

## ASSUMPTION OF RISK IN CONSUMER CONTRACTS AND THE DISTRACTION OF UNCONSCIONABILITY

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*For years, courts have struggled to determine when to enforce exculpatory clauses that would prevent personal injury victims from availing themselves of tort remedies under the doctrine of express assumption of risk. In the past, when courts declined to enforce these clauses, they did so on the ground that enforcing such a waiver for the activities in question was “against public policy.” Recently, however, many courts have addressed the issue through the contract doctrine of “unconscionability.” This change in focus has subtly but importantly altered the enforceability inquiry by emphasizing the conditions under which the plaintiff agreed to the contract, rather than broader policy considerations concerning regulation of defendants’ activities. In doing so, this shift has increased, rather than diminished, the tortfeasor’s chance of escaping liability. As a result, today, risk-generating, repeat-player defendants are increasingly able to avoid responsibility for negligently causing injuries by pointing to boilerplate consumer releases of liability.*

*This Article argues that unconscionability doctrine should be kept out of the law of express assumption of risk—that its importation into tort law is wrong both as a matter of doctrinal analysis and as a matter of policy. It asserts that courts should instead focus on the regulatory role that tort law plays in helping to ensure and promote the safety of consumers and having a right to sue for redress. This view is supported by the history and the evolution of the assumption of risk defense in the United States, and the similar approaches of other common law and civil law systems.*

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## INTRODUCTION

Gina Stelluti, a thirty-nine-year-old uninsured waitress, became a member of Powerhouse Gym facilities in New Jersey by signing several

papers, including the mandatory waiver and release form.<sup>1</sup> She immediately proceeded to the gym's spinning class and informed the instructor that she had no experience for this activity.<sup>2</sup> The instructor helped her settle on the bicycle seat and told her to follow her instructions.<sup>3</sup> Shortly after the class began, Gina's bicycle handlebars suddenly detached, causing her to fall and seriously injure herself.<sup>4</sup> Three years later, she continued to suffer from the injuries of the incident.<sup>5</sup> Physical education experts concluded that the accident occurred because the instructor carelessly forgot to make certain that the bicycle's handlebars were secured.<sup>6</sup>

Stelluti filed a lawsuit for damages against the gym, alleging that it had negligently failed to secure the handlebars to the bicycle before providing it to a customer.<sup>7</sup> Based on Stelluti's signed written release, however, the trial court entered summary judgment for the defendant and the appellate court affirmed.<sup>8</sup> She then appealed to the Supreme Court of New Jersey<sup>9</sup> and argued that the agreement was an unconscionable contract of adhesion.<sup>10</sup> Stelluti further claimed that it was "contrary to public policy to allow an exculpatory agreement to be applied in the instant context."<sup>11</sup>

The Supreme Court of New Jersey—over a vigorous dissent by Justice Albin—affirmed summary judgment and held that the Powerhouse Gym was entitled to have the customer's liability waiver upheld.<sup>12</sup> It concluded that, while exculpatory clauses aiming to release defendants from gross negligence may be held void as against public policy, contracts that exculpate one party's ordinary negligence in the context of recreational activities are enforceable.<sup>13</sup>

*Stelluti* is not an isolated case. It is quite a typical application of what tort scholars often categorize as "express assumption of risk" doctrine. Courts often fail to distinguish a *contractual waiver of rights to sue defense* from an *express assumption of risk defense* and

1 *Stelluti v. Casapenn Enters.*, 1 A.3d 678, 696 (N.J. 2010) (Albin, J., dissenting).

2 *Id.*

3 *Id.* at 683 (majority opinion).

4 *Id.* at 696 (Albin, J., dissenting).

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.* at 687 (majority opinion).

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.* at 681–82.

13 *Id.* at 689–90. The holding was qualified by the condition that statutorily imposed duty cannot be contracted away. *Id.*

overwhelmingly describe exculpatory clauses as “disfavored.” However, to some extent, the “disfavored” status simply means the clause shall be construed against the party seeking to escape liability. Nevertheless, their analysis results in pro-defendant outcomes. Today’s courts typically ask whether the exculpatory clause that a plaintiff signed was unconscionable. This means not only that it must be a contract of adhesion, but also that it must meet a very high threshold of substantive unfairness. If not, the court will probably enforce the exculpatory clause, and the plaintiff is out of luck.

Things were not always so. In 1963, the Supreme Court of California invalidated an exculpatory clause in *Tunkl v. Regents of the University of California*,<sup>14</sup> and it did so without mentioning the word “unconscionability.” To be sure, the contract of adhesion quality of the contract was important to the court’s analysis. However, “contract of adhesion” was but one facet of the case. The *Tunkl* court wanted future courts to examine whether the activity was one that affected the public interest to a substantial degree. It recognized that the enforcement of such clauses for such activities would have the problematic policy consequence of removing the state from the realm of regulating such activities, and the protection of physical well-being that came with it.<sup>15</sup>

Despite the historical background, as this Article explains, plaintiffs are now unable to recover damages in similar cases where recreational activities have resulted in bodily injury. How surprising it is, then, to see so little discussion in academia or the press of an entire area of consumer contract law—the law concerning when consumers have lost their rights to sue for personal injury from negligent conduct because of a boilerplate exculpatory clause they signed prior to engaging in the activity.<sup>16</sup> This Article aims to fill the scholarly gap by depicting the courts’ misguided treatment of exculpatory agreements.

*Stelluti* is emblematic of the central theme of the paper. This Article contends that the Supreme Court of New Jersey was right to

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<sup>14</sup> *Tunkl v. Regents of the Univ. of Cal.*, 383 P.2d 441 (Cal. 1963) (en banc).

<sup>15</sup> See *infra* Part I.

<sup>16</sup> To be clear, there is a wide range of scholarship on boilerplate contract. However, this Article departs from the mainstream narrative by focusing on the impact of boilerplate waivers on the tort law assumption of risk defense and the consumer’s right to sue for personal injury. On criticism of boilerplate contracts, see generally MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013); Blake D. Morant, *Contracts Limiting Liability: A Paradox with Tacit Solutions*, 69 TUL. L. REV. 715 (1995); Gregory Klass, *Boilerplate and Party Intent*, 82 LAW & CONTEMP. PROBS. 105 (2019); Aditi Bagchi, *Risk-Averse Contract Interpretation*, 82 LAW & CONTEMP. PROBS. 1 (2019); Amanda Greer, *Extreme Sports and Extreme Liability: The Effect of Waivers of Liability in Extreme Sports*, 9 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 81 (2012); Emily Strauss, *Crisis Construction in Contract Boilerplate*, 82 LAW & CONTEMP. PROBS. 163 (2019).

reject the plaintiff's unconscionability argument, but should have ruled in her favor nonetheless. That is because unconscionability is not the only, nor even the principal reason for striking down exculpatory clauses, and it never really has been. The main reason, this Article argues, is the public policy of ensuring that states, through tort law, can safeguard the health and safety of their citizens, and empower them to vindicate their rights against being injured through negligent or otherwise wrongful conduct.

This Article proceeds as follows: Part I takes a closer look at the origins of exculpatory clauses, the assumption of risk defense, and the legacy of *Tunkl*. It illustrates the shift from tort law's consumer protection agenda to a contractually created liability-free world in the domain of recreational activities.

Part II examines the role of unconscionability doctrine in this shift. The high bar to satisfy unconscionability evidently resulted in more pro-defendant outcomes in cases that involved exculpatory clauses. This approach arrives at a set of results that are inconsistent with the goals of tort law and are not defensible by reference to core values of contract law, either.

As detailed in Part III, courts have understandably been more inclined to respect express assumption of risk defenses—and with them, exculpatory clauses—as the strength of implied assumption of risk defenses has waned.

Part IV puts things into comparative perspective, considering the common law in England and Wales and the civil law in France. Despite the differences, the two have similar approaches in their intolerance for waivers of bodily injuries caused by negligence, leaving U.S. tort law an outlier.

Part V offers a normative defense of this Article's proposed approach to exculpatory clauses. It argues that the policies underscored by unconscionability doctrine, such as duress and prevention of oppression, should not be the major focus when examining waivers of personal injury liability. Courts should instead focus on the regulatory role of the states to ensure and promote consumer safety both in nonrecreational and recreational settings. They should take stock of the inherent riskiness of the activity the express statement acknowledges and the fact that there was acknowledgment. But liability should remain for negligent conduct beyond those intrinsic risks. While it can sometimes be a challenge to identify those areas where tort law's regulatory function is especially important, products liability law and law regulating public utilities will provide significant guidance going forward.

## I. TUNKL AND PUBLIC POLICY

A. *Origins and Evolution*

An exculpatory clause consists of a signatory agreeing “in advance of the occasion of her injury to waive the right she would otherwise enjoy to sue the defendant for negligence should the defendant carelessly injure her.”<sup>17</sup> They are sometimes simply known as “contractual releases” or “contractual waivers of liability.”<sup>18</sup>

When a party to a contract containing such a clause suffers an injury at the hands of the other party, and sues the other party in tort, the relevance of the clause will typically be addressed through application of the tort defense of “express assumption of risk.”<sup>19</sup> Some scholars have defined assumption of risk as “an expression of a contractual idea within the law of torts.”<sup>20</sup>

Despite these scholars’ categorization, it is crucial to note the fundamental difference between express assumption of risk and exculpatory clauses. The defense of assumption of risk is an important tool in tort law. “It permits our legal system to finesse the often difficult question of whether the risk is wrongful by making it clear in advance that the plaintiff will not be able to hold the defendant accountable for the ripening of the risk into an injury.”<sup>21</sup> Exculpatory clauses, however, are not *just* about assumed risks; you are not only assuming the risk to an activity, you are also waiving your right to sue. Therefore, exculpatory clauses are a form of release from liability and the right to sue. This multidimensional nature of exculpatory clauses has led to disagreements in choosing the most apt analytical framework.

Reviewing the rise of the public policy argument is also necessary in understanding the complexity of exculpatory clauses. The U.S. courts of the nineteenth century had “inherited the concept of extreme

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<sup>17</sup> JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* 184 (Dennis Patterson ed., 2010).

<sup>18</sup> RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 2 cmt. a (AM. L. INST. 2000) (explaining the decision to change the nomenclature from “express assumption of risk” to “contractual limitations on liability” to refer more directly to contract law on issues of validity and construction”).

<sup>19</sup> Other English-speaking legal systems may use different terms to describe this provision. The English, for example, use the phrase “exclusion clauses” more commonly in lieu of exculpatory clause.

<sup>20</sup> Dilan A. Esper & Gregory C. Keating, *Abusing “Duty,”* 79 S. CAL. L. REV. 265, 290 (2006).

<sup>21</sup> Benjamin C. Zipursky, *Junk Food and Assumption of Risk*, JOTWELL (Mar. 24, 2016), <https://torts.jotwell.com/junk-food-and-assumption-of-risk> [<https://perma.cc/ZC3D-8WDX>] (reviewing Avihay Dorfman, *Assumption of Risk, After All*, 15 THEORETICAL INQUIRIES LAW 293 (2014)).

individualism of the early industrial revolution.”<sup>22</sup> Concerns about intense individualism and the need for enforceable standards were first raised in contracts of carriage of goods and carriage of passenger’s services, innkeepers, and later the liabilities of telegraph transmission companies,<sup>23</sup> all of which share the common thread of public calling.<sup>24</sup> There was “a general concurrence of view to the effect that obligations to those who are entitled to such [public services] cannot be reduced by any such stipulation.”<sup>25</sup>

The growth of industries and new activities required the recognition of affirmative duties of care, which constrained voluntary assumption of risk contracts.<sup>26</sup> Courts thus began to recognize public policy-based objections to certain exculpatory contracts. One of the prominent early cases was *Henningsen v. Bloomfield Motors, Inc.*<sup>27</sup> In this case, the plaintiff purchased a Chrysler from the defendant and signed a contract that expressly disavowed any warranties beyond the limited warranty contained in the contract.<sup>28</sup> Soon after the purchase, Ms. Henningsen was injured when the car’s steering wheel spun in her hands and she lost control.<sup>29</sup> The Henningsens sued.

The Supreme Court of New Jersey had to decide, among other things, whether the car was sold with an implied warranty of merchantability, and if so, what the effect of the disclaimer and limitation of liability clauses on the implied warranty would be. The court examined precedent from other jurisdictions and noted that,

[i]t is true that the rule governing the limitation of liability cases last referred to is generally applied in situations said to involve services of a public or semi-public nature. . . . But in recent times the books have not been barren of instances of its application in private contract controversies . . . .<sup>30</sup>

The court declared the manufacturer’s disclaimer of the implied warranty violative of public policy and void.<sup>31</sup>

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<sup>22</sup> Joe Greenhill, *Assumed Risk*, 20 SW. L.J. 1, 6 (1966).

<sup>23</sup> Emlin McClain, *Contractual Limitation of Liability for Negligence*, 28 HARV. L. REV. 550, 551, 561 (1915).

<sup>24</sup> *Id.* at 551.

<sup>25</sup> *Id.* at 564.

<sup>26</sup> The rise of worker dissatisfaction with the situation and the adoption of workers’ compensation law gave rise to comparative negligence statutes. *See infra* Part III.

<sup>27</sup> *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).

<sup>28</sup> *Id.* at 73–74.

<sup>29</sup> *Id.* at 75.

<sup>30</sup> *Id.* at 91–92.

<sup>31</sup> *Id.* at 97.

The tradition of declaring contractual provisions void as against public policy reached a focal point in the United States in 1963. And like many parts of American tort law, California played a key role. In *Tunkl v. Regents of the University of California*,<sup>32</sup> the Supreme Court of California designed a test for analyzing the validity of exculpatory clauses against the public policy of a state. Section B lays out the story of this prominent case.

### B. *Tunkl v. Regents of the University of California*

Hugo Tunkl checked into the University of California, Los Angeles Medical Center—a nonprofit charitable hospital operated by the Regents of the University of California.<sup>33</sup> UCLA Medical Center accepted patients whose conditions would provide a teaching experience for medical students enrolled in the university.<sup>34</sup>

When Tunkl arrived at the hospital he signed a document titled “Conditions of Admission.”<sup>35</sup> Little did Tunkl know, he was giving up his rights to any claim of negligence and medical malpractice. Over the course of his treatment, he suffered injuries and filed a lawsuit for malpractice. However, he passed away as a result of his injuries and his estate continued with the lawsuit.<sup>36</sup>

Tunkl’s case reached the Supreme Court of California, with Justice Tobriner writing for the unanimous court.<sup>37</sup> Justice Tobriner declared the exculpatory clause of the hospital void as against public policy under California’s Civil Code Section 1668.<sup>38</sup> He stated that although courts

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<sup>32</sup> *Tunkl v. Regents of the Univ. of Cal.*, 383 P.2d 441 (Cal. 1963) (en banc).

