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The Avid Sportsman and the Scope for Self-Protection: When Exculpatory Clauses Should Be Enforced

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THE AVID SPORTSMAN AND THE SCOPE FOR SELF-PROTECTION: WHEN EXCULPATORY CLAUSES SHOULD BE ENFORCED

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I. INTRODUCTION

"Life is either a daring adventure or nothing."

Helen Keller

The expansion of tort liability since the 1960s has coincided with a sharp curtailment of the availability of some recreational activities.[1] For instance, the percentage of hotel, motel, and YMCA swimming pools that offer the use of one and three-meter diving boards has plummeted.[2] Likewise, the percentage of horse-riding stables that offer the opportunity to ride a horse unaccom-

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1. *See* Mario R. Arango & William R. Trueba, Jr., *The Sports Chamber: Exculpatory Agreements Under Pressure*, 14 U. MIAMI ENT. & SPORTS L. REV. 1, 30–31 (1997) (examining the rising costs of liability insurance); Gil B. Fried, *Punitive Damages and Corporate Liability Analysis in Sports Litigation*, 9 MARQ. SPORTS L.J. 45, 48–49 (1998) (discussing the extent to which the liability expense of recreational vendors has increased); *see also* James M. Garner, *The Louisiana 1988 Products Liability Reform Act: The Changes and Their Effect*, 5 TUL. EUR. & CIV. L.F. 129, 165–66 (1990). Yet while the liability expense of vendors has increased, the injury rate from the vendors' activities has decreased. *See* Larry Weisman, *Risk All in the Game, But Costly*, USA TODAY, July 28, 1987, at C1, *available at* 1987 WL 4572449. For a general description on this curtailment of activities, see Marcia Chambers, *Whatever Happened to the Sandlot?*, NAT'L L.J., Apr. 22, 1991, at 15.

2. *See* Jane E. Brody, *Think Before You Dive*, CHI. TRIB., July 19, 1994, at 7. *See also* Greg Sobo, Note, *Look Before You Leap: Can the Emergence of the Open and Obvious Danger Defense Save Diving from Troubled Waters?*, 49 SYRACUSE L. REV. 175, 175–77 (1998) (illustrating how tort law has affected the availability of diving facilities for amateurs and professionals alike).

panied,[3] the percentage of ski areas that offer ungroomed intermediate runs,[4] the percentage of boat renting companies that offer power boats for water-skiing,[5] and the percentage of schools and day care centers that offer playground equipment have also declined.[6] Some activities, such as rented time on a trampoline[7] or on a mechanized bull have virtually disappeared,[8] perhaps because neither the recreational vendors who offer them nor the manufacturer who produced the product could sanitize the activity in a manner which would reduce the vendor's liability to injured patrons.[9] While courts and commentators continue to suggest that the expansion of the recreational vendors' liability comes at the expense of either the vendors themselves, or perhaps, their liability insurers,[10] the primary victims of the expan-

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3. *See* Lee Condon, *The Commerce of Camps: Making Profit from Play,* L.A. TIMES, June 6, 2000, at B6; Antoinette Fitch, *Riding Without the Law: Horse Clubs, Owners and Breeding Farms Paying High Insurance Premiums in the Face of Possible Liability Lawsuits Say They Are Struggling To Stay Alive. Now They're Looking Toward State Government for Protection.,* PITT. POST-GAZETTE, July 23, 2000, at W-1. Rising liability and insurance costs have not only affected unguided trail riding, they have also forced some equine entrepreneurs to stop offering guided trail rides. *See* Stephanie Scott, *Wisconsin Equine Entrepreneurs, Enthusiasts Find Joys of Hobby Surpass Costs,* POST-CRESCENT (Appleton, Wis.), July 21, 2000, *available at* 2001 WL 10114290; Dru Wilson, *City Won't Offer New Contract to Stable,* GAZETTE (Colorado Springs, Colo.) July 11, 2000, at Metro 2, *available at* 2000 WL 19083522.

4. Al Sokol, *Insurance Crisis Means Fun Runs Are No Longer Fun,* TORONTO STAR, Apr. 16, 1986, at E6. Ungroomed intermediate runs reappeared somewhat in New England in the mid-90s. *See* Tony Chamberlain, *No Boundaries: Some Areas Are Allowing Skiers Off the Beaten Path,* BOSTON GLOBE, Nov. 10, 1995, at A8; Allen Lessels, *Ski Managers Add More Gusto,* N.H. WKLY., Dec. 17, 1995, at 1, *available at* 1995 WL 5966943.

5. David G. Brown, *Powerboat Rentals: Are They Coming or Going?,* BOATING INDUS. INT'L ONLINE, Oct. 1, 1996, at 25, *available at* 1996 WL 9735056.

6. *See* Andrea Billups, *Educators Learn From Lawsuits, But the Fear of Costly Litigation Haunts Teachers,* WASH. TIMES, Nov. 21, 1999, at C1, *available at* 1999 WL 3099467; Laird Harrison, *Where Have All the Swing Sets Gone?,* TIME, May 14, 2001, at 29; Anjetta McQueen, *Liabilities, Threats Burden Schools,* AP ONLINE, Sept. 9, 1999, *available at* 1999 WL 22042246.

7. *See* Cindy Oakes, Note, *Florida's Bungee Jumping Regulations: Why Other States Should Take the Plunge,* 16 HASTINGS COMM. & ENT. L.J. 189, 210–12 (1993) (discussing the emergence and subsequent decline of the trampoline industry in the 1950s and 1960s).

8. *See* Babine v. Gilley's Bronco Shop, Inc., 488 So.2d 176, 177–78 (Fla. Dist. Ct. App. 1986); Van Tuyn v. Zurich Am. Ins. Co., 447 So. 2d 318, 320–21 (Fla. Dist. Ct. App. 1984); Jason Scott Johnston, *Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal Form,* 76 CORNELL L. REV. 341, 389–92 (1991).

9. This list of recreational activities which have become less available is not comprehensive. It is merely a representative sample.

10. *See, e.g.,* John Elliot Leighton, *Swimming Pools, Trampolines, and Other Backyard Activities—Fun Might Not Be Fun,* 1 Ann. 2000 ATLA CLE 695 (2000) (seeing vendors and their insurers as the only victims of increased liability).

sion of liability are the avid sportsmen who now search in vain for the activities they love.

This article discusses the liability rules that should govern when the recreational vendor who offers these activities is sued for negligence by an injured patron. The article does not discuss the rules that should govern the liability of a manufacturer or other seller of a recreational product, although much that is said here may be pertinent to that liability. The article contends that courts should handle lawsuits by injured patrons against recreational vendors by more faithfully enforcing the patron's pre-injury agreement to release the vendor from liability for injuries caused by its negligence.[11] Currently too many courts refuse to enforce these exculpatory agreements, also known as releases.[12] Once the presence of such a release is established, a court should routinely dismiss the patron's action against the vendor without the need for further discovery of the circumstances surrounding the injury (i.e., enforcing the release calls for granting the vendor's motions for judgment on the pleadings or for summary judgment). The article does acknowledge some limits to the protection the release should afford. While the release should protect the vendor from liability for its negligence or recklessness, a court should not enforce the release if it concludes that the vendor's behavior, as alleged in the patron's complaint, rises to the level of "outrageous."[13] Upon reaching that conclusion, the court should let the patron's case proceed. If at the close of the patron's case in chief, and at the close of all the evidence, the court still deems the vendor's conduct outrageous, then the release would be deemed unenforceable. The judicial finding of outrageousness then could be thought of as a threshold requirement that must be met before voiding the release and allowing the case to proceed under the

11. To be sure, some of the recreational vendors mentioned in this article, such as motels and ski areas, do not currently use release agreements. The routine enforcement of releases proposed in this article should eventually elicit their wider use.

12. *See infra* notes 43–47.

13. Perhaps the best description of the conduct to be deemed "outrageous" is conduct which Professor Owen describes as an "extreme departure from accepted safety norms." David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 27 (1982). Unlike a finding that the vendor intended to cause injury, a finding that the vendor's conduct was outrageous would not currently threaten the vendor's coverage under the typical liability insurance policy. KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION 444 (3d ed. 2000) (stating that the only current exclusion based on the insured's culpability is for harm expected or intended by the insured).

current test for vendor liability—typically negligence.[14] In addition, the release should be ignored when the injury occurs in a context in which the patron lacks significant opportunity for self-protection.[15] For example, while the release should bar a ski area's liability for a skier's injuries while skiing (unless the court deems the ski area's alleged behavior outrageous), the release would have no effect on the liability of the ski area for injuries to skiers from the collapse of a chair-lift. While the release should bar an amusement park's liability for the nausea, nightmares, headaches and sore necks patrons suffer from the normal operation of its rides, the release would have no effect on the liability of the amusement park for injuries to patrons from a ride derailing.

While no jurisdiction has embraced this proposed rule, many have abandoned their centuries-old commitment to negligence as the standard for liability when the plaintiff was injured while participating in recreational activities. Those jurisdictions have opted instead for a significantly heightened standard for liability, namely, that a defendant's behavior be reckless or worse than

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14. With cases that reach the jury, the judicial finding that the vendor's conduct was outrageous would never affect the jury instructions or deliberations.

Nor would the judicial determination of whether the vendor's conduct—as alleged in the patron's complaint—was outrageous duplicate the jury determination of whether the vendor's conduct—as shown at trial—was negligent. Apart from the different record on which the two determinations are based, there are two separate issues which call for separate resolution. First, the court should determine the enforceability of the release. Second, in the absence of an enforceable release, the jury should determine whether the vendor was negligent provided, of course, sufficient evidence exists for a sensible jury to decide that issue either way.

15. When the patron has a significant opportunity for self-protection, the risks he faces from the recreational activity can be viewed as patron-controlled or at least patron-influenced. The extent of patron influence suggests that patrons are either the cheaper precaution-takers or will possess an opportunity to adjust to the vendor's previous negligence. A skier, for example, can typically adjust his skiing to accommodate any negligence by the ski area in failing to groom slopes or to otherwise eliminate natural hazards on the slopes. When the patron is the cheaper precaution-taker or can adjust to the vendor's previous negligence, there is a strong utilitarian case for denying liability in order to maintain the incentive for the patron to take care. *See* GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 154 (1970); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 88–96 (1987).

Moreover, in such situations the release may make perfect sense to a rational patron because the patron may prefer to substitute more of his own care for the vendor's care. Patrons may desire this substitution when they believe the precautions available to themselves are superior and will alone suffice, when they believe any precautions by the vendor are likely to spoil the aesthetic and other benefits of the recreation, and when they derive satisfaction from taking care. Indeed taking care to protect themselves may be part of the pleasure and challenge of the activity. For more defense of the proposed rule and an explanation of how it is to be administered, see *infra* Part IV.

reckless.[16] To be sure, the courts requiring more than negligence have been addressing a different context than that discussed here. In those cases, an injured participant was suing another individual participant and not, as here, a business vendor whom the injured patron paid for providing or allowing access to the activity.[17] The earlier cases requiring more than negligence have also involved injury to participants in highly organized, competitive athletic events taking place in relatively formal settings.[18] But the rule requiring more than negligence has been extended to cooperative recreational activities in informal settings.[19] The California Supreme Court, for example, has recognized that while negligence is the usual standard for liability, the negligence standard is inappropriate when an injured participant in a recreational activity—whether competitive or cooperative and regardless of the formality of the setting—sues another participant whose negligence caused the injury.[20] Instead, liability should only be imposed when the defendant-participant's conduct is deemed so reckless as to be "totally outside the range of the ordi-

16. *See, e.g.*, Jaworski v. Kiernan, 696 A.2d 332, 339 (Conn. 1997) (applying a recklessness standard to all team contact sports); Nabozny v. Barnhill, 334 N.E.2d 258, 261 (Ill. App. Ct. 1975) (holding that a soccer player is liable for injury in a tort action if his behavior is deliberate, willful, or reckless); Mark v. Moser, 746 N.E.2d 410, 419–20 (Ind. Ct. App. 2001) (applying a recklessness or intentional standard for voluntary sports activities); Hoke v. Cullinan, 914 S.W.2d 335, 339 (Ky. 1995) (applying a recklessness or intentional standard to injuries sustained in a tennis match); Turcotte v. Fell, 502 N.E.2d 964, 968 (N.Y. 1986) (applying a recklessness standard when one jockey crossed into another jockey's lane causing injuries); Daniel E. Lazaroff, *Torts & Sports: Participant Liability to Co-Participants for Injuries Sustained During Competition,* 7 U. MIAMI ENT. & SPORTS L. REV. 191, 195–98 (1990) (finding the recklessness standard to be the modern trend).

