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Playing with Liability: The Risk Release in High Risk Sports

We are a nation of adventurers¹ who in the last ten years have reaffirmed our native love of excitement. This trend is evidenced by a steady rise in the number of Americans whitewater rafting, mountain climbing, hang gliding, sky diving, scuba diving and vehicle racing.² These sports, as opposed to more traditional American recreational pursuits,³ are activities which routinely expose the participant to the risk of serious bodily harm.⁴ With increasing numbers of Americans insisting on exposing themselves to danger in order to satisfy their desire to "have fun," the courts are addressing some interesting legal questions when an adventurer is injured and sues his teacher, guide, or sponsor.⁵

Recently, California courts have made several decisions on lawsuits brought by participants in high risk sports who alleged that an instructor's or sponsor's negligence caused their injuries.⁶ The participants had signed contracts purportedly releasing the instructors or sponsors from all liability.⁷ The courts were asked to

1. We have a national history of adventurism. In the 1600s, hundreds of Europeans braved the treacherous ocean voyage from Europe to America. The colonists left the comparative safety of Europe to fight for survival in the wilderness of a new land. The settlers of our country did not stop where their ships landed. By the mid-1800s, the first wagon train had traveled the Oregon Trail. By 1853, the coterminous territorial expansion of the United States was complete. American social development continually began over again as the frontier pushed west. According to the great historian Fredrick Jackson Turner, "this perennial rebirth, this fluidity of American life, this expansion westward with its new opportunities, its continuous touch with the simplicity of primitive society furnish the forces dominating American character." According to Turner, this experience made Americans more restless, enterprising, materialistic, individualistic, lawless, and democratic than Europeans. This trend had not changed. In 1969, the first man to walk on the moon was an American.

The birth and growth of our nation fits the definition of adventure; it has been a continuous "undertaking involving danger and unknown risk." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 59 (1985).

2. Romano & Tagert, *Anatomy of a Recreational Tort Case*, 5 AM. J. TRIAL ADVOC. 175 (1982).

3. Examples of more traditional recreational activities include baseball (first all pro game 1869), basketball (invented in 1891 in America by Canadian J. Naissmith), football (1869 first intercollegiate game), tennis (first court laid out in 1874), swimming, bowling and golf. RANDOM HOUSE ENCYCLOPEDIA 1408-09 (1977).

4. Lindgren & Ream, *Participants in Hazardous Recreational Activities*, FOR THE DEFENSE (Dec. 1985); Lindgren & Ream, *Recreational Premises*, FOR THE DEFENSE (Nov. 1985).

5. See *infra* notes 9-24 and accompanying text.

6. See *infra* notes 94-128 and accompanying text.

7. See *infra* notes 104 and 120, and accompanying text.

determine whether the participant who had signed a risk release could recover. The courts' answers have varied.⁸

The arenas for incurring and resolving risk release disputes are widely separate. On one hand, granite peaks and whitewater rivers form the backdrop for adventurous individuals who are willing to "take a chance" in order to have a unique experience. On the other hand, oak panelled courtrooms set the stage for injured adventurers and high risk sport providers who must have their various rights determined. In between these extremes lies the risk release, which is itself a split arena, being a contract to absolve another for what would otherwise be a tort.⁹

The risk release is a contract, between a participant and their instructor or sponsor, in which the participant promises not to sue the instructor or sponsor.¹⁰ A release is usually required by a provider of high risk instruction or services before a paying customer will be allowed to participate.¹¹ This contract absolves the instructor or sponsor of any duty¹² to the student. More specifically, the purpose of the contract is to relieve the instructor or sponsor from any liability to the paying customer for accidents which may result from any cause, including the instructor's or sponsor's negligence.¹³

8. See *infra* notes 54-132 and accompanying text.

9. An express assumption of risk contract is considered to be a contract to release another from what would otherwise be negligence or intentional tort. W. KEETON, PROSSER AND KEETON ON TORTS §§ 18, 36 (5th ed. 1984). The term "risk release" is actually somewhat of a misnomer. In the legal world, "release" has traditionally been interpreted as a contract signed, absolving one from liability, *after* the incident, where an exculpatory agreement is the way in which one expressly agrees to assume the risk of harm arising from another's conduct usually entered into *before* the commission of a tort. G. SCHUBERT, R. SMITH & J. TRENTADUE, SPORTS LAW 217 (1986). In this Comment the term risk release is used to identify all exculpatory agreements to release for the right to sue for risks that may be incurred after signing. The term is meant to cover exculpatory agreements, waivers of liability and releases.

10. Examples of risk releases that were upheld in two California courts of appeal were printed with the court's opinions in *Hulsey v. Elsinore Parachute Center*, 168 Cal. App. 3d 333, 214 Cal. Rptr. 194 (1985) and *McAtee v. Newhall*, 169 Cal. App. 3d 1031, 216 Cal. Rptr. 465 (1985).

11. The risk release may be a condition to the instructor's or sponsor's ability to obtain liability insurance or may act in lieu of insurance as the provider's only protection from liability. The release usually contains language stating that the participant acknowledges the hazard, that he is executing the release voluntarily and is releasing for all acts, even negligent acts of the defendant. All of the releases litigated, and discussed in this Comment, were signed *prior* to engaging in the sport.

12. A duty is a legal obligation to conform to the legal standard of reasonable conduct towards another person in light of the apparent risk. W. KEETON, *supra* note 9, at 356. (In the situation of the sports participant, the duty is created by the relationship, *i.e.*, guide-client, instructor-student, or sponsor-participant. The duty is then abolished with the risk release. "Negligence in the air, so to speak, will not do." *Id.* at 357 (citing F. POLLACK, THE LAW OF TORTS (13th ed. 1920)).

13. Generally, the release states that the one signing of the release agrees not to sue the releasee for any accident or occurrence that results, even if it is due to the releasee's

Because a risk release is a contract, it must meet certain standard contractual requirements to be considered valid and enforceable.¹⁴ Basically, the contract¹⁵ must include an offer,¹⁶ an acceptance¹⁷ and consideration,¹⁸ or a mutual promise.¹⁹ Additionally, the contract must be executed absent fraud, duress, or unequal bargaining power.²⁰

In the beginning, California risk releases were invalidated on contractual criteria alone.²¹ Then several California appellate decisions upheld well-drafted releases that fulfilled the contractual criteria.²² Now, the treatment of the risk release has taken yet an additional turn in California.

negligence. There is some misunderstanding among the lay population regarding the function of a risk release versus a risk acknowledgement. A risk acknowledgement has no legal ability to preclude a civil lawsuit. The reason is because a civil action must allege negligence in order for the plaintiff to assert a cause of action. Alleging an "accident" does not assert a recognizable cause of action. This Comment especially focuses on the issue of beginners, who sign release forms and are paying customers of an instructor, sponsor, or guide, these people being the releasees.

14. See generally, J. CALAMARI & J. PERRILLO, *CONTRACTS* 446-47 (1977); E. FARNSWORTH, *CONTRACTS* § 1.1, § 3.1-3.30, § 7.1, (1982); A. CORBIN, *CORBIN ON CONTRACTS - ONE VOLUME EDITION* § 1-3 (1952). G. SCHUBERT, R. SMITH, & J. TRENTADUE, *supra* note 9 at 199-200, 179-87, 217-18.

15. RESTATEMENT (SECOND) OF CONTRACTS, § 1 (1965), defines a contract as a "promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." A contract has been defined as a "promise or set of promises that the law will enforce. The specific mark of a contract is the 'creation of a right, not to a thing but to a man's conduct in the future.'" A. CORBIN, *supra* note 14 at 3, 4 n.1 (1952).

16. "An offer is an expression by one party of his assent to certain definite terms, provided that the other party involved in the bargaining transaction will likewise express his assent to the identically same terms. An offer looks forward to an agreement — to mutual expressions of assent." A. CORBIN, *supra* note 14, at 16-17. In the case of the risk release, the offeror (the instructor, sponsor or guide) is also the seller of the service.

17. Acceptance "is a voluntary act of the offeror whereby he exercises the power conferred upon him by the offer and thereby creates the set of legal relations called a contract." A. CORBIN, *supra* note 14, § 11, at 17 n.18 (1952). Acceptance of a risk release is evidenced by the client's assent to the terms of the release. The case law has provided that assent may be evidenced by the offerer's signature on the release (whether or not he has read it) or his manifestation that he agreed to be bound (even if he has not signed the release). See *Blide v. Rainier Mountaineering, Inc.* 30 Wash. App. 571, 636 P.2d 492 (1981) (dealt with a release of liability to participate in a mountaineering seminar. The plaintiff thought he had signed the release, but had not. The court held that the plaintiff had agreed to the terms of the contract).

18. Consideration is "that certain factor" that justifies enforcement of a promise. A. CORBIN, *supra* note 14, at 165. Generally the risk release states that as consideration for the releasor signing the risk release they will be allowed to participate.

19. "A Promise is a sufficient consideration for a return promise." A. CORBIN, *supra* note 14, § 142, at 205.

20. Where "A" induces the agreement of "B" by fraud, as long as it remains wholly executory by both parties, it can hardly be said that "B" is under a legal duty. *Id.* § 6, at 10. Regarding unequal bargaining power, see notes 45-53 and accompanying text which address the public policy issues surrounding exculpatory contracts.

21. See *infra* notes 29-88 and accompanying text.

22. See *infra* notes 94-128 and accompanying text.

In August 1987, a California Court of Appeal reversed a summary judgement in favor of a risk release on a tort law basis.²³ As a result, there is now the possibility that even the properly drafted risk release will be subject to a tort law inquiry. An investigation into the contractual format of the risk release as well as the tort doctrine foundation is necessary in order to protect the participant's right to legally assume the risk and to protect the providers of high risk services from liability for which insurance is unavailable.²⁴

There are thousands of people who want to bike, race, climb, dive, fly, and explore. Because of the current unavailability of liability insurance for providers of high risk sports, these modern American adventurers may be faced with no legitimate outlet for their desires. There is a need to dispel any misconceptions about risk releases and to make available to adventurers a release that will enable them to validly assume the risks that high risk sports entail. Additionally, there is the need to protect the providers, so they can continue to function as high risk sport vendors.

Assumption of the risk remains an important doctrine. Therefore, this Comment first traces the judicial history of risk releases in California.²⁵ It then explores the tort law foundations of the risk release²⁶ focusing on express assumption of the risk in negligence law.²⁷ Finally, this Comment proposes guidelines for drafting and interpreting risk releases so that they will:

- 1) Protect the individuals' right to assume the risk while also protecting the individuals right to be fully informed, and;
- 2) Protect the vendors of high risk activities from nuisance lawsuits while promoting high standards of care in the risk sport industries.²⁸

23. *Bennett v. United States Cycling Found.*, 193 Cal. App. 3d 1485, 239 Cal. Rptr. 55 (1987).

24. For example, in the United States there are 250-60 dropzones where a private individual can pay to participate in sport parachuting (California has approximately 10 dropzones). At this time no American drop zone carries liability insurance. All are presently relying solely on the liability waivers. Telephone interview with Michael Johnston, Director of Safety and Training United States Parachute Association (U.S.P.A.) (August 1987).

25. See *infra* notes 29-132 and accompanying text.

26. See *infra* notes 133-46 and accompanying text.

27. See *supra* note 197-221 and accompanying text.

28. This Comment will not cover the liability issues that arise when people consent to engage in high risk sports mutually, (as when friends engage in high risk sports together without any exchange of consideration). The sports discussed are not intended to constitute a comprehensive list of high risk sports, but are only a representative sample. See *infra* notes 175-96 and accompanying text.