<sup>33</sup> *Id.* at 442.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 441.

<sup>38</sup> The California Civil Code has four main divisions: Division One: “Persons”; Division Two: “Property”; Division Three: “Obligations”; and Division Four: “General Provisions.” Division Three, which is dedicated to obligations, consists of four parts: “Obligations in General”; “Contracts”; “Obligations Imposed by Law”; and “Obligations Arising from Particular Transactions.” Part Two, which covers contracts, has five titles. Title four is on “unlawful contracts.” Section 1667 is titled “‘Unlawfulness’ Defined” and states: “That is not lawful which is: 1. Contrary to an express provision of law; 2. Contrary to the policy of express law, though not expressly prohibited; or, 3. Otherwise contrary to good morals.” Section 1668 is titled “Contracts Contrary to Policy of Law.” Note that section 1670.5 is about “Unconscionable contract or clause of contract; finding as matter of law; remedies.” This section was added in 1979. CAL. CIV. CODE §§ 1667, 1668, 1670.5 (West 2021). The Legislative Committee Comments for this section state:

have had different opinions about exculpatory clauses, what they all agree upon was the invalidity of such clauses when they are against the public interest.<sup>39</sup>

The court spelled out a six-factor test to determine transactions that involve public interest:

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.<sup>40</sup>

According to the court, examination of these factors has many functions, one of which is to ensure that the shift of liability through an exculpatory contract clause is done voluntarily and with acquiescence.<sup>41</sup> Additionally, the court believed the public policy of California had been to “allow or require that the risk shift to another party better or equally

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Section 1670.5 is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability. The basis test is whether, in the light of the general background and the needs of the particular case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subdivision (b) makes it clear that it is proper for the court to hear evidence upon these questions.

Civ. § 1670.5 cmt. 1 (West 1979).

<sup>39</sup> *Tunkl*, 383 P.2d at 442–43.

<sup>40</sup> *Id.* at 445–46 (footnotes omitted).

<sup>41</sup> *Id.*

able to bear it, not to shift the risk to the weak bargainer.”<sup>42</sup> The hospital-patient relationship in Mr. Tunkl’s case met the requirements of the test.<sup>43</sup> A hospital is an institution “suitable for, and a subject of, public regulation.”<sup>44</sup> The hospital is a necessity for the members of the public, and it also holds itself out as willing to offer its services to those who qualify for it.<sup>45</sup> There is also a disparate bargaining power in the hospital-patient relationship, with the hospital having an advantage.<sup>46</sup> The patient also put himself under the control of the hospital when he signed the contract.<sup>47</sup>

The *Tunkl* six-factor test helped many U.S. courts bring a degree of order to the potentially unruly public policy<sup>48</sup> doctrine.<sup>49</sup> Many jurisdictions adopted the *Tunkl* factors verbatim and ruled in favor of injured plaintiffs.<sup>50</sup> Many others were influenced by *Tunkl* and created their own version of a public policy test.<sup>51</sup>

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<sup>42</sup> *Id.* at 447. California had also abandoned charitable immunity earlier in *Malloy v. Fong*, 232 P.2d 241 (Cal. 1951). See *Tunkl*, 383 P.2d at 448.

<sup>43</sup> *Tunkl*, 383 P.2d at 447. The court also rejected the defendant’s argument that it was not vicariously liable for the negligent acts of its physicians, stating that the hospital is a corporation and precedent shows there is “no distinction between the corporation’s ‘own’ liability and vicarious liability resulting from negligence of agents.” *Id.* at 448.

<sup>44</sup> *Id.* at 447.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See generally *Richardson v. Mellish* [1824] 130 Eng. Rep. 294, 303 (noting that public policy “is a very unruly horse”).

<sup>49</sup> See Farshad Ghodoosi, *The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements*, 94 NEB. L. REV. 685, 695–98 (2016) (noting the historical unease of legal tradition in allowing public policy to serve as a factor to be considered in contracts analysis).

<sup>50</sup> See, e.g., *Morgan v. S. Cent. Bell Tel. Co.*, 466 So. 2d 107, 117 (Ala. 1985); *Banfield v. Louis*, 589 So. 2d 441, 446 (Fla. Dist. Ct. App. 1991); *Wagenblast v. Odessa Sch. Dist. No. 105-157-166J*, 758 P.2d 968, 972 (Wash. 1988) (en banc); *Kyriazis v. Univ. of W. Va.*, 450 S.E.2d 649, 654–55 (W. Va. 1994).

<sup>51</sup> See, e.g., *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981) (en banc) (developing a four-factor test to determine the validity of exculpatory clauses: “(1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language.”); *Hanks v. Powder Ridge Rest. Corp.*, 885 A.2d 734, 739, 744 (Conn. 2005) (the court adopted a totality of the circumstances test. It stated that while it is guided by the *Tunkl* factors, however, it is not limited to them and “is informed by any other factors that may be relevant given the factual circumstances of the case and current societal expectations.”); *Milligan v. Big Valley Corp.*, 754 P.2d 1063, 1066–67 (Wyo. 1988) (adopting Colorado’s four-factor test).

## II. FROM PUBLIC POLICY TO UNCONSCIONABILITY

Today, nevertheless, case outcomes are more similar to *Stelluti* than to *Tunkl*.<sup>52</sup> *Stelluti* mentioned the *Tunkl* factors as a guiding test in its analysis.<sup>53</sup> However, it upheld the exculpatory clause.<sup>54</sup> Courts seem to have become dismissive of the core elements and the backdrop of *Tunkl*, one which was built upon a tradition of holding the responsible and negligent party accountable. Once courts begin dismissing the presence of any unconscionability factor, it becomes difficult to declare the exculpatory clause void as against public policy.<sup>55</sup>

To satisfy the judges, many courts are emphasizing a need to show “reckless conduct or gross negligence” to strike down an exculpatory clause.<sup>56</sup> For some judges, even gross negligence is up for grabs.<sup>57</sup> Moreover, like in *Stelluti*, the necessity factor of the *Tunkl* test has become the focal point that engenders a dismissive attitude towards bodily injuries resulting from clear negligence of the defendant.<sup>58</sup>

<sup>52</sup> See *infra* Part II.

<sup>53</sup> *Stelluti v. Casapenn Enters.*, 1 A.3d 678, 689 (N.J. 2010).

<sup>54</sup> The court in *Stelluti* recalled New Jersey’s public policy of exculpatory clauses as one which will enforce the clause if “(1) it does not adversely affect the public interest; (2) the exculpated party is not under a legal duty to perform; (3) it does not involve a public utility or common carrier; or (4) the contract does not grow out of unequal bargaining power or is otherwise unconscionable.” *Id.* at 686 (quoting *Gershon v. Regency Diving Ctr., Inc.*, 845 A.2d 720, 727 (N.J. Super. Ct. App. Div. 2004)).

<sup>55</sup> For additional examples of cases involving exculpatory clauses with similar unsuccessful unconscionability defenses to waivers in recreational activity, see, e.g., *Beaver v. Grand Prix Karting Ass’n, Inc.*, 246 F.3d 905, 910 (7th Cir. 2001) (go-kart racer who was injured during a race brought suit but had signed a release and the court ruled that the release was not unconscionable); *Hall v. Woodland Lake Leisure Resort Club, Inc.*, No. 97CA945, 1998 WL 729197, at \*8 (Ohio Ct. App. Oct. 15, 1998) (Bill and Kim Hall sued a club, but the court rejected the unconscionability claim for the membership contract that contained a release).

<sup>56</sup> See, e.g., *Zavras v. Capeway Rovers Motorcycle Club, Inc.*, 687 N.E.2d 1263, 1265 (Mass. App. Ct. 1997) (noting that releases are effective against ordinary negligence); *Boyce v. West*, 862 P.2d 592, 597 (Wash. Ct. App. 1993) (noting that “the plaintiff must establish gross negligence affirmatively to avoid enforcement of the release”); *Wade v. Watson*, 527 F. Supp. 1049, 1052 (N.D. Ga. 1981) (stating that under Georgia law “one may exculpate himself for liability for his own simple negligence, but not for gross negligence”), *aff’d*, 731 F.2d 890 (11th Cir. 1984).

<sup>57</sup> *City of Santa Barbara v. Superior Ct.*, 161 P.3d 1095, 1128–29 (Cal. 2007) (Baxter, J., dissenting) (in his dissent, Justice Baxter wrote in favor of upholding exculpatory clauses that also aim to cover gross negligence in recreational activities).

<sup>58</sup> See, e.g., *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 925–26 (Minn. 1982) (after discussing *Tunkl*, the court notes that spa is a non-essential activity and cites to similar cases: *Barker v. Colo. Region-Sports Car Club of Am., Inc.*, 532 P.2d 372 (Colo. App. 1974); *Ciofalo v. Vic Tanney Gyms, Inc.*, 214 N.Y.S.2d 99 (N.Y. App. Div. 1961), *aff’d*, 177 N.E.2d 925 (N.Y. 1961); *Jones v. Dressel*, 623 P.2d 370 (Colo. 1981) (en banc)); *Empress Health & Beauty Spa v. Turner*,

What follows discusses the impact of unconscionability among different jurisdictions in more detail. Section A introduces the doctrine of unconscionability. Section B reviews judicial decisions which demonstrate the influence of courts' increased focus on unconscionability in analyzing exculpatory clauses.

### A. *Unconscionability*

Unconscionability doctrine has been around for a long time.<sup>59</sup> First in courts of equity,<sup>60</sup> primarily as a defense against specific performance,<sup>61</sup> and later in courts of law, courts could “set aside a contract if ‘in conscience’ it should not be binding.”<sup>62</sup> Unconscionability, in addition to duress and fraud, aimed to “alleviate the harshness” of certain contracts.<sup>63</sup> In *Campbell Soup Co. v. Wentz*,<sup>64</sup> the court labeled a contract as unconscionable because “the sum total of its provisions drives too hard a bargain for a court of conscience to assist.”<sup>65</sup> Yet, there was no clear formula for determining what constitutes an unconscionable contract.

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503 S.W.2d 188 (Tenn. 1973); *Moss v. Fortune*, 340 S.W.2d 902 (Tenn. 1960)). In *Stelluti*, for example, the court noted that the patron:

[C]ould have taken her business to another fitness club, could have found another means of exercise aside from joining a private gym, or could have thought about it and even sought advice before signing up and using the facility's equipment. No time limitation was imposed on her ability to review and consider whether to sign the agreement. In sum, although the terms of the agreement were presented “as is” to *Stelluti*, rendering this a fairly typical adhesion contract in its procedural aspects, we hold that the agreement was not void based on any notion of procedural unconscionability.

*Stelluti*, 1 A.3d at 688.

<sup>59</sup> IAN AYRES & GREGORY KLASS, *STUDIES IN CONTRACT LAW* 561 (9th ed. 2017) (citing to *Earl of Chesterfield v. Janssen* [1750] 28 Eng. Rep. 82 (quoted in *Hume v. United States*, 132 U.S. 406, 411 (1889))).

<sup>60</sup> JOSEPH M. PERILLO, *CALAMARI AND PERILLO ON CONTRACTS* 332 (6th ed. 2009).

<sup>61</sup> Jane P. Mallor, *Unconscionability in Contracts Between Merchants*, 40 SW. L.J. 1065, 1065 n.3 (1986).

<sup>62</sup> M. Neil Browne & Lauren Biksacky, *Unconscionability and the Contingent Assumptions of Contract Theory*, 2013 MICH. ST. L. REV. 211, 216 (quoting Donald R. Price, *The Conscience of Judge and Jury: Statutory Unconscionability as a Mixed Question of Law and Fact*, 54 TEMP. L.Q. 743, 744 n.3 (1981)).

<sup>63</sup> Browne & Biksacky, *supra* note 62, at 226.

<sup>64</sup> *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948).

<sup>65</sup> *Id.* at 84.

The unconscionability defense we know today dates back to the Uniform Commercial Code (U.C.C.).<sup>66</sup> The U.C.C. devoted a section to “unconscionable contract or clause,”<sup>67</sup> and gave courts of law explicit authorization to rule a contract void as unconscionable.<sup>68</sup> It did not define unconscionability. Borrowing the U.C.C. terminology,<sup>69</sup> many jurisdictions look for “oppression” and “unfair surprises”<sup>70</sup> to determine unconscionability. For example, the D.C. Circuit Court in *Williams v. Walker-Thomas Furniture Co.*<sup>71</sup> defined unconscionability as “an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”<sup>72</sup> In many cases, it becomes evident that “[t]he equitable roots of unconscionability reflect a traditional concern for relatively weaker parties that are more likely to be taken advantage of in the bargaining process.”<sup>73</sup>

After the enactment of the U.C.C. in several states in the United States, commentators divided unconscionability doctrine into

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<sup>66</sup> U.C.C. § 2-302 (1952) (amended 1977) (AM. L. INST. & UNIF. L. COMM’N 1977); see AYRES & KLASS, *supra* note 59, at 561; see also RESTATEMENT (SECOND) OF CONTS. § 208 reporter’s note cmt. a (AM. L. INST. 1981) (stating despite the applicability of U.C.C. to sales of goods, the unconscionability doctrine covered by U.C.C. has proven to have influence over non-sale of good contracts as well. The influence has “either by analogy or because it was felt to embody a generally accepted social attitude of fairness go[ne] beyond its statutory application to sales of goods.” (citing to cases such as *Seabrook v. Commuter Hous. Co.*, 338 N.Y.S.2d 67 (N.Y. Civ. Ct. 1972) (apartment lease); *C & J Fertilizer, Inc. v. Allied Mut. Ins.*, 227 N.W.2d 169, 179–81 (Iowa 1975) (construction of insurance policy); *Albert Merrill Sch. v. Godoy*, 357 N.Y.S.2d 378, 381 (N.Y. Civ. Ct. 1974) (citing *David v. Mfrs. Hanover Trust Co.*, 287 N.Y.S.2d 503 (N.Y. Civ. Ct. 1968) (a jury trial waiver clause), *rev’d by* 287 N.Y.S.2d 503 (N.Y. App. Term 1969))).

<sup>67</sup> U.C.C. § 2-302 (providing: “(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.”).

<sup>68</sup> *Browne & Biksacky*, *supra* note 62, at 217.