17. *See supra* note 16.

18. *See, e.g.*, *Nabozny,* 334 N.E.2d at 261.

19. *See, e.g.*, Dotzler v. Tuttle, 449 N.W.2d 774, 779 (Neb. 1990) (applying a willful or reckless disregard of safety standard to an injury arising from a church pickup basketball game); Marchetti v. Kalish, 559 N.E.2d 699, 702–03 (Ohio 1990) (holding that participants in recreational or sports activities assume the ordinary risk of these activities and cannot recover for the injury unless the injury was intentional); Connell v. Payne, 814 S.W.2d 486, 488–89 (Tex. App. 1991) (holding damages for an injury sustained in a recreational polo match are only recoverable when recklessness is shown).

20. *See* Knight v. Jewett, 834 P.2d 696, 710–11 (Cal. 1992) (finding the negligence standard inappropriate in the context of a pickup football game); *see also* Cheong v. Antablin, 946 P.2d 817, 820–21 (Cal. 1997) (finding the negligence standard inappropriate in the context of a skiing accident). The *Knight* court's approach has been followed in other states. *E.g.*, Crawn v. Campo, 643 A.2d 600, 604–05 (N.J. 1994). *But see* Graven v. Vail Assocs., Inc., 909 P.2d 514, 520–21 (Colo. 1995) (finding that negligence is the proper standard in claims where a ski area operator failed to mark a dangerous area); Lestina v. West Bend Mut. Ins. Co., 501 N.W.2d 28, 32–33 (Wis. 1993) (embracing the negligence standard).

nary [conduct] involved in the sport"—the standard referred to here as outrageous.[21] And just as the California Supreme Court's rule was based on the recognition that "vigorous participation" in athletic competitions—there a pickup touch football game—"likely would be chilled" if liability arose from "ordinary careless conduct,"[22] so too the rule proposed here stems in part from recognition that imposing liability for negligence will unduly chill vendors from offering vigorous recreational activities.[23]

Admittedly, the appropriate standard of culpability for prima facie liability, the issue in *Knight*, bears no obvious relation to the appropriate standard for deciding whether to enforce a properly worded release.[24] Conventionally, the former concerns a plaintiff's prima facie showing, the latter a defense. The former focuses on a defendant's conduct in regard to the risk of injury, the latter on the significance afforded the plaintiff's attitude toward the risk of injury. Little seems to be gained, and much lost, by conflating the two. If one claims, as this Article does, that the law treats the defendant vendors, and through them the avid sportsman, with undue harshness, one logically should call for raising the standard for prima facie liability from negligence to outrageousness. That approach, while more logical and straightforward, is not advocated here for at least two practical reasons. First, replacing the current negligence standard for prima facie liability with an "outrageousness" standard even when no release has been signed is too radical and sweeping a change for widespread acceptance. Defendant's argument for an "outrageousness" standard is stronger when plaintiff has clearly agreed in advance, under circumstances which do not suggest any coercion, to release defendant from liability for its negligence. Moving to an "outrageousness" standard only in the face of a release is a more incremental change. Second, if "outrageousness" became the test for defendant's prima facie liability, then the ancient and entrenched tra-

21. *Knight*, 834 P.2d at 710.

22. *Id.*

23. The *Knight* court refused to resolve suits arising from athletic competitions by ascertaining the scope of the plaintiff's consent and instead focused on the culpability of defendant's behavior and whether deeming that behavior actionable would discourage desirable recreational activities. *See id.* at 723 (Kennedy, J., dissenting).

24. *See* Mincin v. Vail Holdings, Inc., 308 F.3d 1105, 1111 (10th Cir. 2002) ("The issue is *not* whether the Colorado General Assembly has limited landowner liability. . . . Rather, it is whether . . . an exculpatory clause is valid."); Brooks v. Timberline Tours, Inc., 127 F.3d 1273, 1275–76 (10th Cir. 1997).

ditions of the common law would insist that the jury decide whether defendant's conduct rose to that level.[25] "Outrageousness" would be deemed a jury issue just as certainly and universally as "negligence" and "recklessness" have been deemed jury issues. And like "negligence" and "recklessness," which call both for evaluation and for fact-finding, it would rarely be appropriate for resolution before the end of trial. Hence suits against the defendant-vendors would still be likely to subject the vendors to the expense of discovery and trial, and to the risk of jury sympathy for the injured plaintiff. Defendants' expected liability and their liability insurer's charges and requirements would not decline significantly, and they would not return to offering the activities the avid sportsman loves. Whether a release is enforceable, on the other hand, is an issue more likely to be decided by the court on pretrial motions.[26] Even when enforceability turns on the culpability of defendant's conduct (i.e., whether defendant's conduct as alleged in the pleadings can be deemed "reckless," "willful or wanton," "gross negligence," or "outrageous"), the enforceability issue could be assigned to the court and decided before trial without too much violence to the long traditions of the common law.[27] Once releases are routinely enforced before trial and before discovery, the liability expense of the recreational vendors should decrease significantly.

There is nothing new about allowing the enforceability of a release to turn in part on the culpability of the alleged conduct the

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25. *See* Arango & Trueba, *supra* note 1, at 35–45.

26. Both the enforceability and interpretation of releases are for the courts. *See* Zollman v. Myers, 797 F. Supp. 923, 928 (D. Utah 1992) (determining that the release was not too ambiguous and denying summary judgment); Malecha v. St. Croix Valley Skydiving Club, Inc., 392 N.W.2d 727, 732 (Minn. Ct. App. 1986) (granting summary judgment because exculpatory agreement was enforceable); Vodopest v. MacGregor, 913 P.2d 779, 789 (Wash. 1996) (finding agreement unenforceable and upholding summary judgment); Schutkowski v. Carey, 725 P.2d 1057, 1060 (Wyo. 1986) (affirming summary judgment because indemnity agreement was valid).

27. *E.g.*, Neuchatel Ins. v. ADT Sec. Sys., Inc., No. 96-5396, 1998 U.S. Dist. LEXIS 17692, at *39 (E.D. Pa. Nov. 5, 1998) (enforcing release where defendant's behavior was not gross negligence and granting summary judgment); Lahey v. Covington, 964 F. Supp. 1440, 1446 (D. Colo. 1996); Bertotti v. Charlotte Motor Speedway, Inc., 893 F. Supp. 565, 570 (W.D.N.C. 1995); Potter v. Nat'l Handicapped Sports, 849 F. Supp. 1407, 1411–12 (D. Colo. 1994) (enforcing release and granting summary judgment because the court found no "willful or wanton" behavior by defendant); Heil Valley Ranch, Inc. v. Simkin, 784 P.2d 781, 785 (Colo. 1989) (enforcing release and granting summary judgment, holding that "[i]t is difficult to imagine any claim that Simkin could have asserted against Heil Valley that would not have been based, at bottom, on negligence.").

release would shield. Several courts have suggested that releases enforced to bar liability for negligence will not be enforced to protect conduct more culpable than negligence.[28] And nearly every tort defense, of which contributory negligence is the most obvious, is lost to the intentional wrongdoer.[29]

For nearly forty years, the prevailing test for determining the enforceability of a release from liability for negligence has been the test of *Tunkl v. Regents of the University of California*.[30] In *Tunkl*, the California Supreme Court struck down a release given on admission by a hospital patient who was now claiming malpractice.[31] The court set forth a list of factors which should determine whether a release is enforced.[32] One of those factors strongly supports the proposed rule. Releases are suspect, the court said, when "as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents."[33]

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28. *See* K-Lines, Inc. v. Roberts Motor Co., 541 P.2d 1378, 1382 (Ore. 1975) (noting that a release is enforceable for negligence but not for gross negligence, recklessness or willful and wanton behavior); Murphy v. N. Am. River Runners, Inc., 412 S.E.2d 504, 509 n.6 (W. Va. 1991) (holding that the release is enforceable in common law negligence action but not in action based on a breach of a statutory safety standard or recklessness). The Restatement (Second) of Torts provides that "clauses 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 cmt. d (1965).

29. *See* FDIC v. Marine Nat'l Bank of Jacksonville, 431 F.2d 341, 344 (5th Cir. 1970) (holding that under Florida law contributory negligence is no defense to an action sounding in trover and conversion) (citing RESTATEMENT (SECOND) OF TORTS § 463 (1965)); McLain v. Training and Dev. Corp., 572 A.2d 494, 497 (Me. 1990) ("'[c]ontributory negligence never has been considered a good defense to an intentional tort.'") (quoting W. Page Keeton et al., PROSSER & KEETON ON THE LAW OF TORTS § 67 at 477–78 (5th ed. 1984)). *See also* Hoffmeyer v. Hoffmeyer, 869 S.W.2d 667, 668 (Tex. App. 1994) (holding that parental immunity is no defense to intentional torts); Morgan v. Johnson, 976 P.2d 619, 620 (Wash. 1999) (holding that the intoxication defense is unavailable in an intentional tort). Should courts dramatically water down the intent required for an intentional tort to, say "exposing another to a known risk," then releases of liability for intentional torts should be enforced. *See* Blankenship v. Cincinnati Milacron Chems. Inc., 433 N.E.2d 572, 578 (Ohio 1982) (broadening the concept of intent so as to avoid Worker's Compensation Act exemption of employer from liability for negligence).

30. 383 P.2d 441 (Cal. 1963). *Tunkl*'s refusal to enforce a mandatory arbitration system as an alternative to malpractice liability was overruled in *Madden v. Kaiser Foundation Hospital*, 552 P.2d 1178, 1186 (Cal. 1976).

31. *Tunkl*, 383 P.2d at 448–49.

32. *Id.* at 445–46.

33. *Id.* at 446. An alternative criteria for enforcing releases is whether the release agreement imposes external costs on others. Because a recreational release does not affect the liability of either the vendor or the patron toward others injured by the recreational

The rule proposed in this article can be reduced to a mere interpretation of this "control" factor. Under the proposed rule, releases would be enforced, absent outrageous behavior by the vendor, as long as the patron at the time of injury was not so under the vendor's control that the patron no longer retained significant opportunity for self-protection.

Any proposed rule must meet the challenge of not extending into settings where it does not belong. Enforcing releases on behalf of recreational vendors does not call for enforcing releases in industrial accident, medical malpractice, or automotive design settings, for example. A release given by a worker to the manufacturer of the industrial equipment that the worker uses should not allow the manufacturer to avoid liability for his negligence. Nor should the releases given by a patient to a doctor or a car buyer to the car's manufacturer allow the doctor or manufacturer to avoid liability for negligence. A major theme of this article is that recreational activities differ significantly from many other activities which give rise to tort liability because there is a positive social value in leaving patrons free to deal with the activities' risks, including those risks that can be said to come from the vendor's negligence.[34] Hence, in recreational settings, the law should not pressure vendors to sanitize their activities through the taking of every precaution which a judge or jury, often mistakenly, may deem cost-justified.

Part II of the article describes the current law affecting the recreational vendor and evaluates the likely effect of that law. Part III discusses the social value of the recreational activities whose availability has decreased. Part IV explains the proposed rule and defends it. Part V concludes.

