the comparison of recklessness with ordinary negligence is the extent to which the jurisdiction's recklessness doctrine exists to mitigate the harshness of contributory negligence and has been rendered obsolete by the adoption of comparative fault. The element militating against comparison is the extent

to which the recklessness doctrine carries with it a judgment that the reckless party's state of mind so closely approximates intent that he should bear the totality of the loss. On the comparative fault side of the equation, the element militating in favor of comparisons between recklessness and ordinary negligence is the extent to which the jurisdiction's comparative fault system exists to assess liability equitably in proportion to the contributing fault. The element militating against comparison on this side is the extent to which the jurisdiction's comparative fault system may have been created for some other inconsistent purpose.

See Jim Hasenfus, *Comment: The Role of Recklessness in American Systems of Comparative Fault*, 43 Ohio St. L.J. 399, 423 (1982). How does this balancing compare to the analysis of the Illinois Supreme Court in *Downing?*

III. Assumption of Risk

Can a person give up the right to sue a defendant for harms that might be caused in the future by that defendant's negligence? The concept of *assumption of risk* provides tort law's answer to this question. Sometimes an express agreement to forgo a right to sue will bar a plaintiff from recovery for harm caused by a defendant's negligent conduct.

In some cases, a plaintiff has not made an explicit agreement to excuse the defendant's negligence, but the plaintiff has acted as if he or she was willing to encounter the risks presented by that negligence. These cases, involving *implied assumption of the risk*, have presented a number of analytical difficulties. The adoption of comparative negligence has worked significant changes on this part of assumption of the risk doctrine.

A. Express Assumption of Risk

Express assumption of risk cases involve agreements by plaintiffs to accept risks created by defendants' activities. They almost always involve written releases in which a plaintiff agrees not to sue a defendant if certain risks cause harm. In exchange, the defendant provides a service or product to the plaintiff. Enforceability of a release involves two questions: (1) Does public policy permit releases in connection with the activity? (2) If public policy allows assumption of risk for that activity, does the particular release provided by the plaintiff merit enforcement?

Wagenblast v. Odessa School District examines categories of activities for which releases are generally unenforceable. The court considers the legality of agreements by parents not to sue schools for risks associated with school-related activities. The court applies six factors to determine whether *any* release would be enforceable in this context. Turnbough v. Ladner examines the enforceability of an agreement not to sue a scuba diving instructor and the yacht club that employed her if decompression sickness resulted from using compressed air. In this case, the activity is one for which a release might be appropriate. The court considers both the terms of the release and the negotiations underlying its signing to determine whether the release is enforceable.

WAGENBLAST v. ODESSA SCHOOL DISTRICT

758 P.2d 968 (Wash. 1988)

ANDERSON, J.

In these consolidated cases we consider an issue of first impression — the legality of public school districts requiring students and their parents to sign a release of all potential future claims as a condition to student participation in certain school-related activities. [Lower courts treated the release as legal in one of the consolidated cases and as illegal in the other of the consolidated cases.]

The plaintiffs in these cases are public school children and their parents. . . .

The courts have generally recognized that, subject to certain exceptions, parties may contract that one shall not be liable for his or her own negligence to another. As Prosser and Keeton explain:

> It is quite possible for the parties expressly to agree in advance that the defendant is under no obligation of care for the benefit of the plaintiff, and shall not be liable for the consequences of conduct which would otherwise be negligent. There is in the ordinary case no public policy which prevents the parties from contracting as they see fit, as to whether the plaintiff will undertake the responsibility of looking out for himself.

(Footnotes omitted.)

In accordance with the foregoing general rule, appellate decisions in this state have upheld exculpatory agreements where the subject was a toboggan slide, a scuba diving class, mountain climbing instruction, an automobile demolition derby, and ski jumping.

As Prosser and Keeton further observe, however, there are instances where public policy reasons for preserving an obligation of care owed by one person to another outweigh our traditional regard for the freedom to contract. Courts in this century are generally agreed on several such categories of cases.

Courts, for example, are usually reluctant to allow those charged with a public duty, which includes the obligation to use reasonable care, to rid themselves of that obligation by contract.

Thus, where the defendant is a common carrier, an innkeeper, a professional bailee, a public utility, or the like, an agreement discharging the defendant's performance will not ordinarily be given effect. Implicit in such decisions is the notion that the service performed is one of importance to the public, and that a certain standard of performance is therefore required.

Courts generally also hold that an employer cannot require an employee to sign a contract releasing the employer from liability for job-related injuries caused by the employer's negligence. Such decisions are grounded on the recognition that the disparity of bargaining power between employer and employee forces the employee to accept such agreements.

Consistent with these general views, this court has held that a bank which rents out safety deposit boxes cannot, by contract, exempt itself from liability for its own negligence, and that if the circumstances of a particular case suggest that a gas company has a duty to inspect the pipes and fittings belonging to the owner of the building, any contractual limitation on that duty would be against public policy.

This court has also gone beyond these usually accepted categories to hold future releases invalid in other circumstances as well. It has struck down a lease provision

exculpating a public housing authority from liability for injuries caused by the authority's negligence and has also struck down a landlord's exculpatory clause relating to common areas in a multi-family dwelling complex.

In reaching these decisions, this court has focused at times on disparity of bargaining power, at times on the importance of the service provided, and at other times on other factors. In reviewing these decisions, it is apparent that the court has not always been particularly clear on what rationale it used to decide what type of release was and was not violative of "public policy." Undoubtedly, it has been much easier for courts to simply declare releases violative of public policy in a given situation than to state a principled basis for so holding.

Probably the best exposition of the test to be applied in determining whether exculpatory agreements violate public policy is that stated by the California Supreme Court. In writing for a unanimous court, the late Justice Tobriner outlined the factors in Tunkl v. Regents of Univ. of Cal., 383 P.2d 441 (Cal. 1963):

> Thus the attempted but invalid exemption involves a transaction which exhibits some or all of the following characteristics. It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

(Footnotes omitted.) *Tunkl,* 60 Cal. 2d at 98-101, 383 P.2d 441, 32 Cal. Rptr. 33. We agree.

Obviously, the more of the foregoing six characteristics that appear in a given exculpatory agreement case, the more likely the agreement is to be declared invalid on public policy grounds.

In the consolidated cases before us, *all* of the characteristics are present in *each* case. We separately, then, examine each of these six characteristics as applied to the cases before us.

1. The agreement concerns an endeavor of a type generally thought suitable for public regulation.

Regulation of governmental entities usually means self-regulation. Thus, the Legislature has by statute granted to each school board the authority to control, supervise, and regulate the conduct of interscholastic athletics. In some situations, a school board is permitted, in turn, to delegate this authority to the Washington Interscholastic Activities Association (WIAA) or to another voluntary nonprofit entity. In the cases before us, both school boards look to the WIAA for regulation of interscholastic sports. The WIAA handbook contains an extensive constitution with rules for such athletic endeavors. These rules cover numerous topics, including student eligibility standards,

athletic awards, insurance, coaches, officials, tournaments and state championships. Special regulations for each sport cover such topics as turnout schedules, regular season game or meet limitations, and various areas of regulation peculiar to the sport, including the rule book governing the sport.

Clearly then, interscholastic sports in Washington are extensively regulated, and are a fit subject for such regulation.

2. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.

This court has held that public school students have no fundamental right to participate in interscholastic athletics. Nonetheless, the court also has observed that the justification advanced for interscholastic athletics is their educational and cultural value. As the testimony of then Seattle School Superintendent Robert Nelson and others amply demonstrate, interscholastic athletics is part and parcel of the overall educational scheme in Washington. The total expenditure of time, effort and money on these endeavors makes this clear. The importance of these programs to the public is substantive; they represent a significant tie of the public at large to our system of public education. Nor can the importance of these programs to certain students be denied; as Superintendent Nelson agreed, some students undoubtedly remain in school and maintain their academic standing only because they can participate in these programs. Given this emphasis on sports by the public and the school system, it would be unrealistic to expect students to view athletics as an activity entirely separate and apart from the remainder of their schooling.

This court observed in McCutcheon v. United Homes Corp., 486 P.2d 1093 (1971), that it makes little sense to insist that a worker have a safe place to work but at the same time to deny that worker a safe place to live. There is likewise little logic in insisting that one who entrusts personal property to a bank for safekeeping in a deposit box must be protected from the bank's negligence while denying such protection to a student who entrusts his or her person to the coaches, trainers, bus drivers and other agents of a school sports program.

In sum, under any rational view of the subject, interscholastic sports in public schools are a matter of public importance in this jurisdiction.

3. Such party holds itself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.

Implicit in the nature of interscholastic sports is the notion that such programs are open to all students who meet certain skill and eligibility standards. This conclusion finds direct support in the testimony of former Superintendent Nelson and the WIAA eligibility and nondiscrimination policies set forth in the WIAA handbook.

4. Because of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks the services.

Not only have interscholastic sports become of considerable importance to students and the general public alike, but in most instances there exists no alternative program of organized competition. For instance, former Superintendent Nelson knew of no alternative to the Seattle School District's wrestling program. While outside

alternatives exist for some activities, they possess little of the inherent allure of interscholastic competition. Many students cannot afford private programs or the private schools where such releases might not be employed. In this regard, school districts have near-monopoly power. And, because such programs have become important to student participants, school districts possess a clear and disparate bargaining strength when they insist that students and their parents sign these releases.

5. In exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.

Both school districts admit to an unwavering policy regarding these releases; no student athlete will be allowed to participate in any program without first signing the release form as written by the school district. In both of these cases, students and their parents unsuccessfully attempted to modify the forms by deleting the release language. In both cases, the school district rejected the attempted modifications. Student athletes and their parents or guardians have no alternative but to sign the standard release forms provided to them or have the student barred from the program.

6. The person or property of members of the public seeking such services must be placed under the control of the furnisher of the services, subject to the risk of carelessness on the part of the furnisher, its employees or agents.

A school district owes a duty to its students to employ ordinary care and to anticipate reasonably foreseeable dangers so as to take precautions for protecting the children in its custody from such dangers. This duty extends to students engaged in interscholastic sports. As a natural incident to the relationship of a student athlete and his or her coach, the student athlete is usually placed under the coach's considerable degree of control. The student is thus subject to the risk that the school district or its agent will breach this duty of care.

In sum, the attempted releases in the cases before us exhibit all six of the characteristics denominated in Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 98-101, 383 P.2d 441, 32 Cal. Rptr. 33, 6 A.L.R.3d 693 (1963). Because of this, and for the aforesaid reasons, we hold that the releases in these consolidated cases are invalid as against public policy.

Having decided the case on this basis, [the relationship of this decision to the doctrine of assumption of risk] requires discussion. . . .

. . . Another name for a release of the sort presented here is an express assumption of risk. If a plaintiff has released a defendant from liability for a future occurrence, the plaintiff may also be said to have assumed the risk of the occurrence. If the release is against public policy, however, it is also against public policy to say that the plaintiff has assumed that particular risk. This court has implicitly recognized that an express assumption of risk which relieves the defendant's duty to the plaintiff may violate public policy. Accordingly, to the extent that the release portions of these forms represent a consent to relieve the school districts of their duty of care, they are invalid whether they are termed releases or express assumptions of risk. . . .