<sup>69</sup> U.C.C. § 2-302 cmt. 1.

<sup>70</sup> See, e.g., *Zapatha v. Dairy Mart, Inc.*, 408 N.E.2d 1370, 1375 (Mass. 1980).

<sup>71</sup> *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

<sup>72</sup> *Id.* at 449.

<sup>73</sup> Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 480 (1995) (noting also, however, that “[a]lthough some early drafts of Section 2-302 excluded merchants from its protection, the text of the Section does not limit its application to nonmerchants, and several cases cited in the Official Comments involve transactions between merchants. Moreover, U.C.C. provisions other than Section 2-302 contemplate the possible application of the unconscionability doctrine in favor of merchants.” (footnotes omitted)); see also Mallor, *supra* note 61.

substantive and procedural components.<sup>74</sup> There are a variety of views on what may constitute “substantive” or “procedural” unconscionability. Procedural deficiencies can include discussions of “deception or a refusal to bargain over contract terms,” or lack of meaningful choice.<sup>75</sup> Substantive elements may include issues such as fine print or harsh terms.<sup>76</sup> Today, some jurisdictions require the presence of both categories for a contract to be unconscionable.<sup>77</sup>

Despite unconscionability’s pro-consumer tendencies, the number of successful unconscionability claims has not increased over time.<sup>78</sup> The threshold to demonstrate that a contract is unconscionable has historically been high.<sup>79</sup> Prior to the U.C.C., courts would rule a contract unconscionable if it amounted to a contract which “no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept on the other.”<sup>80</sup> Although the U.C.C. normalized the discussion of unconscionability, courts remain wary in finding unconscionability,<sup>81</sup> for fear of excessively policing and interfering with freedom of contract.<sup>82</sup>

As the next section illustrates, some defense lawyers comfortably used an unconscionability framework to present what ought to have been public policy-based issues. Courts accepted both the

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<sup>74</sup> Arthur Allen Leff, *Unconscionability and the Code—the Emperor’s New Clause*, 115 U. PA. L. REV. 485 (1967) (famously introducing the nomenclature of substantive and procedural unconscionability to contract law scholarship).

<sup>75</sup> 8 WILLISTON ON CONTRACTS § 18:10 (4th ed. 1993).

<sup>76</sup> *Id.*

<sup>77</sup> See, e.g., *Alexander v. Anthony Int’l, L.P.*, 341 F.3d 256, 265 (3d Cir. 2003) (noting that unconscionability requires a two-fold test comprising both procedural and substantive elements).

<sup>78</sup> Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1100–01 (2006).

<sup>79</sup> See PERILLO, *supra* note 60, at 334 (noting that before the U.C.C., courts barely relied on the unconscionability defense).

<sup>80</sup> *Hume v. United States*, 132 U.S. 406, 406 (1889) (quoting BOUVIER’S LAW DICTIONARY (defining unconscionable bargain)).

<sup>81</sup> See, e.g., *Browne & Biksacky*, *supra* note 62, at 250 (noting that even in cases where unconscionability factors seemed present, courts preferred to rule against unconscionability and “implicitly evoke Adam Smith’s laissez-faire statement: ‘Every man, [so] long as he does not violate the laws of justice, is left perfectly free to pursue his own interest [in] his own way,’ or John Stuart Mill’s anti-paternalistic statement: ‘[T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.’” (footnote omitted) (alterations in original)).

<sup>82</sup> Mallor, *supra* note 61, at 1068 (explaining that “[c]lassical contract law defined courts’ roles in policing contracts relatively narrowly, however. Because of its emphasis on certainty and freedom to contract, classical contract law refrained from over consideration of the fairness of a contract unless one of the recognized abuses was present or unless a court found that the enforcement of the contract would violate public policy.” (footnote omitted)).

unconscionability framing and the highly pro-defendant set of consequences that flowed from it. This was especially notable in cases involving plaintiffs injured in recreational activities suing those who negligently provided such activities, where exculpatory clauses are now routinely enforced in a stunningly broad range of cases.

B. *Recasting Public Policy Limits on Exculpatory Clauses in Terms of Unconscionability*

The following caselaw from across the United States provides insight into courts' contemporary analysis when the unconscionability doctrine and its policies become central to the examination of exculpatory clauses that waive liability against physical injury in non-essential activities.<sup>83</sup> This section illustrates that unconscionability defense and analyzing the contractual power of each party can make courts miss the policy concerns they should be considering in deciding the validity of exculpatory clauses.

In *Avant v. Community Hospital*,<sup>84</sup> for example, the plaintiff alleged that “negligent design and implementation of a fitness program by a Fitness Pointe employee”<sup>85</sup> caused him serious injuries. He filed the lawsuit against the health club, owned and operated by Community Hospital. However, he, too, had signed a waiver. The appellate court upheld the language of the release without inquiring into the essence of the public policy objections.<sup>86</sup>

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<sup>83</sup> It is important to separate this claim from the use of unconscionability doctrine in forced arbitration cases. In the latter, the unconscionability defense seems to have been more successful. For analysis of unconscionability in forced arbitration cases, see, e.g., Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751, 779–80 (2014); Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 48 (2006); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 813 (2004); Colleen McCullough, *Unconscionability as a Coherent Legal Concept*, 164 U. PA. L. REV. 779 (2016).

<sup>84</sup> *Avant v. Cmty. Hosp.*, 826 N.E.2d 7, 10 (Ind. Ct. App. 2005).

<sup>85</sup> *Id.* at 11.

<sup>86</sup> *Id.* (stating “[t]he plain language of the Fitness Pointe Release is even clearer as to Avant’s intent to indemnify Fitness Pointe for its negligence. The Release states that Avant agrees to indemnify Fitness Pointe for ‘all claims, demands, rights and causes of action of any kind, whether arising from [Avant’s] own acts or those of Fitness Pointe.’ Applying the plain meaning of these words, it is clear that the negligent design and implementation of a fitness program by a Fitness Pointe employee is an ‘act’ for which Avant knowingly and willingly agreed to provide indemnification.” (alteration in original) (citation omitted) (quoting Brief of Appellant at 13, *Avant*, 826 N.E.2d 7 (No. 45A03-0409-CV-393))).

The court in *Avant* focused on unequal bargaining power and the “knowing and willing” character of plaintiff’s acceptance—elements commonly used to determine unconscionability—to determine whether the exculpatory clause may be upheld.<sup>87</sup> The court appeared to contend that these concerns exhausted the involvement of the public policy issue and upheld the clause. Yet, the problem with the waiver is not resolved by paying attention to whether a party was forced to sign a contract or not. The problematic issue is with the health club’s action seeking to exclude the ordinary operation of the legal system. By incorporating a term that waives the patron’s right to sue in court, the business seeks more than just an expressive form of assumption of risk from the patron.

Another example is *Jordan v. Diamond Equipment & Supply Co.*<sup>88</sup> This Arkansas case involved the rental of a Bobcat loader, which became top-heavy and flipped over during operation. The plaintiff suffered permanent spinal cord injuries and sued for damages. However, the defendant filed for summary judgment based on an exculpatory clause incorporated in their leasing agreement. The plaintiff alleged the boilerplate language violated public policy and was unconscionable.

The court discussed the two allegations separately and ruled in favor of the defendant.<sup>89</sup> It stated that exculpatory clauses may be found enforceable in Arkansas: (1) when the party is knowledgeable of the potential liability that is released; (2) when the party is benefiting from the activity which may lead to the potential liability that is released; and (3) when the contract that contains the clause was fairly entered into.<sup>90</sup>

For the first prong of the test, the court emphasized the “clear and unambiguous” language of the exculpatory clause.<sup>91</sup> It pointed to the boilerplate language of the invoice that read, “Customer has received complete safety instructions,” under which Jordan’s initials appeared.<sup>92</sup> The court saw no need for much discussion on the second prong because Jordan clearly benefited from the lease.<sup>93</sup> To satisfy the third prong, the court explained that there was no evidence of fraud, duress, undue influence, lack of capacity, mutual mistake, or inequitable conduct sufficient to void the contract.<sup>94</sup> The court thus stated the

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<sup>87</sup> *Avant*, 826 N.E.2d at 10–11.

<sup>88</sup> *Jordan v. Diamond Equip. & Supply Co.*, 207 S.W.3d 525, 528 (Ark. 2005).

<sup>89</sup> *Id.* at 532 (stating “Jordan is bound to know the contents of the contract that he signed”).

<sup>90</sup> *Id.* at 531 (citing *Finagin v. Ark. Dev. Fin. Auth.*, 139 S.W.3d 797, 808 (Ark. 2003)).

<sup>91</sup> *Jordan*, 207 S.W.3d at 531–32.

<sup>92</sup> *Id.* at 532.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

contract had not contravened public policy and “[u]ltimately, Jordan is bound to know the contents of the contract that he signed.”<sup>95</sup>

The court discussed the unconscionability defense raised by the plaintiff in a separate section. It explained that to satisfy the unconscionability defense in Arkansas, the questions are whether there is gross inequality of bargaining power, and whether the party comprehended and was made aware of the provision.<sup>96</sup> It then rejected the existence of any gross inequality of bargaining power and stated that the court had “already determined that the exculpatory clause was available for Jordan to read when he signed and initialed the agreement.”<sup>97</sup> This way, the court appears to confuse the two underlying doctrines as essentially focused on a similar set of concerns. Three judges dissented.

Justice Imber in dissent criticized the court’s reliance on the plaintiff’s signature and his subjective knowledge for determination of the scope of the clause. Under such an approach, the requirement of the knowledge of the liability release “would become a virtual nullity if a signature was all that was required to show knowledge.”<sup>98</sup> The dissent noted: “The enforcement of broad and vague exculpatory clauses like the one at issue here erodes the very idea of ordinary care and provides an easy escape for entities who seek to avoid liability for their negligence.”<sup>99</sup> It concludes that the approach taken by the majority rejects the court’s “tradition of analyzing separately the questions of clarity of scope and public policy.”<sup>100</sup>

One jurisdiction which initially took a different path from adopting the *Tunkl* test and presented a significant shift in the conversation was Vermont. In *Dalury v. S-K-I, Ltd.*,<sup>101</sup> plaintiff Robert Dalury was seriously injured as a result of a collision with a metal pole that was allegedly negligently placed on the ski resort.<sup>102</sup> Dalury sued for damages, but the trial court issued summary judgment for the defendant based on the release that Dalury had signed when purchasing his ski season pass. The Vermont Supreme Court overturned the decision, holding the exculpatory clause contrary to public policy. In doing so, the court stated that despite the language of the release, which

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 535.

<sup>97</sup> *Id.* at 536.

<sup>98</sup> *Id.* at 540 (Imber, J., dissenting).

<sup>99</sup> *Id.* at 538–39.

<sup>100</sup> *Id.* at 541.

<sup>101</sup> *Dalury v. S-K-I, Ltd.*, 670 A.2d 795, 799 (Vt. 1995).

<sup>102</sup> *Id.* at 796.

was sufficiently unambiguous, “[e]ven well-drafted exculpatory agreements, however, may be void because they violate public policy.”<sup>103</sup>

Admitting *Tunkl*'s test to be the “leading judicial formula for determining whether an exculpatory agreement violates public policy,” the court stated that the *Tunkl* factors are “not as rigid factors that, if met, preclude further analysis.”<sup>104</sup> It then examined the case of *Jones v. Dressel*.<sup>105</sup>

*Jones* involved an injury resulting from a parachute jump rendered by an air service company. In *Jones*, the Colorado Supreme Court cited to *Tunkl*, but drafted its own test and enforced the exculpatory clause in question. The court laid down the test as follows: “(1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language.”<sup>106</sup> The *Jones* court concluded the service was not an essential service that would warrant a public policy defense.

*Dalury* dismissed Colorado's approach and concluded “no single formula will reach the relevant public policy issues in every factual context.”<sup>107</sup> *Dalury* cited the Maryland case *Wolf v. Ford*,<sup>108</sup> which held that the “determination of what constitutes the public interest must be made considering the totality of the circumstances of any given case against the backdrop of current societal expectations.”<sup>109</sup>

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<sup>103</sup> *Id.* at 797.

<sup>104</sup> *Id.* at 797–98 (“Instead, we recognize that no single formula will reach the relevant public policy issues in every factual context. Like the court in *Wolf v. Ford*, 644 A.2d 522, 527 (Md. 1994), we conclude that ultimately the ‘determination of what constitutes the public interest must be made considering the totality of the circumstances of any given case against the backdrop of current societal expectations.’”).

<sup>105</sup> *Jones v. Dressel*, 623 P.2d 370 (Colo. 1981) (en banc).

<sup>106</sup> *Id.* at 376.

<sup>107</sup> *Dalury*, 670 A.2d at 798.

<sup>108</sup> *Wolf*, 644 A.2d 522.

<sup>109</sup> *Id.* at 527.

In light of that test, the court dismissed the “non-essential nature” of the activity,<sup>110</sup> and stated the relevant public policy at issue is that of the law of premises liability.<sup>111</sup> The court stated:

The policy rationale is to place responsibility for maintenance of the land on those who own or control it, with the ultimate goal of keeping accidents to the minimum level possible. Defendants, not recreational skiers, have the expertise and opportunity to foresee and control hazards, and to guard against the negligence of their agents and employees.<sup>112</sup>

Nevertheless, even in Vermont, a shift from public policy concerns into construing the language of the contract and focusing on the element of necessity has gained popularity amongst judges. This has led to claims that *Dalury*, the leading case concerning exculpatory clauses in Vermont, “is on its last legs and will not survive much longer.”<sup>113</sup>

In *Thompson v. Hi Tech Motor Sports, Inc.*,<sup>114</sup> for example, the plaintiff was injured during a motorcycle test ride in Vermont and claimed the defendant had been negligent in allowing the plaintiff to ride the motorcycle. Defendant relied on the exculpatory clause plaintiff had signed before riding the motorcycle. The trial court decided that defendant’s release was contrary to public policy for concerns related to motorcycle safety. However, based on “the totality of circumstances and societal expectations,”<sup>115</sup> the Vermont Supreme Court reversed, concluding that the release was not void.<sup>116</sup>

The court stated *Dalury*’s public policy tradition concerning property owners and the safety of premises did not exist in this situation.<sup>117</sup> The burden of driving safely should be on the operator of

<sup>110</sup> *Dalury*, 670 A.2d at 799 (“Whether or not defendants provide an essential public service does not resolve the public policy question in the recreational sports context. The defendants’ area is a facility open to the public. They advertise and invite skiers and nonskiers of every level of skiing ability to their premises for the price of a ticket. At oral argument, defendants conceded that thousands of people buy lift tickets every day throughout the season. Thousands of people ride lifts, buy services, and ski the trails. Each ticket sale may be, for some purposes, a purely private transaction. But when a substantial number of such sales take place as a result of the seller’s general invitation to the public to utilize the facilities and services in question, a legitimate public interest arises.”).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Littlejohn v. TimberQuest Park at Magic, LLC*, 116 F. Supp. 3d 422, 427–29 (D. Vt. 2015) (citing and rejecting defendant’s argument, declaring void an exculpatory clause obtained for participating at a zip-line course).