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activity, this criterion also favors enforcing the release.

34. Another obvious difference is that in the industrial accident, medical malpractice, and automotive design settings, the plaintiff is less likely to be the cheaper accident-avoider, either by taking precautions or by lowering his activity level. Consider the worker using a drill press who, through momentary inadvertence, catches and loses a finger in the press. Because the cost of the worker guarding against any momentary inadvertence is prohibitive and because the worker's care is stochastic, the worker is unable to wholly avoid the possibility of injuring himself. And avoiding the accident through the worker opting for a lower activity level by avoiding that work may also be prohibitively costly. When the manufacturer could have designed some cost-justified engineering safeguard which would have protected the worker from his momentary inadvertence, the manufacturer is rightly seen as the cheaper accident-avoider, a factor which supports manufacturer liability. In the recreational settings discussed here, the patron is much more likely to be the cheaper accident-avoider either by taking precautions or by avoiding the activity until he is better prepared.

II. THE CURRENT LAW AND ITS EFFECTS

A. *The Current Law*

"It is only by risking our person from one hour to another that we live at all."

William James

Not all courts show hostility toward a patron's release of a recreational vendor from liability for the vendor's negligence. In a great many cases courts have enforced releases and have terminated the injured patron's negligence suit against the vendor before trial.[35] Typically the ground for enforcing a release is that the *Tunkl* criteria support enforcement. The criterion most often invoked is that the vendor is not "engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public."[36]

Nevertheless almost every jurisdiction contains cases where courts have voided or circumvented the release and have allowed

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35. *See, e.g.*, Gambino v. Music Television, Inc., 932 F. Supp. 1399, 1401–02 (M.D. Fla. 1996) (granting summary judgment in favor of defendant sponsor of an obstacle course based on an exculpatory clause contained in a registration form signed by plaintiff prior to participation); Szczotka v. Snowridge, Inc., 869 F. Supp. 247, 251 (D. Vt. 1994) (granting summary judgment for defendant ski resort based on a release signed by the plaintiff as a condition of renting skiing equipment); Allan v. Snow Summit, Inc., 59 Cal. Rptr. 2d 813, 826 (Cal. Ct. App. 1996) (upholding summary judgment in favor of defendant ski resort based on a release signed in connection with skiing lessons); McAtee v. Newhall Land & Farming Co., 216 Cal. Rptr. 465, 467 (Cal. Ct. App. 1985) (granting summary judgment for defendant river rafting vendor based on a release); Hulsey v. Elsinore Parachute Ctr., 214 Cal. Rptr. 194, 200, 202 (Cal. Ct. App. 1985) (granting summary judgment for defendant skydiving vendor based on a release); Malecha v. St. Croix Valley Skydiving Club, Inc., 392 N.W.2d 727, 731–32 (Minn. Ct. App. 1986) (granting summary judgment in favor of defendant skydiving club based on a release signed by the plaintiff prior to a parachute jump); Finkler v. Toledo Ski Club, 577 N.E.2d 1114, 1118 (Ohio Ct. App. 1989) (upholding summary judgment in favor of defendant ski club based on a release included in decedent's original club membership application); Moss v. Fortune, 340 S.W.2d 902, 903–04 (Tenn. 1960) (summary judgment in favor of defendant stable based on a release); Blide v. Rainier Mountaineering, Inc., 636 P.2d 492, 494 (Wash. Ct. App. 1981) (granting judgment for defendant mountain climbing vendor based on a release).

36. *Tunkl*, 383 P.2d at 445. Of the decisions listed in note 35, those upholding releases under *Tunkl* include *Husley*, 214 Cal. Rptr. at 199 and *McAtee*, 216 Cal. Rptr. at 467.

No court has held that enforcement of the release depends on the criterion proposed here, namely, whether the patron at the time of injury possessed an opportunity for self-protection.

injured patrons who merely show the vendor's negligence to prevail. Some courts hostile to recreational releases have nullified them as violations of public policy.[37] Other hostile courts narrow recreational releases into oblivion by insisting that they identify the risk that materialized or the activity from which the injury arose with a specificity that the vendor, drafting ex ante, cannot possibly achieve. In *Dobratz v. Thomson*,[38] for instance, the Wisconsin Supreme Court upheld a release signed by participants in a water-skiing show on public policy grounds. The court, however, found the release inapplicable because it applied to injuries suffered "in the event" and "in competition" rather than in a "ski show," and because it did not specify "what particular sorts of skiing stunts [were to be performed] . . . [or their] level of difficulty and dangerousness."[39] Some courts nullify releases on grounds which stand as a tribute to judicial ingenuity. The Supreme Court of Idaho, for example, held that while a release extinguished the common law negligence action of a patron of a horse-riding stable, a state statute which merely restated the usual duty "to 'conform to the standard of care expected of members of [the] profession'" created a statutory cause of action which the release did not affect.[40] Until recently, perhaps the most popular, if disingenuous, method for nullifying a recreational release was to claim that the language of the release was ambiguous in that it could be read to cover only injuries occurring *in the absence of the vendor's negli-*

37. *See, e.g.*, Coughlin v. T.M.H. Int'l Attractions, 895 F. Supp. 159, 162 (W.D. Ky. 1995) (invalidating release signed by participant in guided cave tour because of state's public policy against enforcing release agreements); Weiner v. Mt. Airy Lodge, Inc., 719 F. Supp. 342, 346 (M.D. Pa. 1989) (denying motion to dismiss strict liability count because as a matter of public policy, "strict liability should not be disclaimed"); Williams v. United States, 660 F. Supp. 699, 703 (E.D. Ark. 1987) (holding that an agreement releasing the United States Air Force of liability during an air R.O.T.C. program violated public policy by permitting the government to assume care and custody without any policy encouraging the exercise of reasonable care); Dalury v. S-K-I, Ltd., 670 A.2d 795, 800 (Vt. 1995) (holding release agreement in favor of a ski resort unenforceable because of public interest in assuring that ski areas maintain reasonably safe premises); Scott v. Pac. W. Mountain Resort, 834 P.2d 6, 11 (Wash. 1992) (invalidating exculpatory clause because it violates public policy to allow parents to waive the rights of their children). In New York the legislature at one point voided recreational releases. *See* N.Y. GEN. OBLIG. LAW § 5-326 (McKinney 1978). This statute now is understood to void releases only where the recreation is paid for and where the release appears as small print on the back of tickets. *See* Geise v. County of Niagara, 458 N.Y.S.2d 162, 164 (N.Y. Sup. Ct. 1983); Blanc v. Windham Mountain Club, Inc., 454 N.Y.S.2d 383, 389–90 (N.Y. Sup. Ct. 1982).

38. 468 N.W.2d 654 (Wis. 1991).

39. *Id.* at 661.

40. Lee v. Sun Valley Co., 695 P.2d 361, 364 (Idaho 1984) (quoting Idaho Code § 36-1204 (Michie 1987)).

gence.[41] Hence, the contract interpretation principle—that the release should be construed against the drafter—rendered the release inapplicable as long as the negligence of the vendor was alleged.[42] Because the vendor would not have been liable in the absence of its negligence whether the release existed or not, this approach nullified the release entirely.[43] Since the 1980s, however, a consensus seems to have emerged that wording the release to apply to injuries "arising from the vendor's negligence" will render it unambiguous in this respect, and this method of overcoming the release is rarely seen today.[44] Finally, some courts which ultimately rule for the vendor based on the release undermine the release's purpose by finding that the significance of the release cannot be determined until the end of trial.[45] As the California Court of Appeal has emphasized:

> In cases arising from hazardous recreational pursuits, to permit released claims to be brought to trial defeats the purpose for which releases are requested and given, regardless of which party ultimately wins the verdict. Defense costs are devastating. Unless courts are willing to dismiss such actions without trial, many popular and lawful recreational activities are destined for extinction.[46]

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41. *See, e.g.,* Yauger v. Skiing Enters., 557 N.W.2d 60, 61 (Wis. 1996) ("The Yaugers argue that the ambiguity in the language of the exculpatory contract renders it unenforceable.").

42. *See, e.g.*, Rosen v. LTV Recreational Dev., Inc., 569 F.2d 1117, 1122–23 (10th Cir. 1978) (ruling under Colorado law that a release signed in connection with a purchase of a season pass did not free defendant from liability for injuries sustained when plaintiff collided with ski-lift pole because it failed expressly to exonerate the defendant for its negligence); Ferrell v. S. Nev. Off Road Enthusiasts, Ltd., 195 Cal. Rptr. 90, 96 (Cal. Ct. App. 1983) (holding that a release's failure to mention negligence renders it irrelevant); Celli v. Sports Car Club of Am., Inc., 105 Cal. Rptr. 904, 911 (Cal. Ct. App. 1972) (holding that "pit passes" signed by plaintiff's spectators at an auto race did not exonerate defendant from liability because they failed to state explicitly that the signors released the defendant from liability for its own negligent conduct); Bernstein v. Seacliff Beach Club, Inc., 228 N.Y.S.2d 567, 569 (N.Y. Dist. Ct. 1962) (holding that a clause in plaintiff's membership application that purported to waive all claims of injury was insufficient to free defendant from liability for negligence); *Yauger,* 557 N.W.2d at 65 (holding a release agreement included in ski area's application for a season pass unenforceable as against public policy because it failed to clearly inform the signer that he accepted the risk of the defendant's negligence).

43. *See, e.g.*, *Yauger*, 557 N.W.2d at 65.

44. *See, e.g.*, Allan v. Snow Summit, Inc., 59 Cal. Rptr. 2d 813, 826 (Cal. Ct. App. 1996) (upholding summary judgment for defendant ski resort based on signed release in which plaintiff agreed not to sue defendant for its negligence); Malecha v. St. Croix Valley Skydiving Club, Inc., 392 N.W.2d 727, 729 (Minn. Ct. App. 1986) (upholding a release that stated that defendant would be free from liability for "negligence implied or otherwise").

45. *E.g.,* Buchan v. U.S. Cycling Fed'n, Inc., 277 Cal. Rptr. 887, 894–95 (Cal. Ct. App. 1991).

46. Nat'l & Int'l Bhd. of Street Racers, Inc. v. Superior Court of Los Angeles County,

Of course the serious possibility that the release will not be enforced would raise the vendor's costs less if the vendor could escape the expense and disruption of discovery and trial on other grounds.[47] But the current law of negligence and of civil procedure provides few such grounds. Unlike criminal procedure in most states,[48] the civil procedure to be followed in negligence cases offers no way for a defendant to force a preliminary determination of whether the action against it possesses some threshold merit. And unlike the procedure in contract cases, where the key elements will eventually be put into the relatively predictable hands of a judge, the key elements in a negligence action are all for the jury. No matter how carefully the vendor conducted himself, the elements of negligence and cause in fact being for the jury, the vendor cannot draw the court's attention to the lack of evidence of those elements until the end of the patrons' case-in-chief at trial.[49] The expense of defending the vendor to that stage is suggested by insurance data indicating that the costs of defense now often exceed the indemnity limits of the vendor's liability insurance.[50]

The ongoing study of the relative merits of the American Rule, which bars a successful litigant from recovering his litigation expenses, and the English Rule, which awards successful litigants these expenses, suggests that a major shortcoming of the American Rule is the temptation put before injured persons to bring frivolous suits.[51] This temptation becomes most acute when three conditions are met.[52] The first condition is that potential damages are high, even though the chance of prevailing is remote.[53] The second condition is that the mere advancement of the suit will subject the defense to substantial expense,[54] and the third condition is that the injured person is able to hire an attorney under a

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264 Cal. Rptr. 44, 46–47 (1989).

47. *See Buchan*, 277 Cal. Rptr. at 894–95.

48. *See, e.g.*, FED. R. CRIM. P. 5–7.

49. *Buchan*, 277 Cal. Rptr. at 894–95.