[In the case where the release was invalidated, the decision was affirmed. Where it was upheld, the decision was reversed.]

TURNBOUGH v. LADNER

754 So. 2d 467 (Miss. 1999)

McRae, J. . . .

Michael Turnbough decided in 1994 that he wanted to obtain his open-water certification as a scuba diver. He had previously been certified as a scuba diver, but his certification had expired back in the 1980's. Turnbough enrolled in a scuba diving class offered by Gulfport Yacht Club and taught by Janet Ladner. Upon learning from Ladner that all of the participants would be required to execute a release in favor of her and the Gulfport Yacht Club in order to participate in the class, Turnbough questioned a fellow student who also happened to be an attorney. After Turnbough's classmate informed him that such releases were unenforceable, Turnbough then executed the document entitled "Liability Release and Express Assumption of Risk." The release, in pertinent part, stated

> Further, I understand that diving with compressed air involves certain inherent risks: decompression sickness [and others]. . . .

At the conclusion of the six-week course, the class convened in Panama City, Florida to perform the first of their "check-out dives" in order to receive certification. On Saturday, July 23, 1994, the class performed two dives from the beach. However, Turnbough's participation in the first dive was cut short by a leaking tank. He completed the second dive with no apparent problems. The next morning, Sunday, July 24, 1994, the class performed two dives from a dive boat. Two dives of sixty feet each were scheduled, but because the dive boat had engine problems, the first dive site was only forty-six to forty-eight feet deep. The second dive descended to sixty feet, and Ladner calculated the maximum time allowable for the second dive as thirty-eight minutes.

Turnbough began to feel the first effects of decompression sickness, commonly known as "the bends," on his way back to Gulfport that evening. The next day Turnbough began experiencing a pain that he described as "arthritic" in his joints. On Tuesday, Turnbough began attempting to contact Ladner to inform her of his symptoms. He continued to make attempts to contact her throughout the week, finally reaching her on Friday. Ladner advised Turnbough to call a diver's hotline, which in turn instructed him to seek medical attention at a dive hospital. Turnbough received treatment for decompression sickness at the Jo Ellen Smith Hospital in New Orleans. Turnbough states that he was told by the doctors at the hospital who ran the dive profile that the dive was too long, and there should have been a decompression stop before the divers surfaced. He further states that he was told that he could never dive again. Tom Ebro, an expert in water safety and scuba diving, opined that Ladner was negligent in planning the depths of the dives as well as in failing to make safety stops and that these errors significantly increased the risk that her students might suffer decompression illness.

On February 10, 1995, Turnbough filed suit against Ladner. In his complaint, Turnbough alleged that Ladner was negligent in her supervision of the dive and in exposing him to decompression injury. Ladner filed a motion for summary judgment on October 27, 1995, based on the release Turnbough had signed. The circuit court granted the motion, and dismissed the case.

Turnbough appealed, asserting that the release should be declared void as against public policy, and the case was assigned to the Court of Appeals. The Court of Appeals

found that the release was a contract of a purely personal nature and did not violate Mississippi public policy because scuba diving does not implicate a public concern. We subsequently granted certiorari.

The law does not look with favor on contracts intended to exculpate a party from the liability of his or her own negligence although, with some exceptions, they are enforceable. However, such agreements are subject to close judicial scrutiny and are not upheld unless the intention of the parties is expressed in clear and unmistakable language.

The wording of an exculpatory agreement should express as clearly and precisely as possible the *extent* to which a party intends to be absolved from liability. Failing that, we do not sanction broad, general "waiver of negligence" provisions, and strictly construe them against the party asserting them as a defense.

In further determining the extent of exemption from liability in releases, this Court has looked to the intention of the parties in light of the circumstances existing at the time of the instrument's execution. The affidavit of Tom Ebro, an expert in water safety and scuba diving, shows that the alleged negligent acts on which Turnbough's claim is based could not have been contemplated by the parties. Ebro stated that Ladner's instruction fell "woefully short" of minimally acceptable standards of scuba instruction. Specifically, he averred that Ladner negligently planned the depths of the dives and failed to make safety stops which significantly increased the risk of decompression illness, especially with a student class. Assuming Turnbough was aware of the inherent risks in scuba diving, it does not reasonably follow that he, a student, intended to waive his right to recover from Ladner for failing to follow even the most basic industry safety standards. This is especially true since Ladner, who held herself out as an expert scuba instructor and is presumed to have superior knowledge, is the very one on whom Turnbough depended for safety. In this case it appears that Ladner may have miscalculated the amount of time for the dive or may have failed to take into account previous dives. This is important because nitrogen builds up in the body while underwater and, with too much nitrogen, the "bends" and permanent damage including loss of life may occur. Surely it cannot be said from the language of the agreement that Turnbough intended to accept any heightened exposure to injury caused by the malfeasance of an expert instructor. Turnbough, by executing the release, did not knowingly waive his right to seek recovery for injuries caused by Ladner's failure to follow basic safety guidelines that should be common knowledge to any instructor of novice students.

We have held in *Quinn* that contracts attempting to limit the liabilities of one of the parties would not "be enforced unless the limitation is fairly and honestly negotiated and understood by both parties." Quinn v. Mississippi State Univ., 720 So. 2d 843, 851 (Miss. 1998). In this case, Turnbough signed a pre-printed contract, the terms of which were not negotiated. Since the contract was not negotiated and contained a broad waiver of negligence provision, the terms of the contract should be strictly construed against the party seeking to enforce such a provision.

Although waivers are commonly used and necessary for some activities and the attendant risks and hazards associated with them, those who wish to relieve themselves from responsibility associated with a lack of due care or negligence should do so in specific and unmistakable terms. The agreement in this case fails to do that.

We therefore reverse the judgment of the Court of Appeals and the trial court's summary judgment and we remand this case to the trial court for further proceedings consistent with this opinion.

NOTES TO WAGENBLAST v. ODESSA SCHOOL DISTRICT AND TURNBOUGH v. LADNER

1. ***Express Assumption of Risk in Torts and Contracts.*** Express assumptions of risk raise two questions also raised in contract law: Will the court enforce agreements in the factual setting involved in the case? And, is the particular contract enforceable? Contracts contrary to public policy, such as a promise to pay money for another to commit murder, are unenforceable. *Wagenblast* identifies factors used to determine whether releases, also called exculpatory clauses when found in contracts, are contrary to public policy for some activities. Releases signed under conditions that do not provide the potential plaintiff with an informed, voluntary choice or that contain oppressive terms are unenforceable even if a proper agreement would be acceptable under the public policy analysis. *Turnbough* is such a case.

2. ***Injuries to Children.*** In Scott by and through Scott v. Pacific West Mountain Resort, 834 P.2d 6 (Wash. 1992), the Washington Supreme Court held that a parent has no right to waive a child's right to sue. A small number of other states have also taken this position. Since a child's own contract not to sue would be unenforceable, what options remain for a business that would like to have children participate in a risky activity?

3. ***Problems.*** In the following cases, how would a court likely treat the validity of the assumption of risk agreements, in terms of general public policy and the specific details of each release?

A. The adult plaintiff brought suit alleging malpractice on the part of two physicians employed by the charitable hospital to which the plaintiff had been admitted. The plaintiff at the time of signing the release was in great pain, under sedation, and probably unable to read. The release stated:

> RELEASE: The hospital is a nonprofit, charitable institution. In consideration of the hospital and allied services to be rendered and the rates charged therefor, the patient or his legal representative agrees to and hereby releases. The Regents of the University of California, and the hospital from any and all liability for the negligent or wrongful acts or omissions of its employees, if the hospital has used due care in selecting its employees.

See Tunkl v. Regents of Univ. of Cal., 383 P.2d 441 (Cal. 1963).

B. The adult plaintiff was injured while snowtubing at a ski resort. His right foot became caught between his snow tube and the man-made bank of the snow-tubing run, resulting in serious injuries that required multiple surgeries to repair. He signed the following release before participating in the activity:

> SNOWTUBING RELEASE FROM LIABILITY
> PLEASE READ CAREFULLY BEFORE SIGNING
> 1. I accept use of a snowtube and accept full responsibility for the care of the snowtube while in my possession.
> 2. I understand that there are inherent and other risks involved in SNOWTUBING, including the use of lifts and snowtube, and it is a dangerous activity/sport. These risks include, but are not limited to, variations in snow, steepness, and terrain, ice and icy conditions, moguls, rocks, trees, and other forms of forest growth or debris (above or below the surface), bare spots, lift terminals, cables, utility lines, snowmaking

equipment and component parts, and other forms [of] natural or man made obstacles on and/or off chutes, as well as collisions with equipment, obstacles or other snowtubes. Snow chute conditions vary constantly because of weather changes and snowtubing use. Be aware that snowmaking and snow grooming may be in progress at any time. These are some of the risks of SNOWTUBING. All of the inherent risks of SNOWTUBING present the risk of serious and/or fatal injury.

See Hanks v. Powder Ridge Restaurant Corporation, 885 A.2d 734 (Conn. 2005).

C. Plaintiff Larry Cornell slipped and fell on a patch of ice in the parking lot of the Royal Hawaiian Condominium in Ocean City, Maryland, on December 31, 1993. Plaintiff owned a unit at the Royal Hawaiian that he used as a vacation home. Plaintiff has now sued the condominium's governing body and various individuals and corporations involved in the design, construction, and maintenance of the condominium, alleging that the defendants were negligent in the maintenance and design of the Royal Hawaiian, resulting in faulty drainage leading to the ice formation that caused his injuries. The condominium council alleges plaintiff waived his right to sue it for failure to maintain the premises when he became a unit owner, which automatically enrolled him in the council and subjected him to its bylaws, which limit the council's liability for personal injuries. The release was contained in the bylaws of the condominium association, of which Cornell was a member:

> Limitation of Liability. The Council shall not be liable . . . for injury or damage to persons or property caused by the elements, or by the Unit Owner of any unit, or any other person, or resulting from electricity, water, snow, or ice, which may leak or flow from any portion of the general or limited common elements, or from any pipe, drain, conduit, appliance, or equipment.

See Cornell v. Council of Unit Owners Hawaiian Village Condominiums, Inc, 983 F. Supp. 640 (D. Md. 1997).

Statute: EXPRESS ASSUMPTION OF RISK

Ohio Stat. §4171.09 (2002)

The general assembly recognizes that roller skating as a recreational sport can be hazardous to roller skaters regardless of all feasible safety measures that can be taken. Therefore, roller skaters are deemed to have knowledge of and to expressly assume the risks of and legal responsibility for any losses, damages, or injuries that result from contact with other roller skaters or spectators, injuries that result from falls caused by loss of balance, and injuries that involve objects or artificial structures properly within the intended path of travel of the roller skater, which are not otherwise attributable to an operator's breach of his duties pursuant to sections 4171.06 and 4171.07 of the Revised Code [describing safety measures the operator is obliged to take].