<sup>114</sup> *Thompson v. Hi Tech Motor Sports, Inc.*, 945 A.2d 368 (Vt. 2008).

<sup>115</sup> *Id.* at 371.

<sup>116</sup> *Id.* at 372.

<sup>117</sup> *Id.*

the motorcycle, according to *Thompson*.<sup>118</sup> The court focused “on the fact that, in *Dalury*, the defendant owned and controlled the property while here defendant could not ‘control a prospective customer’s driving capability.’”<sup>119</sup>

Citing *Tunkl* and *Jones*, the court also contended motorcycle test-drives for retail are not a public necessity, unlike *Dalury*.<sup>120</sup> Furthermore, no legislation regulated the retailers on the matter. Rather, the existing legislation focused on the safe driving of the driver.<sup>121</sup> *Thompson* concluded that although the clause was not contrary to public policy, its language was not conspicuous enough to cover the defendant’s own negligence.<sup>122</sup>

*Thompson* refused to extend the public policy concern to all consumer-related exemptions. The majority contended the principles that were at stake were not only those of tort law—freedom of contract also permits some exculpatory clauses and prohibits a blanket ban on such exemptions.<sup>123</sup>

Following this decision, in 2009, the court also allowed an exculpatory clause to be enforced in the context of a motocross pre-race. In *Provoncha v. Vermont Motocross Ass’n, Inc.*,<sup>124</sup> the plaintiff claimed Vermont Motocross Association’s (VMA) failure to raise a warning flag, used to alert motorcyclists behind him, led to a collision that rendered him paraplegic. VMA refused to share any liability based on a release agreement the plaintiff signed as part of the Race Day Entry Form.<sup>125</sup>

When the trial court issued summary judgment in favor of VMA, the plaintiff appealed, alleging, inter alia, that the release violated public policy. However, the Vermont Supreme Court held the release was sufficiently clear. *Provoncha* reiterated *Thompson*’s “commitment to the dual clarity/public-policy inquiry by ‘strictly constru[ing] an exculpatory agreement against the party relying on it,’ and ‘consider[ing] whether [a] release [was] void as contrary to public policy.’”<sup>126</sup>

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 378 (Johnson, J., concurring and dissenting).

<sup>120</sup> *Id.* at 373 (majority opinion).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 377.

<sup>123</sup> *Id.* at 374.

<sup>124</sup> *Provoncha v. Vt. Motocross Ass’n*, 974 A.2d 1261 (Vt. 2009).

<sup>125</sup> *Id.* at 1264.

<sup>126</sup> *Id.* at 1265 (alterations in original) (quoting *Thompson*, 945 A.2d at 371, 375).

The court held that the services provided by VMA were “neither of great importance to the public nor open to the public at large,”<sup>127</sup> since “[u]nlike in the ski-resort cases, VMA does not permit the public at large to race in its scheduled events.”<sup>128</sup> Thus, focusing on the private nature of the activity, one which did not involve the public interest, the court upheld the exemption.<sup>129</sup>

As this review shows, confusing the two pro-consumer doctrines of unconscionability and public policy as addressing one similar set of concerns, and an emphasis on the necessity element of the activity in question, has made courts lenient in upholding exculpatory clauses. But this is not all of the story. The evolution of implied assumption of risk and its—at times—vagueness also played a pivotal role in courts giving extra deference to express waivers of liabilities, which seemed to make more sense despite strong public policy reasons for striking them down. Part III illustrates the evolution of implied assumption of risk and its impact on exculpatory clause.

### III. IMPLIED ASSUMPTION OF RISK AND EXCULPATORY CLAUSES

Ironically, it is progressive changes in a somewhat different aspect of tort law that made state courts more receptive to exculpatory clauses. Over the past several decades, implied assumption of risk had an interesting life. Its demise and confusing development fed into a heavy reliance on express waivers of liability.

Often used in employment settings in its heyday in the nineteenth century, implied assumption of risk barred workers from recovery for damages acquired during a work accident on the theory that the employer did not have a duty to protect the servant in the work-related accident.<sup>130</sup> Without inquiring into consent, courts placed the burden of the injury on employees who were “voluntarily” working in dangerous work environments and “assuming” the risks thereof.<sup>131</sup>

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<sup>127</sup> *Provoncha*, 974 A.2d at 1267.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> See JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 466–67 (4th ed. 2016).

<sup>131</sup> *Id.* at 467; see also W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 481 (W. Page Keeton ed., 5th ed. 1984); 1 ARTHUR LARSON, LEX K. LARSON & THOMAS A. ROBINSON, LARSON’S WORKERS’ COMPENSATION LAW § 2.03 (Matthew Bender rev. ed. 2020) (explaining that the origins of the fellow-servant rule can be found in *Priestley v. Fowler* [1837] 150 Eng. Rep. 1030, of 1837, in which the employer, a butcher, was held not liable for the injury sustained by one of his workers as the result of the

The development of implied assumption of risk as a separate defense is said to have started with the “common[ ]law action of a servant against his master.”<sup>132</sup> Vicarious liability, contributory negligence, and implied assumption of risk were branded as the “unholy trinity.”<sup>133</sup> Criticisms prevailed over the unfavorable approach of judges towards workers in the pervasive use of implied assumption of risk and for the adoption of workers’ compensation schemes.<sup>134</sup> In this evolution, workers’ compensation movements slowly paved the way for the rise of comparative fault doctrine and the abolition of implied assumption of risk.<sup>135</sup>

#### A. *From Workers’ Compensation to Assumption of Risk*

The growing social tension by the end of the nineteenth century and the increasing number of industrial injuries<sup>136</sup> led to many studies of the plight of the workers aiming to ameliorate working conditions. The study of the New York commission of 1910, for example, indicated that in New York City in 1908, “[o]f 74 cases whose disposition was known, there was no compensation in 43.2 percent, and compensation under \$500 in 40.5 percent, with only 16.3 percent receiving between \$500 and \$5,000.”<sup>137</sup>

While earlier courts had in limited circumstances ruled in favor of the workers by mitigating the contributory negligence defense,<sup>138</sup> a significant change happened in the early twentieth century through

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negligence of another employee); Michael Ashley Stein, *Priestley v. Fowler (1837) and the Emerging Tort of Negligence*, 44 B.C. L. REV. 689 (2003).

<sup>132</sup> See *Meistrich v. Casino Arena Attractions, Inc.*, 155 A.2d 90, 93 (N.J. 1959) (discussing the history of implied assumption of risk); see, e.g., *Hesse v. Nat’l Casket Co.*, 52 A. 384, 384 (N.J. 1902); *McDonald v. Standard Oil Co.*, 55 A. 289, 290–91 (N.J. 1903); *Dunn v. McNamee*, 37 A. 61, 61–62 (N.J. 1897). The dissent in *Dunn* states,

[A] minor employé assumes even apparent risks only so far as he is presumed to understand, or has been properly instructed in, the means of obviating them by due care; and if the master has taken no care to give him necessary instructions, and injury results through the lack of them, the master is responsible.

*Id.* at 62 (Dixon, J., dissenting).

<sup>133</sup> GOLDBERG ET AL., *supra* note 130, at 466–67.

<sup>134</sup> *Id.* at 467.

<sup>135</sup> See, e.g., *Williamson v. Smith*, 491 P.2d 1147 (N.M. 1971); *Gilson v. Drees Bros.*, 120 N.W.2d 63 (Wis. 1963); *Arnold v. City of Cedar Rapids*, 443 N.W.2d 332, 333 (Iowa 1989).

<sup>136</sup> LARSON ET AL., *supra* note 131, § 2.07.

<sup>137</sup> *Id.* § 2.05.

<sup>138</sup> See, e.g., *Louisville, Nashville & Great S. R.R. Co. v. Fleming*, 82 Tenn. 128 (1884); *Augusta & Savannah R.R. Co. v. McElmurry*, 24 Ga. 75 (1858); *Galena & Chi. Union R.R. Co. v. Jacobs*, 20 Ill. 478 (1858).

state legislation. Social norms had begun to change and accidental harms were viewed as a societal dilemma, rather than an individual's problem.<sup>139</sup> Indeed, “[b]y 1920 all but eight states had adopted compensation acts, and in 1963, the last state, Hawaii, came under the system.”<sup>140</sup> Today, every state in the United States has a worker compensation statute in place.<sup>141</sup>

The workers' compensation schemes allowed workers to step outside of tort law requirements, such as proving fault, and to sue the employer for injuries resulting from any work-related accidents.<sup>142</sup> However, this also meant being barred from suing the employer in separate negligence claims.<sup>143</sup> Workers' compensation statutes would not tolerate implied assumption of risk or contributory negligence defenses.

On the federal level, Congress passed the Federal Employers' Liability Act (FELA) for railroad workers.<sup>144</sup> FELA replaced the contributory negligence defense with comparative fault, yet its ambiguities forced the legislature to amend the act in 1939 and eliminate the assumption of risk doctrine altogether.<sup>145</sup>

Over the years, some jurisdictions adopted a “pure” (or “complete”) comparative fault defense, while others adopted a “modified” (or “incomplete”) comparative fault defense. The modified system of comparative fault still allows for a complete bar if the plaintiff's fault is either “greater than” the fault of the defendant or “equal to” it, depending on the jurisdiction.<sup>146</sup> By contrast, the pure comparative fault system simply applies the jury's allocation of fault to

<sup>139</sup> Eric A. Feldman & Alison Stein, *Assuming the Risk: Tort Law, Policy, and Politics on the Slippery Slopes*, 59 DEPAUL L. REV. 259, 269 (2010).

<sup>140</sup> LARSON ET AL., *supra* note 131, § 2.08.

<sup>141</sup> *Id.*

<sup>142</sup> GOLDBERG ET AL., *supra* note 130, at 818.

<sup>143</sup> *Id.* at 820. This exclusivity “does not apply if the employer has committed an intentional tort against the employee.” RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1 (AM. L. INST. 2010).

<sup>144</sup> 45 U.S.C. §§ 51–60.

<sup>145</sup> The Act now states:

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

*Id.* § 54.

<sup>146</sup> GOLDBERG ET AL., *supra* note 130, at 432.

the damages, even if the plaintiff's fault was greater than the defendant's.<sup>147</sup>

Most American states began adopting some form of comparative fault through legislation in the 1960s. For example, Kansas,<sup>148</sup> Montana,<sup>149</sup> Arkansas,<sup>150</sup> and Massachusetts<sup>151</sup> now have comparative fault statutes. For many states, the abolition of implied assumption of risk also came through courts. States like Tennessee,<sup>152</sup> Mississippi,<sup>153</sup> Florida,<sup>154</sup> and Maine<sup>155</sup> saw judicial abolition of implied assumption of risk. Courts also began incorporating comparative fault through judicial decisions. The District of Columbia<sup>156</sup> and the states of Alabama,<sup>157</sup> Maryland,<sup>158</sup> North Carolina,<sup>159</sup> and Virginia<sup>160</sup> are the only jurisdictions with a contributory negligence defense to this date.

Nevertheless, the advent of comparative fault did not make the American implied assumption of risk law any simpler. Some jurisdictions abolished all forms of implied assumption of risk as a complete defense, as mentioned earlier. Other jurisdictions adopted a "primary/secondary" distinction within implied assumption of risk doctrine.<sup>161</sup>

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<sup>147</sup> *Id.*

<sup>148</sup> KAN. STAT. ANN. § 60-258a (2021).

<sup>149</sup> MONT. CODE ANN. §§ 27-1-702, 27-1-703 (2021).

<sup>150</sup> ARK. CODE ANN. §§ 16-55-216, 16-64-122 (2021).

<sup>151</sup> MASS. GEN. LAWS ANN. ch. 231, § 85 (West 2021).

<sup>152</sup> *Perez v. McConkey*, 872 S.W.2d 897, 905 (Tenn. 1994).

<sup>153</sup> *Churchill v. Pearl River Basin Dev. Dist.*, 757 So. 2d 940, 943 (Miss. 1999).

<sup>154</sup> *Hoffman v. Jones*, 280 So. 2d 431, 438 (Fla. 1973).

<sup>155</sup> *Wilson v. Gordon*, 354 A.2d 398, 402 (Me. 1976).

<sup>156</sup> *See Felton v. Wagner*, 512 A.2d 291, 296 (D.C. 1986) ("In the District of Columbia contributory negligence is an absolute bar to recovery in a negligence action."); *see also Jarrett v. Woodward Bros.*, 751 A.2d 972, 985 (D.C. 2000) ("The District of Columbia is one of the few jurisdictions in which the claimant's contributory negligence can act as a complete defense to the defendant's liability for negligence.").

<sup>157</sup> *See, e.g., H.R.H. Metals, Inc. v. Miller*, 833 So. 2d 18, 27 (Ala. 2002).

<sup>158</sup> *See, e.g., Warsham v. James Muscatello, Inc.*, 985 A.2d 156, 159 (Md. Ct. Spec. App. 2009).

<sup>159</sup> *See, e.g., Oraefo v. Pounds*, No. COA13-101, 2014 WL 457695 (N.C. Ct. App. Feb. 4, 2014).

<sup>160</sup> *See, e.g., Jenkins v. Pyles*, 611 S.E.2d 404, 407 (Va. 2005).

<sup>161</sup> GOLDBERG ET AL., *supra* note 130, at 453.

B. *The Advent of Primary and Secondary Assumption of Risk*

The increasingly esoteric nature of implied assumption of risk doctrine is largely due to a pair of decisions by the Supreme Court of California: *Li v. Yellow Cab Co.*<sup>162</sup> and *Knight v. Jewett*.<sup>163</sup>

Unlike most jurisdictions, California's turn to comparative fault occurred judicially. In *Li*, the court abolished contributory negligence and adopted the pure comparative fault scheme.<sup>164</sup> The *Li* decision also abrogated the last clear chance rule and appeared (at the time) to have *abolished* the assumption of risk doctrine, subsuming it under "the general process of assessing liability in proportion to negligence,"<sup>165</sup> "to the extent that it is merely a variant of the former doctrine of contributory negligence."<sup>166</sup> *Li* is the classic case *merging* implied assumption of risk into comparative fault.