50. *See* Ellen S. Pryor, *The Tort Liability Regime and the Duty to Defend*, 58 MD. L. REV. 1, 38–39 (1999).

51. J. Robert S. Prichard, *A Systemic Approach to Comparative Law: The Effect of Cost, Fee, and Financing Rules on the Development of the Substantive Law*, 17 J. LEG. STUD. 451, 457, 460–61 (1988).

52. *Id.* at 460–61.

53. *Id.* at 460.

54. *Id.* at 461.

contingency fee agreement.[55] All three conditions exist in our current tort system.[56] Hence our system tempts injured patrons to bring frivolous tort suits against vendors much more than it tempts other potential plaintiffs to bring, say, frivolous contract suits.[57] Because frivolous suits are more likely in torts, courts should search more assiduously than in other areas of law for some method of identifying frivolous tort suits early and of containing the expense those suits inflict on defendants.

The consequences for a vendor when the release is overcome do not cease once the plaintiff patron concludes his case-in-chief. At that point—when the vendor can finally force the court to decide whether the evidence of the vendor's causal negligence is sufficient—the weakness of the modern meaning of negligence comes into play and nearly assures that the court will be unwilling to grant the vendor a directed verdict. While negligence at one time meant failure to provide average care or failure to provide the care which would have been provided by a reasonable person, it has evolved to mean the mere failure to provide any cost-justified precaution.[58] In their universal adoption of the Learned Hand test for negligence, courts have implicitly assumed that a reasonable person would take every cost-justified precaution. That one who takes every cost-justified precaution is acting with optimal (i.e., perfect) care and hence that this meaning of negligence requires perfection is rarely noticed.[59] The many older opinions in which courts have sharply distinguished sub-optimal behavior from negligent behavior seem to be ignored.[60] One consequence is that in

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55. *Id.*

56. *Id.* at 460–61.

57. *See id.*

58. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (stating Judge Hand's cost justification test for determining negligence); *see also* Michael D. Green, *Negligence = Economic Efficiency: Doubts>*, 75 TEX. L. REV. 1605, 1615–43 (1997) (examining the development of the negligence standard from the reasonable person test to the economic efficiency model of Hand and Posner).

59. Acting with greater care than that required by the Learned Hand test is sub-optimal because it means providing care that at the margin costs more than the safety benefits it provides. For a discussion of the apparent infallibility required of tort defendants by the Learned Hand test, without recognition that requiring infallibility requires more than reasonable care, see Mark F. Grady, *Why Are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 NW. U. L. REV. 293 (1988). *See also* Mark F. Grady, *Discontinuities and Information Burdens: A Review of* The Economic Structure of Tort Law by Landes and Posner, 56 GEO. WASH. L. REV. 658 (1988).

60. *See, e.g.*, Saunders v. Boston & Maine R.R., 136 A. 264, 265–66 (N.H. 1927) (finding defendant not negligent despite failing to take precaution of equipping trolley with a

order to reach a jury, a patron need only advance sufficient evidence of some untaken precaution or some safer alternative affirmative act which would have been cost-justified and which would probably have avoided or reduced the patron's injury. This shift in the meaning of negligence may have hurt recreational vendors especially. Anyone leading a group of horse riders would concede that each outing includes many moments when the leader fails to take every precaution which a judge or jury may later deem cost-justified.

In pointing to the vendor's untaken precaution, a process one could call selecting plaintiff's theory of causal negligence, the patron cannot be accused of viewing the injury ex post. For the patron is saying "here is a precaution that would have probably reduced the patron's injury and that one in the vendor's position, acting ex ante, should have known was cost-justified and safer overall (i.e., not just in regard to the risk that materialized, but in regard to all reasonably foreseeable risks)." Second guessing the vendor's behavior in order to suggest a theory of causal negligence does not require the hindsight of an ex post perspective, although the patron can count on the hindsight of the judge and jury to emphasize the safety payoff of his proposed precaution.

This modern meaning of negligence encourages relentless second-guessing. Attorneys are trained to engage in this second-guessing until conjuring up untaken precautions that are plausibly cost-justified and that would probably have reduced the patron's injury becomes second-nature. Identifying such untaken precautions becomes like shuffling through a rabbit-eared deck of cards to pick out the hand that just beats the vendor's. In the typical horse-riding injury case against the renting stable, the plaintiff patron can pick his alternative theories of causal negli-

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jack); Cordas v. Peerless Transp. Co., 27 N.Y.S.2d 198 (N.Y. City Ct. 1941); Watkins v. Taylor Furnishing Co., 31 S.E.2d 917, 918 (N.C. 1944) (stating that the measure of care in North Carolina is that of the ordinarily prudent, not the perfectly prudent, man); Porter v. Cook, 13 S.E.2d 486, 488 (S.C. 1941) (holding that a driver was not guilty of negligence "even though he did not make the wisest choice"). Professor Schwartz summarized the pre-1960 notion of negligence as requiring "'clear moral culpability substantially antagonistic to social norms.'" Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law,* 26 GA. L. REV. 601, 623 n.104 (1992).

The ancient common law rule that minors and those with certain physical disabilities will be held to a lower standard of care also seems contrary to the notion that negligence means neglect of any cost-justified precaution. *See* RESTATEMENT (THIRD) OF TORTS § 912 (Tentative Draft 2002).

gence from a deck which includes the following: (1) The stable did not adequately interview the patron to ascertain his level of skill and experience before allowing him to ride; (2) The stable did not select an appropriately low-spirited horse for the patron; (3) The stable did not adequately warn him about the risks of walking or standing behind a horse; (4) The stable strapped on the saddle or bridle too tightly, hence increasing the risk of the horse becoming irritated and misbehaving, or too loosely, hence increasing the risk of the saddle shifting or sliding; (5) The stable did not adequately instruct the patron about how to stop, turn, calm, or otherwise manage the horse; (6) The stable did not adequately warn him about the particular horse's characteristics or the risks of this particular trail; (7) The stable chose a trail that was inappropriately steep or rocky or that created a risk of jumping over tree limbs or ditches or that encountered other undue hazards; (8) The stable did not adequately maintain the trail; (9) The stable began the ride at an inappropriate time in light of the horse's habits or condition; (10) The stable continued the ride for an inappropriate time or distance; (11) The stable did not respond appropriately to the complaints of the patron during the ride; and (12) The stable did not behave appropriately during or after the patron's injury.[61]

While the circumstances of each patron's injury will instantly render inapplicable many of these theories of causal negligence, those circumstances will also suggest additional specific theories which that patron can advance. The ease of advancing a theory of causal negligence—and modern procedure encourages a plaintiff to advance multiple, alternative theories—contrasts with the intellectual labor a conscientious trial judge must undertake to evaluate whether there is sufficient evidence in support of the theory, not to mention the labor required to explain why there is

61. For cases where those theories of negligence have been advanced, although not necessarily with success, see *Guido v. Koopman*, 2 Cal. Rptr. 2d 437, 441 (Cal. Ct. App. 1991) (finding a stable negligent for saddling a horse too tightly); *Raveson v. Walt Disney World Co.*, 793 So. 2d 1171, 1174 (Fla. Dist. Ct. App. 2001) (finding a stable negligent for failing adequately to train the horse and the supervising employees); *Gober v. Nolan*, 57 S.E.2d 700 (Ga. Ct. App. 1950) (finding a stable negligent for giving a patron a too-spirited horse); *Meyer v. Naperville Manner, Inc.*, 673 N.E.2d 1079, 1082 (Ill. App. Ct. 1996) (finding a riding school negligent for failure to warn the plaintiff that a previously learned riding technique was dangerous to use with their horses and for promoting the plaintiff from beginner to advanced before she had learned to manage the horses safely); *Amado v. Malibu Dude Ranch*, 98 A.2d 121, 123 (N.J. 1953) (finding a stable negligent for not warning about the possible harm from bees).

not.[62] The trial judge knows that he undertakes this evaluation in the shadow of the deeply entrenched principle that negligence and cause-in-fact, whenever sensible minds can differ, are for the jury.

The triumph of the Learned Hand test may have also hurt the avid sportsman because of the risk that the test will be misapplied to the vendor's operation of its recreational activity. The test does not assure that the judge and jury will appreciate how the untaken precaution proposed by the injured patron would impair the recreational value of the activity for patrons generally. To its credit, the test allows the vendor's counsel to argue that a precaution should not be deemed cost-justified once its negative impact on the recreational value of the vendor's activity to other patrons is weighed in the calculus. But the utilitarian atmospherics of the Learned Hand test and the absence of any jury instruction on the matter invite the jury to ignore this disadvantage of the proposed precaution. When an injured patron claims a rock-climbing vendor should have interfered with the bluff to which it offers access in order to reduce the risk of the climb, can a jury be relied upon to appreciate all the ways in which the proposed interference will diminish the fun, thrill, and challenge of the bluff to other rock-climbers? Will juries even appreciate the role that the risk of injury plays in rock climbing? Those studying rock climbing emphasize that rock climbers, like the patrons of the other recreational activities in question, generally do not pursue risk for its own sake.[63] Rather risk is accepted and utilized as a part of the gestalt of climbing in which feelings of control and competence predominate. Yet as one commentator points out in regard to rock climbing, "the outsider systematically misestimates the role played by the 'irrational' counters of the activity [such as risk], either by mistaking them for an end rather than a means or by assuming the player's obsession with them."[64] Under the current law, the recreational benefits of rejecting the patron's proposed precaution

62. Given the weakness of the modern meaning of negligence and the ease with which patrons can advance a theory of negligence, the patron's release could well be interpreted as a promise from the patron that if injured, he will refrain from second-guessing the vendor's behavior with some negligence theory.

63. MIHALY CSIKSZENTMIHALYI, BEYOND BOREDOM AND ANXIETY 82 (1975) [hereinafter BOREDOM].

64. *Id.*

may not even receive the complement of repudiation. More likely, they will simply be ignored.[65]

The Learned Hand test also hurts the avid sportsman because it fails to focus the jury's attention on the possibility that the injured patron might easily have avoided his injury merely by delaying his participation in the activity until he was better prepared for it. The failure of the negligence test to create an incentive for the plaintiff to avoid injury by lowering his activity level is well-known.[66] In light of the disproportionately high proportion of injured patrons who are novices, the patron's nonparticipation may often be the cheapest precaution. Finally, the Learned Hand test assumes risk neutrality and will therefore induce vendors to take precautions that are excessive for patrons who like dealing with risk.[67]

Whatever the reason for the evolution of the meaning of negligence from the failure to take the care of a reasonable person to the failure to change one's behavior in any manner deemed cost-justified, that is not the only change in the meaning of negligence which has reduced the vendor's chance of winning a directed verdict. The historic meaning of negligence, which an occasional court will still cite with approval, was failure to take the care that was necessary and proper to *prevent injuries to reasonably careful persons*. As Judge Posner has written:

> A person cannot be deemed negligent for failing to take precautions against an accident that potential victims could avoid by the exercise of elementary care; negligence is failing to take the care necessary and proper to prevent injury to reasonably careful persons. Correlatively, there is no duty to warn against an obvious danger, for an obvious danger is no danger to a reasonably careful person.[68]

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65. Professor Gerla has reviewed the psychological literature suggesting that juries will ignore many disadvantages of a plaintiff's proposed precaution. Harry S. Gerla, *The "Reasonableness" Standard in the Law of Negligence: Can Abstract Values Receive Their Due?*, 15 U. DAYTON L. REV. 199, 205–14 (1990).

66. LANDES & POSNER, *supra* note 15, at 141.

67. *Id.* at 140. One must distinguish a preference for dealing with risks the actor can influence from a general preference for risk. A person with a general preference for the risk of death or serious injury would enjoy travel on a commercial airline partly because of the risk of a crash. This article does not call for a consideration of such a preference. *See also infra* note 342.