Statute: WAIVER OF LIABILITY

Haw. Stat. §663-10.95(a) (2001)

(a) Any waiver and release, waiver of liability, or indemnity agreement in favor of an owner, lessor, lessee, operator, or promoter of a motorsports facility, which releases

or waives any claim by a participant or anyone claiming on behalf of the participant which is signed by the participant in any motor sports or sports event involving motorsports in the State, shall be valid and enforceable against any negligence claim for personal injury of the participant or anyone claiming on behalf of and for the participant against the motorsports facility, or the owner, operator, or promoter of a motorsports facility. The waiver and release shall be valid notwithstanding any claim that the participant did not read, understand, or comprehend the waiver and release, waiver of liability, or indemnity agreement if the waiver or release is signed by both the participant and a witness; provided that a waiver and release, waiver of liability, or indemnity agreement executed pursuant to this section shall not be enforceable against the rights of any minor or the minor's representative.

NOTES TO STATUTES

1. ***Legislative Solutions to Judicial Invalidation of Waivers.*** Legislatures have responded in various ways to claims by operators of public facilities that they could not reasonably operate their facilities without enforceable waivers of liability. How does the Ohio approach to protecting operators of roller skating arenas differ from Hawaii's approach to protecting operators of motorsports facilities? Which provides greater protection?

2. ***Judicial Enforceability of Waivers.*** Would a waiver signed under the conditions described in the Hawaii statute be enforceable under the rules described in *Wagenblast* and *Turnbough?*

B. Implied Assumption of the Risk

Tort law recognizes two kinds of implied assumption of risk. One is *primary implied assumption of risk.* This doctrine has nothing to do with an individual's knowledge of risks or interest in giving up the ability to sue for injuries. It describes situations in which a court concludes or a statute states that the defendant has no duty to the plaintiff or has not breached a duty to the plaintiff. This doctrine is treated in more detail in Chapter 11.

Secondary implied assumption of risk requires a subjective test of whether the plaintiff actually knew and appreciated the risk created by the defendant's wrongful conduct and voluntarily accepted the risk. This doctrine serves as a defense for a defendant who would otherwise be liable for tortious conduct. Primary implied assumption of risk, by contrast, is an argument that the defendant did not breach a duty to the plaintiff. While secondary implied assumption of risk is a defense, primary implied assumption of risk is a rebuttal to the plaintiff's arguments for duty and breach.

Traditionally, contributory negligence and secondary implied assumption of risk were complete bars to recovery. Schroyer v. McNeal distinguishes between the contributory negligence and the secondary implied assumption of risk defenses, in a traditional contributory negligence jurisdiction. Davenport v. Cotton Hope Plantation Horizontal Property Regime discusses how express assumption of risk, primary implied assumption of risk, and secondary implied assumption of risk should be treated in comparative negligence jurisdictions.

SCHROYER v. McNEAL

592 A.2d 1119 (Md. 1991)

ROBERT M. BELL, J.

The genesis of this case was a slip and fall accident which occurred on the parking lot of the Grantsville Holiday Inn in Garrett County, Maryland. Frances C. McNeal (McNeal), the respondent, sustained a broken ankle in the accident and, as a result, sued Thomas Edward Schroyer and his wife, Patricia A. Schroyer (the Schroyers), the petitioners, in the Circuit Court for Garrett County, alleging both that they negligently maintained the parking lot and negligently failed to warn her of its condition. The jury having returned a verdict in favor of McNeal for $50,000.00 and their motion for judgment notwithstanding the verdict or for new trial having been denied, the Schroyers appealed to the Court of Special Appeals, which affirmed. In its opinion, the intermediate appellate court directly addressed the Schroyers's primary negligence and McNeal's contributory negligence; however, although it was properly presented, that court did not specifically address whether McNeal had assumed the risk of her injury. We issued the writ of certiorari at the request of the Schroyers and now reverse. We hold that, as a matter of law, McNeal assumed the risk of the injury. . . .

The events surrounding McNeal's accident and her subsequent complaint against the Schroyers are largely not in dispute. McNeal arrived at the Grantsville Holiday Inn at approximately 5:30 P.M. on January 9, 1985. At that time, although approximately four inches of sleet and ice had accumulated, she observed that the area in front of, and surrounding, the main lobby area, where hotel guests registered, had been shoveled and, thus, was reasonably clear of ice and snow. She also noticed, however, that the rest of the parking lot had neither been shoveled nor otherwise cleared of the ice and snow. McNeal parked her car in front of the hotel while she registered. While registering, she requested a room closest to an exit due to her need to "cart" boxes and paperwork back and forth to her room. She was assigned a room close to the west side entrance, which was at the far end of the hall, away from the lobby. This was done notwithstanding the hotel's policy of not assigning such rooms during inclement weather. Also, contrary to policy, McNeal was not advised that she should not use the west entrance and, of course, no warnings to that effect were posted near that entrance.

Having registered, McNeal drove her car from the main entrance to within ten to fifteen feet of the west side entrance. She parked on packed ice and snow. Moreover, as she got out of her car, she noticed that the sidewalk near the entrance had not been shoveled and, furthermore, that the area was slippery. Nevertheless, she removed her cat from the car and crossed the ice and snow carefully, and without mishap. On the return trip to her car to retrieve the remainder of her belongings, she slipped and fell, sustaining the injury previously described.

Concerning her knowledge of the parking lot's condition, McNeal testified that, in the immediate vicinity of where she parked her car, the "packed ice and snow" was slippery and that, as a result, she entered the building "carefully." She denied, however, that it was unreasonable for her, under the circumstances, to try to traverse the parking lot; she "didn't think it was that slippery. I didn't slip the first time in."

The Schroyers moved for judgment, both at the end of McNeal's case in chief and at the conclusion of all the evidence. That McNeal had assumed the risk of her injury was one of the grounds advanced in support of those motions. Both motions were denied. The jury having returned its verdict in favor of McNeal, the Schroyers filed

a motion for judgment notwithstanding the verdict or a new trial. As in the case of the motions for judgment, they argued, *inter alia,* that respondent was barred from recovery by the doctrine of assumption of the risk. The trial court denied that motion.

. . . [T]he Court of Special Appeals did not directly address whether McNeal assumed the risk of injury. Although it recognized that she "knew of the dangerous condition" and, presumably, acted voluntarily when she started to cross the ice and snow covered parking lot and sidewalk, the court perceived the question to be "whether she acted reasonably under the circumstances." It concluded that whether McNeal was contributorily negligent, *i.e.*, acted reasonably in light of the known risk, was a question appropriately left to the jury for decision.

Assumption of the risk and contributory negligence are closely related and often overlapping defenses. They may arise from the same facts and, in a given case, a decision as to one may necessarily include the other.

The relationship between the defenses has also been addressed in the Restatement (Second) of Torts:

> The same conduct on the part of the plaintiff may . . . amount to both assumption of risk and contributory negligence, and may subject him to both defenses. His conduct in accepting the risk may be unreasonable and thus negligent, because the danger is out of all proportion to the interest he is seeking to advance, as where he consents to ride with a drunken driver in an unlighted car on a dark night, or dashes into a burning building to save his hat. Likewise, even after accepting an entirely reasonable risk, he may fail to exercise reasonable care for his own protection against that risk.

§496A, comment d, at 562. The overlap between assumption of the risk and contributory negligence is a complete one where "the plaintiff's conduct in voluntarily encountering a known risk is itself unreasonable. . . ." §496A, comment c4. When that occurs, the bar to recovery is two-pronged: 1) because the plaintiff assumed the risk of injury and 2) because the plaintiff was contributorily negligent.

There is, however, a distinction, and an important one, between the defenses of assumption of the risk and contributory negligence. That distinction was stated in *Warner v. Markoe,* 189 A. 260, 264 (Md. 1937), thusly:

> The distinction between contributory negligence and voluntary assumption of the risk is often difficult to draw in concrete cases, and under the law of this state usually without importance, but it may be well to keep it in mind. Contributory negligence, of course, means negligence which contributes to cause a particular accident which occurs, while assumption of risk of accident means voluntary incurring that of an accident which may not occur, and which the person assuming the risk may be careful to avoid after starting. Contributory negligence defeats recovery because it is a proximate cause of the accident which happens, but assumption of the risk defeats recovery because it is a previous abandonment of the right to complain if an accident occurs.

The distinction is no less clearly made by reference to the rationale underlying the doctrine of assumption of the risk. We explicated that rationale in *Gibson v. Beaver,* 226 A.2d 273, 275 (1967) (quoting W. Prosser, *Handbook of the Law of Torts* §55 at 303 (2nd ed. 1955)):

> The defense of assumption of risk rests upon the plaintiff's consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of harm from a particular risk. Such consent may be found: . . . by implication from the conduct of the parties. When the plaintiff enters voluntarily into a relation or

situation involving obvious danger, he may be taken to assume the risk, and to relieve the defendant of responsibility. Such implied assumption of risk requires knowledge and appreciation of the risk, and a voluntary choice to encounter it.

. . . .

While, ordinarily, application of either defense will produce the same result, that is not always the case. Especially is that so in the instant case. The record reflects, and the Court of Special Appeals held, a matter not in dispute on this appeal, that McNeal was fully aware of the dangerous condition of the premises. She knew that the area was ice and snow covered and that the ice and snow were slippery. Nevertheless, she parked in the area and, notwithstanding, according to her testimony, that she proceeded carefully, she took a chance and walked over the ice and snow covered parking lot and sidewalk because she did not think it was "that" slippery.

It is clear, on this record, that McNeal took an informed chance. Fully aware of the danger posed by an ice and snow covered parking lot and sidewalk, she voluntarily chose to park and traverse it, *albeit* carefully, for her own purposes, *i.e.* her convenience in unloading her belongings. Assuming that the decision to park on the ice and snow covered parking lot and to cross it and the sidewalk was not, itself, contributory negligence, McNeal's testimony as to how she proceeded may well have generated a jury question as to the reasonableness of her actions. On the other hand, it cannot be gainsaid that she intentionally exposed herself to a known risk. With full knowledge that the parking lot and sidewalk were ice and snow covered and aware that the ice and snow were slippery, McNeal voluntarily chose to park on the parking lot and to walk across it and the sidewalk, thus indicating her willingness to accept the risk and relieving the Schroyers of responsibility for her safety. Consequently, while the issue of her contributory negligence may well have been for the jury, the opposite is true with respect to her assumption of the risk. We hold, as a matter of law, that McNeal assumed the risk of her own injuries.

Judgment of the Court of Special Appeals Reversed and case remanded to that court with directions to reverse the judgment of the Circuit Court for Garrett County. . . .