One of the main challenges the Supreme Court of California faced in adopting the comparative negligence scheme was the California Civil Code of 1872.<sup>167</sup> The court held that the Code simply codified the existing common law practices; it had not, in other words, statutorily created the contributory negligence rule.<sup>168</sup> The court had the power to construe the Code in light of the common law decisions,<sup>169</sup> making adaptation to changing circumstances possible.<sup>170</sup> Consequently, it adopted the pure comparative fault scheme, stating that the *Li* decision would open the road for future courts to develop the rule as needed.<sup>171</sup> That development happened largely in *Knight v. Jewett*.<sup>172</sup>

<sup>162</sup> *Li v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975).

<sup>163</sup> *Knight v. Jewett*, 834 P.2d 696 (Cal. 1992).

<sup>164</sup> *Li*, 532 P.2d at 1243.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> Section 1714 of the Code states:

(a) Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself. The design, distribution, or marketing of firearms and ammunition is not exempt from the duty to use ordinary care and skill that is required by this section. The extent of liability in these cases is defined by the Title on Compensatory Relief.

CAL. CIV. CODE § 1714(a) (West 2021).

<sup>168</sup> *Li*, 532 P.2d at 1234.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 1242.

<sup>172</sup> *Knight v. Jewett*, 834 P.2d 696 (Cal. 1992).

In *Knight*, the Supreme Court of California stepped back from its boldly pro-plaintiff stance in *Li* and considered whether it was serious about re-classifying all implied assumption of risks under the rubric of comparative fault.<sup>173</sup> Kendra Knight, the plaintiff, had sustained injuries during a friendly football game after a Super Bowl party at a friend's house. During the game, Michael Jewett had injured Kendra Knight's hand and little finger.<sup>174</sup> As the result of the injuries, Knight's little finger was amputated after several unsuccessful surgeries. She sued Jewett for negligence, assault, and battery.<sup>175</sup>

Jewett moved for summary judgment, asserting Knight had assumed the risk of the game. To resolve the issue, the Supreme Court of California revisited its decision in *Li v. Yellow Cab Co.* The *Knight* court observed that courts had disagreed as to "what category of assumption of risk cases would be merged into the comparative negligence scheme."<sup>176</sup> *Li* had suggested partially merging the implied assumption of risk doctrine into the comparative fault scheme. The question before the court was which category of assumption of risk should be merged.<sup>177</sup>

*Knight* focused on the primary and secondary assumption of risk categories—terms which had been used by the Harper and James treatise on *The Law of Torts*.<sup>178</sup> According to *Knight*:

[T]he distinction to which the *Li* court referred was between (1) those instances in which the assumption of risk doctrine embodies a legal conclusion that there is "no duty" on the part of the defendant to protect the plaintiff from a particular risk—the category of assumption of risk that the legal commentators generally refer to as "primary assumption of risk"—and (2) those instances in which the defendant does owe a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty—what most commentators have termed "secondary assumption of risk."<sup>179</sup>

The court defined the focal question as one of analyzing "the nature of the activity or sport in which the defendant is engaged and the relationship of the defendant and the plaintiff to that activity or sport."<sup>180</sup> The *Knight* court stated that plaintiffs have no legal duty to

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 697.

<sup>175</sup> *Id.* at 698.

<sup>176</sup> *Id.* at 701.

<sup>177</sup> *Id.* at 702.

<sup>178</sup> *Id.* at 703 n.3.

<sup>179</sup> *Id.* at 703.

<sup>180</sup> *Id.* at 704.

eliminate risk inherent in the sport. Defendants “have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.”<sup>181</sup>

However, in a sports setting, what is considered careless is different than a non-sport related situation. In the former situations, ordinary careless conduct can be treated as an inherent risk of a sport.<sup>182</sup> Unless the carelessness amounts to a recklessness that is totally outside the range of the ordinary activity of the sport, or a player intentionally injures another player, the injured player is barred from recovery under the duty approach of primary assumption of risk.<sup>183</sup> In sum, a defendant’s liability depends “on the nature of the sport itself,” and “the defendant’s role in, or relationship to, the sport.”<sup>184</sup>

This was not an easy decision. *Knight*, while famous and heavily relied upon, had only a three-justice plurality opinion. The plurality reached a majority vote because of the contribution of two partial concurrences: one by Justice Mosk and one by Justice Panelli (with whom Justice Baxter concurred). Justice Mosk called for a total abolition of all forms of implied assumption of risk, noting the nomenclature only adds more confusion to an already confusing situation.<sup>185</sup> The court could have reached the same result, he stated, by relying solely upon the duty element of a negligence claim and reducing liability under the comparative fault scheme, while expressly rejecting all forms of implied assumption of risk.<sup>186</sup>

By contrast, Justice Panelli agreed with the dissent that duty doctrine is irrelevant, and that consent is the core notion of implied assumption of risk.<sup>187</sup> He concurred with the plurality, however, in thinking that the defendant should prevail under the assumption of risk framework (even when so conceived). Finally, in dissent, Justice Kennard reasoned that once implied assumption of risk was properly conceived in terms of consent, it was clear that the defendant could not demonstrate the plaintiff accepted the risk in question.<sup>188</sup>

After *Knight*, there has not been much meeting of the minds in California. For example, in *Cheong v. Antablin*,<sup>189</sup> five separate opinions

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<sup>181</sup> *Id.* at 708.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 711.

<sup>184</sup> *Id.* at 709.

<sup>185</sup> *Id.* at 712 (Mosk, J., concurring and dissenting).

<sup>186</sup> *Id.* at 713.

<sup>187</sup> *Id.* (Panelli, J., concurring and dissenting).

<sup>188</sup> *Id.* at 714 (Kennard, J., dissenting).

<sup>189</sup> *Cheong v. Antablin*, 946 P.2d 817, 825 (Cal. 1997) (Kennard, J., concurring).

were written by justices of the Supreme Court of California.<sup>190</sup> The consequence of *Knight* in recreational activities and the ability of the injured party to sue is troubling. In 2006, the Supreme Court of California, in *Avila v. Citrus Community College District*,<sup>191</sup> decided that an intentional pitch to the head of a baseball player during a community college baseball game was an inherent risk of baseball which could not give rise to liability under the primary assumption of risk doctrine.<sup>192</sup>

The *Avila* court rejected the dissenting opinion's argument that this "is an ill-conceived expansion of that rule [the no-duty-for-sports rule] into intentional torts."<sup>193</sup> For the dissent, it did not make sense to argue that *Avila* (the injured baseball player) had consented to being intentionally hit since this is an inherent risk of the game.<sup>194</sup> In other words, "the protective policy of the [safety] statutes simply must be held to override any such private agreements [express] or understandings [implied]."<sup>195</sup>

As it stands now, it is fair to say as a general matter that American law has—in a very laborious and confusing way—managed to keep implied assumption of risk in many recreational settings, while rejecting it in employment contexts. Such confusion, as this Part illustrates, further fed a heavier reliance on the express assumption of risk defense and the expansion of the scope of the risk covered by it.

#### IV. COMPARATIVE STUDY

Studying other legal systems to see how they have dealt with similar questions provides helpful critical perspective on the current American doctrine. "Foreign laws can provide models of how well different sets of legal rules work in addressing a particular problem or in pursuing a particular policy."<sup>196</sup> This Part first examines a common law system, that of the U.K. on how it has dealt with waivers of liability. Next, it looks at a civil law system, that of France. Surprisingly, outside

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<sup>190</sup> *Id.*

<sup>191</sup> *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383 (Cal. 2006).

<sup>192</sup> *Id.* at 394.

<sup>193</sup> *Id.* at 399 (Kennard, J., concurring and dissenting).

<sup>194</sup> *Id.* at 395 (majority opinion).

<sup>195</sup> KEETON ET AL., *supra* note 131, at 493.

<sup>196</sup> MATHIAS SIEMS, *COMPARATIVE LAW* 4 (2d ed. 2018). For a discussion on the anti-florigen law attitudes in the United States, see Mark C. Rahdert, *Exceptionalism Unbound: Appraising American Resistance to Foreign Law*, 65 CATH. U. L. REV. 537 (2016). For a discussion on comparative law in the United States, see Jedidiah Kroncke, *Law and Development as Anti-Comparative Law*, 45 VAND. J. TRANSNAT'L L. 477 (2012).

of the United States the two systems find more common ground in responding to exculpatory clauses.

#### A. *The United Kingdom: England and Wales*

The U.K. is comprised of three different legal systems: England and Wales [English Law], Scotland, and Northern Ireland.<sup>197</sup> The focus here will be on the law of England and Wales. In England, tort law is primarily composed of common law principles found in case law.<sup>198</sup> English authors have defined tortious liability as a liability that “arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressable by an action for unliquidated damages.”<sup>199</sup> Similar to the United States, a successful tort of negligence claim requires arguing: “(1) a duty of care owed by the defendant to the claimant (2) a breach of that duty (3) damage caused thereby.”<sup>200</sup>

##### 1. *Defense of Volenti Non Fit Injuria*

One category of the volenti defense in English law is discussed under the rubric of trespass to the person. In claims of trespass to the person, such as battery, assault, or false imprisonment, one may be confronted with the defense of volenti—consent. Consent can be both to the physical act itself or consent to a risk. An example of the first category is a surgeon who touches the patient’s body to perform a surgery.<sup>201</sup> If he performs the wrong surgery due to an administrative mix-up, the patient can sue because she did not consent to that form of touching.<sup>202</sup> The other category of consent relates to consent to risk.

The volenti defense affords protection to a defendant sued for negligence if the act could have been within the claimant’s expectation and within the four corners of the law.<sup>203</sup> Yet, in cases where a party may

<sup>197</sup> CEES VAN DAM, *EUROPEAN TORT LAW* 93 (2d ed. 2013).

<sup>198</sup> W.V. Horton Rogers, *Compensation for Personal Injury in England*, in *COMPENSATION FOR PERSONAL INJURY IN A COMPARATIVE PERSPECTIVE* 76–78 (B.A. Koch & H. Koziol eds. 2003).

<sup>199</sup> VAN DAM, *supra* note 197, at 101 (citing WINFIELD AND JOLOWICZ ON TORT 2.4 (W.V.H. Rogers ed., 18th ed. 2010)).

<sup>200</sup> *Id.* at 102.

<sup>201</sup> NICHOLAS J. MCBRIDE & RODERICK BAGSHAW, *TORT LAW* 45 (4th ed. 2012).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 48–49 (explaining the case of *Blake v. Galloway* [2004] EWCA (Civ) 814, 1 WLR 2844, 3 All ER 315, in which claimant—a fifteen-year-old—sued after being hit in the eye by

exploit the idea of consent there are limitations. Nicholas McBride and Roderick Bagshaw give the example of detaining a person (a body) versus a car (an object) to recover debts.<sup>204</sup> The latter is legal, whereas in the former “detaining someone’s body to enforce a debt that they owe you cannot be made lawful, even if the owner has consented to the risk that his body might be detained.”<sup>205</sup> Therefore, the *volenti* defense has its limitations.

## 2. Waivers Under Occupiers’ Liability Act 1957

Before proceeding to the analysis of exclusion clauses<sup>206</sup> in contemporary English tort law, this Section first addresses the waivers under the Occupiers’ Liability Act 1957.<sup>207</sup> Springing from a recommendation by the Law Reform Committee,<sup>208</sup> the intention of the Occupiers’ Liability Act was to provide a “common duty of care”<sup>209</sup> that would “replace the rules of common law under which the duty owed by an occupier of premises differed according as the visitor was an invitee, or a licensee.”<sup>210</sup> The Act preserved the *volenti* defense.<sup>211</sup> When an

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another fifteen-year-old who had negligently thrown bark chippings during the game. The court concluded the claimant had consented in playing and the throw had been playful and not reckless.).

<sup>204</sup> *Id.* at 49.

<sup>205</sup> *Id.* at 50.

<sup>206</sup> The legal term often used for exculpatory clauses in England is “exclusion clause.”

<sup>207</sup> Occupiers’ Liability Act 1957, 5 & 6 Eliz. 2 c. 31 (available at <https://www.legislation.gov.uk/ukpga/Eliz2/5-6/31/contents>) [<https://perma.cc/8MR2-KYUC>].

<sup>208</sup> Not to be confused with the Law Commission for England, which was established in 1965.

<sup>209</sup> Occupier’s Liability Act 1957, 5 & 6 Eliz. 2 c. 31, § 2(1) provides: “An occupier of premises owes the same duty, the “common duty of care[,” ]to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.”

<sup>210</sup> JOHN FREDERIC CLERK & WILLIAM HENRY BARBER LINDSELL, CLERK & LINDSELL ON TORTS 868 (22d ed. 2014).

<sup>211</sup> Occupier’s Liability Act 1957, 5 & 6 Eliz. 2 c. 31, § 2. Section 2 provides:

(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)—

(a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and

(b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an

injury arises, the volenti defense can only be invoked if the risks encountered are precisely those that the claimant had assumed. For example, if the injury arises out of negligent setup of safety requirements, the defendant cannot invoke volenti, as the claimant had not assumed the risk of such negligent safety work.<sup>212</sup>

Contrary to the case law in the United States, this approach to volenti is evident in sport-related injuries in the English system. For example, in *White v. Blackmore*,<sup>213</sup> a spectator of a jalopy race—Mr. White—who himself was also a jalopy racer, died when a car’s wheel became entangled in the safety ropes that were allegedly negligently set up.<sup>214</sup> Even though the organizer’s liability for Mr. White’s death was effectively excluded according to the Occupiers’ Liability Act, the court rejected the volenti defense of the defendant and ruled “a spectator’s knowledge that a particular sporting event involves an element of risk does not mean that he is aware of, and has thereby consented to negligence by the organizers in respect of the safety arrangements.”<sup>215</sup>

The English understanding of assumption of risk in sport contexts is different. Although the term “assumption of risk” is used in such contexts, this does not equal the volenti defense. In other words, assuming the risk in sport is limited to consent to some physical contact that is “within the ordinary performance of the game,” and is thus reasonably expected to occur.<sup>216</sup> While inherent risk may be subject to the volenti defense, other risks not assumed cannot be said to have been assumed. Since 1977, all exclusion contracts between occupiers and visitors are subject to the Unfair Contract Terms Act discussed below.