68. Pomer v. Schoolman, 875 F.2d 1262, 1268 (7th Cir. 1989) (citations omitted); *see also* Shipp v. Johnson, 452 S.W.2d 828, 830 (Ky. 1969) (holding that there is a duty to warn only of hidden, not obvious, perils); Burdeaux v. Montgomery Ward & Co., 192 So.

The goals driving this historic meaning of negligence are to lead the plaintiff to undertake reasonable efforts to learn about an activity's risks and to avoid the proof problems that would be encountered if the fact finder needed to determine whether a particular plaintiff actually undertook those efforts.[69]

Rather than follow this historic meaning of negligence, many modern courts have broadened the concept of negligence to include any failure to take a precaution that would be cost-justified if vendors assumed *foreseeable misbehavior by the patron.*[70] This broadened concept of negligence allows juries to deem vendors negligent for failing to take precautions that would only be cost-justified if one assumes patrons will behave as unreasonably as fools, drunks, or those rendered ill or unconscious in the midst of the activity. Thus, tort law instructs vendors to sanitize their activities until they are safe for use by the foolish or the drunk; that is, until their activities are foolproof and drunk proof.

The toll which this broadened concept of negligence takes on recreational activities is rarely appreciated. Foolproofing and drunk proofing a recreational activity will often suck the life from the activity or eliminate it altogether. The treatment accorded hotels offering a pool and diving board that satisfied or exceeded the safety standards of the National Spa and Pool Institute ("NSPI") provides an example.[71] Under the historic concept of negligence—

728, 731 (La. Ct. App. 1939) (finding no "legal duty to prevent careless persons from hurting themselves"); S. Md. Elec. Coop. v. Blanchard, 212 A.2d 301, 304 (Md. 1965) (holding that the defendant was not liable for failing to insulate wire, in plain view, which electrocuted plaintiff); Velte v. Nichols, 127 A.2d 544, 546 (Md. 1956) (finding that the defendant was not obligated to ensure safe footing of ladder which plaintiff did not check before using); Yaniger v. Calvert Bldg. & Constr. Co., 37 A.2d 263, 266 (Md. 1944) (holding that the defendant was not negligent where plaintiff fell out of a large, conspicuous window); Hunnewell v. Haskell, 55 N.E. 320, 320 (Mass. 1899) (stating that there is "no duty . . . to give warning of the presence of an ordinary flight of stairs in broad daylight").

69. *See* STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 73–85 (1987).

70. *E.g.*, Auburn Mach. Works Co. v. Jones, 366 So. 2d 1167, 1167 (Fla. 1979) ("[T]he obviousness of the hazard is not an exception to liability on the part of the manufacturer."); *In re* Martin, 559 N.E. 2d 1125, 1129 (Ill. Ct. App. 1990) (concluding that electrocution was reasonably foreseeable because "the condition and circumstances reasonably indicate that people might come into contact with the transmission lines"); Holm v. Sponco Mfg., Inc. 324 N.W.2d 207, 211 (Minn. 1982) (reversing summary judgment for the defendant which had been granted on the basis that the danger was obvious); Ayers v. Johnson & Johnson Baby Prods. Co., 797 P.2d 527, 533 (Wash. Ct. App. 1990) (upholding a jury verdict for the plaintiff where a child inhaled baby oil and the mother did nothing because there was no warning on the bottle).

71. *E.g.*, Ryan v. KDI Sylvan Pools, Inc., 579 A.2d 1241 (N.J. 1990) (finding a pool manufacturer negligent for following NSPI safety standards).

failure to take care to prevent injury to a reasonably careful person—such a hotel faced little or no tort exposure for the terrible injuries when patron-divers contacted the bottom of the pool with great force. This was because in a pool meeting NSPI standards, a diver who exercised the minimal care against smashing his head on the bottom needed to steer up after hitting the water's surface thereby eliminating his risk of injury from contacting the bottom. Because minimal care by patrons made a pool and diving board complying with NSPI standards reasonably safe, the hotel could not be deemed negligent for offering such a pool and diving board. Accordingly, no court needed to consider the plaintiff's claims that yet further precautions, well beyond what the NSPI required, such as further increasing the pool's depth or throw area or further decreasing its slope rise, were cost-justified. But once the concept of negligence required all precautions that would be cost-justified if one assumed foreseeable misbehavior by the patron, the sportsmen's hope of finding diving boards at such pools was doomed. For the foolish, drunken, or unconscious diver who, say, relied entirely on the water to slow his descent or who continued his dive underwater into the shallow part of the pool, neither the NSPI standards nor any other practical alternative design would be reasonably safe. To save divers who rely entirely on the water to slow their descent from spinal injuries, for example, a pool with a standard one-meter diving board would need to be about twenty-two feet deep rather than the standard nine or ten feet.[72] The head-on collision between the wish to encourage precautions the foolish, drunken, and unconscious need, and the wish to preserve recreational activities the minimally careful desire, should be clear. Not surprisingly, then, judicial decisions that allow liability to turn on the precautions needed to protect the foolish and the drunken ignore the wishes of the minimally careful sportsman entirely. Indeed this utter disregard of the wishes of the minimally careful sportsmen is a conspicuous feature of the opinions upholding jury awards against vendors who offer pools that comply with NSPI safety standards,[73] as well as of a recent opinion upholding an award against the NSPI itself.[74] At

72. Nat'l Spa and Pool Inst. Consumer Awareness Bulletin (October 1982) (on file with author); *see also* Meneely v. S.R. Smith, Inc., 5 P.3d 49, 58 (Wash. Ct. App. 2000).

73. *E.g., Ryan*, 579 A.2d at 1252.

74. *Meneely*, 5 P.3d at 57 (upholding a judgment of $11 million against the NSPI for their negligence in suggesting minimum safety standards for Type II pools which fail to protect a diver who relies on the water to slow him down).

no point in these opinions do the courts acknowledge that the pool and diving board were reasonably safe for the minimally careful diver nor appreciate the consequences for the minimally careful diver of requiring the precautions deemed cost-justified for the foolish or drunken.[75] Rather the courts seem to suggest that the injured patron has produced sufficient evidence of negligence merely by having his expert testify that, in light of the design of defendant's pool and board and the wide variety of dangerous behavior past divers have engaged in, a diver *can* strike the bottom forcefully.[76] Under such a test, any vendor offering any activities that the patron can perform in a dangerous way may be found negligent for that reason alone.

As John Stuart Mill argued in *On Liberty*, a free society will target those who abuse a freedom and not shut down for all an entire domain of freedom simply to deal with the minority who cannot be trusted with it.[77] Yet imposing tort liability on vendors who neglect a precaution worthwhile only for the foolish or unusually impaired patron shuts down an entire domain of freedom when it leads to the activities' disappearance.

Granted, this modern and broader meaning of negligence may be appropriate for settings other than recreational activities. In the industrial accident setting, a major concern driving product liability law is the wish to pressure manufacturers to adopt cost-justified design changes that will anticipate momentary inadvertence by the workers expected to use the product. The momentary inadvertence of a worker using a drill press is—however culpable—virtually inevitable over the useful life of the press. This is just another way of saying that the cost of the worker staying vigilant over the life of the press is probably greater than the cost of almost any engineering solution the manufacturer may devise. Hence the better precaution, and the precaution the law seeks to encourage through liability, is for the drill press designer to engineer safety features that render the press proof against such inadvertence.[78] These engineered safety measures may increase the

75. *See, e.g., Ryan*, 579 A.2d at 1252; *Meneely*, 5 P.3d at 57.

76. *See Meneely*, 5 P.3d at 52, 57 (examining expert testimony and holding that the NSPI failed to exercise its duty to protect divers).

77. JOHN STUART MILL, ON LIBERTY 96 (Hackett Publishing Co. 1978).

78. Perhaps the most widely used expression of this preference for engineering solutions over behavioral solutions comes from the traffic accident context: "Which is easier,' . . . 'to convince 195 million drivers to habitually refrain from panic application of the

initial costs and maintenance costs of the press; moreover, those safety measures may decrease the durability and ease of use of the press. Still, the decision whether the safety measure is cost-justified may comfortably turn on the usual comparison in negligence cases of the measure's safety payoff to the workers versus all the measure's costs. In other words, the workers' risks of injury in this business context are not an inseparable part of the workers' benefit from their work. The social value of allowing the user of a drill press to deal with the risks from his inadvertence is not so keen that it needs to disturb the usual straightforward calculus of negligence law.[79] In contrast, many injury risks to a patron from recreational activities are indeed an inseparable and often desirable part of the patron's benefit from the activity. One can applaud the modern meaning of negligence that requires all cost-justified precautions to render a drill press proof against momentary inadvertence without applying an analogous principle to the vendor's recreational activities.

The abandonment of the notion that negligence means the failure to take the care appropriate to prevent injury to reasonably careful persons appears more clearly when one considers that this notion would require those evaluating a party's conduct to determine (if only implicitly) what behavior the ordinary care standard demands *of the other parties*. Under the historic meaning, the level of ordinary care for one party will depend on the other parties' costs of, and possibilities for, reducing risk. Indeed were the previous meaning followed, a jury instruction reminding the jury of their need to determine how the other parties would behave if they behaved with reasonable care would be appropriate in almost every case. I say almost every case because in some cases—for instance, in some car accidents where the standard of ordinary care is set by the rules of the road and few exceptions allowed—one can determine what ordinary care would require regardless of the care taken by the other parties. A party who drives at night without turning his lights on can be deemed negligent without determining how ordinary care would require

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brake in emergencies or to design an anti-locking braking system in the vehicle?'" JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 65 (1990) (quoting a witness who testified in favor of the National Traffic and Motor Vehicle Safety Act of 1966).

79. The same philosophy drives the notion that cars should be made crash-proof. Again, there is little social value in allowing car occupants to deal with the risk of injury from car collisions.

other drivers to behave.[80] Those cases aside, however, the fact that no such instruction is ever given and that juries are never told the previous meaning nor ever invited as part of their evaluation of the defendant's negligence to consider how other parties ought to behave shows that the previous meaning is ignored. If juries evaluating whether a vendor's conduct is negligent consider the ability of the patron to take care and how his taking care would have affected the behavior expected of the vendor, they do so on their own.

The well-known move by most states to comparative negligence has further reduced the vendor's chance of winning on directed verdict. Contributory negligence and assumption of risk, previously complete defenses, are now subsumed in most states' comparative negligence scheme.[81] That scheme encourages, and some states require, trial courts to let the plaintiff reach the jury despite obvious or outrageous negligence on the part of the plaintiff and no matter how willingly the plaintiff encountered an activity's risks.[82] In the move to comparative negligence, furthermore, several states have eliminated assumption of risk as a defense by finding that it adds nothing to the contributory negligence defense.[83] As a result, contributory negligence has become the only

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80. *E.g.*, Hiltgen v. Sumrall, 47 F.3d 695, 701 (5th Cir. 1995) (ruling that operating a car with only one headlight is negligence per se under Alabama law).

81. *See, e.g.*, Li v. Yellow Cab Co. of Cal., 532 P.2d 1226, 1242 (Cal. 1975).

82. Professor James Henderson has referred to the reduction in the judicial role and the tendency to leave all cases to the jury as the "expansion and purification of the negligence concept." James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 477 (1976). This expansion of the negligence concept increases the percentage of cases in which juries are in a position to render discretionary judgments.