NOTES TO SCHROYER v. MCNEAL

1. ***Comparing Contributory Negligence and Assumption of Risk.*** The defense of secondary implied assumption of risk requires that the defendant prove that the plaintiff had subjective actual knowledge of the risk, had subjective actual appreciation of its nature and extent, and voluntarily accepted it. The defense of contributory negligence is objective; it requires the defendant to prove only that the plaintiff *should have* known of the risk and that a reasonable person would not have behaved as the plaintiff behaved.

2. ***Overlap Between Contributory Negligence and Assumption of Risk.*** The opinion in *Schroyer* points out that both defenses may apply in cases where (1) the plaintiff knew and appreciated and voluntarily accepted the risk and (2) a reasonable person either would not have accepted the risk or, having done so, would not have behaved as the plaintiff behaved. If a person drives just at the posted speed limit on an icy, snowy road to get to a video rental store before it closes, knowing of road conditions and appreciating the risk losing control on the ice and crashing, she might be assuming a

risk that a reasonable person would not assume. Both defenses would apply. But if that person drove the same way while rushing to a hospital in a life-or-death emergency, she might not be found to be contributorily negligent. Nevertheless, in a traditional contributory negligence jurisdiction like *Schroyer*, her recovery would be barred by secondary implied assumption of risk even though her conduct was reasonable.

3. ***Reasonable and Unreasonable Assumption of Risk.*** The type of assumption of risk illustrated in *Schroyer* is often called *secondary unqualified implied assumption of risk.* It bars or reduces a plaintiff's recovery even if the plaintiff acted reasonably. Even before the advent of comparative negligence, some jurisdictions, unlike Maryland (the jurisdiction in *Schroyer*), added a fourth requirement to the defense of secondary implied assumption of risk. In addition to showing that the plaintiff (1) knew of the risk, (2) appreciated the nature of extent of the risk, and (3) voluntarily exposed herself to the risk, the defendant was also required to show that (4) it was objectively unreasonable for the plaintiff to expose herself to the risk. Assumption of risk with this fourth element added is sometimes called *secondary qualified assumption of risk.* The "qualification" is that the assumption of risk must be unreasonable for plaintiff's recovery to be barred.

The secondary qualified assumption of risk defense is very similar to the defense of contributory negligence. Although differences remain (i.e., the first three elements), every case in which the defense of secondary qualified assumption of risk applies is also a case in which the defense of contributory negligence applies. This complete overlap has led some jurisdictions to abandon the secondary implied assumption of risk terminology. See, e.g., Meistrich v. Casino Arena Attractions, Inc., 155 A.2d 90, 96 (N.J. 1959)("We are satisfied there is no reason to charge assumption of risk in its secondary sense as something distinct from contributory negligence and hence . . . the terminology should not be used.")

DAVENPORT v. COTTON HOPE PLANTATION HORIZONTAL PROPERTY REGIME

508 S.E.2d 565 (S.C. 1998)

TOAL, J. . . .

Alvin Davenport is a resident of Cotton Hope Plantation located on Hilton Head Island. The plantation is organized under state law as Cotton Hope Plantation Horizontal Regime ("Cotton Hope"). Cotton Hope is composed of ninety-six condominium units located in multiple buildings. Each building consists of three levels. The buildings have three stairways each, one in the middle and two on either side. Davenport's unit is on the top level, approximately five feet from a stairway. Davenport leases his unit from the owner.

Cotton Hope employed Property Administrators, Incorporated ("PAI") to maintain the grounds at Cotton Hope Plantation. In April 1991, PAI, as Cotton Hope's agent, hired Carson Landscaping Company, Inc., ("Carson") to perform landscaping and general maintenance work at the condominiums. Carson's duties included checking the outdoor lights and changing light bulbs as needed. . . .

In June 1991, Davenport began reporting that the floodlights at the bottom of the stairway he used were not working. Davenport testified he made several phone calls to

PAI complaining about the problem. Davenport nevertheless continued to use the stairway during this time. On the evening of August 12, 1991, Davenport fell while descending the stairway closest to his apartment. Davenport testified he fell after attempting to place his foot on what appeared to be a step but was really a shadow caused by the broken floodlights. He admitted not using the handrail in the stairway.

Davenport sued Cotton Hope for his injuries. . . . At the close of all the evidence, the trial court directed a verdict against Davenport, finding he had assumed the risk of injury. The trial court also held that even if assumption of risk were abrogated by the adoption of comparative negligence, Davenport was more than fifty-percent negligent. [Davenport appealed.]

[T]he Court of Appeals held that assumption of risk had been subsumed by South Carolina's adoption of comparative negligence. As such, assumption of risk was no longer a complete defense to a negligence claim but, instead, was simply another factor to consider in comparing the parties' negligence. The court ruled that the relative negligence of Davenport and Cotton Hope turned on factual considerations which should have been submitted to the jury. . . .

This Court granted Cotton Hope's petition for a writ of certiorari. . . .

The threshold question we must answer is whether assumption of risk survives as a complete bar to recovery under South Carolina's comparative negligence system. In Nelson v. Concrete Supply Company, 303 S.C. 243, 399 S.E.2d 783 (1991), we adopted a modified version of comparative negligence. Under this system, "for all causes of action arising on or after July 1, 1991, a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant." *Nelson* made clear that a plaintiff's contributory negligence would no longer bar recovery unless such negligence exceeded that of the defendant. Not so clear was what would become of the defense of assumption of risk. . . .

Currently in South Carolina, there are four requirements to establishing the defense of assumption of risk: (1) the plaintiff must have knowledge of the facts constituting a dangerous condition; (2) the plaintiff must know the condition is dangerous; (3) the plaintiff must appreciate the nature and extent of the danger; and (4) the plaintiff must voluntarily expose himself to the danger. Senn v. Sun Printing Co., 295 S.C. 169, 367 S.E.2d 456 (Ct. App. 1988). "The doctrine is predicated on the factual situation of a defendant's acts alone creating the danger and causing the accident, with the plaintiff's act being that of voluntarily exposing himself to such an obvious danger with appreciation thereof which resulted in the injury."

Assumption of risk may be implied from the plaintiff's conduct.

[A]n overwhelming majority of jurisdictions that have adopted some form of comparative negligence have essentially abolished assumption of risk as an absolute bar to recovery. In analyzing the continuing viability of assumption of risk in a comparative negligence system, many courts distinguish between "express" assumption of risk and "implied" assumption of risk. See W. Page Keeton et al., Prosser and Keeton on the Law of Torts, §68 at 496 (5th ed. 1984). Implied assumption of risk is further divided into the categories of "primary" and "secondary" implied assumption of risk. We will discuss each of these concepts below.

Express assumption of risk applies when the parties expressly agree in advance, either in writing or orally, that the plaintiff will relieve the defendant of his or her legal duty toward the plaintiff. Thus, being under no legal duty, the defendant cannot be charged with negligence. Even in those comparative fault jurisdictions that have

abrogated assumption of risk, the rule remains that express assumption of risk continues as an absolute defense in an action for negligence. The reason for this is that express assumption of risk sounds in contract, not tort, and is based upon an express manifestation of consent. . . .

Express assumption of risk is contrasted with implied assumption of risk which arises when the plaintiff implicitly, rather than expressly, assumes known risks. As noted above, implied assumption of risk is characterized as either primary or secondary. Primary implied assumption of risk arises when the plaintiff impliedly assumes those risks that are *inherent* in a particular activity. See, e.g., Fortier v. Los Rios Community College Dist., 45 Cal. App. 4th 430 (1996) (student injured in a collision during football drill); Swagger v. City of Crystal, 379 N.W.2d 183 (Minn. App. 1985) (injured while watching softball game). Primary implied assumption of risk is not a true affirmative defense, but instead goes to the initial determination of whether the defendant's legal duty encompasses the risk encountered by the plaintiff. E.g., Perez v. McConkey, 872 S.W.2d 897 (Tenn. 1994). In *Perez*, the Tennessee Supreme Court summarized the doctrine in the following way:

> In its primary sense, implied assumption of risk focuses not on the plaintiff's conduct in assuming the risk, but on the defendant's general duty of care. . . . Clearly, primary implied assumption of risk is but another way of stating the conclusion that a plaintiff has failed to establish a prima facie case [of negligence] by failing to establish that a duty exists.

In this sense, primary implied assumption of risk is simply a part of the initial negligence analysis.

Secondary implied assumption of risk, on the other hand, arises when the plaintiff knowingly encounters a risk created by the defendant's negligence. It is a true defense because it is asserted only after the plaintiff establishes a prima facie case of negligence against the defendant. Secondary implied assumption of risk may involve either reasonable or unreasonable conduct on the part of the plaintiff. In Litchfield Company of South Carolina, Inc. v. Sur-Tech, Inc., 289 S.C. 247, 249, 345 S.E.2d 765, 766 (Ct. App. 1986), the Court of Appeals illustrated secondary "unreasonable" implied assumption of risk:

> The conduct of a plaintiff in assuming a risk may itself be unreasonable and thus negligent because the risk he assumes is out of all proportion to the advantage which he is seeking to gain. For example, if a plaintiff dashed into a fire in order to save his hat, it might well be argued that he both assumed the risk of being injured and that he acted unreasonably. *In such cases, a defendant can maintain both defenses.*[4]

Since express and primary implied assumption of risk are compatible with comparative negligence, we will refer to secondary implied assumption of risk simply as "assumption of risk."

[A]ssumption of risk and contributory negligence have historically been recognized as separate defenses in South Carolina. However, other courts have found assumption of risk functionally indistinguishable from contributory negligence and consequently abolished assumption of risk as a complete defense.

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[4] Reasonable implied assumption of risk exists when the plaintiff is aware of a risk negligently created by the defendant but, nonetheless, voluntarily proceeds to encounter the risk; when weighed against the risk of injury, the plaintiff's action is reasonable.

To date, the only comparative fault jurisdictions that have retained assumption of risk as an absolute defense are Georgia, Mississippi, Nebraska, Rhode Island, and South Dakota. Only the Rhode Island Supreme Court has provided a detailed discussion of why it believes the common law form of assumption of risk should survive under comparative negligence. In Kennedy v. Providence Hockey Club, Inc., 119 R.I. 70, 376 A.2d 329 (R.I. 1977), the Rhode Island Supreme Court distinguished between assumption of risk and contributory negligence, emphasizing the former was measured by a subjective standard while the latter was based on an objective, reasonable person standard. The court further noted that it had in the past limited the application of assumption of risk to those situations where the plaintiff had actual knowledge of the hazard. The court then rejected the premise that assumption of risk and contributory negligence overlap:

> Contributory negligence and assumption of the risk do not overlap; the key difference is, of course, the exercise of one's free will in encountering the risk. Negligence analysis, couched in reasonable hypotheses, has no place in the assumption of the risk framework. When one acts knowingly, it is immaterial whether he acts reasonably.