### 3. Waivers of Liability and the Unfair Contract Terms Act 1977

Exclusion clauses are now mainly governed by two pieces of legislation: the Unfair Contract Terms Act 1977 (UCTA), and the

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independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

<sup>212</sup> CLERK & LINDSELL, *supra* note 210, at 890.

<sup>213</sup> *Id.* at 269 (citing *White v. Blackmore* [1972] 2 Q.B. 651).

<sup>214</sup> *White v. Blackmore* [1972] 2 Q.B. 651, LAWTEACHER, <https://www.lawteacher.net/cases/white-v-blackmore.php?vref=1> [<https://perma.cc/J3DT-T3WA>].

<sup>215</sup> CLERK & LINDSELL, *supra* note 210, at 269.

<sup>216</sup> *Id.* at 268.

Consumer Rights Act 2015.<sup>217</sup> UCTA was passed after the recommendation<sup>218</sup> of the Law Commission.<sup>219</sup> Section 2 of the Act covers negligence liability.<sup>220</sup>

Per the UCTA, the defendant can no longer evade liability “by pleading to a contractual exclusion of liability as conclusive evidence of *volenti*”<sup>221</sup> in cases of death or personal injury.<sup>222</sup> In other cases—meaning anything other than death or personal injury—the waiver is

<sup>217</sup> There are also two additional acts worth mentioning: the Misrepresentation Act 1967, c. 7 (U.K.) (“provides that a term that purports to exclude or limit someone’s (not necessarily just a business’s) liability for misrepresentation will be invalid if it is unreasonable.” MCBRIDE & BAGSHAW, *supra* note 201, at 728), and the Road Traffic Act 1988, c. 52 (U.K.) (“provides that a term in a contract between a driver and a passenger that purports to exclude or limit the driver’s liability for injuring the passenger will be invalid.”).

<sup>218</sup> *Exclusion Clauses in Contracts*, INST. OF LEGAL SEC’YS & PAS (Feb. 10, 2015), [https://www.legalsecretaryjournal.com/Exclusion\\_Clauses\\_in\\_Contracts](https://www.legalsecretaryjournal.com/Exclusion_Clauses_in_Contracts) [https://perma.cc/GHH9-YD9A].

<sup>219</sup> Law Commission is a “statutory independent body created by the Law Commissions Act 1965 to keep the law of England and Wales under review and to recommend reform where it is needed.” LAW COMM’N, <https://www.lawcom.gov.uk> [https://perma.cc/GJW3-XTAD].

<sup>220</sup> Unfair Contract Terms Act 1977, c. 50 (U.K.) provides:

- (1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.
- (2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.
- (3) Where a contract term or notice purports to exclude or restrict liability for negligence a person’s agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk.

The Act applies to business liability per s.1(3). This text should be accompanied by the restrictions set forth in the Consumer Rights Act of 2015, which provides a “bar on exclusion or restriction of negligence liability”:

- (1) A trader cannot by a term of a consumer contract or by a consumer notice exclude or restrict liability for death or personal injury resulting from negligence.
- (2) Where a term of a consumer contract, or a consumer notice, purports to exclude or restrict a trader’s liability for negligence, a person is not to be taken to have voluntarily accepted any risk merely because the person agreed to or knew about the term or notice.
- (3) In this section “personal injury” includes any disease and any impairment of physical or mental condition.

Consumer Rights Act 2015, c. 15, § 65 (U.K.).

<sup>221</sup> CLERK & LINDSELL, *supra* note 210, at 274.

<sup>222</sup> *Id.* at 272.

subject to a “reasonableness test,”<sup>223</sup> the details of which are out of the scope of this piece.

In sum, since the enactment of the UCTA, exclusionary clauses no longer have the full effect they did before. While the UCTA preserves the defense of *volenti*, it no longer applies to “death or personal injury resulting from negligence,”<sup>224</sup> and in cases not involving death or personal injury, the “agreement to or awareness of it is not of itself to be taken as indicating . . . voluntary acceptance of any risk.”<sup>225</sup> Section 65(2) of the Consumer Rights Act 2015 also provided similar boundaries.<sup>226</sup> The restrictions set forth in different statutes show the English no longer tolerate waivers that target exclusion of liability for death or personal injury, shielding the human body as much as legally possible.

## B. France

France is one of the pioneers of the civil law legal tradition. The French Civil Code, which is “often seen as a symbol of the modern civil law tradition,”<sup>227</sup> has historically been a model for many countries.<sup>228</sup> It was codified in the nineteenth century, when nation-states emerged and began to codify the Roman law.<sup>229</sup> The code has largely remained the same since 1804, except for the 2016 presidential decree that revised some of its sections.<sup>230</sup> Civil liability articles remained the same, with changes only to their numbering. Nevertheless, a new project on reforming civil liability law in France is underway,<sup>231</sup> and the

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<sup>223</sup> Unfair Contract Terms Act 1977, c. 50, § 2(2) (“[A] person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.”).

<sup>224</sup> *Id.* § 2(1).

<sup>225</sup> *Id.* § 2(3).

<sup>226</sup> CLERK & LINDSELL, *supra* note 210, at 274 n.491.

<sup>227</sup> SIEMS, *supra* note 196, at 51.

<sup>228</sup> See, e.g., John T. Hood, Jr., *The History and Development of the Louisiana Civil Code*, 19 LA. L. REV. 18, 26 (1958) (explaining that the state of Louisiana also modeled its Civil Code after that of France).

<sup>229</sup> SIEMS, *supra* note 196, at 51.

<sup>230</sup> *Réforme du droit des contrats, du régime général et de la preuve des obligations: la révision pour imprévision*, DALLOZ ACTU ÉTUDIANT (June 10, 2016), <https://actu.dalloz-etudiant.fr/a-la-une/article/reforme-du-droit-des-contrats-du-regime-general-et-de-la-preuve-des-obligations-la-revision/h/6246e9db7fe716016f50d31934e1a744.html> [<https://perma.cc/NQ4Z-EAZV>].

<sup>231</sup> Fanny Joffrois, *Projet de Réforme de la Responsabilité Civile: Ouverture d'un Espace Participatif Jusqu'au 30 Avril 2018*, INSTITUT NATIONAL DE LA CONSOMMATION (Mar. 22, 2018), <https://www.inc-conso.fr/content/projet-de-reforme-de-la-responsabilite-civile-ouverture-dun-espace-participatif-jusquau-30> [<https://perma.cc/VY3X-C7T9>].

government has already issued a draft of possible reform for the public.<sup>232</sup> For now, this Article studies the law as of today.

Despite the fact that the English term “tort” comes from the old French language,<sup>233</sup> tort law in France is not often called the law of torts. Instead, it is often called “civil liability.” French legal scholars divide obligations into different categories, one of which classifies obligations based on their sources: obligations may arise out of the law or derive from the will of an individual.<sup>234</sup> Therefore, civil responsibility itself has traditionally been divided into two large categories: *la responsabilité contractuelle* (contractual responsibility) and *responsabilité délictuelle* (tortious responsibility).<sup>235</sup>

### 1. French Elements of Civil Liability

Unlike the U.S. gallery of torts, where each tort has its unique character and requirement,<sup>236</sup> the French civil liability has a principled theory that applies to different scenarios. The main articles in the Code that are the basis for civil liability are found in Articles 1240 and 1241. Article 1240 provides: “every act whatever of man that causes damage to another, obliges him by whose fault it occurred to repair it.”<sup>237</sup> Article 1241 states: “we are responsible not only for the damage occasioned by our own act, but also by our own negligence or imprudence.”<sup>238</sup> Finally, the first paragraph of Article 1242 provides: “we are responsible not only for the damage caused by our own act, but also for that which is

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<sup>232</sup> MINISTÈRE DE LA JUSTICE, PROJET DE RÉFORME DE LA RESPONSABILITÉ CIVILE (2017), [http://www.justice.gouv.fr/publication/Projet\\_de\\_reforme\\_de\\_la\\_responsabilite\\_civile\\_13032017.pdf](http://www.justice.gouv.fr/publication/Projet_de_reforme_de_la_responsabilite_civile_13032017.pdf) [<https://perma.cc/3EMC-MBLD>].

<sup>233</sup> GOLDBERG & ZIPURSKY, *supra* note 17, at 1; *Tort*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/tort> [<https://perma.cc/QUJ9-6KYT>]; *see also* GOLDBERG ET AL., *supra* note 130, at 3 (explaining that going further in history, tort is derived from the Latin word *torquere*: to twist).

<sup>234</sup> ALAIN BÉNABENT, DROIT DES OBLIGATIONS (PRÉCIS DOMAT) 18 (16th ed. 2017).

<sup>235</sup> *Id.* at 393.

<sup>236</sup> GOLDBERG & ZIPURSKY, *supra* note 17, at 28.

<sup>237</sup> “Tout fait quelconque de l’homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer.” CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1240. This provision was previously Article 1382. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1382 (1804).

<sup>238</sup> “Chacun est responsable du dommage qu’il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence.” CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1241. This provision was previously Article 1383. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1383 (1804).

caused by the acts of persons for whom we are responsible, or by things that are in our custody.”<sup>239</sup>

Based on the aforementioned articles, the requirements for civil liability for one’s own act that have been explained in detail by French scholars<sup>240</sup> are: damage,<sup>241</sup> act,<sup>242</sup> causality,<sup>243</sup> and fault.<sup>244</sup> Certain other specific torts, such as strict liability torts, are exceptions to the general theory.<sup>245</sup> Additional legislation has also added to the basic system of liability laid out in the civil code, which is outside the scope of this research.<sup>246</sup>

## 2. Non-cumulative Rule (*La Règle de Non-cumul*)

Before proceeding to the discussion of liability waivers, it is important to understand the non-cumulative rule in French law. According to this rule, one may not choose to pursue damages based on non-contractual (i.e., tort) liability for acts related to a contract or during the duration of that contract.<sup>247</sup> This principle has also been called the non-option principle.<sup>248</sup> For example, when an employment contract exists, the employee may not sue for damages outside the boundaries of the contract.<sup>249</sup> There are exceptions: in cases of grave fault<sup>250</sup> by one contractual party, the other party may invoke tortious responsibility.<sup>251</sup>

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<sup>239</sup> “On est responsable non seulement du dommage que l’on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l’on a sous sa garde.” CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1242. This provision was previously Article 1384. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1384 (1804).

<sup>240</sup> MARJORIE BRUSORIO AILLAUD, *DROIT DES OBLIGATIONS* 27 (8th ed. 2017).

<sup>241</sup> “Un dommage.”

<sup>242</sup> “Un fait générateur.”

<sup>243</sup> “L’existence d’un lien de causalité entre le dommage et le fait générateur.”

<sup>244</sup> VAN DAM, *supra* note 197, at 52.

<sup>245</sup> “Les régimes spéciaux.” *See, e.g.*, Loi 85-677 du 5 juillet 1985 tendant à l’amélioration de la situation des victimes d’accidents de la circulation et à l’accélération des procédures d’indemnisation [Law 85-677 of July 5, 1985 for the Amelioration of the Situation of Victims of Traffic Accidents and Acceleration of the Compensation Procedure], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 6, 1985, p. 7584.

<sup>246</sup> For example, the road traffic accident compensatory regime is governed by a law known as *loi Badinter*. VAN DAM, *supra* note 197, at 52.

<sup>247</sup> BÉNABENT, *supra* note 234, at 395.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> “Faute extrêmement grave.”

<sup>251</sup> It also includes intentional fault (*faute dolosive*) of a contractor or fault that has criminal sanctions (*faute pénalement réprimée*). BÉNABENT, *supra* note 234, at 396.

As previously explained, while the reform project of 2016 did not address civil liability, the draft of the 2017 reform proposes article 1233-1 change to the following: “The damages that resulted from bodily injuries are redressed based on the principles of extra-contractual liability, even if they were caused from the execution of a contract.”<sup>252</sup> In any event, however, the victim can invoke the express stipulations of the contract which are more favorable to her than the extra-contractual responsibility. Based on this article, victims of bodily damages would have the option of choosing whichever basis best serves their interest. The special nature of physical damage has warranted this approach.

### 3. Public Policy

Since the nineteenth century, public policy has limited the individual’s will in an expansive manner.<sup>253</sup> “Contemporary public policy mainly involves that of economic, social and professional public policy.”<sup>254</sup> Mandatory laws—*lois impératives*—as opposed to *lois supplétives*, are part of public policy-related issues. Consumer protection laws generally have an imperative nature.<sup>255</sup> In other circumstances, there is no explicit provision, but the nature of the law is entangled with public interest—for example, criminal laws.<sup>256</sup> Lastly, when a law is silent about its nature and it is not evident from the law, it is the judge who shall decide.<sup>257</sup>

Article 6 of the French Civil Code states: “Statutes relating to public policy and morals may not be derogated from by private agreements.”<sup>258</sup> In addition, Article 1162 of the French Civil Code provides: “A contract cannot derogate from public policy either by its stipulations or by its purpose, whether or not this was known by all the

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<sup>252</sup> MINISTÈRE DE LA JUSTICE, *supra* note 232 (“Les préjudices résultant d’un dommage corporel sont réparés sur le fondement des règles de la responsabilité extracontractuelle, alors même qu’ils seraient causés à l’occasion de l’exécution du contrat. Toutefois, la victime peut invoquer les stipulations expresses du contrat qui lui sont plus favorables que l’application des règles de la responsabilité extracontractuelle.”).

<sup>253</sup> JÉRÔME JULIEN, *DROIT DES OBLIGATIONS* 156 (3d ed. 2019).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 144.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> CODE CIVIL [C. CIV.] [CIVIL CODE] art. 6. (“On ne peut déroger, par des conventions particulières, aux lois qui intéressent l’ordre public et les bonnes mœurs.”).

parties.”<sup>259</sup> In light of this, are waivers of tortious liability a matter of public interest in the French law? As discussed below, the answer is yes.

