

Assumption of Risk

Hanks v. Powder Ridge Restaurant Corp.

“Snowtubing Waiver”

Two Common Issues

1. Was the contract clear enough about releasing the defendant from liability?
2. Will the court enforce contract?

- I fully assume all risks associated with [s]nowtubing, even if due to the NEGLIGENCE of [the defendants]
- I ... agree I will defend, indemnify and hold harmless [the defendants] ... from any and all claims, suits or demands ... including claims of NEGLIGENCE on the part of [the defendants]
- I will not sue [the defendants] ... for money damages for personal injury ... even if due to the NEGLIGENCE of [the defendants]

Will the court enforce contract?

Various legal tests for determining if liability waiver is against public policy:

- Liability waivers are unenforceable
- Totality of the circumstances
- Six factors from *Tunkl*

Tunkl factors

1. Business of a type generally thought suitable for public regulation.
2. Defendant performs a service of great importance to the public (often a matter of practical necessity for some members of the public)
3. Defendant willing to perform this service for any member of the public
4. Defendant has bargaining advantage
5. Standardized adhesion contract of exculpation
6. Plaintiff placed under the control of the defendant, subject to the risk of carelessness by the seller or his agents.

Tort Law Values

Era	Philosophy	Primary Goal	Concern
Classical	Corrective justice	Individual accountability	Autonomy
New Deal	Political Economy	Distributive justice	Power
Neoliberal	Economics	Maximize utility	Efficiency

Murphy v. Steeplechase

“The Flopper”

volenti non fit injuria

volenti non fit injuria

“to one who is willing, no wrong is done”

Cardozo's counter-examples

1. “Obscure and unobserved” dangers
2. Too many accidents

Knight v. Jewett

“Touch Football Injuries”

Explicit assumption of risk

Implicit assumption of risk

Is assumption of risk redundant?

Can issues of “duty” and “comparative negligence” suffice?

Course evaluations



<https://go.blueja.io/IYSmYiQcWk27BHY8imT9CQ>

Review

Two parts to causation

- 1.

- 2.

Two parts to causation

1. Factual cause

2. Proximate cause

Two different tests for factual causation

1. “But for”
2. Substantial factor

Factual Cause

Stubbs v. City of Rochester: “Sewage in the Drinking Water”

Zuchowicz v. United States: “Prescribed Drug Overdose”

Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co.:
“Multiple Fires Whodunnit”

Summers v. Tice: “Hunting Party Whodunnit”

Garcia v. Joseph Vince Co.: “Fencing Sabre Whodunnit”

Sindell v. Abbott Laboratories: “Toxic Harms”

Proximate Cause

About scope of liability. Is the harm too attenuated? Policy question based on a rough sense of justice.

Rule-like carveouts:

- Danger invites rescue
- Eggshell plaintiff
- Intervening / Superseding Cause

In re Polemis: “The Plank that Made a Ship Explode”
Wagner v. International Railway Co.: “The Injured Rescuer”
Benn v. Thomas: “The Time-Delayed Heart Attack”
Steinhauser v. Hertz Corp.: “Sudden Schizophrenia”
Gibson v. Garcia: “The Rotten Telephone Pole that Fell on the Car”
Berry v. Borough of Sugar Notch: “The Rotten Tree that Fell on the
Speeding Car”
Palsgraf v. Long Island Railway Co.: “Fireworks on the Train
Platform”

Vicarious Liability

Three criteria for scope of employment

- 1) Employee's conduct must be of the general kind the employee is hired to perform.
- 2) Employee's conduct must occur substantially within the hours and ordinary spatial boundaries of the employment.
- 3) Employee's conduct must be motivated, at least in part, by the purpose of serving the employer's interest.

Vicarious Liability

Miller v. Reiman-Wuerth Co.: “The Bank Errand”

Christensen v. Swenson: “The Lunch Break”

Kuehn v. Inter-city Freight: “Road Rage”

Sage Club v. Hunt: “The Violent Bartender”

Exercise: Causation & Vicarious Liability (pg. 99)

Cooper seeks to dismiss the case against her for two independent reasons:

1. Cooper did not breach a duty of care to Boyd.
2. Cooper did not proximately cause Boyd's injuries.

Greene seeks to dismiss the case against her for two independent reasons:

1. Cooper putting out the trashcans was an intervening cause of Boyd's injuries.
2. Even if Cooper's actions were not an intervening cause, Greene still did not proximately cause Boyd's injuries.

ACME seeks to dismiss the negligence case against it for two reasons:

1. ACME is not liable for Greene's tortious acts because she was acting outside the scope of her employment.
2. ACME is not liable because asking Greene to pick up a birthday cake was not a factual cause of Boyd's injuries.