I. THE HISTORY OF RISK RELEASES IN CALIFORNIA

A. California Decisions Invalidating Releases

1. *Release Invalid Due to a Finding of Fraud*—As early as 1954, the California Supreme Court was called upon the address the validity of a risk release, in *Palmquist v. Mercer*.²⁹ There, an equestrian sued a riding academy for injuries he sustained when a rented horse misbehaved.³⁰ Prior to renting the horse, the plaintiff had signed a release discharging the riding academy from liability.³¹ The trial court granted the defendant's motion for a nonsuit on the ground that the plaintiff's release of the riding academy constituted a bar to his case.³²

The plaintiff appealed basing his argument, in part,³³ on the theory that the defendant's knowledge of the horse's character constituted fraud or misrepresentation because additionally the defendant knew of the plaintiff's inexperience, and also solicited a release waiver from the plaintiff.³⁴

The California Supreme Court looked to California Civil Code section 1668 which provides:

Certain contracts unlawful. All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of the law, whether willful or negligent, are against the policy of the law.³⁵

Without analyzing whether the release was against public policy or lacking in contractual construction, the court focusing on the issue of fraud, which was clearly prohibited by section 1668, reversed the non-suit.³⁶ Although the decision turned upon the find-

29. 43 Cal. 2d 92, 272 P.2d 26 (1954).

30. *Id.* at 97, 272 P.2d at 29. The horse bolted unexpectedly and ran under a trestle. The rider struck his head on the trestle and was paralyzed as a result. *Id.*

31. *Id.* at 96, 272 P.2d at 28. The facts indicated that the defendant stable manager knew that the horse assigned to the plaintiff was unruly and inappropriate for a beginning rider. *Id.* at 99, 272 P.2d at 30.

32. *Id.* at 98, 272 P.2d at 24.

33. *Id.* at 98, 272 P.2d at 29. The plaintiff's complaint rested on two theories of recovery and named Mercer, the owner of the riding academy, and two oil companies that maintained the trestles. The plaintiff's cause of action against Mercer was based on breach of warranty and negligence. The action against the oil companies was for negligence in maintaining the trestle, a so-called hazardous condition. The question of the release's validity was a factual issue to be determined by a jury in light of the circumstances surrounding its execution. *Id.* at 98, 272 P.2d at 30.

34. *Id.* at 100, 272 P.2d at 31.

35. CAL. CIV. CODE § 1668 (West 1986) (emphasis in original).

36. *Palmquist*, 43 Cal. 2d at 100, 272 P.2d at 31 (1954). The court decided that there was enough evidence to find the defendant's actions fraudulent. The defendant argued that the release was binding as a matter of law under a prior decision (citing *Werner v. Knoll*, 89 Cal. App. 2d 474, 201 P.2d 45, 47 (1949)), recognizing that "contracts seeking to relieve individuals from the results of their own negligence are not invalid as against

ing of fraud during the execution of the release, the court implicitly acknowledged the validity of risk releases signed in the absence of fraud.

2. *Release Invalid Due to Public Policy Considerations*—Several years later, in *Tunkle v. Regents of the University of California*,³⁷ the California Supreme Court summarized the various situations in which a release would be invalid.³⁸ In *Tunkle*, a hospital patient was required to sign a release of liability for future negligence as a prerequisite to admission to a hospital.³⁹ The patient sued for damages alleging that his injuries had resulted from his doctor's negligent acts.⁴⁰ Although the trial court held for the defendants, the Supreme Court reversed, holding the release invalid.⁴¹

Applying California Civil Code section 1668,⁴² the court said that the *Tunkle* release exculpated the defendants for liability in an area proscribed by statute.⁴³ In interpreting section 1668 other

the policy of the law." *Id.* The court said that failure to disclose material facts affecting the essence of the agreement may constitute "actual fraud" vitiating the contract. The court cited CAL. CIV. CODE § 1572 (West 1986), which provides:

Actual Fraud What. Actual fraud, within the meaning of this chapter, consists in any of the following acts committed by a party to a contract, or with his connivance with intent to deceive another party thereto, or induce him to enter the contract:

(1) The suggestion, as a fact, of that which is not true, one who does not believe it to be true; (2) The positive assertion in a manner not warranted by the information of the person making it of that which is not true though he believes it to be true; (3) The suppression of that which is true, by one having knowledge or belief of the fact; (4) A promise made without any intention of performing it; or, (5) Any other act fitted to deceive.

37. 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).

38. *Id.* at 97-101, 383 P.2d at 444-46, 32 Cal. Rptr. at 36-38. (recreational activities were not included in those transactions in which the court held that exculpatory provisions would be held invalid).

39. *Id.* at 94, 383 P.2d at 441, 32 Cal. Rptr. at 33.

40. *Id.* at 94, 383 P.2d at 442, 32 Cal. Rptr. at 34.

41. *Id.* at 93, 383 P.2d at 441, 32 Cal. Rptr. at 33.

42. *Id.* at 95, 383 P.2d at 442, 32 Cal. Rptr. at 33. The court further stated that requiring clear and concise language reflects and reiterates a long line of California cases dating from *Vinnell Co. Inc. v. Pacific Elec. Ry. Co.*, 52 Cal. 2d 411, 340 P.2d 604 (1959). In *Vinnell* an agreement between a railroad and a contractor, drawn by the railroad, in which the contractor agreed to indemnify the railroad, did not exculpate the railroad from the effects of its own negligence. *Id.* at 414-15, 340 P.2d at 606-07.

43. *Tunkle*, 60 Cal. 2d at 95, 383 P.2d at 442, 32 Cal. Rptr. at 34. Past interpretations of CAL. CIV. CODE § 1668 had varied along a continuum from invalidating all releases of negligence to invalidating releases only in situations where they exempted one from responsibility for violations of a statutory law. *Id.* at 95-96, 383 P.2d at 442-43, 32 Cal. Rptr. at 34-35. Courts interpretations of section 1668 have been diverse. *Compare* *England v. Lyon Fireproof Storage Co.*, 94 Cal. App. 562, 575, 271 P. 532 537 (1928) which held: "The defendant cannot limit its liability against its own negligence by contract, and any contract to that effect would be void," with *Mills v. Rupert*, 167 Cal. App. 2d 58, 62-63, 333 P.2d 818 (1959), in which the court limited "[n]egligent . . . violation of law"

courts had consistently held that an exculpatory provision⁴⁴ is valid only if it is not contrary to public policy.⁴⁵ The court then summarized the characteristics of the type of transaction in which exculpatory provisions will be held invalid as against public policy.⁴⁶ A release contract will be found invalid as against public policy if:

[1] [The transaction] concerns a business of a type thought suitable for public regulation.⁴⁷ [2] The party seeking exculpation is engaged in performing a service of great importance to the public.⁴⁸ [3] [The service needed] is often a matter of practical necessity for some members of the public.⁴⁹ [4] The party holds himself out as willing to perform the service for any member of the public who seeks it, or at least for any number coming within certain established standards.⁵⁰ [5] 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.⁵¹

These criteria share a common characteristic; they all describe services which would put consumers at a disadvantage if they were required to release the providers of these services from liability. The *Tunkle* decision was based on the belief that exculpatory contracts with providers of "public" services would create unequal bargaining power and therefore should be considered invalid.⁵²

exclusively to statutory law.

44. See *supra* note 9.

45. *Tunkle*, 60 Cal. 2d at 96 n.6, 383 P.2d at 443 n.6. 32 Cal. Rptr. at 35 n.6. "the view that the exculpatory contract is valid only if the public interest is not involved represents the majority of the holdings in the United States." *Id.*

46. Public policy involves public interest. Public interest is defined as something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It is an interest shared by citizens generally in affairs of local, state or national government. BLACK'S LAW DICTIONARY 406 (5th ed. 1979).

47. *Tunkle*, 60 Cal. 2d at 98, 383 P. 2d at 445, 32 Cal. Rptr. at 37.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 98-100, 383 P.2d at 446-47, 32 Cal. Rptr. at 37-38.

52. Comment, *Contractual Exculpation From Tort Liability In California—The "True Rule" Steps Forward*, 52 CALIF. L. REV. 350 (1964). The *Tunkle* criteria enumerate the situations in which an exculpatory provision adversely "affects the public interest" and will not be given effect. This Comment breaks the *Tunkle* criteria into three categories: the type of business involved; the source of bargaining power; and the form and content of the contract. *Id.* at 352.

Tunkle used willingness to serve the public as a characteristic indicating that a given business' attempt to be released will be defeated. *Id.* This expanded the historical view that government regulation was the indicator that exculpation would not be allowed. *Id.*

Tunkle defined the type of bargaining power that would preclude exculpation as being bargaining power arising from the fact that the service being provided was a necessity for which there was no immediate substitute. *Id.* at 354.

After *Tunkle*, services not described by the Supreme Court's criteria were considered to be outside public policy concern. This meant that voluntary contractual releases executed in non-public policy areas could be upheld unless a defect was found on other grounds.⁵³

3. *Releases Invalid Due to Drafting*—Nearly a decade later, in *Celli v. Sports Car Club of America, Inc.*,⁵⁴ a California court of appeal was faced with a release clause executed in an obviously non-public policy area.⁵⁵ There, a spectator at an auto race sued the track owners and race sponsors for personal injuries incurred when a race car went out of control, hitting several spectators.⁵⁶ Both the trial and appellate courts held for the plaintiff, excluding from evidence a release of liability he had signed before the race.⁵⁷

The appellate court's decision turned on a finding that the signed release did not specifically and clearly absolve the defendants from responsibility for their negligent conduct.⁵⁸ The release barred any action arising "out of an accident or other occurrence during or in connection with"⁵⁹ the events sponsored, but it did not specifically say that the defendants were released from liability for injuries caused by their negligence.⁶⁰ Regarding the specificity required of a release, the court said that when exculpatory contracts are, "prepared entirely by the party relying on it, words clearly and explicitly expressing that this was the intent of the parties are required."⁶¹ The court upheld the proposition that general exculpatory provisions should be limited to passive negligence if they were to be enforceable at all.⁶² The court concluded that

Tunkle said that the exculpation provision in a contract was usually unbargained for. *Id.* at 355.

53. *Tunkle*, 60 Cal. 2d at 101, 383 P.2d at 446-47, 32 Cal. Rptr. at 38-39.

54. 29 Cal. App. 3d 511, 105 Cal. Rptr. 904 (1972).

55. *Id.* In this case, the action was brought by a spectator at an automobile race. Auto racing does not fall within the *Tunkle* criteria for public policy arguments. *See supra* notes 47-51 and accompanying text.

56. *Celli*, 29 Cal. App. 3d at 515, 105 Cal. Rptr. at 907. *Compare* *Ferrell v. Southern Nevada Off Road Enthusiasts, Ltd.*, 147 Cal. App. 3d 309, 195 Cal. Rptr. 90 (1983) (in this subsequent California case the defendants state that *Celli* is the only case in which an agreement involving a race track has not been upheld). *Id.* at 324, 195 Cal. Rptr. at 92. One fact from *Celli* which distinguished it from other race track cases was that the plaintiff was a *spectator*, instead of a participant.

57. *Celli*, 29 Cal. App. 3d at 522, 105 Cal. Rptr. at 911-12.

58. *Id.* at 518-19, 105 Cal. Rptr. at 909-10.

59. *Id.* at 518, 105 Cal. Rptr. at 913.

60. *Id.* at 518, 105 Cal. Rptr. at 909.

61. *Id.* (citing *Barkett v. Brucato*, 122 Cal. App. 2d 264, 264 P.2d 978 (1953)).