#### 4. No-Liability Clauses in Non-contractual Liability

The use of exculpatory clauses is common in contractual relationships.<sup>260</sup> Yet, such clauses, referred to as *les clauses limitant la responsabilité* or *convention de responsabilité*,<sup>261</sup> are generally inadmissible in contexts when they are intended to cover areas where the regulations and laws are part of public policy. The inadmissibility of liability waivers for physical injuries in France is considered a matter of public policy.<sup>262</sup> The French see the human body with a “sacred character” which has been enshrined in their law of obligation.<sup>263</sup>

The highest court in France declared the waivers void in 1955.<sup>264</sup> In that case, a waiver of tortious responsibility was included in a rent contract of a depot that caught on fire and left one party with burned merchandise stored in it. The court declared Articles 1382 and 1383 of the Civil Code (currently Articles 1241 and 1242) were public policy and their application could not be undermined in advance by an agreement.<sup>265</sup>

#### 5. Accepting the Risks<sup>266</sup>

For the French, waiving liability is theoretically different from accepting the risk of a certain activity. The scope of accepting the risk is limited to the inherent risk of the activity.<sup>267</sup> French scholars write that in such cases, we assume the participant has only accepted “the normal risks” inherent in the activity or the thing used.<sup>268</sup>

<sup>259</sup> CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1162. (“Le contrat ne peut déroger à l’ordre public ni par ses stipulations, ni par son but, que ce dernier ait été connu ou non par toutes les parties.”).

<sup>260</sup> BÉNABENT, *supra* note 234, at 397.

<sup>261</sup> “L’ordre public.”

<sup>262</sup> BÉNABENT, *supra* note 234, at 397.

<sup>263</sup> Christophe Radé & Laurent Bloch, *La Réparation du Dommage Corporel en France, in Compensation for Personal Injury in a Comparative Perspective*, 4 TORT AND INSURANCE LAW 101, 101 (Bernhard A. Koch & Helmut Koziol eds., 2003).

<sup>264</sup> Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Feb. 17, 1955, Bull. civ. II, No. 100, p. 59 (Fr.).

<sup>265</sup> *Id.*

<sup>266</sup> “L’acceptation des risques.”

<sup>267</sup> MURIEL FABRE-MAGNAN, LES OBLIGATIONS 787 (2004).

<sup>268</sup> *Id.* at 788.

The understanding in sport activities was that the participant accepted the risk and waived the right stated in Article 1242 (the right to sue for negligence). An interpretation by the French Court of Cassation in 2010 redefined the understanding of the accepting the risk doctrine.<sup>269</sup> In that case,<sup>270</sup> the court concluded that “the victim of a damage caused by something can invoke the liability of the first paragraph of Article 1384 of the Civil Code<sup>271</sup> against the guardian of a thing, the object that caused the damage, without forcing him to oppose his acceptance of the risks.”<sup>272</sup>

In this case, Mr. Pascal A. was negligently hit and injured Mr. Saïd X. They were both on motorcycles inside a recreational racing track. The trial judges ruled that participation in recreation as such implied acceptance of the risks inherent in that activity.<sup>273</sup> However, the supreme court ruled that accepting the risk means accepting the risks which are normally predictable, and the victim can in fact invoke the tortious responsibility of Article 1384 (now 1242) towards the guardian of the thing that caused damage, even though the plaintiff assumed certain risks.<sup>274</sup> In other words, even in such recreational activities, assuming the risk does not equal assuming the risk of negligent conduct by operators. Instead it means assuming the inherent risks of the activity, such as losing control, falling down, and injuring oneself for reasons other than the negligent conduct of operators.

Commentators have stated that this interpretation in effect signals the abandonment of the theory of assumption of risk.<sup>275</sup> This decision

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<sup>269</sup> PHILIPPE MALAURIE, LAURENT AYNÈS & PHILIPPE STOFFEL-MUNCK, *DROIT DES OBLIGATIONS* 76 (9th ed. 2016).

<sup>270</sup> Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Nov. 4, 2010, Bull. civ. II, No. 176 (Fr.), <https://www.legifrance.gouv.fr/juri/id/JURITEXT000023012845> [<https://perma.cc/H2FW-L9UM>].

<sup>271</sup> Now numbered as Article 1242, which states: “We are responsible not only for the damage caused by our own act, but also for that which is caused by the acts of persons for whom we are responsible, or by things that are in our custody.” See *supra* note 239 and accompanying text.

<sup>272</sup> Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Nov. 4, 2010, Bull. civ. II, No. 176 (Fr.) (“Attendu que la victime d’un dommage causé par une chose peut invoquer la responsabilité résultant de l’article 1384, alinéa 1er, du code civil, à l’encontre du gardien de la chose, instrument du dommage, sans que puisse lui être opposée son acceptation des risques.”).

<sup>273</sup> *Droit de la Responsabilité Civile; Responsabilité du Fait des Choses: Abandon de la Théorie de L’acceptation des Risques*, DALLOZ ACTU ÉTUDIANTS (Nov. 30, 2010), <https://actu.dalloz-etudiant.fr/a-la-une/article/responsabilite-du-fait-des-chose-abandon-de-la-theorie-de-lacceptation-des-risques/h/4592f8dcc5b448ea06637e7890aad733.html> [<https://perma.cc/4PR8-HD57>].

<sup>274</sup> Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Nov. 4, 2010, Bull. civ. II, No. 176 (Fr.).

<sup>275</sup> DALLOZ ACTU ÉTUDIANTS, *supra* note 273.

applies to bodily injury and damage caused by others. For non-bodily damages, the assumption of risk theory continues to apply.<sup>276</sup>

As to the abnormal risk, it is the judge who decides how to compensate the victim. The victim is not barred from receiving any form of compensation for simply having assumed an abnormal risk. In such cases, the French divide the fault similarly to the pure comparative fault regime in the United States, on the theory that the victim himself is also partially at fault for having assumed such abnormal risk, and thus there is a “common fault” at issue.<sup>277</sup>

In conclusion, French law has long held bodily integrity sacred, and its protection has grown over the years. Article 1242 of the Civil Code provides protection against negligence. Courts further expanded that protection. Next, the French supreme court declared the aforementioned articles matters of public policy that cannot be altered by means of contracts.<sup>278</sup> This expansion was further underscored in a recent supreme court decision in 2010, where the court effectively abandoned the defense of assumption of risk.<sup>279</sup>

## V. THE PROPER TREATMENT OF RELEASES

Courts generate fair decisions by relying upon a coherent body of law. Doctrinal coherence also fosters predictability. Unfortunately, as this Article illustrates, tort doctrine on exculpatory clauses lacks both fairness and predictability. To tackle this problem, this Article puts forward the following proposals and addresses some of the possible objections.

### A. *Non-waivability of Negligence Law and Inherent Risks*

It is crucial to distinguish regulatory power principles from unconscionability principles. Supporting both and their distinct roles allows our legal system (a) to deliberate and decide clearly about the proper balance between regulation of private relationships and contractual private ordering; and (b) to serve as a watchdog for extreme

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<sup>276</sup> MALAURIE ET AL., *supra* note 269, at 77.

<sup>277</sup> *Id.*

<sup>278</sup> Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Feb. 17, 1955, Bull. civ. II, No. 100, p. 59 (Fr.), <https://www.legifrance.gouv.fr/juri/id/JURITEXT000006952758> [<https://perma.cc/V4WA-BCL7>].

<sup>279</sup> Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Nov. 4, 2010, Bull. civ. II, No. 176 (Fr.).

and inequitable relationships in commercial life. Today, we are at risk of conflating the two, and keeping only the second of these two.

The main principle behind unconscionability is the refusal of courts to be instruments of unjust transactions—the recognition that a state that respects freedom of contract can and should nonetheless stop short of empowering individuals to enforce especially oppressive deals. The principal public policy concern with regard to waivers of liability is *neither* the lack of meaningful choice nor the element of duress. It is that the state has a strong interest in using tort law to protect individuals against certain kinds of risky enterprises, and if those enterprises are permitted to insulate themselves wholly from tort liability through individual exculpation clauses, the state will no longer be able to provide such protection.

Even though this Article mostly focuses on bodily injuries arising out of recreational accidents, such as in *Stelluti*, the bigger picture in distinguishing tort law's public policies and contract law's underlying policies as embodied in unconscionability doctrine is not limited to recreational cases. That *Stelluti* was a recreational activity seems really neither here nor there, since it was not the risks intrinsic to the activity that injured the plaintiff, but simply negligent maintenance of a machine. As the breadth of products liability law and innumerable other areas of consumer law display, judicial and legislative protections of consumers in the United States over the past seventy-five years go far beyond the basic essentials of life.

The birth of products liability law,<sup>280</sup> for example, illustrates that the public policy concept driving nonwaivability is broad and goes far beyond unconscionability policies. Indeed, given the wide array of products (including leisure products) that are incontrovertibly covered by public policy-based, nonwaivable duties, the necessity-based reading of the *Tunkl* doctrine is clearly untenable.

Considering this background, a sensible approach to treating exculpatory clauses and the assumption of risk defense would be to limit the scope of the assumption of risk defense to the inherent risk of an activity. The characteristics of an activity alert the participant of what is to be expected when voluntarily engaging in the activity. The participants assume the risk reasonably associated with the activity while expecting a common duty of care from the provider. When signing a contract to participate which includes an exculpatory clause, the signatory is expressly assenting to the inherent risks that are

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<sup>280</sup> See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 18 cmt. a (AM. L. INST. 1998) (stating “[a] commercial seller or other distributor of a new product is not permitted to avoid liability for harm to persons through limiting terms in a contract governing the sale of a product”).

associated with that activity *and* acknowledging that she will not sue for them.

This is what distinguishes implied assumption of risk from an exculpatory clause. In implied assumption of risk, the participant is implicitly assuming those inherent risks. But with an express waiver, the participant expressly agrees that should she be injured as a result of those risks, she will not sue. In other words, with the simple act of engaging in an activity, the participant is only assuming the risk associated with that activity. For example, being touched by a soccer player, she assumes the risk of being so injured, but does not consent in being injured.<sup>281</sup> With the exculpatory clause, she further expressly agrees that she will not sue, should she be injured as a result of having assumed the risk of being so injured.

When providers—in many cases repeat players—go further to insert broad exculpatory clauses that purport to waive the right to sue should the participant be injured as a result of the negligence of the provider, courts should announce the clause void as against tort law’s public policy of protecting physical integrity. The right to sue for liability for personal injuries arising out of negligence should be beyond the reach of private parties, similar, if not identical, to what many foreign jurisdictions—both common law and civil law—have done in considering physical integrity an inalienable right.<sup>282</sup>

### B. *Dangerous Activities*

It may seem reasonable to leave breathing space for extremely dangerous activities. Extreme activities and sports are inherently dangerous. The nature of extreme sports is that they “exceed traditional safety limitations to create new disciplines in the sport.”<sup>283</sup> In such activities, one may doubt the public’s interest in the existence of the activity itself. Hence, one may argue that the sophisticated participant bears all the risks associated with the activity, even the negligence of the other party.

The social benefits and tort law’s role in protecting people against extreme activities are also not as evident. In 2017, parents of a twenty-

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<sup>281</sup> Zipursky, *supra* note 21.

<sup>282</sup> See, e.g., Unfair Contract Terms Act 1977, c. 50, § 2(1) (U.K.), [legislation.gov.uk/ukpga/1977/50](https://legislation.gov.uk/ukpga/1977/50) [<https://perma.cc/T4RH-U8FD>]; Consumer Rights Act 2015, c. 15, pt. 2 § 65 (U.K.), <https://www.legislation.gov.uk/ukpga/2015/15/contents/enacted> [<https://perma.cc/YV5L-VY3E>]; CLERK & LINDSELL, *supra* note 210, at 274; Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Feb. 17, 1955, Bull. civ. II, No. 100, p. 59 (Fr.).

<sup>283</sup> Amanda Greer, *supra* note 16, at 82.

year-old college student brought a wrongful death action against the organizer of a study abroad program their son had attended.<sup>284</sup> Erik Downes drowned in the Pacific Ocean while he was in Costa Rica with the group. In this case, the court argued that entering the Pacific Ocean is so inherently dangerous that Olgethorpe (the study abroad program) had no duty to Downes, and the defense of assumption of risk correctly applied to the case. The court wrote: “[b]ecause he was a competent adult, Downes would have appreciated the specific risk of drowning posed by entering a body of water so inherently dangerous as the Pacific Ocean.”<sup>285</sup>

However, such enforceability of exculpatory clauses is also best kept to a limited number of activities. Many of the extreme sports are widely held and watched, especially after what became popular as the X Games on ESPN.<sup>286</sup> In 2018, the X Games in Sydney drew more than 52,000 fans to the three-day event.<sup>287</sup> People’s expectation of the protection of law also extends to extremely dangerous activities, as long as the activities are legal. Many businesses are established around these activities and draw significant customers.<sup>288</sup> Cutting them out of the tort law system will both decrease the incentive of due care and, again, undermine the regulatory role of the state that tort law promotes. The French, for example, have the judge determine the extent of liability sharing in cases of bodily injury arising out of abnormal activities.<sup>289</sup> This is similar to the pure comparative fault scheme. As a result, the plaintiff is not absolutely barred from recovering for personal injuries arising out of negligence of the other party; but she is also not entitled to full compensation for having taken part in an abnormal activity.

### C. *The Right to Sue and the Cost of Insurance*

Scholars have different views on the importance of the right to sue for injuries that exculpatory clauses aim to waive.<sup>290</sup> For example, Professors Richard Thaler and Cass Sunstein argue that even patients

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<sup>284</sup> Downes v. Oglethorpe Univ., Inc., 802 S.E.2d 437 (Ga. Ct. App. 2017).

<sup>285</sup> *Id.* at 442.

<sup>286</sup> Kate Pickert, *A Brief History of the X Games*, TIME (Jan. 22, 2009), <http://content.time.com/time/nation/article/0,8599,1873166,00.html> [<https://perma.cc/W75V-FMRP>].

<sup>287</sup> X GAMES, *History of X Games*, <https://www.xgamesmediakit.com/read-me> [<https://perma.cc/R52V-BP2S>].

<sup>288</sup> See Greer, *supra* note 16, at 83 (arguing for broader protection of extreme sport athletes from sponsors).

<sup>289</sup> MALAURIE ET AL., *supra* note 269, at 77.