Rhode Island's conclusions are in sharp contrast with the West Virginia Supreme Court's opinion in King v. Kayak Manufacturing Corp., 182 W. Va. 276, 387 S.E.2d 511 (W. Va. 1989). Like Rhode Island, the West Virginia Supreme Court in *King* recognized that assumption of risk was conceptually distinct from contributory negligence. The court specifically noted that West Virginia's doctrine of assumption of risk required actual knowledge of the dangerous condition, which conformed with the general rule elsewhere in the country. In fact, the court cited Rhode Island's decision in *Kennedy* as evidence of this general rule. Nevertheless, the West Virginia court concluded that the absolute defense of assumption of risk was incompatible with its comparative fault system. The court therefore adopted a *comparative assumption of risk* rule, stating, "a plaintiff is not barred from recovery by the doctrine of assumption of risk unless his degree of fault arising therefrom equals or exceeds the combined fault or negligence of the other parties to the accident." The court explained that the absolute defense of assumption of risk was as repugnant to its fault system as the common law rule of contributory negligence.

A comparison between the approaches in West Virginia and Rhode Island is informative. Both jurisdictions recognize that assumption of risk is conceptually distinct from contributory negligence. However, Rhode Island focuses on the objective/subjective distinction between the two defenses and, therefore, retains assumption of risk as a complete bar to recovery. On the other hand, West Virginia emphasizes that the main purpose of its comparative negligence system is to apportion fault. Thus, West Virginia rejects assumption of risk as a total bar to recovery and only allows a jury to consider the plaintiff's negligence in assuming the risk. If the plaintiff's total negligence exceeds or equals that of the defendant, only then is the plaintiff completely barred from recovery.

Like Rhode Island and West Virginia, South Carolina has historically maintained a distinction between assumption of risk and contributory negligence, even when the two doctrines appear to overlap. Thus, the pertinent question is whether a plaintiff should be completely barred from recovery when he voluntarily assumes a known risk, regardless of whether his assumption of that risk was reasonable or unreasonable. Upon considering the purpose of our comparative fault system, we conclude that West Virginia's approach is the most persuasive model.

In *Nelson*, we adopted . . . the following justification for adopting a comparative negligence system: "It is contrary to the basic premise of our fault system to allow a defendant, who is at fault in causing an accident, to escape bearing any of its cost, while requiring a plaintiff, who is no more than equally at fault or even less at fault, to bear all of its costs." By contrast, the main reason for having the defense of assumption of risk is not to determine fault, but to prevent a person who knowingly and voluntarily incurs a risk of harm from holding another person liable. Cotton Hope argues that the justification behind assumption of risk is not in conflict with South Carolina's comparative fault system. We disagree.

[I]t is contrary to the premise of our comparative fault system to require a plaintiff, who is fifty-percent or less at fault, to bear all of the costs of the injury. In accord with this logic, the defendant's fault in causing an accident is not diminished solely because the plaintiff knowingly assumes a risk. If assumption of risk is retained in its current common law form, a plaintiff would be completely barred from recovery even if his conduct is reasonable or only slightly unreasonable. In our comparative fault system, it would be incongruous to absolve the defendant of all liability based only on whether the plaintiff assumed the risk of injury. Comparative negligence by definition seeks to assess and compare the negligence of both the plaintiff and defendant. This goal would clearly be thwarted by adhering to the common law defense of assumption of risk. . . .

We therefore hold that a plaintiff is not barred from recovery by the doctrine of assumption of risk unless the degree of fault arising therefrom is greater than the negligence of the defendant. To the extent that any prior South Carolina cases are inconsistent with this approach, they are overruled. Express and primary implied assumption of risk remain unaffected by our decision. . . .

Based on the foregoing, the Court of Appeals' decision is affirmed as modified.

NOTES TO DAVENPORT v. COTTON HOPE PLANTATION HORIZONTAL PROPERTY REGIME

1. *Secondary Implied Distinguished from Primary Implied Assumption of Risk.* The doctrine of primary assumption of risk is discussed in Chapter 11. Under the doctrine of primary implied assumption of risk, a defendant has no duty to take precautions to prevent a risk that is inherent in its activity. "Inherent" means that the risks are obvious (in the objective sense that reasonable people know about them) and necessary (in the sense that the cost of avoiding the risk outweighs the benefit of doing so). The doctrine of secondary implied assumption of risk applies to those risks created by the defendant that are not necessary — in fact, it was negligent (or reckless) for the defendant to create those risks.

2. *Problems: Implied Assumption of Risk*

A. In Kirk v. Washington State University, 746 P.2d 285 (Wash. 1987), the Washington Supreme Court considered whether primary or secondary assumption of risk applied to the claims of a cheerleader who had sued her university to recover for injuries sustained while she was practicing cheerleading on an allegedly dangerous surface and without adequate supervision. Does this appear to be a case where the doctrines of primary or secondary implied assumption of risk would apply? What are the inherent risks in the sport of cheerleading? Are these the risks that the plaintiff encountered?

B. In Scott v. Pacific West Mountain Resort, 834 P.2d 6, 13 (Wash. 1992), the plaintiff, a 12-year-old boy, was injured while he was attending a ski school at a ski resort. As he was practicing a slalom race, he veered off the race course and ran into an unused tow-rope shack that was allegedly positioned too close to the slalom course. The plaintiff alleged that his injuries were caused by negligent provision of dangerous facilities or improper supervision of the ski students. Is this a case where primary or secondary implied assumption of risk applies?

3. ***Treatment of Careful and Careless Victims.*** Suppose a plaintiff *saw a dangerous condition* on a defendant's property, understood the risk, voluntarily encountered it, and was hurt. In the small number of comparative negligence jurisdictions that recognize implied secondary assumption of risk, if the plaintiff established that the defendant had been negligent in creating that condition, could the plaintiff recover damages? Could the plaintiff recover in a jurisdiction like South Carolina or other comparative negligence jurisdictions that adopt the majority approach?

Suppose a plaintiff *carelessly failed to see a dangerous condition* on a defendant's property and then was hurt by the condition. In the small number of comparative negligence jurisdictions that recognize implied secondary assumption of risk, if the plaintiff established that the defendant had been negligent in creating that condition, could the plaintiff recover damages? Could the plaintiff recover in a jurisdiction like South Carolina or other comparative negligence jurisdictions that adopt the majority approach?

Giving a careless victim better treatment than a careful victim is the result in the minority jurisdictions, criticized in *Davenport.*

IV. Mitigation and Avoidable Consequences

A plaintiff who is hurt can seek medical attention to mitigate the extent of the harm after an accident. Wearing a seatbelt is something a plaintiff can do *before* encountering a defendant's injurious conduct that can protect against some of the harm that conduct might otherwise have inflicted. Miller v. Eichhorn and Klanseck v. Anderson Sales and Service, Inc. illustrate contrasting ways courts reduce damages to reflect a plaintiff's post-accident failure to mitigate harm. Law v. Superior Court confronts the issue of whether a vehicular accident plaintiff's failure to use a seatbelt should affect the plaintiff's recovery of damages.

MILLER v. EICHHORN

426 N.W.2d 641 (Iowa Ct. App. 1988)

SACKETT, J. . . .

A car driven by Plaintiff-Appellant Connie M. Miller collided with a car driven by Defendant-Appellee Harold Eichhorn. Defendant Gloria Eichhorn was not involved in the collision. The collision occurred when defendant backed his car from his driveway into the street. Plaintiffs sued defendants for injuries Connie allegedly received in the accident. Plaintiff Keith Miller is Connie's husband. His claim was for loss of consortium. The case was tried to a jury which found Connie's damages to be $3,569.70.

The jury found no damages for Keith. The jury determined Connie's fault to be fifteen percent and Harold's fault to be eighty-five percent. . . .

Plaintiff . . . challenges the trial court's submission of an instruction on mitigation of damages. Plaintiff objected to the mitigation of damage instruction claiming the failure to mitigate damages is not fault. We disagree. Iowa Comparative Fault Act, Iowa Code section 668.1, provides: "As used in this chapter, . . . the term ["fault"] also includes . . . unreasonable failure to avoid an injury or to mitigate damages." Section 668.3 provides: "In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party and the extent of the causal relation between the conduct and the damages claimed."

The statute clearly provides the unreasonable failure to mitigate damages means fault as used in the statute.

Defendant argues it was not error to give the instruction because there is substantial evidence plaintiff failed to mitigate damages. Defendant also argues there is substantial evidence because plaintiff claimed medical problems and the need to employ substitute labor in her business from the time of the accident to the time of trial. There were periods of time when Connie did not see a doctor regularly. We reject defendant's argument on these grounds. For the failure to consult a doctor on a regular basis to be evidence of failure to mitigate damages there must be a showing consultations on a regular basis would have mitigated damages. Connie's duty is to use ordinary care in consulting a physician. There is, however, testimony by one of Connie's doctors that additional chiropractic treatments would have helped Connie's condition. This evidence supports the submission of the mitigation of damage issue and is evidence from which the jury could find she did not use due care in following her doctor's advice. . . .

We affirm.

KLANSECK v. ANDERSON SALES & SERVICE, INC.

393 N.W.2d 356 (Mich. 1986)

WILLIAMS, J. . . .

Plaintiff, Stephen Klanseck, brought this action, seeking damages for injuries suffered in a motorcycle accident which occurred May 27, 1976. Mr. Klanseck had that day purchased a Honda GL 1000 motorcycle from defendant Anderson Sales & Service, Inc., and was heading for home with his new cycle when the machine began to "fishtail." Plaintiff applied the brakes and the motorcycle slid sideways and went down, resulting in plaintiff's injuries.

Following the accident, plaintiff received sutures in his left arm, was x-rayed and released. Twelve days later, a fracture of plaintiff's right wrist was diagnosed and treated. Plaintiff, who was employed as an auto mechanic, claimed that his injuries resulted in chronic pain and numbness in his left arm and hand, which interfered with his work and eventually resulted in a serious mental disorder. . . .

With regard to plaintiff's alleged failure to mitigate damages, the court gave the following instruction:

> Now, a person has a duty to use ordinary care to minimize his own damages after he has been injured, and it is for you to decide whether the Plaintiff failed to use such ordinary care and, if so, whether any damages resulted from such failure.

You may not compensate the Plaintiff for any portion of his damages which resulted from his failure to use ordinary care.

Plaintiff contends that this instruction was erroneous because no evidence was presented that would create an issue as to plaintiff's failure to mitigate his damages. Defendant points to the testimony of Dr. Gary W. Roat, and claims that it creates an issue on the question of mitigation. Dr. Roat, a neurologist, testified that the plaintiff had come to him on referral from another physician about a year after the accident and that he had treated the plaintiff a number of times for numbness and tingling in his hand as well as back and leg pain. After trying several medications, Dr. Roat recommended that plaintiff undergo additional diagnostic tests, including nerve conduction studies, an electromyelographic examination, and a myelogram to determine whether he had a herniated disk. According to Dr. Roat's testimony, plaintiff decided against taking these tests unless his symptoms worsened.

It is well-settled that an injured party has a duty to exercise reasonable care to minimize damages, including obtaining proper medical or surgical treatment. It is also settled that the charge of the court must be based upon the evidence and should be confined to the issues presented by the evidence.