83. *See, e.g.*, Leavitt v. Gillaspie, 443 P.2d 61, 68 (Alaska 1968) ("As a matter of policy we disapprove of a concept which could result in a situation where an accident victim, even though not contributorily at fault, could be barred from recovery because he knew or should have known of a negligently created risk."); McGrath v. Am. Cyanamid Co., 196 A.2d 238, 240–41 (N.J. 1963) (refusing to recognize the doctrine of assumption of risk); Rutter v. N.E. Beaver County Sch. Dist., 437 A.2d 1198, 1208–09 (Pa. 1981) (abolishing the doctrine of assumption of risk). The erosion of the assumption of risk doctrine has been described elsewhere. *See* Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213, 215–16 (1987). The assumption of risk doctrine as it existed before 1965 allowed the risk-preferring and risk-averse to sort themselves to activities of different dangerousness. It was this benefit of the doctrine that Judge Cardozo referred to when he ruled for the vendor in *Murphy v. Steeplechase Amusement Park* with the famous words "[t]he timorous may stay at home." 250 N.Y. 479, 483 (N.Y. 1929). With the demise of the assumption of risk doctrine, enforcing releases may be the best method of providing this benefit. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 176 (6th ed. 2003).

claim based on a plaintiff's behavior that modern law considers. And, of course, even establishing a plaintiff's contributory negligence, in many jurisdictions, will merely reduce the defendant's liability, not eliminate it.[84]

Eliminating assumption of risk as a defense separate from contributory negligence often renders irrelevant a plaintiff's willingness or desire to encounter the risks that materialized. And disregarding a plaintiff's attitude toward those risks yields perverse results. Consider the plaintiff passenger who intentionally takes a pistol from the glove compartment of a defendant's car and shoots himself in a suicide attempt. When the plaintiff or his heirs sue the defendant for his negligent placement of his pistol—a straightforward claim that has often prevailed[85]—the fact that the plaintiff intentionally took the pistol and shot himself in a suicide attempt may not be relevant in plaintiff's suit at all.[86] Logically a plaintiff's suicide attempt may not bear on any element in his prima facie claim for unreasonably dangerous placement of the pistol, having no bearing on the elements of breach or cause-in-fact or proximate cause, at least when that latter element has been reduced to the foreseeability of the negligently placed pistol aiding a suicide attempt. Any relevance then must come from its tendency to show that the plaintiff was contributorily negligent. In some jurisdictions, however, intentional misconduct—like the plaintiff's attempt to commit suicide—is never viewed as negligence, because intentional and negligent misconduct are viewed as mutually exclusive categories.[87] One anomaly is that the plaintiff who attempted suicide would have a better chance of recovery than a plaintiff who unintentionally but negli-

84. In many states, plaintiff's contributory negligence will only eliminate liability when it exceeds the negligence of each defendant. Johnson v. Serra, 521 F.2d 1289, 1298 (8th Cir. 1975) (applying a Minnesota statute and holding that recovery is precluded if the plaintiff's contributory negligence exceeds the defendant's negligence). In some states contributory negligence does not eliminate liability even then. *See, e.g.*, Wong v. Hawaiian Scenic Tours, Ltd., 642 P.2d 930, 931–32 (Haw. 1982) (allowing recovery against a defendant only six percent responsible when plaintiff was fourteen percent responsible).

85. *E.g.*, Stewart v. Wulf, 271 N.W.2d 79 (Wis. 1978) (upholding judgment in favor of the plaintiff who found a gun on a bed in the defendant's house and accidentally shot himself).

86. *See id.*

87. *E.g.*, Harvey v. Mid-Coast Hosp., 36 F. Supp. 2d 32, 38 (D. Me. 1999) (ruling that a hospital could not assert contributory negligence as a defense to a claim for improper treatment of an attempted suicide victim).

gently shot himself, because the contributory negligence of the unintentional shooter would plainly be held against him.[88]

Granted, some courts would have no problem—and there is certainly no conceptual problem—finding that attempting suicide creates an unreasonable risk of injury to oneself and hence is clearly contributory negligence. *Not attempting suicide* surely qualifies as a cost-justified precaution that plaintiff neglected to take. But there are limits to the amount of baggage the contributory negligence concept can be made to carry. The plaintiff's intentional misconduct will not always create an unreasonable risk of injury to himself. The armed robber of a flower shop—that is too isolated for police patrols and that is clearly unoccupied save for the infirm proprietor known to be defenseless—may reasonably believe he can walk in the open door during business hours and rob the shop without creating an unreasonable risk of injury to himself. How then can his robbery be viewed as contributory negligence? But if his robbery does not bear on his contributory negligence, on what element will it bear should the robber, after slipping on the steps of the flower shop, sue the proprietor for negligent maintenance of the steps? With the assumption of risk defense eliminated and proximate cause reduced to foreseeability, the answer is none. That the robber's injury arose while he was in the process of robbing the defendant proprietor has become entirely irrelevant to his tort action.[89] In order to render the robbery relevant, some defense separate from the contributory negligence defense is needed.

The most common illustrations of the consequences of allowing a defendant to attack a plaintiff's conduct only on the ground of contributory negligence come from the famous premises liability cases which abolished the old distinctions between trespassers, licensees, and invitees.[90] By imposing on land occupiers a duty of

88. *Compare Harvey*, 36 F. Supp. 2d at 38 *with Wulf*, 271 N.W.2d at 85 (finding that a gunshot victim was contributorily negligent).

89. *See Harvey*, 36 F. Supp. 2d at 38.

90. *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968), is the most well-known case abolishing the former classifications of trespassers, licensees and invitees. For cases allowing trespassers to recover, see *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630–31 (1959); *Smith v. Arbaugh's Rest., Inc.*, 469 F.2d 97, 101 (D.C. Cir. 1972); *Gould v. DeBeve*, 330 F.2d 826, 830 (D.C. Cir. 1964); *Mile High Fence Co. v. Radovich*, 489 P.2d 308, 314 (Colo. 1971); *Pickard v. City & County of Honolulu*, 452 P.2d 445, 446 (Haw. 1969); *Cates v. Beauregard Elec. Coop.*, 328 So. 2d 367, 371 (La. 1976); *Basso v. Miller*, 352 N.E.2d 868, 872 (N.Y. 1976). In response to negligence actions by criminal trespassers to

ordinary care to all who come on the land, the courts limit land occupiers to two arguments: either no negligence on their own part or contributory negligence on the injured's part. Under that rule, burglars injured during their burglary by their victim's negligent maintenance of his stairway, roof, or hot tub have successfully sued their victim.[91] Consider the logical implications of a duty of ordinary care to trespassers should night time bank robbers sue their target bank for back injuries suffered while hauling away bags of coins during their robbery. Given that banks can surely foresee night time bank robbers breaking into their bank and its safe—and the foreseeability is shown by the bank's precautions against such a crime—and can also foresee the robbers swiftly carrying off the coins and injuring their backs in the process, and given the modest cost of keeping a dolly near the safe, shouldn't a jury be allowed to find a bank which failed to keep a dolly near the safe causally negligent? Devoting negligence lawsuits to the single-minded goal of encouraging all cost-justified safety precautions leads to such results. That single-minded goal drives negligence suits toward inevitable collisions with many other values and goals, not just those of the avid sportsman. Holding the banks liable to the injured robbers, for instance, offends the principle that no one should profit by his own wrong and undermines the deterrence goals of the criminal law.

Many of the courts that still retain assumption of risk have so raised the requirements for establishing that defense as to sap it of any value to vendors. For instance, courts have increased the amount of knowledge about the risk which a plaintiff must possess in order for the defense to apply.[92] A few courts have gone so far as to confine the defense to those rare instances where plaintiff knew that the risk would materialize and knew that he would probably be injured as a result.[93] Yet such an interpretation of as-

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recover for their injuries against the victims of their trespasses, the California legislature passed Civil Code section 847 in 1985 which bars these negligence actions.

91. *See* Kathleen Day, *Consumers Feel Pinch: Insurance for Liability Skyrockets*, L.A. TIMES, Sept. 14, 1985, at 1 ("[A] burglar who fell through a skylight and was paralyzed while trying to break into a high school, recovered $260,000 in an out-of-court settlement plus $1,200 a month for 20 years. He argued that the school should have warned that the skylight was unsafe.").

92. *See, e.g.*, Heath v. First Baptist Church, 341 So. 2d 265, 267–68 (Fla. Dist. Ct. App. 1977) (reversing summary judgment for the defendant despite the plaintiff's prior knowledge that the stair upon which she slipped and fell was damaged).

93. *See, e.g.*, Dofflemyer v. Gilley, 384 So. 2d 435, 438–39 (La. 1980) (holding that the assumption of risk defense requires that the plaintiff voluntarily participate with full

sumption of risk is wholly inconsistent with the defense to which assumption of risk has always been analogous, namely, the consent privilege to intentional torts. Because the consent privilege affords a complete defense to an intentional tort, traditionally a more culpable wrong than mere negligence, logically it should be harder to establish than assumption of risk. That is, the defendant asserting a consent defense should need to show that the plaintiff has more knowledge about the chance of injury than if the defendant were merely asserting an assumption of risk defense. But the common law defense of consent can be shown even though the plaintiff knows nothing of the likely injury from the defendant's invasion. To consent to battery, for example, the plaintiff need not know that the defendant's behavior would injure him but only that the defendant's behavior would cause him contact.[94] In other words, the plaintiff's knowledge that the defendant's tortious behavior exposes him to the risk of injury, rather than the certainty of injury, may suffice to relieve an intentional tortfeasor from liability.[95] Confining assumption of risk to cases where plaintiffs know they likely will be injured treats the merely negligent tortfeasor more harshly than the intentional one.[96]

Less well-known doctrinal changes have likewise reduced the vendor's ability to win a directed verdict by pointing to the patron's negligence. The willingness of courts to narrow the circumstances in which the patron's negligence will be imputed to the plaintiff has hurt vendors considerably. In wrongful death actions brought by the patron's relatives for the patron's death, the patron's negligence, however clear or flagrant, simply may not count. In a California Supreme Court case, *Haft v. Lone Palm Hotel*,[97] the wife and mother of a father and son who drowned while using the defendant's hotel pool in the early morning hours brought a wrongful death action for negligence.[98] There were no witnesses to the drowning.[99] The father and son were alone in the

knowledge that serious injuries could result).

94. *See* RESTATEMENT (SECOND) OF TORTS § 893B (1963).

95. *See id.*

96. *See* Murray v. Ramada Inns, Inc., 521 So. 2d 1123, 1127–28 (La. 1988) (comparing contributory negligence to assumption of risk).

97. 478 P.2d 465 (Cal. 1970).

98. *Id.* at 466.

99. *Id.* at 467.

pool area throughout their use of the pool, circumstances strongly suggesting that at least one of them was contributorily negligent.[100] Justice Tobriner, however, thought their behavior should not bar recovery by the wife and mother: "When the negligent spouse dies in the accident and thus will in no way benefit from any recovery received . . . no logical basis can support the application of the 'imputed contributory negligence' rule to a wrongful death action maintained by the surviving non-negligent spouse."[101] In short, as long as the plaintiff spouse and mother is innocent, and the defendant vendor causally negligent, the vendor is fully liable.[102] That the vendor's negligence—the hotel's failure to post a sign indicating that no lifeguard was on duty—paled in comparison to the likely contributory negligence of the father and son became an irrelevant detail.[103] Throughout his opinion, Justice Tobriner demonstrates his indifference to the effect of his ruling on the number of hotels with pools and hence on those who enjoy hotel pools. In a footnote he suggests, amazingly, that while liability will raise the price of hotels with pools, it would not influence a hotel's decision to offer a pool.[104]

The vendor's difficulty in winning on directed verdict under the current law naturally becomes more expensive as the chance of losing with the jury and the average amount of damages awarded increases. While no statistics are available specifically for recreational activity cases, both the percent of plaintiff jury victories in all tort cases and the average inflation-adjusted award in all tort cases have increased in the modern era.[105]

Several state legislatures and other state and private organizations have reacted against the judicial willingness to let injured patrons sue vendors for negligence.[106] While the resulting statutes

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100. *Id.*

101. *Id.* at 474 n.15 (quotation marks added by court for emphasis).

102. *Id.*

103. *Id.* at 473–74.

104. *Id.* at 477 n.20.