62. *Id.* The Supreme Court subsequently adopted the rule in *Vinnell v. Pacific Elec. Co.*, 52 Cal. 2d 411, 340 P.2d 604 (1959). The Supreme Court then distinguished between

the release agreements were neither specifically nor clearly worded enough to protect the defendants from liability for their negligence.⁶³

Additionally, the *Celli* court denied that the releases were evidence of assumption of risk⁶⁴ The court reminded the defendants that a plaintiff who assumes the risk must have had knowledge and appreciation of the risk.⁶⁵ The *Celli* court then held that there was no evidence from which a jury could infer that the plaintiffs in that case had knowledge and appreciation of the danger which caused their injuries.⁶⁶

More recently, the trend in *Celli* was followed in *Ferrell v. Southern Nevada Off Road Enthusiasts, Ltd.*⁶⁷ *Ferrell* involved a release signed by a participant in a dune buggy race.⁶⁸ The trial court granted the defendant's motion for a summary judgment,⁶⁹ but the court of appeal reversed upon a finding that the release in question was not clearly, explicitly and comprehensively drafted to set forth the intent to release the race sponsors from liability for negligence.⁷⁰ The court followed *Celli*, saying that even in a situation outside of public policy concern,⁷¹ the language of a release prepared entirely by the party relying on it must be clearly and

active and passive negligence and indicated that an indemnity agreement phrased in general language will not protect an indemnitee whose active negligence is the proximate cause of the injury. See *Goldman v. Ecco Phoenix Elec. Corp.*, 62 Cal. 2d 40, 396 P.2d 377, 41 Cal. Rptr. 40 (1964).

One is passively negligent in merely failing to act in fulfillment of a duty of care imposed by law, while one is actively negligent by participating in some manner in the conduct or omission that caused the injury. See *King v. Timber Structures, Inc.*, 240 Cal. App. 2d 178, 182, 49 Cal. Rptr. 414 (1966).

63. *Celli*, 20 Cal. App. 3d at 521, 105 Cal. Rptr. at 911. This holding followed a California Supreme Court decision in which it was indicated that an exculpatory agreement phrased in general language would not protect against active negligence. *Id.* (citing *Goldman v. Ecco Phoenix Elec. Corp.*, 62 Cal. 2d 40, 396 P.2d 377, 41 Cal. Rptr. 73 (1964)).

64. *Id.* at 521-22, 105 Cal. Rptr. at 911.

65. *Id.* at 522, 105 Cal. Rptr. at 911.

66. *Id.*, 105 Cal. Rptr. at 912. The court also noted that the typeface of the release was smaller than the size statutorily required for even less significant types of contracts. *Id.* at 521, 105 Cal. Rptr. at 911. Retail installment contracts are governed by California Civil Code section 1803.1 requiring 8 point type, parking lot contracts require 8 point type. Here 6 point type was used. Anything smaller than 8 point type is an unsatisfactory reading medium. See Meleinkoff, *How To Make Contracts Illegible*, 5 STAN. L. REV. 418 (1953). The court avoided deciding whether public policy would allow enforcement of a release printed in such small type because its decision rested on the language used in the release. *Celli*, Cal. App. 3d at 521, 105 Cal. Rptr. at 911.

67. 147 Cal. App. 3d 309, 195 Cal. Rptr. 90 (1983).

68. *Id.* at 312, 195 Cal. Rptr. at 91.

69. *Id.*

70. *Id.* at 319, 195 Cal. Rptr. at 96.

71. See *supra* notes 47-51 and accompanying text for criteria defining public policy interest areas.

explicitly expressed.⁷²

In *Ferrell*, the unacceptable release language was buried in a “convoluted”⁷³ 147-word sentence. The document mentioned that it was a release only in the title.⁷⁴ The court concluded that the language did not “clearly, explicitly and comprehensively set forth to the ordinary person, untrained in the law, the intent and effect of the document.”⁷⁵

The *Ferrell* court viewed the release as having been presented on a “take it or leave it” basis because all participants had to sign the release as a condition to competing in the race.⁷⁶ While the court found this to be evidence of unequal bargaining power,⁷⁷ it did not explain this finding in light of the fact that participation in the race was totally voluntary.⁷⁸ Looking at the totality of the circumstances, the court saw the economic setting, the resulting unequal bargaining power, and the lack of a clear definition of the type of negligence being released as reasons for a strict examination of the release language.⁷⁹

4. *Release Invalid Due to Print Size*—The trend of barring releases on contractual criteria continued in 1984 in the case of *Conservatorship of Link v. National Association for Stock Car Auto Racing*.⁸⁰ In *Link*, a plaintiff’s release of the defendant’s negligence was found unenforceable due to its having been printed in small type⁸¹ which could not easily be read by people with ordi-

72. *Ferrell*, 147 Cal. App. 3d at 318, 195 Cal. Rptr. at 95. The court further stated that requiring clear and concise language reflects and reiterates a long line of California cases dating from *Vinnell Co. Inc. v. Pacific Elec. Ry. Co.*, 52 Cal. 2d 411, 340 P.2d 604 (1959). In *Vinnell*, an agreement between a railroad and a contractor, drawn by the railroad, in which the contractor agreed to indemnify the railroad, did not exculpate the railroad from the effects of its own negligence. *Id.* at 414-15, 340 P.2d at 606.

73. *Ferrell*, 147 Cal. App. 3d at 319, 195 Cal. Rptr. at 96.

74. *Id.*

75. *Id.*

76. *Id.* at 318, 195 Cal. Rptr. at 95.

77. *Id.*

78. The court said that in the context of the economic setting of the parties where they were of unequal bargaining strength, the contract was adhesive. An adhesion contract is one in which the party signing has no real choice. He must take the form or leave it. D. CALAMARI & J. PERILLO, *supra* note 14, at 6. The court did not discuss the fact that in this situation, participation is voluntary and, therefore, the participant does have a choice. See Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943). See also Note, *Exculpatory Clauses and Public Policy: A Judicial Dilemma*, 53 U. COLO. L. REV. 793, 795-803 (1982) for the Colorado Supreme Court’s treatment of voluntariness of a contract executed to relieve the owners and operators of an airplane, airport, and skydiving facility from liability for negligence.

79. *Ferrell*, 147 Cal. App. 3d at 316-30, 195 Cal. Rptr. at 93-96.

80. 158 Cal. App. 3d 138, 205 Cal. Rptr. 513 (1984).

81. *Id.* at 139, 205 Cal. Rptr. at 513. The release was printed in five and one-half point type. See *supra* note 66.

nary vision.⁸² While discussing the defendant's seeming intent to conceal the release in the fine print, the court stated that it is the "public policy of this state to posit the risk of negligence on the actor."⁸³ The court added that release type should be at least as big as that required by the California Civil Code for required contract provisions.⁸⁴ The court noted that the operative language should be in a position that compels notice that valuable legal rights are being extinguished.⁸⁵ In *Link*, as in *Ferrell* and *Celli*, the release language was buried in a long complicated sentence.⁸⁶ The court summarized preferred release language as clear, explicit, free of ambiguity, and free of obscurity.⁸⁷ The language should also state that the releasor is releasing the other party from all liability, including liability for negligence.⁸⁸

In summary, until 1985, California courts had uniformly found reasons for denying the validity of risk releases in high risk sports. The reasons included findings of fraud,⁸⁹ inadequate drafting,⁹⁰ small print,⁹¹ unclear language,⁹² and public policy considerations.⁹³ In 1985, however, the trend of readily invalidating risk releases was reversed.

B. Recent California Decisions Upholding Risk Releases

1. *Release Valid Because of Drafting, Absence of Public Policy Considerations, Proper Execution, and Nature of the Sport*—Recently, several risk releases signed in the context of high risk sports have been upheld in California courts. In *Hulsey v. Elsinore Parachute Center*,⁹⁴ the plaintiff was injured during his first parachute jump taken while participating in a "First Jump Course."⁹⁵ Before class, he had signed an "Agreement and Release of Liability," releasing the parachute center from liability for "any and all risks of injury."⁹⁶ On his first jump, the plaintiff was unable to steer his parachute to the target area and conse-

82. *Link*, 158 Cal. App. 3d at 141, 205 Cal. Rptr. at 514.

83. *Id.*

84. *Id.* at 141-42 at n.1, 205 Cal. Rptr. at 514-15 n.1.

85. *Id.* at 143, 205 Cal. Rptr. at 515-16.

86. *Id.*

87. *Id.*

88. *Id.* at 142, 205 Cal. Rptr. at 515.

89. See *supra* notes 29-36 and accompanying text.

90. See *supra* notes 54-79 and accompanying text.

91. See *supra* notes 80-84 and accompanying text.

92. See *supra* notes 70-75 and accompanying text.

93. See *supra* notes 37-53 and accompanying text.

94. 168 Cal. App. 3d 333, 214 Cal. Rptr. 194 (1985).

95. *Id.* at 337, 214 Cal. Rptr. at 195.

96. *Id.*

quently hit some electric power lines.⁹⁷ Although he sustained only a broken wrist,⁹⁸ he sued the parachute center alleging negligence and strict liability.⁹⁹

The trial court granted the defendant's motion for summary judgment.¹⁰⁰ A California court of appeal¹⁰¹ affirmed the trial court's decision stating that the risk release was unambiguous, not against public policy, validly executed and therefore not unconscionable. The court also held that the defendant could not be held strictly liable because parachuting is not defined as ultra-hazardous.¹⁰² The *Hulsey* court examined each of these areas in detail.

a. Drafting—The *Hulsey* release was drafted in language that the court said would be clear to anyone.¹⁰³ The release included

97. *Id.* at 338, 214 Cal. Rptr. at 196.

98. *Id.*

99. *Id.* at 336, 214 Cal. Rptr. at 195.

100. *Id.*

101. *Id.* at 346, 214 Cal. Rptr. at 202.

102. *Id.* at 340-46, 214 Cal. Rptr. at 197-202.

103. *Id.* at 341, 214 Cal. Rptr. at 198. The court said that the release was not disguised in any legalese. It was in simple, unambiguous language, understandable to any lay person. This allowed it to fall within the *Ferrell* rule that the release was drafted to give notice of the effect of signing it. (citing *Ferrell v. Southern Nevada Off Road Enthusiasts, Ltd.*, 147 Cal. App. 3d 309, 195 Cal. Rptr. 90 (1983)). Compare the *Ferrell* release, worded as follows:

RELEASE OF LIABILITY. ENTRANTS ARE REQUIRED TO READ AND SIGN THE FOLLOWING DECLARATION.

In consideration of the acceptance of this entry or my being permitted to take part in this event, I, for myself, my heirs, executors, administrators, successors and assignees [sic] agree to save harmless and keep indemnified SNORE, Ltd., it's [sic] individual members and their respective agents, officers, servants, and representatives, the owners, curators, lessor, agencies (including but not limited to Federal, State, County and City, or managers of any lands upon which this event takes place from and against all actions, claims, costs, expenses, and demands in respect of death, injury, loss of or damage to my person or property, howsoever caused, arising out of or in connection with my entry or my participation in this event, and notwithstanding that the same may have contributed to, occasioned by, or directly caused by the negligence of said bodies, their agents, officials, servants, or representatives. I declare that the drivers possess the standard of competence [sic] necessary and are physically fit for an event of the type to which this entry relates and the vehicle entered is suitable and roadworthy for the event.

Id. at 312 n.1, 195 Cal. Rptr. at 91 n.1.

with the *Hulsey* release worded as follows:

AGREEMENT & RELEASE OF LIABILITY [initials]

I, _____, HEREBY ACKNOWLEDGE that I have voluntarily applied to participate in parachuting instruction and training, culminating in a parachute jump at the premises of Elsinore Parachute Center.