<sup>290</sup> See generally Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581 (2005).

should not be forced to buy a “lottery ticket.”<sup>291</sup> Focusing on the economic side of the bargain, they note that such a right to sue is included in the price of insurance, which is itself becoming ever more expensive. In addition to the monetary consequences of having a right to sue, they also explain the indirect costs of this right to sue, such as “defensive medicine.”<sup>292</sup> Defensive medicine may include “ordering expensive but unnecessary treatments for patients, or refusing to provide risky but beneficial treatments, simply in order to avoid liability.”<sup>293</sup> The authors believe that “the deterrent effect of tort law is overstated” (at least for medical liability).<sup>294</sup>

Thaler and Sunstein therefore propose that “choice architects give serious consideration to allowing freedom of contract in the context of negligence in medical care.”<sup>295</sup> Their proposed safeguard consists of “procedural safeguards designed to ensure that the waiving party is fully informed.”<sup>296</sup> For Thaler and Sunstein, if one insists on the right to sue and is skeptical of malpractice lawsuits, “patients should be presumed to be permitted to sue only for intentional or reckless wrongdoing—and not for mere negligence.”<sup>297</sup> They further give examples of jurisdictions such as California that have implemented a capping of “noneconomic damages,” or countries such as New Zealand, Denmark, Sweden, and Finland that have a no-fault system similar to American workers’ compensation.<sup>298</sup>

These proposals are indeed admirable insofar as they offer solutions that would benefit both patients and doctors in a country where so many people suffer from expensive medical care and insurance.<sup>299</sup> Justice Tobriner of *Tunkl* would have, however, disagreed. Tort law’s “duty of care” has been one of the main ways societies and legal systems protect people against bodily injuries and promote safety. This claim may be overstated, but its truth cannot be denied in its entirety. It was for similar reasons that tort law even took one step

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<sup>291</sup> RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 209 (2009).

<sup>292</sup> *Id.* at 211.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 212.

<sup>295</sup> *Id.* at 214.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 215.

<sup>298</sup> *Id.*

<sup>299</sup> The authors also finish this section’s discussion by noting that “[i]ncreasing contractual freedom won’t solve the health care crisis. But it might well help—and in this domain, every little bit of help counts.” *Id.* at 216.

further with the advent of industrialization to develop products liability law, even for luxury products.<sup>300</sup>

The outrageously high cost of healthcare in the United States should not be blamed solely on the potential lawsuits and their expenses.<sup>301</sup> A detailed debate on the problem of access to healthcare is out of the scope of this Article. However, one problem cannot be fixed by adding another problem to the system. The effect of such waivers of the right to sue—exculpatory clauses—will disproportionately impact the poor.<sup>302</sup> The rich will be able to find ways to address medical malpractice. It is the poor who are ultimately more inclined to give up the right to sue.

These concerns are also present with respect to recreational activities and the role of waivers in reducing their cost. Courts, too, are aware of that, and note the chilling effect that striking down the waivers may have on recreational activities. Margaret Radin notes “[a]necdotal evidence suggests that firms are using these clauses because their insurance companies make it a condition of their coverage,”<sup>303</sup> whereas a gym, for example, would otherwise be unable to purchase insurance.<sup>304</sup>

But courts have to think about the long-term implications of upholding these clauses and limiting their public policy analysis to unconscionability elements and contracts of adhesion. Justice Albin in his dissent in *Stelluti* so elegantly puts forward the concern that it is worth citing it here:

Today the Court has abandoned its traditional role as the steward of the common law. . . . Under the Court’s ruling, a health club will have no obligation to maintain its equipment in a reasonably safe manner or to require its employees to act with due care toward its patrons. That is because, the Court says, a health club patron has the *right* to contract not only for unsafe conditions at a health club, but

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<sup>300</sup> On products liability waivers and the economics of such waivers, see Albert H. Choi & Kathryn E. Spier, *Should Consumers Be Permitted to Waive Products Liability? Product Safety, Private Contracts, and Adverse Selection*, 30 J.L., ECON., & ORG. 734 (2014); Xinyu Hua & Kathryn E. Spier, *Product Safety, Contracts, and Liability*, 51 RAND J. ECON. 233 (2020).

<sup>301</sup> Some proponents of tort reform disagree. See John G. Fleming, *Is There a Future for Tort?*, 44 LA. L. REV. 1193, 1199 (1984) (arguing the admonitory role of tort law is residual).

<sup>302</sup> See Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283 (1995).

<sup>303</sup> RADIN, *supra* note 16, at 139. Radin contends that validating the clauses so that the gym will not have to be forced to buy insurance is a “weak rationale.” *Id.* She notes that in addition to entailing “some risk of moral hazard,” it seems that insurance companies in that case are “insuring firms against liability they will not have to cover, since as a condition of coverage the insurance company is requiring the firm to disclaim liability and shunt it to the client or customer.” *Id.* at 139–40.

<sup>304</sup> *Id.*

also for careless conduct by its employees. The Court's decision will ensure that these contracts of adhesion will become an industry-wide practice and that membership in health clubs will be conditioned on powerless consumers signing a waiver immunizing clubs from their own negligence. The Court's ruling undermines the common-law duty of care that every commercial operator owes to a person invited on to its premises.

Without the incentive to place safety over profits, the cost to the public will be an increase in the number of avoidable accidents in health clubs. And like the plaintiff in this case, the victims of the clubs' negligence will suffer the ultimate injustice—they will have no legal remedy.<sup>305</sup>

In Part III, this Article considered the role of workers' compensation schemes and implied assumption of risk in explaining courts' further reliance on express forms of assumptions of risk. While it is true that, as Thaler and Sunstein contend, some countries have put forward no-fault systems with payouts to all of those injured, they understate the importance of such systems.<sup>306</sup> Indeed, for many of these countries, waivers of liability for bodily injury are outright illegal<sup>307</sup>—a form of coerced paternalism perhaps, but one justified by the inalienability of certain rights associated with the human body and the role of law in protecting it.<sup>308</sup>

It is also helpful to note an underlying difference between tort policies and contractual obligations. Liability can arise either out of the breach of *contractual* obligations or out of the breach of *non-contractual* obligations. Tort liability arises from the latter. Although the ultimate source of both liabilities lies in principles of accountability for breach of legal obligations, contractual liability exists because the law empowers parties to *create* such obligations by their own will or choice,<sup>309</sup> while tort liability exists because the state recognizes individual and corporate persons to owe non-contractual duties not to injure others in various ways. Because contractual duties only come into being through individual choice in the context of a reciprocal agreement, there is some plausibility to the view that courts should give

<sup>305</sup> *Stelluti v. Casapenn Enters.*, 1 A.3d 678, 695 (N.J. 2010) (Albin, J., dissenting).

<sup>306</sup> THALER & SUNSTEIN, *supra* note 291, at 215.

<sup>307</sup> See, e.g., Unfair Contract Terms Act 1977, c. 50, § 2(1) (U.K.), [legislation.gov.uk/ukpga/1977/50](https://legislation.gov.uk/ukpga/1977/50) [<https://perma.cc/T4RH-U8FD>]; Consumer Rights Act 2015, c. 15, pt. 2 § 65 (U.K.), <https://www.legislation.gov.uk/ukpga/2015/15/contents/enacted> [<https://perma.cc/YV5L-VY3E>].

<sup>308</sup> On coercive paternalism, see SARAH CONLY, *AGAINST AUTONOMY: JUSTIFYING COERCIVE PATERNALISM* 149 (2013).

<sup>309</sup> 1 Naʿsir Kaṭuẓiyān, *Mas'uliyat-i madanī-I* [Civil Responsibility] 101 (2013).

individuals control over whether to extinguish those duties by contractual waiver of their rights.

An identical analysis does not apply to tort duties, however, because they are not principally created by the parties themselves; the responsibility to exercise due care exists prior to any contractual undertaking. It is reasonable to allow contractually born obligations to be contractually waived without too much second guessing of the parties' decisions. However, waiving liabilities that the law imposes on individuals through tort law and their ability to sue in court calls for greater scrutiny, which can be achieved through the test of public policy. Judges should be mindful that:

Tort duties are imposed by law to protect the interest of society in freedom from various kinds of harm. They are grounded basically upon social policy and not upon the will or intention of the parties. The duty of ordinary care, therefore, does not arise out of the contract. It is imposed by law upon those who by virtue of their superior bargaining position enter into relationships of public interest. It is thus an incident of the relationship rather than of the contract.<sup>310</sup>

In supplying and applying a law of torts, states exercise a power to protect persons' safety and physical integrity. Deterrence has been an objective of tort which different doctrinal tort theories can agree on.<sup>311</sup> But "[w]hen liability for negligence is waived in a standardized term, the default regime of tort liability is effectively replaced."<sup>312</sup>

Courts should acknowledge this and look with closer scrutiny at the limitations created by the law of torts and be wary of defenses which switch the focus from public policy-oriented concerns to laissez-faire freedom of contract concerns, which were criticized long ago in the *Lochner* era.<sup>313</sup>

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<sup>310</sup> Robert A. Seligson, *Contractual Exemption from Liability for Negligence*, 44 CALIF. L. REV. 120, 127 (1956) (footnote omitted).

<sup>311</sup> DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, HORNBOOK ON TORTS 23–24 (2d ed. 2016) (explaining both systems of thought of social justice and those that emphasize policy and utility deterrence are aims of tort law, although their approaches in deterring certain kinds of conduct may be different).

<sup>312</sup> Aditi Bagchi, *At the Limits of Adjudication: Standard Terms in Consumer Contracts*, in COMPARATIVE CONTRACT LAW: BRITISH AND AMERICAN PERSPECTIVES 439, 440 (Larry DiMatteo & Martin Hogg eds., 2016).

<sup>313</sup> *Stelluti v. Casapenn Enters.*, 1 A.3d 678, 702–03 (N.J. 2010) (Albin, J., dissenting) (citing *Lochner v. New York*, 198 U.S. 45 (1905), *overruled in part by Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952), and *Ferguson v. Skrupa*, 372 U.S. 726 (1963), *abrogated by W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)).

D. *Judicial Activism?*

Sometimes, courts point to the lack of specific legislation in the context of the activity that has given rise to the lawsuit involving a waiver of liability. Such tendency stems from a climate in which some courts are politically and socially pressured to minimize liability.<sup>314</sup> This demand fails to appreciate the traditional role of courts in tort cases. It is correct to say policymaking judgments largely remain in the hands of the legislative body, which is elected, hears the public's opinion, and reacts to it. However, courts have also been vested with the responsibility of making limited policy judgments when required. For example, the famous *Henningsen v. Bloomfield Motors, Inc.*<sup>315</sup> was itself decided before the U.C.C. was adopted in New Jersey.<sup>316</sup>

While a number of jurisdictions expressly precluded waivers of negligence in the landlord-tenant context through legislation,<sup>317</sup> others did so through judicial decisions.<sup>318</sup> For example, Michigan courts recognized the public policy concerns surrounding the landlord-tenant relationship. In *Calef v. West*, the Michigan Court of Appeals noted how jurisdictions such as New Hampshire had declared exculpatory clauses in landlord-tenant relationships void as against public policy without

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<sup>314</sup> John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other "Quaint" Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329, 351 (2006) (claiming that California "courts are now "dominated by judges who harbor 'let's cut back' sentiments," cutting the many avenues open for litigation in the years 1950s to 1970s).

<sup>315</sup> *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 73 (N.J. 1960).

<sup>316</sup> Prince, *supra* note 73, at 475 n.85.

<sup>317</sup> See, e.g., *McCoy v. Coral Hills Assocs.*, 264 A.2d 896, 898–900 (D.C. 1970) (invalidating an exculpatory clause exonerating the lessor of liability arising from fault relying on statute); *Palanker v. Edwards Props., Inc.*, 222 N.Y.S. 2d 266, 268 (N.Y. Sup. Ct. 1961) (relying on Section 234 of the Real Property Law of New York, the court notes that any lease provision that attempts to relieve a landlord or its agents from negligence is void); see also N.Y. GEN. OBLIG. LAW § 5-321 (McKinney 2021) (stating "Agreements exempting lessors from liability for negligence [are] void and unenforceable," and "Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable."). But see *Life & Cas. Ins. v. Porterfield*, 194 So. 173, 175 (Ala. 1940) (upholding an exculpatory clause in an apartment lease that exempted the lessor of liability arising out of negligence).

<sup>318</sup> *McCutcheon v. United Homes Corp.*, 486 P.2d 1093, 1095 (Wash. 1971) (en banc) (noting that "[u]nder modern circumstances the tenant is almost wholly dependent upon the landlord to provide reasonably for his safe use of the 'common areas' beyond the four walls demised to him").

mention of a specific housing law.<sup>319</sup> The public policy could not allow the implementation of such clauses in this area of law.<sup>320</sup>

The policymaking role of the court is not tantamount to that of the legislature. This reality narrows the role of the court to its own four corners of jurisdictional responsibility—a responsibility which includes carrying out policies of the laws that have been either passed by the legislature or created by common law. The common law of tort is a distinct and unique area for the courts to play their multi-dimensional role. The duty of care is embedded in tort law and courts have historically been at the vanguard of assuring its implementation.

Despite the expansion of governments and creation of various regulatory institutions which, to some extent, have rearticulated tort law through statutory and regulatory documents, the overall deterrent essence of the tort law has not changed. Hence, asking states to create new regulations for each and every activity is institutionally impracticable. Even if we do not emphasize the role of deterrence, and instead focus on tort norms as norms guiding conduct and protecting people (in sum, a system of accountability),<sup>321</sup> such a call for new regulation is misplaced. With such a system of accountability already in place, there is no need for the additional safety regulations.

#### CONCLUSION

Different approaches to the validity of an exculpatory clause have produced disparate results with deep impact on the public interest. The ambiguity is at its highest when dealing with recreational activities and sports incidents. However, as this Article illustrates, the major flaw began when courts moved away from the public policy analysis of *Henningsen* and *Tunkl* towards an unconscionability approach.

At the core of *Henningsen* and the arguments that dominated the rise of the “public policy argument” was a simple idea, but it was importantly not an idea about an especially sympathetic plaintiff. It was about how much power the state should retain to regulate risk-creating enterprises in order to protect the health and safety of consumers. Widespread exculpatory clauses in a domain of commercial activity, by

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<sup>319</sup> *Calef v. West*, 652 N.W.2d 496, 502 (Mich. Ct. App. 2002) (“One may not by contract relieve himself from the consequences of the future nonperformance of his common-law duty to exercise ordinary care.” (quoting *Papakalos v. Shaka*, 18 A.2d 377, 379 (N.H. 1941))).

<sup>320</sup> Whether due to the slow pace of the courts or the urgency of the landlord-tenant relationship, many states have now taken statutory measures to regulate the industry.

<sup>321</sup> See generally JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* (2020).

taking away the right to sue, will effectively undermine the regulatory capacity of tort law. If the government and the courts care about safety for consumers, they have strong policy reasons for resisting widespread exculpatory clauses. That is why courts should strike them down and limit the scope of exculpatory clauses that aim to exempt liability for physical injury to the inherent risk of the activity. The concern with exculpatory clauses is not about enforcing an exceedingly unfair deal between the plaintiff and the defendant, as unconscionability doctrine would suggest, but about an unwillingness to let contract erode tort for a domain where tort law's regulatory bite is important.