Contributory / Comparative Negligence and Assumption of Risk

Contributory Negligence in General:

The defendant is not liable

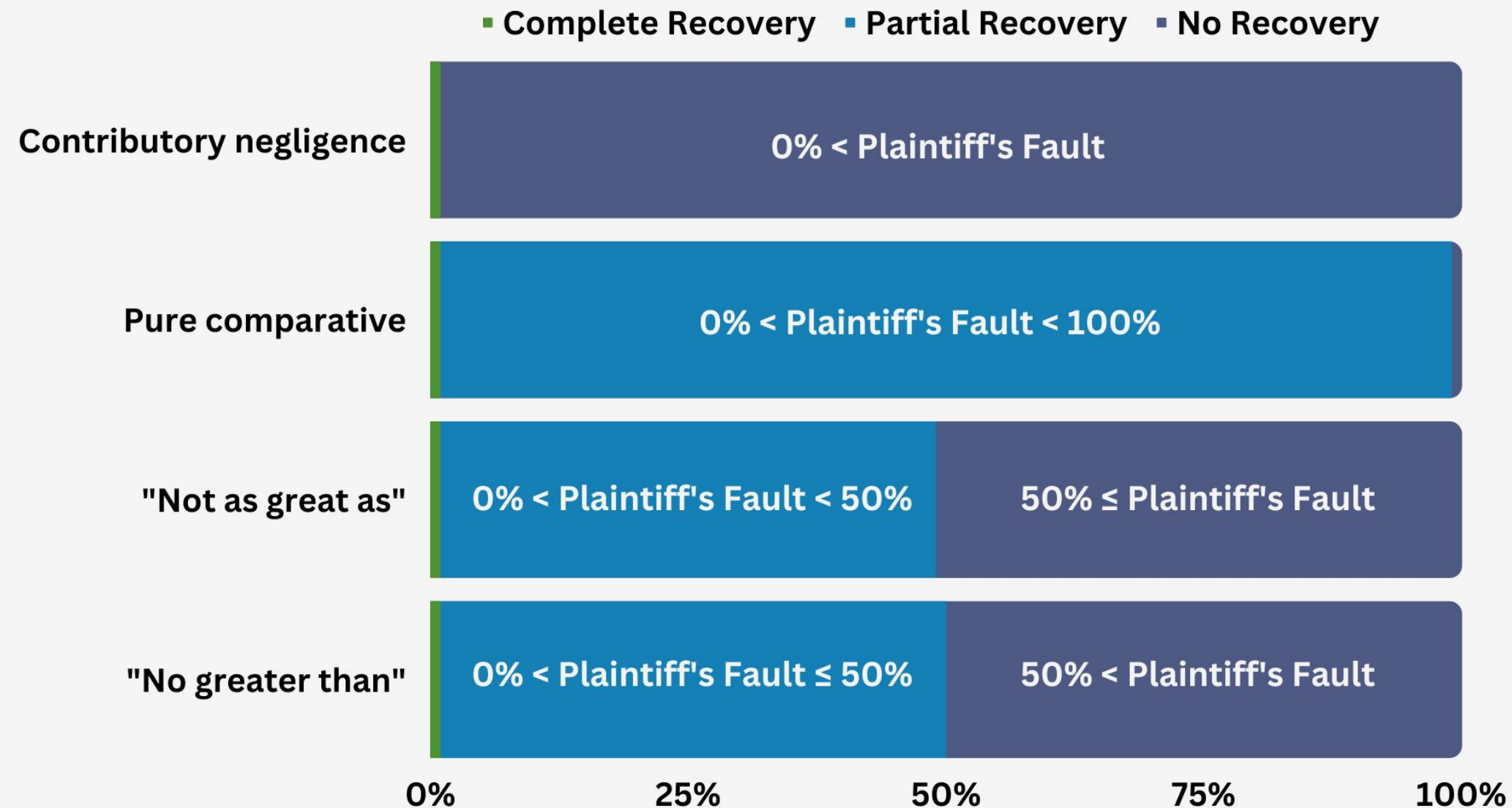
If the plaintiff was also negligent

- Duty,
- Breach,
- Causation, and
- Harm

Unless an exception applies:

- Last clear chance,
- Recklessness or willfulness of defendant, or
- Statute

Can the negligent plaintiff recover damages?



Doctrine of Contribution

Traditional Common Law Approach

Two versions:

1. Joint and several liability
2. Several liability

Order of operations with multiple injuries and multiple liable defendants

First step:

Separate injuries based on factual cause.

Second step:

For injuries that multiple defendants caused, sort out liability based on the contribution rule in the jurisdiction.

Explicit assumption of risk

Implicit assumption of risk

Tunkl Factors

1. Business of a type generally thought suitable for public regulation.
2. Defendant performs a service of great importance to the public (often a matter of practical necessity for some members of the public)
3. Defendant willing to perform this service for any member of the public
4. Defendant has bargaining advantage
5. Standardized adhesion contract of exculpation
6. Plaintiff placed under the control of the defendant, subject to the risk of carelessness by the seller or his agents.

Exercise: Defenses to Negligence

Plaintiffs:

- Emily (baby)
- Lynn (sister)
- Tito (father)
- Tatiana (mother)