I AM AWARE THAT PARACHUTE INSTRUCTION AND JUMPING ARE HAZARDOUS ACTIVITIES, AND I AM VOLUNTARILY PARTICIPATING IN THESE ACTIVITIES WITH KNOWLEDGE OF THE DANGER INVOLVED AND HEREBY AGREE TO ACCEPT ANY AND ALL RISKS OF INJURY OR DEATH. PLEASE INITIAL.'

"AS LAWFUL CONSIDERATION for being permitted by Elsinore Parachute

language that informed the releasor that he was accepting any and all risks of injury or death resulting from the parachute center's negligence.¹⁰⁴ It also stated that execution of the release was voluntary.¹⁰⁵ The court distinguished the *Hulsey* release, saying that it was understandable to any lay person where in *Ferrell* and *Celli* the releases had not been clear and explicit.¹⁰⁶ Additionally, the *Hulsey* release was distinguishable from the *Link* release because it was typed in a standard typeface, using capital and lower case letters.¹⁰⁷

b. Validity and Public Policy—The *Hulsey* court stated that this type of release was “arguably” contemplated by California Civil Code section 1668,¹⁰⁸ but that section 1668 does not automatically invalidate contracts seeking to exculpate one from liability for negligence.¹⁰⁹ The court referred to the *Tunkle* analysis of Civil Code section 1668 to bolster the proposition that the section only invalidates releases that are against the policy of the law or the public interest.¹¹⁰ The court then applied the *Tunkle* public interest criteria to sport parachuting and concluded that this sport was not essential to the public.¹¹¹ Therefore, there was no reason to limit the individual freedom to contract to release from liabil-

Center or one of its affiliated organizations to participate in these activities and use their facilities, I hereby agree that I, my heirs, distributees, guardians, legal representatives and assigns will not make a claim against, sue, attach the property of, or prosecute Elsinore Parachute Center, Parachutes, Inc., and or one of its affiliated organizations, and Aurora Leasing Company, and Orange Sport Parachuting Center, Inc. and Elsinore Sport Parachuting Center, Inc., and Lakewood Sport Parachuting Center, Inc. for injury or damage resulting from the negligence or other acts, howsoever caused, by any employee, agent or contractor of Elsinore Parachute Center or its affiliates, as a result of my participation in parachuting activities. In addition, I hereby release and discharge Elsinore Parachute Center . . . from all actions, claims or demands I, my heirs, distributees, guardians, legal representatives, or assigns now have or may hereafter have for injury or damage resulting from my participation in parachuting activities.

I HAVE CAREFULLY READ THIS AGREEMENT AND FULLY UNDERSTAND ITS CONTENTS. I AM AWARE THAT THIS IS A RELEASE OF LIABILITY AND A CONTRACT BETWEEN MYSELF AND ELSINORE PARACHUTE CENTER AND/OR ITS AFFILIATED ORGANIZATIONS AND SIGN IT OF MY OWN FREE WILL.

Hulsey, 168 Cal. App. 3d at 348, 214 Cal. Rptr. at 204.

104. *Id.* at 340, 214 Cal. Rptr. at 197.

105. *Id.*

106. *Id.* at 339, 214 Cal. Rptr. at 198.

107. *Id.* at 339, 214 Cal. Rptr. at 197. (the actual release form is reproduced with the court's opinion). See 168 Cal. App. 3d 333, 348, 214 Cal. Rptr. 194, 204.

108. *Id.* at 341, 214 Cal. Rptr. at 198. See also *supra* note 40 and accompanying text.

109. *Hulsey*, 168 Cal. App. 3d at 342, 214 Cal. Rptr. at 198-99.

110. *Id.* at 342, 214 Cal. Rptr. at 199.

111. *Id.* at 343, 214 Cal. Rptr. at 199. (Most skydivers would argue this point vehemently.)

ity¹¹² in that situation.

c. Execution—The *Hulsey* court also stated that the circumstances of execution of the release were such that it would not be unconscionable to enforce it.¹¹³ The court said that the release was so unambiguous that it could not operate to defeat the releasor's reasonable expectations.¹¹⁴ One circumstance that supported this finding was the plaintiff having initialed the release in three places and having signed it at the bottom.¹¹⁵

d. Classifying The Hazard—Although the layperson often calls adventure sports “ultrahazardous,”¹¹⁶ the court in *Hulsey* did not agree. The Court applied the following definition of ultrahazardous: “An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of utmost care, and (b) is not a matter of common usage.”¹¹⁷ The court stated that because the risks involved in parachuting, skiing, and whitewater rafting are to the participants, and not third parties, they cannot be considered ultrahazardous activities.¹¹⁸

The *Hulsey* court noted there were no other California cases directly on point dealing with this type risk release in the context of a high risk sport.¹¹⁹ However, *Hulsey* was soon followed by just such a case. In *McAtee v. Newhall*,¹²⁰ a release was upheld in a

112. *Id.*

113. *Id.* at 345, 214 Cal. Rptr. at 201.

114. *Id.*

115. *Id.*

116. Lindgren & Ream, *Participants In Hazardous Recreational Activities*, FOR THE DEFENSE, 7 (Dec. 1985), gives examples of sports under the title of ultrahazardous. The authors cite hot air ballooning, whitewater rafting and surfboarding. *Id.* The confusion seems to enter with semantics. Ultrahazardous is defined in the English language as “ultra—beyond what is common, ordinary, natural, right, proper, or moderate; excessively; exceedingly . . .” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2479 (16th ed. 1971). “Hazardous—exposed or exposing one to hazard; involving risk of loss.” *Id.* at 1041. Application of the lay definition of ultrahazardous to such activities as hanggliding, mountaineering, skydiving and scuba diving is appropriate, but application of the legal definition of ultrahazardous is not appropriate.

117. *Hulsey*, 168 Cal. App. 3d at 345, 214 Cal. Rptr. at 201. (quoting Luthringer v. Moore, 31 Cal. 2d 489, 190 P.2d 1 (1900)) (emphasis added).

118. *Id.* at 345-46, 214 Cal. Rptr. at 201. California courts have also held that flying is not ultrahazardous. *Southern Cal. Edison Co. v. Coleman*, 150 Cal. App. 2d Supp. 829, 310 P.2d 504 (1957).

119. *Hulsey*, 168 Cal. App. 3d at 343, 214 Cal. Rptr. at 199.

120. 169 Cal. App. 3d 1031, 216 Cal. Rptr. 465 (1985). This case dealt with a suit brought by a participant in a “motocross” Motocross is a motorcycle race on a tight closed course over natural terrain that includes steep hills, sharp turns and often mud. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 795 (1985). Only a strained construction could make a release of liability to participate in a motocross race involve any sort of public policy concern. race. Prior to competing, the entrant signed a “Release And Waiver of Liability and Indemnity Agreement.” *McAtee*, 169 Cal. Ap. 3d at 1032, 216 Cal. Rptr. at 466. The trial court upheld the release on grounds similar to those in *Hulsey*, finding the

high risk sport dispute. In *McAtee*, as in *Hulsey*, the court noted that the characteristics which had been fatal to previous releases were not present.¹²¹ Hence, these two well drafted releases were found valid and enforceable.

2. *Release Valid as Not Adhesive*—In 1986, the same California Court of Appeal that decided *Hulsey* again upheld a risk release in *Okura v. United States Cycling Federation*.¹²² In *Okura*, the plaintiff argued on appeal that the release was an adhesion contract.¹²³ The court provided a thorough analysis of the *Tunkle* case to support their decision that the *Okura* release involved a non-public policy transaction and therefore was valid and not adhesive.¹²⁴

3. *Release Valid Against Wrongful Death Action*—More recently, in April of 1987, the issue of whether a risk release and waiver of liability would defeat a wrongful death action by the signatory's heirs was addressed in *Coutes v. Newhall Land & Farming, Inc.*¹²⁵ In *Coutes*, the court distinguished between advance "waiver of liability" and "express assumption of risk" saying that waiver constitutes a promise not to sue and that assumption of risk authorizes tortious conduct and eliminates the defendant's duty.¹²⁶ On this basis, the court found that the defendant's behavior was not wrongful and therefore would not support a wrongful death action.¹²⁷

These California cases upholding risk releases seem to weave a cohesive web of rationale defining a high risk participant's ability to validly assume the risk of high risk activities. Foreign jurisdictions have addressed many of the same issues in determining the validity of risk releases.¹²⁸ They too have focused on contract prin-

release language unassailable. *Id.* at 1033, 216 Cal. Rptr. at 466. The court of appeal's affirmation turned on its determination that no public policy concern invalidates execution of this type of a release contract. *Id.* at 1034, 216 Cal. Rptr. at 467.

121. *Id.* at 1032-34, 216 Cal. Rptr. at 466-67.

122. 186 Cal. App. 3d 1462, 231 Cal. Rptr. 429 (1986).

123. *Id.* at 1466, 231 Cal. Rptr. at 430.

124. *Id.* at 1466-68, 231 Cal. Rptr. at 430-32. The contract was found not to be adhesive because of the voluntary nature of the activity (i.e., a non public policy area).

125. 191 Cal. App. 3d 1, 236 Cal. Rptr. 181 (1987).

126. *Id.* at 4, 236 Cal. Rptr. at 184.

127. *Id.*

128. Colorado—in *Jones v. Dressell*, 623 P.2d 370 (Colo. 1981), the court addressed the validity of a risk release executed by a parachutist. He was injured in an air crash preparatory to making a jump. The Colorado Supreme Court affirmed a summary judgment for the defendant. (citing *Tunkle v. Regents of Univ. of Cal.*, 60 Cal. 2d 92, 32 Cal. Rptr. 33, 383 P.2d 441 (1963) for the proposition that a risk release exempting one from liability for negligence did not fall within the category of agreements affecting the public interest).

ciples rather than tort doctrine in judging the validity of risk releases. The resulting decisions have paralleled the California decisions, however, California's law is still not completely settled in this area.

C. *A Recent Case Invalidating a Release on the Basis of Scope*

Just when the right of high risk sports participants to assume the risk in a risk release seemed to be assured, a California Court of Appeal reversed a lower court release decision and held for the plaintiff. In *Bennett v. United States Cycling Federation*,¹²⁹ The court reversed a trial court decision in favor of the defendants on the basis that the cause of the plaintiff's injury was not reasonably foreseeable within the boundaries of the release, and therefore constituted an issue of triable fact precluding summary judgment for the defendant.¹³⁰ The court applied the tort standard of reasonable foreseeability to the release contract holding that the participant could only be held to have waived the obvious or reasonably foreseeable hazards of bicycle racing.¹³¹ The court, however,

New York—in *Solodar v. Watkins Glen Grand Prix*, 317 N.Y.2d 228 (1971), a release was offered as a condition to participating in a race and was not against public policy. (citing *Ciofalo v. Vic Tanney Gyms, Inc.*, 10 N.Y.2d 294, 220 N.Y.S.2d 962, 177 N.E.2d 295 (1961) in which an exculpatory contract between a health club and member was upheld. *Ciofalo* said that "there is no special legal relationship and no overriding public interest which demand that this contract provision, voluntarily entered into by competent parties, should be rendered ineffective." *Id.* at 927); In *Gross v. Sweet*, 49 N.Y.2d 102, 400 N.E.2d 306 (1979), a release was upheld but only to the extent of responsibility for injuries that ordinarily and inevitably occur *without* fault on the party of the sponsor or teacher (emphasis added). The court acknowledged that although frowned upon, contracts to exculpate one for negligence are enforceable, but are subject to close juridical scrutiny. They mentioned an "exacting standard." *Id.* at 105, 400 N.E.2d at 309, requiring that the terms be unambiguous and understandable, clear and coherent. They also mention that the participant must have had apprehension of the risks.