105. Gary T. Schwartz, *Product Liability and Medical Malpractice in Comparative Context, in* THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION 72–73 (Peter W. Huber & Robert E. Litan eds., 1991) (indicating that damage awards are increasing rapidly in the United States).

106. *See* Catherine Hansen-Stamp, *Recreational Injuries and Inherent Risks: Wyoming's Recreational Safety Act—An Update*, 33 LAND & WATER L. REV. 249, 252 (1998) (commenting that many state legislatures have come to the aid of recreational vendors); *see also* Dave Dorr, *Officials Prepare Proposal Requests for St. Charles Skateboard Park;*

differ in form, they all seek to prevent a common law negligence action against the vendor from proceeding in the usual fashion. Like other tort reform statutes which share this goal, they receive such harsh treatment from courts that no vendor or liability insurer can rely on the statutes' plain meaning being enforced.[107] Statutes designed to protect the vendor from suit when the patron's injuries arose from the "inherent risks" of the activity have been vitiated on the ground that they do not apply whenever the "inherent risks" were not the sole cause-in-fact of the patron's injuries.[108] In particular, they do not apply when a cause-in-fact was the vendor's negligence. Of course, absent that cause-in-fact connection to the patron's injuries, no vendor would be liable for his negligence in the first place. Hence this interpretation eliminates any effect of the statute on the common law negligence action.

Other statutes have attempted to control the common law action by carefully limiting the duties of the vendor. A Colorado ski statute, for example, indicates the specific duties which ski areas owe to skiers in a clear attempt to limit the ski areas' duties.[109] The federal courts, however, have interpreted the statute not as limiting the ski areas' common law liability but as adding to that liability.[110] So while the statute obliges a ski area to mark man-made obstacles and conspicuously refrains from imposing any duty to mark natural obstacles, the Tenth Circuit, following Colorado law, found the statute too irrelevant to mention in a successful negligence action for the ski area's failure to mark a natural

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Complex Will Be Open Next Summer, ST. LOUIS POST-DISPATCH, Nov. 6, 2000, at 9, *available at* 2000 WL 3558436 (quoting city park and maintenance supervisors' efforts to limit liability); Steve O'Neill, SCHOOL VIOLENCE ALERT, Apr. 7, 2000 (listing some practical steps that can be taken to reduce school liability for playground accidents).

107. For the marked hostility of courts to tort reform efforts, see *Pizza v. Wolf Creek Ski Dev. Corp.*, 711 P.2d 671, 684 (Colo. 1985) (destroying the value to vendors of the Colorado Ski Safety Act of 1979); *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 719–27 (Wash. 1989) (rejecting the statutory cap on pain and suffering damages); Marco de Sa e Silva, Comment, *Constitutional Challenges to Washington's Limit on Noneconomic Damages in Cases of Personal Injury and Death*, 63 WASH. L. REV. 653, 675 (1988) (showing that most statutes limiting damages have been held unconstitutional).

108. Ninio v. Hight, 385 F.2d 350, 352 (10th Cir. 1967); *see also* Bouchard v. Johnson, 555 N.W.2d 81, 85 (N.D. 1996). A statute banning liability when a patron's injury arose from an activity's inherent risks was also vitiated on other grounds in *Graven v. Vail Assocs.*, 909 P.2d 514, 520 (Colo. 1995).

109. COLO. REV. STAT. §§ 33-44-106, -107, -108 (2002).

110. Rimkus v. N.W. Colo. Ski Corp., 706 F.2d 1060, 1067 (10th Cir. 1983).

obstacle.[111] Recreational use statutes aim to encourage landowners to open their land to the public for recreational purposes by protecting landowners from common law negligence actions for injuries suffered by the land users.[112] But again, the judicial determination to defend the common law negligence action against the legislature has nullified the value of those statutes to recreational vendors.[113] Despite statutory language protecting the landowner against negligence suits by any member of the public entering the landowner's property, courts have construed the recreational use statutes as not applying when the landowner is sued for negligence by a person who was invited onto the property.[114] Under this construction, the statutes bar suits from those on the land merely by permission while allowing suits from those on the land by invitation, a distinction fatal for the recreational vendor.[115] That the statute is in derogation of the common law has constituted the only ground for such an unfriendly construction.[116] The judicial treatment of these statutes suggests that the liability of vendors for their negligence will not be significantly reduced until courts are convinced of the wisdom of doing so. Proposed legislation, however carefully and thoughtfully drafted, will not suffice.[117]

This review of the obstacles recreational vendors face in keeping a case against them from the jury suggests the substantial reduction in the vendor's liability from enforcing releases early

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111. *Id.*

112. *See* LePoidevin v. Wilson, 330 N.W.2d 555, 562–63 (Wis. 1983).

113. The Wisconsin Supreme Court has expressed bewilderment about the legislature's goal in passing the Wisconsin Recreational Use Act. WIS. STAT. § 895.52 (2000). "We continue to be frustrated in our efforts to state a test that can be applied easily because of the seeming lack of basic underlying principles in the statute." Auman v. Sch. Dist. of Stanley-Boyd, 635 N.W.2d 762, 767 (Wis. 2001); *see also* Minn. Fire & Cas. Ins. Co. v. Paper Recycling of La Crosse, 627 N.W.2d 527, 532–33 (Wis. 2001) (finding that boys injured while at play were not engaged in a recreational activity within the meaning of the Act). The court seems to have ignored the simple goal of increasing outdoor recreation by increasing the amount of land available for that recreation.

114. *LePoidevin*, 330 N.W.2d at 563.

115. *Id.*

116. *Id.* at 562.

117. Professor Joseph H. King, Jr. has ably drafted and defended legislation designed to reduce the landowner's liability significantly and thereby achieve the goals of recreational use statutes. As desirable as this legislation would be, courts who are not persuaded of its merits are likely to prevent it from achieving its goals or significantly benefiting sportsmen. *See* Joseph H. King, Jr., *Exculpatory Agreements for Volunteers in Youth Activities—The Alternative to "Nerf® ," Tiddlywinks*, 53 OHIO ST. L.J. 683, 747–58 (1992).

and routinely. But to ensure that reduction in the vendor's liability expense, courts must also clarify some ancillary matters not yet discussed. First, courts need to clarify that releases are to be accorded a reasonable scope. For example, the release of a horse-riding stable should apply not just when the patron is riding, but also during the selection of horses and the mounting, dismounting, and walking away from the horses. The release need not apply when the patron is injured by a negligently maintained stairway leading from the parking lot into the stable's waiting room. In general, the release should apply as long as the vendor's negligence is reasonably related to the object or purpose for which the release was given. Second, the enforcement of the release must not succumb to the court's approach in *Haft v. Lone Palm Hotel,*[118] but must bar claims for negligence that are derivative to the patron's claim.[119] These include claims by relatives or friends of the patron for wrongful death or loss of consortium. These would also include claims for negligent infliction of emotional distress from, for example, witnessing or learning of the patron's injury. Likewise, indemnity or contribution claims against the vendor from others found liable for the patron's injury should be barred.[120] Finally, and most significantly, courts must clarify that a release given by a parent or guardian for a minor patron is no less enforceable than a release signed by an adult patron for himself.[121] The authority which the law accords parents to decide a spectrum of fundamental matters affecting their child calls for according them the authority to waive the child's right to the enervating and indefinite prospect of a tort claim for negligence.[122]

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118. 478 P.2d 465 (Cal. 1970).

119. *Id.* at 474 (holding that the patron's negligence cannot be imputed to a spouse in a wrongful death action).

120. Cases presenting such attempts at indemnity or contribution include *Rose v. Fox Pool Corp.*, 643 A.2d 906, 907 (Md. 1993) and *Noll v. Harrisburg Area YMCA*, 643 A.2d 81 (Pa. 1994).

121. Professor King has argued convincingly that a release granted by a minor patron's parent should be enforced to bar the minor patron's action against the vendor. King, *supra* note 117, at 713–20.

122. Some courts agree with Professor King. *See, e.g.*, Sharon v. City of Newton, 769 N.E.2d 738, 742–48 (Mass. 2002) (upholding parental release when a girl was injured during cheerleading practice at a public school). *But see* Hawkins v. Peart, 37 P.3d 1062,

B. *The Effects of the Current Law*

"And what is it to say goodbye to the swift pony and the hunt? The end of living and the beginning of survival."

Chief Seattle

The previous section pointed out the features of the current law that reduce the vendor's ability to keep a negligence claim by an injured patron from the jury. Subjecting vendors to a jury's discretion means considerable uncertainty about which precautions vendors need to take to avoid being deemed negligent. That the negligence test calls for the application of the general standard of reasonable care rather than any specific rule further increases the unpredictability and uncertainty of a jury's verdict.[123] This uncertain application of the negligence test, Professor Schwartz has argued, is another major shortcoming of the tort system.[124] While one might think this uncertain application would have a neutral effect on precaution-taking by encouraging some vendors to gamble by taking too few precautions and others to play it safe by taking too many, in fact, uncertain application leads vendors systematically to take too many precautions.[125] Liability insurers soon discover that the cost to them of the vendor erroneously being found negligent outweighs any benefit from allowing vendors to forego precautions which are not cost-justified. Predictably, those insurers will pressure their vendors to take precautions which are not cost justified if, for any reason, taking the precaution decreases the chance of an erroneous assessment of negligence.[126] This excess precaution-taking may well entail the elimination of the activities the avid sportsman loves.

1063–68 (Utah 2001) (invalidating parental release when an eleven-year-old fell from a horse at the defendant's stable).

123. *See, e.g.*, Heins v. Webster County, 552 N.W.2d 51, 55 (Neb. 1996) ("[A]bandoning the established system in favor of a standard of reasonable care would decrease predictability . . . ."); Mallet v. Pickens, 522 S.E.2d 436, 446 (W. Va. 1999) ("'Adoptions of a true negligence standard eliminates the complex, confusing, and unpredictable state of premises-liability law . . . .'" (quoting Nelson v. Freeland, 507 S.E.2d 882, 892 (N.C. 1998)).

124. Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 345 (1990).

125. *Id.* at 354–58; *see also* SHAVELL, *supra* note 68, at 82–83 (stating that uncertainty encourages precaution taking, even if it is socially undesirable). *See generally* John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984) (discussing whether uncertainty gives parties an incentive to take too many or too few precautions).

126. *See* Schwartz, *supra* note 124, at 356–57.

Of course one desired effect of vendor liability for negligence is less vendor negligence. And, in theory, this deterrent should be achieved even when the vendors' liability insurers cover the full amount of the vendor liability. This is because those liability insurers should punish vendors found causally negligent by charging them higher premiums, thereby bringing home to the vendors the cost of their negligence and deterring them from future negligence.[127] Partly because such carefully refined pricing of liability risks is rare, considerable uncertainty exists about whether the current liability system actually deters negligence. Review of the ample literature on this subject is beyond the scope of this article.[128] But almost all commentators agree that the case for liability rests on its beneficial deterrence because the other justification for liability—compensation—can be far better achieved through first party methods such as the patron's accident and health insurance.[129]

While we may not know the effect of expanded liability on vendor care, we do know that vendor behavior changed in one respect during the period in which liability expanded: Vendors stopped offering the activities the avid sportsmen love. So two pertinent questions are whether expanded liability was responsible for the elimination of those activities, and if so, whether, from a welfare

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127. Even accurately priced liability insurance reduces the deterrent effect of liability insofar as it lowers the cost of that liability to the insured by economizing on the insured's reserve process. In other words, without liability insurance the fear of liability should lead the insured to estimate and set aside a reserve—a stockpile of liquid assets—in order to cover potential losses. Liability insurance may economize on the cost of estimating and maintaining that reserve because, in effect, it substitutes the insurance premium for those costs. In addition, accurately priced liability insurance reduces the deterrent effect of the risk of liability on risk averse insureds to the extent that the insurance renders those insureds more risk neutral. Despite these reductions, the deterrent effect of liability under accurately priced liability insurance may still be optimal.