Although the evidence of plaintiff's alleged failure to mitigate damages was weak, there was evidence that plaintiff had not followed the recommendation of Dr. Roat. Even scant evidence may support an instruction where it raises an issue for the jury's decision. The trial court's instruction on failure to mitigate damages was proper.

Affirmed.

NOTE TO MILLER v. EICHORN AND KLANSECK v. ANDERSON SALES & SERVICE, INC.

Effect on Damage Recovery of Failure to Mitigate. The courts in *Miller* and *Klanseck* adopted different approaches to reducing damages to reflect the failure of the plaintiff to seek proper medical attention. If the plaintiffs in *Miller* and *Klanseck* each had $10,000 total damages, with $3,000 being due to failure to seek proper medical treatment, how much would each collect under each of the rules?

LAW v. SUPERIOR COURT

755 P.2d 1135 (Ariz. 1988)

FELDMAN, J. . . .

On the evening of November 8, 1985, Cindy Law was driving her parents' car in Tempe, Arizona. She apparently pulled in front of an automobile operated by James Harder, who swerved violently to avoid a collision. Unfortunately, his evasive maneuver overturned the Harder vehicle. Harder and his wife were not wearing their seat belts and were thrown from their car—James through a closed sunroof. The Harders suffered severe orthopedic injuries as a result of the accident.

The Harders (plaintiffs) brought a negligence action against Cindy Law and her parents (defendants). During the course of discovery, defendants sought information concerning plaintiffs' use and experience with seat belts and shoulder restraints. Plaintiffs objected to these discovery requests on the grounds that the subject was irrelevant under the holding of Nash v. Kamrath, 521 P.2d 161 (1974). In that case, division two

of our court of appeals held that evidence of a passenger's failure to wear a seat belt was inadmissible either to show breach of a duty to minimize damages or to prove contributory negligence. [The trial court ruled that there was no duty to wear seatbelts. In an interlocutory appeal the court of appeals held that evidence of seatbelt non-use could be admissible.]

Given modern-day conditions, we conclude as a matter of public policy that the law must recognize the responsibility of every person to anticipate and take reasonable measures to guard against the danger of motor vehicle accidents that are not only foreseeable but virtually certain to occur sooner or later. Rejection of the seat belt defense can no longer be based on the antediluvian doctrine that one need not anticipate the negligence of others. There is nothing to anticipate; the negligence of motorists is omnipresent. . . .

Nash held there was no duty to wear seat belts. We acknowledge that "duty" to use restraints is generally considered the prime question in cases such as this. . . .

[W]e believe that injuries sustained by the plaintiff as a result of his nonuse of an available seat belt are not so much a failure to use care to avoid endangering others but part of the related obligation to conduct oneself reasonably to minimize damages and avoid foreseeable harm to oneself.

Thus, the seat belt defense would ordinarily raise issues concerning the doctrine of avoidable consequences — a theory that denies recovery for those injuries plaintiff could reasonably have avoided. Plaintiffs argue that this doctrine is applied only to post-accident conduct and is inapplicable to events preceding the accident — a time when plaintiffs supposedly had a right to assume that others would not act negligently. Assuming this is ordinarily true, we believe the common law conceptualization of the doctrine of avoidable consequences has been modified by our comparative negligence statute, which applies that doctrine to pre-accident conduct.

When the Arizona legislature enacted the Uniform Contribution Among Tortfeasors Act in 1984, it added several important provisions to the model law delineated in 12 U.L.A. 63-107 (1975). These new sections constituted the statutory adoption of comparative negligence for our state. In any given case, the relevance of comparative negligence principles is normally a question for the jury. If the jury does apply comparative negligence standards, the plaintiff's action is not barred, "but the full damages shall be reduced in proportion to the relative degree of *fault which is a proximate cause of the injury or death,* if any." A.R.S. §§12-2505(A) (emphasis added).

The essential question is whether a plaintiff who does not wear an automobile seat belt is at "fault" for injuries enhanced or caused by the failure to use the seat belt. Neither the Arizona comparative negligence statute nor its progenitor uniform law contains any definition of "fault." We do note the instructive definition of this term given in §§1(b) of the Uniform Comparative Fault Act (UCFA), 12 U.L.A. 39-40 (Cum. Supp. 1987).

> "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. *The term also includes . . . unreasonable failure to avoid an injury or to mitigate damages.* Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

(Emphasis added.) As stated in the official comment to the UCFA, negligent failure to use a seat belt would reduce damages solely for those injuries directly attributable to the lack of seat belt restraint. Thus, as far as the calculation of damages is concerned,

the comparative negligence statutes apply the doctrine of avoidable consequences to pre-accident conduct. . . .

Our examination of the applicable caselaw and our analysis of the concept of "duty" lead us to the conclusion that the seat belt defense is not a question of duty at all. We reject those cases . . . that rely on the absence of "duty" to reject the seat belt defense. We also disapprove the *Nash* analysis. At least under the comparative fault statute, each person is under an obligation to act reasonably to minimize foreseeable injuries and damages. Thus, if a person chooses not to use an available, simple safety device, that person may be at "fault." . . .

Plaintiffs claim that by recognizing the seat belt defense, we would confer a windfall on tortfeasors. As noted ante, the crux of comparative negligence is a proper apportionment of damages based upon the fault of the respective parties. If a victim unreasonably failed to use an available, simple prophylactic device, then he will not be able to recover for damages created or enhanced by the nonuse. Thus, although some tortfeasors may pay less than they otherwise *would,* they will not pay less than they *should.* We do not believe this rule creates a windfall to the tortfeasor; it is an unavoidable consequence of our comparative negligence system.

Petitioners maintain that allowing apportionment of damages based on failure to use seat belts will unnecessarily complicate and protract litigation. The defendant must establish several factual predicates before seat belt nonuse may be presented to the jury. To prove these factors, the defendant may utilize qualified experts in the medical, scientific, and accident reconstruction fields. It is then up to the factfinder to evaluate the evidence and quantify the results under comparative negligence principles.

Of course, this process will take time and create new issues for the jury to decide. These problems are hardly insurmountable. Juries perform this type of operation on a regular basis in many types of civil and criminal cases. The very idea of comparative negligence requires that juries apportion fault. The same is true when juries apportion fault between joint tortfeasors. . . .

There is no doubt that the seat belt defense will complicate and lengthen litigation in some cases. While this certainly does not militate in favor of its acceptance, we believe the problem is no different in principle from that posed by any legal, technological or scientific advance. Neither law nor society can ignore technological change simply because it makes decision more complex.

As the final argument, plaintiffs assert that introducing evidence of seat belt nonuse would propel our courts into a morass of unforeseen consequences. If seat belt nonuse is relevant, why not introduce evidence of failure to install air bags? Why not hold the plaintiff responsible for failure to buy a large car which is normally much safer in a crash than a small car?

We are faced with a concrete application of comparative negligence principles. . . . The exact bounds of fault in other fact situations is a matter for the common law to address in its customary evolutionary fashion. . . .

Within the analytical framework of this opinion, we recognize the seat belt defense as a matter which the jury may consider in apportioning damages due to the "fault" of the plaintiff. Accordingly, in appropriate cases discovery will be available on the issue of nonuse.

We approve the portions of the opinion by the court of appeals that conform to this opinion. This case is remanded to the trial court for further proceedings consistent with our holding.

NOTES TO LAW v. SUPERIOR COURT

1. *Mitigation and Seatbelt Use.* The majority of decisions since *Law* have rejected its position. A South Dakota opinion reflects this trend:

> Drivers and other persons in the front seat of passenger vehicles must use seat belts in South Dakota. SDCL 32-38-1 (effective July 1, 1994). However, by statute, proof of failure to wear a seat belt may not be introduced as evidence in any civil litigation on the issue of mitigation of damages. SDCL 32-38-4. As the accident occurred in August 1993, these enactments are inapplicable to this case.
>
> [T]he trial court instructed the jury that it may consider plaintiff's "failure to use a seatbelt as evidence that the plaintiff had failed to avoid or minimize" his injuries.
>
> . . . Accordingly, despite the existence of statutes controlling the issue for future cases, we must decide whether the mitigation doctrine applied to injured plaintiffs not wearing seatbelts before the effective date of these enactments. Whether the doctrine applies to the use of seatbelts is a question of law. On legal questions, this Court is obligated to reach its decision independent of the conclusion reached by the trial court.
>
> A clear majority of states have judicially refused to admit evidence of a plaintiff's nonuse of an available seatbelt as proof of failure to mitigate damages likely to occur in an automobile accident. A few jurisdictions reason a plaintiff's failure to use an available seatbelt can be considered a substantial factor in increasing the harm, but we conclude the better approach rejects this theory.
>
> A duty to mitigate ordinarily arises only after a tortfeasor's negligent act. A plaintiff's "preaccident" failure to fasten an available seat belt contributes nothing to the transpiring of the accident itself. Such omission occurs before a tortfeasor's negligent act and is, therefore, inconsistent with a plaintiff's later burden to minimize damages. . . . The trial court erred when it instructed the jury it may consider Davis's failure to use a seatbelt as evidence he failed to avoid or minimize his injuries.

Davis v. Knippling, 576 N.W.2d 525 (S.D. 1998).

2. *Statutory Treatment of Non-Use of Seatbelt.* Statutory responses to this problem have been varied. South Dakota, for example, prohibits introduction of seatbelt non-use for any purpose. Other states have imposed precise limits on the percentage of responsibility a jury is permitted to assign to a plaintiff's failure to use a seatbelt. See Mo. Rev. Stat. §307.178(4), imposing a 1 percent limit on that responsibility.

Statute: FAULT

Ind. Code §34-6-2-45 (2002)

(a) "Fault," for purposes of IC 34-20 [referring to injuries caused by products], means an act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term includes the following:

(1) Unreasonable failure to avoid an injury or to mitigate damages. . . .

(b) "Fault," for purposes of IC 34-51-2 [referring to comparative negligence], includes any act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages.

Statute: FAILURE TO COMPLY; FAULT; LIABILITY OF INSURER; MITIGATION OF DAMAGES

Ind. Code §9-19-10-7 (2002)

(a) Failure to comply with section 1, 2, 3, or 4 [requiring front seat occupants of passenger motor vehicles to wear safety belts] of this chapter does not constitute fault under IC 34-51-2 and does not limit the liability of an insurer.

(b) Except as provided in subsection (c), evidence of the failure to comply with section 1, 2, 3, or 4 of this chapter may not be admitted in a civil action to mitigate damages.

(c) Evidence of a failure to comply with this chapter may be admitted in a civil action as to mitigation of damages in a product liability action involving a motor vehicle restraint or supplemental restraint system. The defendant in such an action has the burden of proving noncompliance with this chapter and that compliance with this chapter would have reduced injuries, and the extent of the reduction.

NOTES TO STATUTES

1. *Mitigation and Fault.* The statutory option illustrated by the Indiana Code is to consider that failure to wear a seatbelt is not fault and can be used as evidence of mitigation in a products liability action only. What is the implication for the plaintiff of allowing failure to use a seatbelt as evidence of mitigation but not fault?