Washington—in *Blide v. Rainier Mountaineering, Inc.*, 636 P.2d 492 (1982), a risk release was held to be clear and unambiguous, and mountaineering was found not to be a public policy concern, "Absent some statute to the contrary, the generally accepted rule is that contracts against liability for negligence are valid except in those cases where a public interest is involved." The court said that although a popular sport, mountaineering, did not involve a public interest. (citing 57 AM. JUR. 2d, *Negligence* 366 (1971)); *Hewitt v. Miller*, 11 Wash. App. 72, 521 P.2d 244 (1974)). See also *Broderson v. Rainier Nat'l Park Co.*, 187 Wash. 399, 60 P.2d 234 (1936) (a release was upheld as not against public policy where it released for injuries sustained on a toboggan run); *Baker v. City of Seattle*, 79 Wash. 2d 198, 484 P.2d 405 (1972) (In *Baker, Broderson* was overruled. The release was buried in the middle of the rental agreement and was not conspicuous enough. The decision was based on format, not content); *Hewitt v. Miller*, 11 Wash. App. 72, 521 P.2d 244 (1974) (a release was upheld against a plaintiff scuba diving student. The release was clearly worded and explicit references to negligence was deemed unnecessary).

129. 193 Cal. App. 3d 1485, 239 Cal. Rptr. 55 (1987).

130. *Id.* at 1490-91, 239 Cal. Rptr. at 59.

131. *Id.*

did not declare the contract itself invalid. Instead, the court went outside the four corners of the release, examining the knowledge required for assumption of the risk.¹³²

Bennett demonstrates the tenuous position of the risk release as a vehicle for validly assuming the risk. This case also points to the necessity of incorporating the doctrinal foundation of assumption of risk into the current use of risk releases.

II. THE RISK RELEASE AND THE DOCTRINE OF ASSUMPTION OF RISK

The risk release is a contract in which one party agrees to assume the risk of a hazard created by another party.¹³³ The subject of the contract is the releasor's assumption of risk, which is a tort law doctrine.¹³⁴ This type of assumption of risk consists of a party's express agreement with another party, to assume the risk of harm arising from the other party's conduct.¹³⁵ The essence of the relationship between the risk release contract and the doctrine of assumption of risk is embodied in the idea that the contract is merely the *form* taken by the *agreement* to assume the risk.¹³⁶

Assumption of risk in high risk sports involves the use of an

132. *Id.*

133. See *supra* notes 9-19 and accompanying text. Contract obligations are created to enforce a promise. They are obligations based on the intentions of the parties to a transaction. To say that tort, as well as contract, obligations can be disclaimed is to say that the intent of the parties can control their obligations. Tort obligations are based on policy considerations and the manipulation of these obligations depends on the relationship of the parties, the transaction and the type of loss. W. KEETON, *supra* note 9, at 655-66.

134. The doctrine of assumption of risk, also known as *volenti non fit injuria*, means legally that a plaintiff may not recover for an injury to which he assents, i.e., that a person may not recover for an injury received when he voluntarily exposes himself to a known and appreciated danger. The requirements for the defense of *volenti non fit injuria* are that: (1) the plaintiff has knowledge of facts constituting a dangerous condition, (2) he knows the condition is dangerous, (3) he appreciates the nature or extent of the danger, and (4) he voluntarily exposes himself to the danger. An exception may be applicable even though the above factors have entered into a plaintiff's conduct if his actions come within the rescue or humanitarian doctrine. *Clarke v. Brockway Motor Trucks*, 372 F.Supp. 1342, 1347 (D.C. Pa. 1974).

A defense to action of negligence which consists of showing that the plaintiff, knowing the dangers and risk involved, chose to act as he did. An affirmative defense which the defendant in a negligence action must plead and prove. FED.R.CIV. P. 3(c). It is not a defense under state workers' compensation laws or in FELA actions. Many states have abolished the defense of assumption of risk in automobile cases with the enactment of no-fault insurance acts or comparative negligence acts.

BLACK'S LAW DICTIONARY 113 (5th ed. 1979). See W. KEETON, *supra* note 9, at 480-98; RESTATEMENT (SECOND) OF TORTS § 496Aa-g at 560-66 (1965); 5 F. HARPER, F. JAMES & D. GREY, THE LAW OF TORTS § 21.0-21.8, at 187-258 (2d ed. 1986).

135. W. KEETON, *supra* note 9, at 480; RESTATEMENT (SECOND) OF TORTS § 496B (1965).

136. RESTATEMENT (SECOND) OF TORTS § 496B, comment a (1965).

aged doctrine¹³⁷ in the setting of new types of recreational activities.¹³⁸ The use of assumption of risk in high risk sports is vital to the continued existence of these methods of recreation.¹³⁹ However, express assumption of risk has a potential Achilles' heel — the risk must have been assumed with knowledge and appreciation, or its validity may be challenged.¹⁴⁰

A. Knowledge and Appreciation in Assumption of Risk

Knowledge has been called the “watchword” of assumption of risk.¹⁴¹ Therefore, assumption of risk is not generally attributed to an agreement unless it is clearly intended by the plaintiff and there is knowledge and appreciation of the risk.¹⁴² Accordingly, the defense of assumption of risk is restricted by three prerequisites. First, the plaintiff must *know* the risk is present. Second, the plaintiff must *understand* the nature of the risk. And third, the plaintiff's choice to encounter the risk must be free and voluntary.¹⁴³

The reason for requiring the plaintiff's knowledge of the risk is that he is shouldering the burden of taking care of himself. Therefore, it is only fair that the plaintiff be required to know and ap-

137. Assumption of the risk developed in the common law in 1799. W. KEETON, *supra* note 9, at 480 (citing *Cruden v. Fentham*, 2 Esp. 685, 170 Eng. Rep. 496 (1799), as the first distinguishable case).

138. Hang gliding, scuba diving, high-tech mountaineering, helicopter skiing, ultralight flying, and dune buggy racing, for example, have all become popular since the 1970s.

139. See *supra* note 24 and accompanying text, and see *infra* note 189 and accompanying text.

140. See *infra* notes 141-46 and accompanying text.

141. W. KEETON, *supra* note 9, at 487 (citing *Cincinnati, New Orleans and Texas Pacific Ry. Co. v. Thompson*, 236 F.2d 19 (6th Cir. 1916)), in which contributory negligence and assumption of risk were contrasted. Contributory negligence was identified as arising in the situation where one should have discovered the risk and acted accordingly; assumption of risk occurs when the plaintiff has knowledge of the risk and then assumes it). F. HARPER, F. JAMES & D. GREY, *supra* note 134, § 21.1, at 210 n.2.

142. RESTATEMENT (SECOND) OF TORTS § 496D comment a (1965), states that “As to express agreements to assume the risk, see § 496B. By such an agreement, the plaintiff may undertake to assume all of the risks of a particular relation or situation, whether they are known or unknown to him. *Such a construction will not, however, be given to an agreement unless it is clearly intended.*” (emphasis added). The point here is that unless the risk release expressly states that the signer is releasing for all *unknown* risks, there is a duty to make the signer aware of the facts that create the danger so that he actually appreciates the danger.

143. RESTATEMENT (SECOND) OF TORTS § 496D comments a-e (1965); *Van Tuyn v. Zurich American Ins. Co.*, 447 So. 2d 318 (Fla. App. 4th Dist. 1984). The plaintiff was injured in a fall from a mechanical bull after signing a waiver of liability. The court said that preliminary to any finding of express assumption of risk is a showing that the particular risk was known or should have been known and appreciated by the person injured. (citations omitted) (citing RESTATEMENT (SECOND) OF TORTS § 496D (1965)).

precipitate the magnitude of the particular burden assumed.¹⁴⁴

The beginning high risk sports participant is usually required to execute a risk release to assume the risk *before* engaging in the high risk activity.¹⁴⁵ In order to know and appreciate the type of risk and magnitude of the risk to which they are exposed, participants must either have researched it on their own or have been informed by the instructor or sponsor. Appreciation of the risk is possible if the knowledge required is information that any reasonable person would have. However, most high risk sports involve specific risks that are outside the scope of the average citizen's knowledge.¹⁴⁶ In this regard, a similarity can be drawn between the high risk sports participant and a medical patient. Both are required to give a form of consent regarding their personal bodily integrity in a realm which requires some special knowledge to appreciate.

B. *Applying the Idea of Informed Consent to Risk Releases*

A patient's consent is required in order to allow a physician to operate, an action that would otherwise constitute an intentional tort.¹⁴⁷ The patient and physician usually have a vastly different knowledge base concerning the details of the proposed treatment. Medical negligence law requires the physician to inform the patient of all risks inherent in the procedure so that the patient can make an informed decision regarding treatment based on the information he has received.¹⁴⁸

In California, the leading case on informed consent is *Cobbs v. Grant*.¹⁴⁹ In *Cobbs*, the plaintiff consented to a surgical procedure, after which the plaintiff developed complications.¹⁵⁰ These compli-

144. RESTATEMENT (SECOND) OF TORTS § 496D comment b (1965) which says: "The basis of assumption of risk is the plaintiff's consent to accept the risk and look out for himself. Therefore he will not be found, in the absence of express agreement, which is clearly so to be construed, to assume any risk unless he has knowledge of its existence."

145. See *supra* note 11 and accompanying text.

146. Scuba diving, mountaineering, and hang gliding, for example, are high risk but not high visibility sports. They are not mass spectator sports seen on television or routinely in the sports section of any newspaper, therefore, the beginning participant is less likely to have had exposure to the risks inherent in the activity.

147. W. KEETON, *supra* note 9, at 114; *Cobbs v. Grant*, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

148. For an excellent treatment of the legal and ethical basis of informed consent, its evolution, and its use in the clinical setting, see P. APPELBAUM, C. LIDZ, & A. MEISEL, INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE (1987). "[The idea] of informed consent is the core notion that decisions about the medical care a person will receive, if any, are to be made in a collaborative manner between patient and physician." *Id.* at 12. The doctrine is said to prevail in all American jurisdictions with the possible exception of Georgia. *Id.* at 12. (citing *Young v. Yarn*, 222 S.E.2d 113 (Ga. 1975)).

149. 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505, (1972).

150. *Id.* at 235, 502 P.2d at 4, 104 Cal. Rptr. at 508.

cations were classified as risks that were inherent in the operation, but had a low probability of occurrence.¹⁵¹ The plaintiff sued on the theory that the physician had not obtained his informed consent prior to surgery.¹⁵² The court reversed a judgment for the plaintiff and set guidelines for the physician's duty to inform.¹⁵³ An action on informed consent differs from an action attacking a risk release because physicians are held to higher standards of care and safety than scuba teachers or mountain guides.¹⁵⁴ Additionally, the focus of the release differs in that a medical release does not release from liability for negligence, where a risk release does. However, the rationale for obtaining informed consent for surgery is similar to the rationale for requiring knowledge and appreciation in assumption of the risk in high risk sports. The *Cobbs* court focused on four postulates in explaining the need for informed consent.¹⁵⁵

1. *Knowledge Base*—Because patients are usually unlearned in the technicalities of medical science, *Cobbs* assumed that the doctor's and patient's knowledge are not equal. In scuba or mountaineering, beginning students are generally less educated in the area than the instructors who are (or should be) experts in the field.¹⁵⁶ We can assume that like the doctor and patient, the instructor's and student's knowledge are not equal.

2. *The Right to Decide*—The *Cobbs* court said adults have the right to make decisions regarding their own bodies when submitting to medical treatment.¹⁵⁷ In this light, sports participants

151. *Id.*

152. *Id.*

153. *Id.* at 243-46, 502 P.2d at 10-12, 104 Cal. Rptr. at 514-16.