2. *Statutes and Judicial Interpretation.* Indiana courts have applied its seatbelt and mitigation statutes very narrowly. In Morgen v. Ford Motor Co., 762 N.E.2d 137 (Ind. App. 2002), the court held that it was not misuse of a vehicle not to wear seatbelts because there is no statutory or common law duty to wear a seatbelt in the backseat of a vehicle. In Hopper v. Carey, 716 N.E.2d 566 (Ind. App. 1999), the court held that there was no common law or statutory duty to wear a seatbelt in a fire truck and, while there is a statutory duty to wear a seatbelt in a passenger vehicle, a failure to do so cannot be used as evidence of fault.

V. Immunities

A. Sovereign Immunity

Because "the king can do no wrong," at one time federal and state governments were all immune from suit. At present, that immunity has been modified in various ways for all levels of government. The historical basis for this "sovereign immunity" is deference to the monarchy. In the United States, some have justified this immunity by arguing that it is absurd to think of a wrong committed by an entire people (a government "of the people" and "by the people"), that it is wasteful to use public funds to compensate private parties, or that government should be protected from the inconvenience and embarrassment of litigation.

All levels of government now allow themselves to be sued for some categories of activities. The statute permitting suits for wrongful acts of the federal government is the Federal Torts Claims Act, 28 U.S.C. §1346(b)(1), discussed in Coulthurst v.

United States. Most states have similar statutes. Municipalities traditionally have been immune from tort liability in connection with "governmental" activities and subject to tort liability in connection with their "proprietary" activities. Even when the government is not immune, it may still avoid liability if the plaintiff fails to establish the elements of the tort (such as duty, breach, cause, and damages).

The most notable exception to the Federal Tort Claims Act's authorization of suits against the government precludes suits based on *discretionary functions,* as set out in 28 U.S.C. §2680(a). State torts claims statutes usually have similar provisions. Courts are reluctant to decide whether policy decisions were properly made because of concern that too much judicial supervision would contradict the separation of powers constitutionally required among the legislative, executive, and judicial branches of government.

Coulthurst v. United States illustrates the modern two-part test for whether the discretionary function exemption applies to conduct of part of the federal government, the U.S. Bureau of Prisons. Carter v. Chesterfield County Health Commission examines the governmental/proprietary distinction for municipal immunity.

Statute: UNITED STATES AS A DEFENDANT

28 U.S.C. §1346(b)(1) (2002)

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Statute: LIABILITY OF THE UNITED STATES

28 U.S.C. §2674 (2002)

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Statute: EXCEPTIONS

28 U.S.C. §2680 (2002)

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise

or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer. . . .

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch. 1049, §13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

NOTES TO STATUTES

1. ***Negligent or Wrongful Acts.*** Because §1346 waives sovereign immunity only for a "negligent or wrongful act or omission," the U.S. government cannot be held liable under strict liability theories — theories that do not require proof of fault. For this reason, the Supreme Court in Laird v. Nelms, 406 U.S. 797 (1972), held that a property owner could not sue on a theory of strict liability for ultrahazardous activities for damage allegedly caused by sonic booms caused by military planes flying over North Carolina on a training mission.

2. ***Discretionary Function Exemption.*** The Supreme Court found, in §2680, an alternative basis for denying recovery on a strict liability theory in Laird v. Nelms. Section 2680(a) exempts the U.S. government from liability for acts based on the

performance of a discretionary function. While the manner in which an activity is carried out may subject the government to liability, the decision to engage in an activity may not, even if the activity is ultrahazardous.

COULTHURST v. UNITED STATES

214 F.3d 106 (2d Cir. 2000)

LEVAL, J. . . .

In October 1992, plaintiff was a federal prisoner, serving a felony sentence at FCI-Danbury. According to the allegations of his complaint, at approximately 7 p.m. on October 9, he was lifting weights in the prison exercise room, performing "pull downs" on a lateral pull-down machine. The cable connecting the steel pull-down bar to the weights snapped, bringing the bar down onto his shoulders and neck with approximately 270 pounds of force. As a result of the incident, he suffered a torn rotator cuff in his left shoulder and various injuries to his back and neck.

Guidelines promulgated by the Bureau of Prisons require prison officials to "visit the inmate wellness area (if there is one) and determine if the equipment is arranged in a safe manner and if participants use the equipment properly." The pertinent Guidelines contain no instructions as to the method to be followed in inspecting the machine that caused the injury or the frequency of inspections. The evidence placed before the court on the government's motion to dismiss included no information whether the person assigned to conduct the inspection received any instructions as to what procedures should be followed in conducting the inspection or as to frequency of inspection. Records introduced by the defendant included an inspection log bearing initials purporting to indicate that an inspection of the exercise room had been conducted two days prior to Coulthurst's injury.

The complaint seeks damages, alleging that Coulthurst's injuries were caused by the defendant's "negligence and carelessness" in that the defendant "failed to diligently and periodically inspect the weight equipment, and the cable" and "failed to replace the cable after undue wear and tear." Plaintiff's right to recover was premised on the Federal Tort Claims Act (FTCA), 28 U.S.C. §§1346(b), 2671 et seq. The defendant moved to dismiss for lack of subject matter jurisdiction on the ground that the [discretionary function exception (DFE)] barred recovery for the alleged conduct, even if government negligence could be established. The district court granted the defendant's motion and dismissed the case. . . .

Plaintiff appealed the dismissal to this court.

Under traditional principles of sovereign immunity, the United States is immune from suit except to the extent the government has waived its immunity. In 1946, Congress adopted the FTCA which, subject to numerous exceptions, waives the sovereign immunity of the federal government for claims based on the negligence of its employees. In relevant part, the FTCA, 28 U.S.C. §1346(b)(1), authorizes suits against the government to recover damages

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

A significant limitation on the waiver of immunity provided by the Act is the exception known as the DFE, 28 U.S.C. §2680(a), which provides that Congress's authorization to sue the United States for damages

> shall not apply to . . . any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of . . . an employee of the Government, whether or not the discretion involved be abused.

Over the last two decades, the Supreme Court has handed down a series of decisions clarifying the scope of the DFE. The Court's decisions in Berkovitz v. United States, 486 U.S. 531, 100 L. Ed. 2d 531, 108 S. Ct. 1954 (1988), and United States v. Gaubert, 499 U.S. 315, 113 L. Ed. 2d 335, 111 S. Ct. 1267 (1991), establish the framework for evaluating whether particular governmental conduct falls under the DFE. According to the *Berkovitz-Gaubert* test, the DFE bars suit only if two conditions are met: (1) the acts alleged to be negligent must be discretionary, in that they involve an "element of judgment or choice" and are not compelled by statute or regulation and (2) the judgment or choice in question must be grounded in "considerations of public policy" or susceptible to policy analysis.

In this case, the district court read the complaint to allege a deficiency in the scheduling and procedures for the inspection of the gym equipment. According to the district court's analysis, the acts alleged as negligent involved decisions establishing the procedures and frequency of inspection — decisions themselves involving elements of judgment or choice and a balancing of policy considerations (including inmate safety, providing sufficient recreational opportunities to inmates, and efficient resource allocation). The court therefore concluded that the government is shielded from liability for any negligence arising out of these decisions. As noted above, the relevant regulations do not mandate any particular course of inspection or the frequency of such inspections, and, thus, the officials at each prison are charged with making decisions about maintenance procedures and frequencies of inspection, balancing the relevant policy considerations in the process. The court thus concluded that both prongs of the *Gaubert* test were met as to these claims, and the court therefore lacked jurisdiction.

However, the complaint is susceptible to various readings. There are numerous potential ways in which an inspector's "carelessness" may have triggered the accident. The operative words of the complaint — "negligence and carelessness" in the "failure to diligently and periodically inspect the weight equipment and cable" — encompass the possibility of various different types of careless and negligent conduct. On the one hand, the person charged with designing inspection procedures might have designed procedures that were deficient in that an inspector following those procedures would be likely to overlook, or fail to appreciate, a latent danger resulting from a frayed or strained cable. Similarly, the person deciding how frequently the inspection should be conducted might be negligent in that reasonable precaution might require more frequent inspections than provided in the schedule. We assume that if the negligence or carelessness involved in the case were of those sorts, the United States would be shielded from suit by the DFE. These types of negligently made decisions would involve elements of judgment or choice, would not be compelled by statute or regulation, and would be grounded in considerations of public policy since they would involve choices motivated by considerations of economy, efficiency, and safety.

On the other hand, the complaint's allegations of negligence and carelessness in the failure to diligently and periodically inspect might also refer to a very different type

of negligence. For example, the official assigned to inspect the machine may in laziness or haste have failed to do the inspection he claimed (by his initials in the log) to have performed; the official may have been distracted or inattentive, and thus failed to notice the frayed cable; or he may have seen the frayed cable but been too lazy to make the repairs or deal with the paperwork involved in reporting the damage. Such negligent acts neither involve an element of judgment or choice within the meaning of *Gaubert* nor are grounded in considerations of governmental policy.

All of the foregoing possibilities are fairly alleged by the complaint's allegations that the responsible officers "failed to diligently and periodically inspect the weight equipment" and "failed to replace the cable after undue wear and tear." The complaint was broad enough to cover both the types of negligence that are covered by the DFE and thus cannot be the basis of suit, and the types of negligence that fall outside the DFE. We therefore think the district court erred in assuming that the negligence alleged in the complaint involved only discretionary functions. For the reasons further developed below, we believe that if the inspector failed to perform a diligent inspection out of laziness or was carelessly inattentive, the DFE does not shield the United States from liability.

We acknowledge that the text of the DFE is somewhat ambiguous, and conceivably could be interpreted to bar damage suits based on any actions or decisions that are not directly controlled by statute or regulation. In particular, it is unclear what weight to give to the concluding phrase of the DFE, which asserts that the exception is applicable "whether or not the discretion involved be abused." 28 U.S.C. §2680(a). Reading the words out of context, one might characterize an official's lazy or careless failure to perform his or her discretionary duties with due care as an "abuse of discretion." Reading the statute in this fashion, however, would lead to absurd results. For example, the driver of a mail truck undoubtedly exercises discretion in the manner of driving and makes innumerable judgment calls in the course of making his or her deliveries. In some manner of speaking, therefore, one might characterize it as an "abuse of discretion" for that driver to fail to step on the brake when a pedestrian steps in front of the car, to fail to signal before turning, or to drive 80 miles per hour in a 35 mile per hour zone. Such a characterization, however, would effectively shield almost all government negligence from suit, because almost every act involves some modicum of discretion regarding the manner in which one carries it out. Such a result is not required by the language of the DFE and would undercut the policy aims at the heart of the FTCA. We therefore would be reluctant to adopt that reading of the statute if that question had never before been considered.

In our view, furthermore, such a reading of the statute is foreclosed by a half-century of caselaw interpreting the DFE. As *Gaubert* and *Berkovitz* make clear, the prevailing test for the application of the DFE is two-pronged. It is not enough to establish that an activity is not mandated by statute and involves some element of judgment or choice; to obtain dismissal of the suit, the United States must also establish that the decision in question was grounded in considerations of public policy.

As the Court noted in *Gaubert*, "There are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish." The *Gaubert* court explicitly offered the example of a government official negligently driving a car while on official

business as a discretionary act that clearly falls outside the DFE because the negligence in question cannot be said to be based on policy considerations. Supreme Court and Second Circuit caselaw provide other examples. See, e.g., Indian Towing Co. v. United States, 350 U.S. 61, 68-69, 100 L. Ed. 48, 76 S. Ct. 122 (1955) (careless maintenance of a lighthouse triggers liability); Andrulonis v. United States, 952 F.2d 652, 655 (2d Cir. 1991) (careless failure of government scientist to maintain proper safety procedures and warn others of potential dangers); Caraballo v. United States, 830 F.2d 19, 22 (2d Cir. 1987) (negligent patrol of a beach).

Under various fair readings of the complaint, this case similarly involves negligence unrelated to any plausible policy objectives. An inspector's decision (motivated simply by laziness) to take a smoke break rather than inspect the machines, or an absent-minded or lazy failure to notify the appropriate authorities upon noticing the damaged cable, are examples of negligence fairly encompassed by the allegations of the complaint that do not involve "considerations of public policy." *Gaubert*, 499 U.S. at 323. Such actions do not reflect the kind of considered judgment "grounded in social, economic, and political policy" which the DFE is intended to shield from "judicial 'second-guessing.' " United States v. Varig Airlines, 467 U.S. 797, 814, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984). If the plaintiff can establish that negligence of this sort occurred, his claims are not barred by the DFE, and he is entitled to recover under the FTCA.

The district court dismissed Coulthurst's suit based on its interpretation of the complaint. For the reasons outlined above, we believe that the complaint fairly alleges negligence outside the scope of the DFE and that dismissal on the basis of the allegations of the complaint was inappropriate. We accordingly vacate the district court's dismissal and remand the case for further proceedings.

This does not necessarily mean that plaintiff is entitled to trial on the basis of an ambiguous complaint. The government may compel plaintiff, by interrogatories or otherwise, to declare what is the negligent conduct he alleges occurred and to reveal whatever evidence he relies on to show such negligence. If the plaintiff is unable to offer sufficient evidence to establish a triable issue of fact on any theory of negligence outside the scope of the DFE, then the United States will be entitled to judgment. Such a dismissal, however, cannot be justified given the ambiguous allegations of Coulthurst's complaint.

For the foregoing reasons, the judgment of the district court is vacated and the case is remanded for further proceedings.

NOTES TO COULTHURST v. UNITED STATES

1. ***Development of the Federal Tort Claims Act.*** Prior to the adoption of the FTCA, "private bills" passed by Congress allowed particular individuals to seek tort damages from the federal government for specific injuries. The demand for such bills increased over time. Finally, in 1946, the FTCA was adopted, eliminating the need for individual legislation favoring selected tort plaintiffs.

2. ***Procedural Protections.*** The discretionary function exemption represents a choice to prohibit recovery for injuries related to certain types of governmental conduct. For cases where the FTCA does allow recovery, the statute includes a variety of provisions to discourage excessive litigation or excessive damages. Cases must be tried in federal, not state, court. Cases are tried to a judge, not a jury. Contingent fees for the

plaintiff's lawyer are limited, with federal criminal sanctions for collection of fees that exceed the limits. See 28 U.S.C. §§1402, 2402, and 2678.

3. ***State Tort Claims Acts.*** Most states have statutes defining state immunity from tort liability. The Federal Tort Claims Act generally allows plaintiffs to assert tort causes of action against the federal government but provides a number of exceptions to that permission. Some state statutes take an opposite approach: They describe sovereign immunity as the general rule but define particular circumstances in which that immunity will be waived. For state statutes of this type, common circumstances in which tort liability is allowed include injuries associated with the operation of motor vehicles or the maintenance of buildings or of equipment.

4. ***Problem: Discretionary Functions.*** On June 7, 1984, Musick was cutting timber in a wooded, mountainous area of Scott County, Virginia. The trees in this area were approximately 50 to 60 feet tall. As he stood under a hickory tree, a U.S. Air Force RF-4 reconnaissance plane flew over him at such a low altitude that the turbulence from its wake caused a large limb from the tree to fall on and severely injure him. The trees over which the plane flew swayed from its passing, and the plane was banking at an approximate 90 degree angle at an altitude of 200 feet when it passed over Musick. The jet that caused the limb to fall on Musick was engaged in a training mission as part of a reconnaissance squadron stationed at Shaw Air Force Base in South Carolina. On the date of the accident, a Department of Defense flight information publication (Flip) was in effect that required pilots to fly at least 100 feet above ground level. A squadron policy in effect at the time of the accident required pilots to fly at an altitude of at least 300 feet. Musick sued the U.S. government for his injuries. Would the discretionary function exception preclude the plaintiff's cause of action? See Musick v. United States of America, 768 F. Supp. 183 (W.D. Va. 1991).

5. ***Problem: State Immunity Provisions.*** New Mexico's Tort Claims Act provides that there is no immunity from "liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building, public park, machinery, equipment or furnishings." N.M. Stat. §41-4-6. Should the statute be interpreted to allow liability based on the following claims?

A. Swimming pool injury that could have been avoided if more trained lifeguards had been on duty.

B. Injury to a student during a fight in a school that could have been avoided with better supervision.

C. Injury to a prison inmate that could have been avoided if prison officials had segregated prisoners who were known to be dangerous gang members.

See Upton v. Clovis Municipal School District, 115 P.3d 795 (N.M. App. 2005) (discussing these and other related cases).

Perspective: Competencies of Branches of Government

The doctrine of separation of powers may provide principled guidance for deciding what acts of the executive branch of the government are subject to judicial

scrutiny. The following excerpt focuses on the relative competencies of the judicial, executive, and legislative branches:

> Courts are ill-equipped to balance the various concerns necessary in formulating governmental policy or to make decisions about the most efficient allocation of resources. The courtroom processes are better suited to the application of a principle to a given set of facts rather than to the formulation of policy for major governmental undertakings that affect a multitude of people in a wide variety of situations across the country. Such decisions frequently require technical expertise in a variety of disciplines. The judiciary usually cannot consistently attain the desired depth of knowledge in any field because of the wide variety of cases that must be heard. . . .
>
> Scarce manpower and financial resources accentuate the judiciary's inability to make the best policy decisions. Because a court is constrained by the facts of the case before it, it may too easily render a decision without full appreciation of the consequences. An apparently just result in one case may have an adverse impact on a larger scale. . . . A court simply does not have the depth of expertise and sufficient data before it to evaluate effectively all of the countervailing considerations. For example, consideration of the other regulatory functions that an agency must perform, may not be properly before a court when it applies a principle of law to the facts of the case. To avoid the danger that far-reaching policy decisions will be made by courts, discretionary-policy decisions should be immune from scrutiny in the courtroom.

Donald S. Ingraham, *The Suits in Admiralty Act and the Implied Discretionary Function*, 1982 Duke L.J. 146, 163-164 (1982).

To what extent do judicial decisions reflect concern about the balance of powers between the branches of government and to what extent do they reflect the relative competencies of those branches?

CARTER v. CHESTERFIELD COUNTY HEALTH COMMISSION

527 S.E.2d 783 (Va. 2000)

LACY, J.

In this appeal, we consider whether the trial court properly concluded that a county health commission was immune from tort liability because it was entitled to the status of a municipal corporation and was performing a governmental function in the operation of a nursing home.

Vance W. Carter, Jr., Administrator of the Estate of Vance W. Carter, Sr., (the Administrator) filed a motion for judgment against the Chesterfield County Health Commission, d/b/a Lucy Corr Nursing Home, (the Commission) and others alleging that negligent acts of the Commission's employees in treating or failing to treat the decedent resulted in his death. The Commission filed a special plea of sovereign immunity. Based on the pleadings, memoranda, and argument of counsel, the trial court ruled that the operation of the nursing home by the Commission was a governmental function and, therefore, entitled to sovereign immunity. The trial court dismissed the Administrator's claim against the Commission and granted the Administrator's motions to non-suit the remaining defendants. We awarded the Administrator an appeal.

The Commission is a political subdivision created by a locality pursuant to statutory authorization. We have held that such entities may be entitled to the status of a municipal corporation for purposes of immunity from tort liability in certain circumstances. The parties generally agree that the Commission is entitled to the status of a municipal corporation.

Municipal corporations are immune from tort liability when performing governmental functions, but are not immune when exercising proprietary functions. The principles to be applied in determining whether a municipality is engaged in a proprietary or governmental function for purposes of immunity are well established. A function is considered governmental if it is the exercise of an entity's political, discretionary, or legislative authority. If the function is a ministerial act, "assumed in consideration of the privileges conferred by . . . charter," and involves no discretion, it is proprietary. . . .

Although the principles for differentiating governmental and proprietary functions are easily recited, as we have often noted, application of these principles "has occasioned much difficulty." Generally speaking, when the allegedly negligent act is one involving the maintenance or operation of the service being provided, the function is deemed to be proprietary. Thus, a housing authority was not entitled to immunity because the alleged negligence — the location, installation, and maintenance of an electric "switching point box" — was part of the operation and maintenance of the housing project and therefore involved a proprietary function of the housing authority. [Virginia Elec. and Power Co. v. Hampton Redevelopment and Housing Authority, 225 S.E.2d 364 (Va. 1976)].

In contrast, we have held that municipalities are immune from tort liability based on allegations of negligence in the design of roads or streets or in the provision of hospital, ambulance, garbage, and emergency street clearing services. The allegations of negligence in those cases involved acts performed in conjunction with the direct provision of the governmental service. We variously described the functions at issue as exercises of a municipality's discretion, activities undertaken for the common good, or in the interest of public health and safety, and exercises of powers "delegated or imposed" upon the municipality.

The Administrator argues that the operation of the nursing home in this case is a proprietary function because fees were charged, the nursing home was not available for the benefit of all Chesterfield residents but "only a select few" (as well as non-Chesterfield County residents), the same service was available from private vendors, the nursing home chiefly served the poor rather than a general public need, and [it] was "designed to privatize the County's nursing home business." These factors, as the Administrator correctly contends, were identified in Hampton Redevelopment as indicia of a proprietary function. However, . . . these factors did not create a new test and were not contested matters in that case.

More importantly, many of these same characteristics were raised and rejected as relevant indicia of proprietary functions in a subsequent case. In Edwards [v. City of Portsmouth, 237 Va. 167, 375 S.E.2d 747 (Va. 1989)], the appellant argued that the City-provided emergency ambulance service was a proprietary function because such service was not needed for the health, safety, and welfare of the City, fees were charged for the service, the service benefited only those who chose to use and pay for it rather than the general public, and the City was not the only provider of emergency