154. Physicians and surgeons are held to an exercise of the degree of learning and skill ordinarily possessed by reputable physicians, practicing in the same or similar locality under same or similar circumstances. The further duty of the physician is to use the care and skill ordinarily exercised in like cases by reputable members of the profession practicing in the same or similar locality under same or similar circumstances. CALIFORNIA BOOK OF APPROVED JURY INSTRUCTIONS, (BAJI) § 6.00 (7th ed. 1986).

There are no official national standards of care required of high risk sports instructors. The standards are industry set standards. See Romano & Taggart, *Anatomy of A Recreational Tort Case*, 5 AM. J. OF TRIAL ADVOC. 457 (1982). For example, skydiving safety standards are set by the United States Parachute Association (U.S.P.A.). This organization recommends the regulation of operational details such as altitudes for opening parachutes and other safety procedures. The procedures are voluntarily adhered to by drop zones (sites for sport parachuting) with no national practical sanction procedure for violators. Telephone interview with Michael Johnston, director of Safety and Training for the U.S.P.A. (August 1987).

155. *Cobbs*, 8 Cal. 3d at 242, 502 P.2d at 9, 104 Cal. Rptr. at 513.

156. See *supra* note 154 and accompanying text.

157. *Cobbs*, 8 Cal. 3d at 242, 502 P.2d at 9, 104 Cal. Rptr. at 513.

deserve the right to make an informed decision when releasing another from a duty, when the effect of this release may affect their bodily integrity and ability to recover money damages.

3. *Informed Consent*—*Cobbs* said medical consent must be informed consent to be effective.¹⁵⁸ Effective assumption of the risk, or risk consent, requires knowledge and appreciation of the risk assumed. Thus, assumption of the risk and medical consent are alike in that they both require a foundation of particular information. The releasor must have assumed the risk based on an informed decision to do so.¹⁵⁹

4. *Nature of the Relationship*—Medical consent acknowledges that the patient trusts his physician and depends on him for the information upon which he relies during his decision-making process.¹⁶⁰ The beginning high risk adventurer has a similar dependence on his instructor, who may be his initial source of information regarding the activity.

The *Cobbs* court stated that these factors mandate that physicians divulge all information upon which the patient will rely in making his decision.¹⁶¹ The court held that “[a]s an integral part of the physician’s overall obligation to the patient, there is a duty of reasonable disclosure of the available choices with respect to proposed therapy, and of the dangers inherently and potentially involved in each.”¹⁶² The trend in California is toward treating failure to obtain informed consent as negligence.¹⁶³ This trend suggests that failure to obtain an informed risk release could also be treated as negligence of the high risk provider, *preceding* the negligence that is released in the risk release.

The *Cobbs* factors require a physician to divulge any information relevant to the patient’s decision-making process.¹⁶⁴ The physician has a duty to disclose the inherent risks, benefits, and alternatives of the proposed treatment.¹⁶⁵ Recognizing the similarity

158. *Id.*

159. *See supra* notes 141-46 and accompanying text regarding knowledge and appreciation of the risk.

160. *Cobbs*, 8 Cal. 3d at 242, 502 P.2d at 9, 104 Cal. Rptr. at 513.

161. *Id.* at 243, 502 P.2d at 10, 104 Cal. Rptr. at 514.

162. *Id.*

163. *Id.* at 239, 502 P.2d at 8, 104 Cal. Rptr. at 511.

164. *Id.*

165. *Id.*; CALIFORNIA BOOK OF APPROVED JURY INSTRUCTIONS, § 6.11 at 188-89. (1986). Although there is no single set of legal requirements for informed consent throughout the jurisdictions, generally physicians must inform patients of the nature, purpose, risks, and benefits of any treatment proposed. In addition alternative forms of treatment must be mentioned. P. APPELBAUM, C. LIDZ, & A. MEISEL, *supra* note 148, at 4.

between a doctor's relationship to a patient and an instructor's relationship to the beginning high risk participant, the instructor's duty to disclose becomes apparent. In order to assure knowledge and appreciation of the risk, the instructor, like the physician, should be charged with the duty to disclose the dangers inherently and potentially involved in the proposed activity.

When an instructor or sponsor executes a release after giving the information necessary for a participant to actually know and appreciate the risk, there will then be tangible evidence to support a finding that the participant expressly assumed the risk.¹⁶⁶ However, this written evidence may raise a question that has been addressed in the area of medical consent. That question being: to what degree should courts presume that informed consent was obtained if a written signed release form was executed by the patient?¹⁶⁷

166. The actual risk release may enter litigation as real evidence of the participant's intent to assume the risk. C. McCORMICK, *McCORMICK ON EVIDENCE* 583-84, 732-36 (3d ed. 1984).

167. This issue has been addressed in the medical context by the Florida Supreme Court in *Parikh v. Cunningham*, 493 So. 2d 999 (Fla. 1986), in which a patient and her husband brought an action for damages against a physician based on the absence of informed consent. Judgement for the defendant physician was appealed and subsequently reversed by the District Court of Appeal. *Id.* At the trial court the question before the jury was whether the doctor had adequately explained the proposed treatment and the substantial risks and hazards inherent in that treatment. *Id.* One of the jury instructions read: "A consent which is evidenced in writing, if signed by a person under all these circumstances is mentally and physically competent to give consent shall be conclusively presumably [sic] to be valid consent." *Id.* at 1000. The plaintiffs appealed and argued that the medical consent statute, giving rise to this instruction violated the state's due process clause and was unconstitutional. *Id.* at 999-1000.

The Florida Supreme Court ruled that the district court had misread the statute which provided that before consent validity will be presumed, the required substantive elements of informed consent must be satisfied. *Id.* at 1001. The court said that the plain language of the statute requires that a presumption of valid consent will not arise unless the consent is informed consent. *Id.*, (citing *Gassman v. United States*, 589 F. Supp. 1534 (Fla. 1984), *aff'd*, 768 F.2d 1263 (11th Cir. 1985)); Probert, *Problems of Medical Malpractice*, 28 U. FLA L. REV. 56, 65 (1975). The court went on to point out that it is crucial that the trial court make clear to the jury that a written, signed consent is presumed valid only on a jury finding that the consent was informed consent. *Parikh*, 493 So. 2d at 1001-2. The court said that since the lower court had deleted the necessity of finding a valid and informed consent, before calling a written consent valid, the case would be remanded for a new trial. *Id.* The court said that the jury's verdict might have been based on the misleading instruction suggesting that "a written consent is a valid consent." Therefore, the jury instruction was prejudicial error.

Although California does not have a medical consent law, the Florida court's type of rationale could be used to defeat a release which is too generally drafted. For a clear description of the legal status of consent forms, see P. APPELBAUM, C. LIDZ, & A. MEISEL, *supra* note 148, § 9.1, at 176-89. "Eleven states (Florida, Idaho, Iowa, Louisiana, Maine, Nevada, North Carolina, Ohio, Texas, Utah, and Washington) have statutes that appear to encourage consent forms by according those that comply with the statutory requirements a 'presumption of validity'." *Id.* at 177. Those authors pointed out that a consent form that created a presumption that a patient was adequately informed and had consented would end a lawsuit at that point, but that the informed consent statutes had not been construed

The recent risk release case of *Bennett v. United States Cycling Federation*¹⁶⁸ faces this issue in the context of a risk release. There, the question was whether a disputed factual question was contemplated by a sports participant when he signed a release.¹⁶⁹ The factual question was whether the presence of an automobile on a bicycle race course, which was supposed to be closed to vehicle traffic, was "obvious or . . . might reasonably have been foreseen."¹⁷⁰ The court held that in this case, the defendants did not negate a triable issue of material fact on the point of whether a moving motor vehicle was a reasonably foreseeable hazard within the scope of the release.¹⁷¹

In *Bennett*, the subject of the release, the releasor's knowledge and appreciation of the risk, was determined to be outside the "scope"¹⁷² of the release, while the release itself was not declared invalid.¹⁷³ The *Bennett* decision implies that in order for a validly executed release to invoke a summary judgment for the defendant, the release must state the specific hazards and risks that the participant must foresee.

The *Bennett* case also indicates high risk recreational activities may create new factual situations in which to apply assumption of the risk in a risk release. The unique character of the eighties plaintiff who wishes to be an adventurer in what has become a very "safe"¹⁷⁴ society has generated the need to re-emphasize the

this way by the courts. These statutes have been held to create a presumption of consent but not of disclosure. "When physician defendants attempt to halt informed consent cases by alleging that patients have signed consent forms in compliance with a statute, they are still required to establish that they in fact provided patients with information adequate to comply with the prevailing standard of care." *Id.* Then it is presumed that the signature indicates consent. So, in using the form to establish consent, the physician must carry the burden of proving adequate disclosure. Otherwise the patient would have had this burden. *Id.* at 179. This argument could be used with risk releases to say that the release form, although evidencing release was signed without adequate disclosure. In order to assure that a properly drafted release, signed with true knowledge and appreciation of the risk, will be able to invoke a summary judgement for the defendant, the release should show evidence of informed assumption of risk. Otherwise, a *Parikh* type argument could be used to defeat a presumption that valid assumption of risk was obtained.

168. 193 Cal. App. 3d 1485, 239 Cal. Rptr. 55 (1987).

169. *Id.* at 1490-91, 239 Cal. Rptr. at 59.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 1490, 239 Cal. Rptr. at 58.

174. In California, the use of seatbelts in automobiles is mandatory because the "Legislature [found] that a mandatory seatbelt law will contribute to reducing highway deaths and injuries by encouraging greater usage of existing manual seatbelts." Private Passenger Motor Vehicle Safety Act, CAL. VEH. CODE § 27315 (West 1986). There are sections indexed in the California Codes dealing with safety in such diverse areas as aerial passenger tramways, amusement rides, boating, hunting safety, skateboard parks, volatile liquids window cleaners. CAL. GEN. LAWS ANN. General Index R to S (West 1981). Even the high risk adventurer is used to this type of protection in his daily life.

express assumption of risk doctrine as expressed in a risk release.

III. RISK RELEASES APPLIED TO HIGH RISK SPORTS, POINTS AND PROPOSALS

A. Points About Risk Releases

Assumption of the risk arose from the high individualism of the early industrial revolution¹⁷⁵ and is now being applied in the individualism expressed by high risk sports.¹⁷⁶ Our personal freedom to contract has often been subject to social influences, at times being zealously guarded and at other times challenged by a paternalistic government.¹⁷⁷ In high risk sports, the rights to assume the risk and individually contract are now joined in a setting where the skills required are complex and the stakes are high.¹⁷⁸

The execution of a risk release often occurs before initiating a new activity, when the beginning participant is eager to learn and may be unaware of the extent of the liability from which he releases the defendant.¹⁷⁹ If the release is carefully drafted and executed, it may totally bar the client from relief for any consequence of the defendant's conduct, possibly even gross negligence.¹⁸⁰ In

175. See *supra* note 143. F. HARPER, F. JAMES & O. GREY, *supra* note 134, at 248, 259, "*volenti non fit injuria*" was an expression of common law which regarded individual action as the keystone of the whole structure. Latin for the volunteer suffers no wrong; no legal wrong is done to the person who consents. S. GIFTS, LAW DICTIONARY 510 (1984).

176. There is no general legal prohibition against express agreement to assume the risk. F. HARPER, F. JAMES & O. GREY, *supra* note 134, at 247. High risk sports have been excluded from the class if specifically proscribed agreements due to their not being against public policy.

177. F. HARPER, F. JAMES & O. GREY, *supra* note 134, at 25; Fleming, *The Supreme Court of California 1974-1975, Forward: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L.REV. 239 (1976).

178. For example, in order to make a freefall skydive, the beginner must learn to recognize and avoid ground hazards, properly exit the aircraft, maintain stability while falling at approximately 120 miles per hour, properly deploy his parachute while travelling at that speed, jettison that parachute should it not open properly, deploy a reserve chute if necessary and safely land the parachute which travels at about 20 miles per hour. Failure to respond quickly and correctly in any of these areas could result in severe injury or death.

179. For example, a beginning rock climber may have the intuitive fear that the rope may break but may not realize that he is subjecting himself to a multitude of other hazards including snake bite, rope burns, abrasions, head injuries, rockfall, gear being dropped on him, dehydration, and hypothermia to name a few. Additionally, the participant may not realize that even if the instructor or sponsor negligently causes their injury they will have no legal rights against the instructor or sponsor after executing a valid risk release.

180. Gross negligence is the initial failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness. BLACK'S LAW DICTIONARY 1185 (4th ed. 1968). "Gross negligence" is substantially higher in magnitude than simple inadvertence, but falls short of intentional wrong. *Id.*

Gross negligence has been defined as very great negligence, the want of even slight or scant care, or failure to exercise the care that even a careless person would use. W. KEE-

view of this situation, the use of risk releases in high risk sports mandates consideration of five areas that may create inequity for beginners who are injured:

1. There is a common belief among lay people that a risk release will not be upheld in court. This attitude probably stems from the many decisions invalidating risk releases in the past,¹⁸¹ but as was discussed, the trend is in transition.¹⁸²

2. The release of liability by the client releases the seller of the service for the hazards which the seller may negligently cause or allow to happen. This brings forward four sub-issues: (a) there could be an unequal bargaining power as a result of the "take it or leave it" nature of the situation;¹⁸³ (b) the seller of the service,

TON, PROSSER AND KEATON ON TORTS § 34, at 211-12 (5th ed. 1984).

In an attempt to more specifically define it various courts have said that gross negligence requires willful, wanton, or reckless misconduct. *Id.* But, most courts consider that it differs from ordinary negligence only in a degree and not kind. *Id.*, but see *Id.* at 214 where the distinction between willful and wanton conduct and gross negligence have merged to mean a different quality of negligence rather than a different kind.

In California gross negligence is *not* defined in the CALIFORNIA BOOK OF APPROVED JURY INSTRUCTIONS (BAJI) 7th ed.(1986). This is interesting in that the objective states in the preface of this book is to be an accurate, neutral statement of the law. *Id.* at V (Preface).

For California Case law defining gross negligence, see *Helm v. Great Western Milling Co.*, 43 Cal. App. 416, (1919) ("gross negligence" defined as thee entire failure to exercise care as to justify the belief that there is an entire indifference to the interest and welfare of others, also distinguishing "willful misconduct" as more than gross negligence); *Pratt v. Western Pac. Ry. Co.*, 213 Cal. App. 2d 573, 29 Cal. Rptr. 108 (1963) (gross negligence the want of slight care and diligence); *Troxler v. Thompson*, 4 Cal. App. 3d 278, 84 Cal. Rptr. 211 (1970) (distinguishing gross negligence from willful misconduct and defining gross negligence as characterized by a passive or indifferent attitude toward results); *Johns-Manville Sales Corporation Private Carriage v. Workers Compensation Appeals Board*, 96 Cal. App. 3d 158 Cal. Rptr. 463 (1979) (in which gross negligence is called a failure to act under circumstances that indicate a passive and indifferent attitude toward thee welfare of others. Gross negligence is distinguished from willful misconduct in that it requires an intentional act of failure to act either with knowledge that a serious inquiry is a probable result, or with a positive and active disregard for thee consequences).

The Restatement (Second) of Torts says that "[c]lauses exempting the defendant from all liability for negligence will not be construed to include intentional or reckless misconduct, or extreme or unusual kinds of negligence, unless such intention clearly appears." RESTATEMENT (SECOND) OF TORTS § 496B comment d (1965).

Most interestingly, gross negligence has been eliminated in blending common law defenses into the comparative regulations apportionment doctrine. What was formerly called gross negligence is now treated as negligent conduct which is compared to the negligence of other tort feasers to determine apportionment. California courts are classifying willful and wanton misconduct (which is greater misconduct then plain gross negligence), as comparable to other kinds of negligence. See *Sorenson v. Allred*, 112 Cal. App. 3d 717, 169 Cal. Rptr. 441 (1980), *Zavala v. Regents of Univ. of Cal.*, 125 Cal. App. 3d 646, 178 Cal. Rptr. 185 (1981).

181. There is a general belief that risk releases will not be upheld because many past decisions have invalidated them. See *supra* notes 29-86 and accompanying text.

182. See *supra* notes 94-128 and accompanying text.

183. The high risk client has a limited number of places to seek instruction, for example in California there are only eight places offering skydiving instruction. Six of these businesses are U.S.P.A. members. Two are not. UNITED STATES PARACHUTE ASSOCIATION,

who is also the drafter of the release, is in the position to control the language used and the circumstances of execution;¹⁸⁴ (c) the drafter/seller may well want to de-emphasize the importance of the release; and (d) the drafter/seller may be willing to rely on the least explicit language in order to avoid scaring off prospective clients.

3. The drafter/seller is a person who is experienced in the field. He should know all of the inherent and possible risks¹⁸⁵ of the activity. The beginning client will not have the same knowledge or experience and will probably rely on the seller/drafter for the risk information.

4. High risk sports have not gained a place among the essential services found to be worthy of public policy concerns¹⁸⁶ because they do not encompass areas that are necessary for the public good.¹⁸⁷ Nonetheless, they deserve careful handling because they are activities that literally deal in life and death.¹⁸⁸ If releases of liability are upheld in the courts without demanding stringent standards of the seller/drafters, then the release could become a license for lower standards of care in all of the risk sport businesses.

5. Many high risk sports vendors have been faced with astronomical liability insurance rates or total inability to get liability insurance. A reliable risk release is a necessity for them.¹⁸⁹ Consequently, risk releases are a necessity for those who want high risk service and instruction to be available.

B. Reinforcing the Right to Assume the Risk While Protecting the Right to Be Informed

Most risk release cases are now being decided at the trial level by the granting of a defendant's motion for summary judgment.¹⁹⁰

1987 U.S.P.A. DROPZONE DIRECTORY 6-7 (1987).

184. The language of a contract will be strictly construed against the drafter. CAL. CIV. CODE § 1654 (West 1987).

185. Reasonably foreseeable risk involves a recognizable danger, based on some knowledge of the existing facts and some reasonable belief that harm may follow. W. KEETON, *supra* note 9, at 170.

186. *See supra* notes 47-51 and accompanying text.

187. *See supra* note 52 and accompanying text.

188. CBS Nightly News, Bob McNamera (June 15, 1987) (26 injuries 6 deaths so far in 1987 from rock climbing in the Colorado/Oklahoma region.)

189. *See supra* note 24.

190. "Summary judgment" is defined as a preverdict judgment entered by the court in response to a motion by the plaintiff or defendant who claims that the absence of factual dispute on one or more issues eliminates the need to send those issues to the jury, no real dispute as to salient facts, only a question of law is involved. S. GIFTS, LAW DICTIONARY 463 (1984). *See also* CAL. CIV. PROC. CODE § 437c (West 1987); *see also* Stationers Corp. v. Dunn Bradstreet Inc., 62 Cal. 2d 412, at 417 (1965); Mitter v. Bechtel Corp. 33 Cal. 3d

To be effective, risk releases should be drafted with the intent of sustaining that motion. However, summary judgment may not be proper or sustainable, if the risk release is executed without knowledge and appreciation of the risk.¹⁹¹ Since a valid risk release combines elements of both contract and tort law, it should satisfy tort criteria, as well as contract criteria. The courts have analyzed the release starting with the contractual criteria. If these requirements are not met, then the risk release should be found invalid on its face. If the contractual requirements *are* met, then in order to forestall a *Bennett* type decision, the next phase of the judicial analysis must determine that the tort criteria were met in the contract. Accordingly, releases should be drafted with this two-step analysis in mind.

1. *Contract Criteria Analysis*—The step-by-step analysis should progress as follows:

1. Is the language of the risk release clear and concise?
2. Is the drafting so unambiguous that any lay person could understand what the drafter is saying?
3. Does the release clearly and explicitly state that it is releasing the instructor or sponsor from liability for negligence?
4. Does it use the word “negligence,” or, if not, have words absolutely conveying that meaning been used?
5. Does the risk release provide release from active as well as passive negligence, and describe both?
6. Is the release printed in a format that is likely to compel notice to any lay person that legal rights are being extinguished by its execution?
7. Does it say that it can and will be used in a court of law against the releasor and has been upheld by the courts in many situations?
8. Is the print easily readable by people with normal vision?
9. Does the release give alternatives to the releasor such as a list of others who offer the same type of service?
10. Does the releasor assume the risk of injuries that may result in the signor’s death, and does the release waive liability to the signor’s heirs?
11. Finally, is the release initialed after each clause or provision and validly signed at the end?¹⁹²

868, 874 (1983).

191. This situation can create a question of fact as to the extent of the knowledge and appreciation.

192. See *Blide v. Rainier Mountaineering, Inc.*, 636 P.2d 492 (1982), in which a risk release was held to be valid even though the participant never signed it. The court said that

If the answer to any of these questions is no, then the risk release should fail as a defense. It is well settled that a written contract will be construed strictly against the drafter.¹⁹³ The poorly drafted release should not require any further inquiry and should be unavailable as a bar to the plaintiff's recovery. If the answer to all of the questions is yes, then the next phase of analysis will concern the tort foundation of the risk release.

2. *Tort Criteria Analysis*—The step-by-step analysis should ask:

1. Does the release clearly state what activities of the participant are covered by it?
2. Does the release disclaim warranties regarding any equipment used in the activity?
3. Does the release enumerate the risks and hazards to the participant explicitly enough to allow the judge to rule, as a matter of law, that an informed release was obtained?
4. Is there evidence in the content of the release to allow a court to find as a matter of law that this release was executed with the requisite knowledge and appreciation of the risks involved?

In order to maintain summary judgment for the defendant at this juncture, the defendant must be prepared to rely on the risk release's content to enable the court to determine as a matter of law that the written consent evidences informed consent. If the judge cannot determine as a matter of law that proper disclosure was given, then the validity of the consent expressed in a risk release may be subjected to either a court's or a jury's determination, as a factual issue.

This two stage analysis, both when drafting and assessing a release, should protect both parties to the bargain. The participant is protected by the impetus given to the proponent to provide full disclosure. Additionally, the participant's rights to assume risks are protected by virtue of the fact that the release will probably be upheld in court. On the other hand, the proponent is protected by a valid release which will bar all suits except for those in which the plaintiff was given a poorly drafted release or a release that does not evidence that the releasor actually knew and understood the exact risks that were assumed.

The risk release is a release from liability for negligence.¹⁹⁴ Historically, we have allowed this "license for negligence" to exist

he knowingly agreed to the terms of the release even though he never signed it. He had submitted the release with a signed letter stating that he had signed the release. *Id.* at 493.

193. See *supra* note 184 and accompanying text.

194. *Celli*, 29 Cal. App. 3d at 909, 105 Cal. Rptr. at 909 (citing *Burr v. Sherwin Williams Co.*, 42 Cal. 2d, 682, 269 P.2d 1041 (1954)).

under the rubric of our personal freedom to contract.¹⁹⁵ Knowing that a risk release will fail as a defense unless it is obtained with adequate disclosure should promote high standards of disclosure. This, in turn, will result in risk releases being executed, even by beginners, based on adequate knowledge. If the defendant's "good faith"¹⁹⁶ effort to disclose the inherent and potential risks is not apparent from the face of the risk release it may then have to be submitted to the jury. The process of evidencing risk in the release should assure that personal freedom was truly exercised by the participant, rather than personal coercion by the instructor or sponsor. Additionally, it should allow the providers of high risk sports to rest assured that this release will protect them in court.

C. Comparative Negligence Analysis

In California, prior to 1975, contributory negligence¹⁹⁷ and assumption of risk were complete defenses to a charge of negligence. Contributory negligence is conduct by the plaintiff which contributes, as a legal cause, to the harm he has suffered.¹⁹⁸ It is conduct which falls below the ideal standard to which he is required to conform for his own protection.¹⁹⁹ Assumption of risk is the plaintiff's knowledge of a possible condition or action which is obviously dangerous, and his subsequent agreement to expose himself to that condition or action.²⁰⁰ This agreement gives express consent to relieve the defendant of any duty to the party assuming the risk.

Assumption of risk has evolved into several categories which are sometimes difficult to delineate.²⁰¹ Assumption of risk occurs in

195. "License for negligence," the author's words.

196. "Good faith" is defined as a total absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations. S. GIFTS, LAW DICTIONARY 204 (1984).

197. "Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by want of ordinary care or skill in the management of his property or person, except so far as the latter has willfully or by want of ordinary care brought the injury upon himself. The extent of liability in such cases is defined by the title on compensatory relief." CAL. CIVIL CODE § 1714 (West 1987).

198. RESTATEMENT (SECOND) OF TORTS § 463 (1965); W. KEETON, *supra* note 9, § 65, at 451-62.

199. RESTATEMENT (SECOND) OF TORTS, § 463 comment b (1965).

200. *See supra*, W. KEETON, note 9, at 480.

201. *See* Annotation, *Effect of Adoption of Comparative Negligence Rules in Assumption of Risk*, 16 A.L.R. 4th 700 (1984); C. HEFT & C. HEFT, *COMPARATIVE NEGLIGENCE MANUAL* § 1.170, at 46 (J. Palmer & S. Flanagan, Rev. Ed. 1986); *Id.* App. I, at 4. W. KEETON, *supra* note 9, § 68, at 480; 5 F. HARPER, F. JAMES & S. GREY, *supra* note 134, § 21.d, at 187.

express,²⁰² implied,²⁰³ primary,²⁰⁴ secondary,²⁰⁵ reasonable,²⁰⁶ and unreasonable types.²⁰⁷ The distinctions between these types of assumption of risk and contributory negligence became especially important in 1975 when comparative negligence was adopted in the case of *Li v. Yellow Cab Co.*²⁰⁸

202. Express assumption of risk is a defense in which the plaintiff relieves the defendant of a duty before entering the relationship, thus the defendant's loyal duty to the plaintiff is abolished and the defendant cannot be charged with negligence. In this type of assumption of risk the plaintiff must give his express consent, in advance, to take the chance of injury due to a known risk. In order for this type of agreement to be sustained, the, 1) terms must have been "brought home" to the plaintiff, 2) if the plaintiff did not know of the provision in his contract, and a reasonable person in his position would not have known of it, it will not be found binding. W. KEETON, *supra* note 9, § 68, at 482-84; the elements of assumption of risk are that, 1) the plaintiff knows that a dangerous situation exists and 2) voluntarily exposes himself or herself to it. C. HEFT & C. HEFT, *supra* note 201, § 1.170, at 47; RESTATEMENT (SECOND) OF TORTS § 496 comment b (1965).

203. Implied assumption of risk is present when the plaintiff assents to the defendant's negligence by operation of the plaintiff's own conduct. Consent is found in the plaintiff's willingness to proceed voluntarily, with knowledge and appreciation of the risk he is incurring. In this case, the basis of the defense is consent, rather than contract. W. KEETON, *supra* note 9, § 68, at 484-86; Implied assumption of risk represents a consequence that the law attaches to voluntary relationships. 5 F. HARPER, F. JAMES & D. GREY, *supra* note 134, § 21.5, at 246; RESTATEMENT (SECOND) OF TORTS § 496 comment c (1965).

204. Primary assumption of risk is similar to express assumption of risk in that it involves the plaintiff voluntarily entering a relationship with the defendant and accepting the known risks that result from that relationship. C. HEFT & C. HEFT, *supra* note 201, § 1.180, at 48. This form of assumption of risk is based on the no duty concept. It differs from express assumption of risk in that it does not include the formalization of an express agreement. *Id.* § 68, at 496. The courts are split as to whether this form of assumption of risk (if implied) is a total bar to recovery or may figure into apportioned damages. W. KEETON, *supra* note 9, § 68, at 497.

205. Secondary (or unreasonable) assumption of risk occurs when a plaintiff unreasonably chooses to encounter a known risk, but does not actually manifest consent to relieve the defendant of any duty. The plaintiff's actions are considered unreasonable in light of the circumstances and when compared to the standard of a reasonable person. C. HEFT & C. HEFT, *supra* note 201, § 1.210, at 51; Annotation, *supra* note 201, at 704. This type of assumption of risk is comparable to contributory negligence, which also involves an unreasonable risk taken by the plaintiff. *Id.*; *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); 4b. WHITKIN, SUMMARY OF CALIFORNIA LAW § 737 F, at 421 (Supp. 1984); *See Grey v. Fibreboard Paper Products Co.*, 65 Cal. 2d 240, 418 P.2d 153 (1966); *Paula v. Gagnon*, 81 Cal. App. 3d 680, 146 Cal. Rptr. 702 (1978); *Gonzales v. Garcia*, 75 Cal. App. 3d 874, 742 Cal. Rptr. 503 (1977). *See infra* note 207 regarding the overlap of unreasonable (or secondary) assumption of risk and contributory negligence.

206. Reasonable assumption of risk exists when the plaintiff reasonably assumes the risk of the defendant's conduct. *See Segoviano v. Housing Auth. of Stanislaus County*, 143 Cal. App. 3d 162, 191 Cal. Rptr. 578 (1983).

207. *See supra* note 205 regarding secondary (or unreasonable) assumption of risk. This type of assumption of risk creates an area where the elements of contributory negligence and assumption of risk are so similar that they are considered to overlap. W. KEETON, *supra* note 9, at 497.

208. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). In *Li*, a driver who was in a collision with a taxi cab sued the taxi cab company and the cab driver. *Id.* at 809, 532 P.2d at 1229, 119 Cal. Rptr. at 861. The trial court found the plaintiff contributorily negligent and barred recovery. *Id.* On appeal the California Supreme Court held that the defense of contributory negligence was superseded by comparative negligence. *Id.* at 810, 532 P.2d at 1230, 119 Cal. Rptr. at 862.

Before *Li*, contributory negligence and all types of assumption of risk acted as *complete* bars to a plaintiff's recovery.²⁰⁹ In *Li*, however, contributory negligence was superseded by comparative negligence, which assigns liability in proportion to fault.²¹⁰ Unreasonable assumption of risk, is considered to be so comparable to contributory negligence that the two are thought to overlap. Therefore, unreasonable assumption of risk was also superseded by comparative negligence.²¹¹ After *Li*, a plaintiff who either is contributorily negligent *or* who unreasonably assumes the risk is no longer barred from recovery.²¹² Under comparative negligence, the plaintiff, whose actions fit into these categories, recovers in inverse proportion to his fault.²¹³

Since the other types of assumptions of risk²¹⁴ continue to be complete defenses to a defendant's negligence,²¹⁵ the particular type of assumption of risk attributed to the plaintiff is crucial to one's ability to recover.²¹⁶ A plaintiff who has unreasonably assumed the risk or contributed to his own injury can recover,²¹⁷ whereas a plaintiff who has reasonably assumed a risk is still barred from recovery.²¹⁸

The risk release is considered express assumption of risk and remains a separate and *complete* defense to a defendant's negligence. However, as *Bennett* demonstrates, there is the possibility that a release may fail to invoke a defendant's summary judgment, and may become an issue of triable fact for a jury. This brings forth an argument for allowing a release that goes before a jury to be included in comparative negligence.

In California, comparative negligence was adopted by judicial opinion to relieve the harshness of the contributory bar. This happened only twelve years ago.²¹⁹ It was a radical remodeling of contributory negligence, a doctrine that had stood essentially unchanged since 1809.²²⁰ The change occurred because the times dictated it. The times are dictating a change again.

209. *Id.* at 810-11 n.4, 532 P.2d at 1230-31 n.4, 119 Cal. Rptr. at 862-63 n.4.

210. *Li*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858.

211. *See supra* note 205 and 207; *Li*, 13 Cal. 3d at 824-25, 532, P.2d at 1240-42, 119 Cal. Rptr. at 872-74.

212. *Id.*

213. *Id.* at 827, 532 P.2d at 1243, 119 Cal. Rptr. at 875.

214. *See supra* notes 202, 204, and 206 and accompanying text.

215. *Li*, 13 Cal. 3d at 824, 532 P.2d at 1240, 119 Cal. Rptr. at 872; CALIFORNIA BOOK OF APPROVED JURY INSTRUCTIONS § 4.30 (1984).

216. *See supra* notes 201-08 and accompanying text for discussion on effect of comparative negligence on recovery under assumption of risk and contributory negligence.

217. Fleming, *supra* note 177.

218. *See supra* notes 209-13 and accompanying text.

219. *See Li*, 13 Cal. 3d 824, 532 P.2d 1226, 119 Cal. Rptr. 858.

220. *See Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (1809).

Comparative negligence allows apportioned recovery to a plaintiff who has either been contributorily negligent or who has unreasonably assumed the risk.²²¹ There is a fundamental flaw in allowing partial recovery to a plaintiff who unreasonably assumes the risk while denying recovery to one who in good faith executes a risk release but is not given full disclosure about the new and unknown risks of the activity. Express assumption of risk should continue to stand as a total defense to a claim of negligence when the risk release meets the burden of invoking a defendant's summary judgment. However, if it is submitted to a jury, it should move into the sphere of comparative negligence allowing apportioned recovery. In this way, the more equitable doctrine of comparative negligence will relieve the harsh results which would otherwise occur under a simple express assumption of the risk classification.

Once absorbed by comparative negligence, the risk release would change character. It would no longer be a one shot defense that would, if defeated, mean total liability for the defendant. Under comparative negligence, as the jury considered the factual issues surrounding the release they would also be free to apportion recovery between the parties.

CONCLUSION

In California, the trend regarding risk releases is changing. The risk release is likely to be upheld if it is properly drafted and executed. In order to protect the beginning high risk participant the release should include the requisite contractual elements. In addition, the release should evidence the plaintiff's exposure to all information necessary to allow him to make knowledgeable and informed release. Making the release evidence of informed release protects the proponent because the release should mandate a summary judgment for the defendant, if it goes to court. If there is a question of fact as to whether informed release was obtained, which is not discernable from the instrument, then that issue may be submitted to a jury.

If the jury finds the release invalid for the purpose of waiving liability then it should be moved into the doctrine of comparative negligence and apportioned recovery be given the plaintiff. The courts can protect personal freedom to contract and waive liability, and concurrently protect the interests of the high risk sports participant by demanding informed risk releases.

We are a nation of adventurers who are now confronted with

221. See *supra* notes 209-13 and accompanying text.

highly technological adventures. Those who choose to participate may seem foolhardy to some; however, they are still entitled to the fullest protection that the law can provide. Additionally, those who choose to provide high risk sports must also be protected from nuisance lawsuits and unlimited liability. The use of risk releases in adventure sports poses complex questions. The answers must be found in the continued evolution of our tort and contract law.

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