128. After examining what he calls "the uneasy case for the deterrent effect of tort liability," Professor Rabin concludes:

> In sum, there are any number of reasons to be less than sanguine about the deterrent effect of tort liability. In some instances . . . they are systematically unobserved. Even when tort rules are clearly communicated, they may add little to other non-legal constraints on dangerous conduct. And even if they deter, it may be that they promote too much or too little caution.

ROBERT L. RABIN, *Deterrence and the Tort System*, *in* SANCTIONS AND REWARDS IN THE LEGAL SYSTEM 85–86 (M.L. Friedland ed., 1989); *see also* A. Russell Localio et al., *Relation Between Malpractice Claims and Adverse Events Due to Negligence: Results of the Harvard Medical Practice Study III*, 325 NEW ENG. J. MED. 245, 250 (1991); Michelle M. Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 TEX. L. REV. 1595, 1607–13 (2002).

129. *E.g.*, RABIN, *supra* note 128, at 94; SHAVELL, *supra* note 69, at 5–32.

perspective, the elimination of those activities was socially desirable (i.e., whether it increased or decreased social welfare).

Skeptics may question whether the increased vendor liability since the 1960s—both real and perceived—is the primary reason that vendors no longer offer the activities that avid sportsmen love. The disappearance or at least reduced availability of these activities may be due to other factors such as changes in consumer tastes or the emergence of new alternative activities. After all, the Coase Theorem suggests that the risk of injury to the patron represents a cost of the activity that will be taken into account by the patron or his parents who appreciate that risk with or without vendor liability.[130] Cognizant of the injury risk to the patron, the patron or his parents will implicitly add the cost of that risk to the activity's price in deciding whether to purchase the activity even when the patron has no hope of being compensated for his injuries.[131] Hence, although liability certainly raises the vendor's costs of offering the activity and, *ceteris paribus*, should reduce the supply of the activity, one cannot glibly maintain that liability raises the activity's full costs.[132] Insofar as the patron's prospect of tort recovery from the vendor reduces the activity's injury costs in the patron's eyes dollar for dollar, that prospect should increase patron demand for the activity.[133] That increased demand by itself should lead to more of the activity in society and should roughly offset the opposite effect from liability's tendency to reduce supply.[134] Indeed, if patrons valued the vendor's liability more than the cost to the vendor of providing it,

130. *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 6–8 (1960) (proposing his theory that the allocation of resources will be the same regardless of whether the business causing the harm is liable). In the absence of any prospect of the injured patron recovering for his injuries, the patron's injury risk is expressed in reduced demand for the activity. *See id.*

131. *See id.*

132. *See id.*

133. *See id.* Of course the idea that liability does not affect the amount of the activity in society assumes that on average juries will value the patron's injury costs in the same amount as the patron would have valued them ex ante. If juries generally award more for an injury than the amount the patron would have paid ex ante to avoid that injury, liability is sure to drive off the market socially desirable activities. Whenever liability exceeds the level of actual losses, the law pressures defendants to take socially inappropriate measures to eliminate risk.

134. *See id.* The net effect of increased demand and reduced supply on the amount of an activity in society depends on the elasticity of supply and demand. Nevertheless an increase in demand tends to offset the reduction in the amount of an activity caused by reduced supply.

the vendor's increased liability should *increase* the activity's availability.[135] In that case, however, we would have expected the vendor and the patron to have agreed beforehand that the vendor would be liable for the patron's injuries.

A further implication of the Coase Theorem is that increasing tort liability on a currently profitable activity will only drive the activity off the market in a well-defined case, namely when the new liability is so little valued by patrons and so costly to vendors that unprofitably few patrons will buy the activity when its price is increased by the added cost of the new liability.[136] In other words, in order to render unprofitable an activity the vendor previously found profitable, the added liability must so substantially raise the price and so modestly raise the patron's benefit that an insufficient number of patrons still find the activity a desirable purchase.[137] For example, parents and children may value the camp experience for children enough to preserve the availability of such camps when the camps are priced at the lower levels possible in the absence of any camp liability for negligence. Increasing the camp's liability for injuries to campers will naturally require the camp to raise its prices. If parents and children attach little, if any, value to the camp's added liability, the increased price of the camp may drive away so many parents that the camp will no longer remain profitable. Only in such a case will increasing the liability of camps lead to their disappearance. To use the terms of George Priest, if one thinks of the pre-liability price of the activity as the price when the patron relies only on his first party insurance to cover his injury costs, and the liability price as the price when the patron is also required to buy, as part of the activity, third party tort insurance, one could say the activity disappears when enough patrons were willing to buy the activity with first party insurance but are not willing to buy the activity when they must also buy the little valued and costly third party insurance.[138] In a series of publications, Priest has explained why rational patrons attach very little value to the vendor's increased

135. *See id.*

136. *See* George L. Priest, *The Modern Expansion of Tort Liability: Its Sources, Its Effects, and Its Reform*, 5 J. ECON. PERSP. 31, 47–48 (1991) [hereinafter *The Modern Expansion of Tort Liability*].

137. *See id.*

138. *See id.*

tort liability,[139] why the vendor's liability insurance for an injury risk[140] is likely to be more expensive—often by several orders of magnitude—than first party insurance for that injury risk, and yet why vendors, especially small ones, would rather abandon activities than go without liability insurance however expensive it may be.[141]

If the increase in liability from the 1960s has caused the disappearance of these activities, supporters of liability could applaud that result. They could posit that liability has rightly led to the disappearance of activities because, by internalizing some injury costs of the activity, liability has required the activities to be priced at an amount closer to the social costs.[142] Their assumption is that, without liability, patrons, or their parents when parents buy the activities, underestimate the injury costs of the activity to the patron and hence buy activities they would not buy if they knew the activities' true injury costs. Without liability the patron's injury costs are not impounded into the vendor's costs and the vendor's price can, and should, be relatively—and deceptively—low. However, when liability impounds the injury cost of the activity into its price, yielding a higher price nearer the activity's social costs, many patrons realize that the activity's value to them is less than that new, higher price and accordingly refuse to

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139. Priest believes one reason the increased liability of the vendor is nearly worthless to consumers is because that extra liability amounts to insurance for nonpecuniary losses and consumers have little reason to value such insurance. *See* George L. Priest, *Can Absolute Manufacturer Liability be Defended?*, 9 YALE J. ON REG. 237, 256–57, 262 (1992).

140. *See* George L. Priest, *Puzzles of the Tort Crisis*, 48 OHIO ST. L.J. 497, 499–501 (1987); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1552–60 (1987) [hereinafter *The Current Insurance Crisis*].

141. *See generally* Priest, *The Current Insurance Crisis, supra* note 141; Priest, *The Modern Expansion of Tort Liability, supra* note 136.

142. To review a specific example of internalization, see RAYMOND L. YASSER, TORTS AND SPORTS: LEGAL LIABILITY IN PROFESSIONAL AND AMATEUR ATHLETICS 78–82 (1985) (discussing product liability as it applies to the football helmet). Yasser maintains, for instance, that if the injury costs of football were internalized, the sport would disappear and "this would surely be a healthy development." *See id.* at 82. Yasser's view contrasts with that of Justice Handler of the Supreme Court of New Jersey:

> One might well conclude that something is terribly wrong with a society in which the most commonly-accepted aspects of play—a traditional source of a community's conviviality and cohesion—spurs litigation. The heightened recklessness standard recognizes a commonsense distinction between excessively harmful conduct and the more routine rough-and-tumble of sports that should occur freely on the playing fields and should not be second-guessed in courtrooms.

Crawn v. Campo, 643 A.2d 600, 607 (N.J. 1994).

buy.[143] The activity disappears only because too few patrons remain willing to buy it once its injury costs have been internalized into its price.[144] By making activities pay their way—i.e., assuring that the activities can survive in the marketplace when consumers appreciate their full costs (which naturally includes their injury costs)—liability eliminates from the market socially undesirable activities. "Socially undesirable" used in this context refers to activities the demand for which is insufficient for the activities to be offered profitably when the activities are priced at their full costs.[145] Accordingly, supporters of this happy explanation for an activities' disappearance—which might be dubbed the internalization explanation—can insist that stables would still allow patrons to take horses on a trail unaccompanied and motels would still offer pools with diving boards if those activities were socially desirable. In other words, if enough patrons valued those activities more than the activities' full costs and, hence, were happy to continue buying the activity even after vendors had passed on the cost of their liability in the form of higher prices, then the activity would have continued to be profitable and would have survived.[146] That the vendors have not been able to pass on the cost of their liability successfully and that the activities have thus disappeared in the face of increased liability only shows that the activities were not socially desirable to begin with.[147]

Supporters of the internalization explanation may concede that the disappearance of activities disadvantages sportsmen who take pains to protect themselves or who resolve not to sue should they be injured. Yet they can console the sportsmen by pointing out that this disadvantage does not differ from the disadvantage to any aficionados of any activity whose collective demand for the activity is insufficient to warrant a vendor providing it. The sportsmen should attribute the unavailability of the activities they love not to increased liability, but to the lack of enough fellow sportsmen willing and able to pay the full costs of the activ-

143. *See* Priest, *The Modern Expansion of Tort Liability*, *supra* note 136, at 47–48.

144. *See id.*

145. A synonymous but perhaps more helpful test for the social desirability of an activity is whether the demand for the activity is sufficiently high and its actual injury costs sufficiently low that, without liability but with patrons knowing the activity's risks, the activity would be profitable.

146. *See* YASSER, *supra* note 142, at 82.

147. *See id.*

ity. Were the demand from avid sportsmen robust enough compared to the full costs of the activities, vendors would continue to offer the activity and would merely pass on the cost of their increased liability in the form of higher prices to patrons.[148] After all, dangerous activities, such as driving a car, remain widely available even though the possibility of a common law negligence action against the driver means that the driver's liability expense, and hence his liability insurance premiums, will be costly. This internalization explanation only becomes more compelling when one realizes that under the current law vendors do not internalize the costs of all injuries caused by their activities, but only the costs of those injuries caused by the vendor's negligence. Complete internalization would require that the law treat vendors much more harshly by holding them strictly liable for all injuries engendered by their activity. Hence, the vendor still does not bear the full cost of the activity and the market price of the activities remains significantly less than the activity's full social costs.

However cheerful, this internalization explanation for the activities' disappearance should not be embraced. First, the explanation assumes that the vendor's liability costs faithfully represent the patron's injury costs from the vendor's negligence. But we know those liability costs include much more than simply the expected damage awards from judges and juries for the patron's injury. For one thing, they include the considerable costs to the vendor's liability insurer of handling the vendor's defense.[149] Even putting aside defense expenses and other costs not included in damage awards, one cannot assume that the damage awards themselves faithfully represent the patron's accident costs from the vendor's negligence. Judges and juries are not allowed to award damages for certain injury costs and in effect are instructed to award damages in excess of other injury costs.[150]

148. See *supra* text accompanying notes 128–41 for a discussion concerning patrons' willingness to buy activities/products which include liability cost.

149. If, because of those overhead costs, the vendor's liability expense is double the expected damages the vendor will pay, and if we assume that those expected damages accurately measure plaintiff's actual injury costs, then the vendor's liability expense will be double the actual injury costs.

150. Tort damages understate the actual losses from a plaintiff's injury because they ignore, for example, the loss to siblings, grandparents, grandchildren, and other relatives or friends due to the injury to the plaintiff. On the other hand, tort damages overstate actual losses from injuries because they ignore, for example, the taxes that a plaintiff would

Moreover, the little value patrons seem to attach to the prospect of vendor liability should raise doubts about whether that prospect represents anything so important in the patron's eyes as his injury costs.[151] So little do patrons seem to value vendor liability that one is almost justified in viewing that liability as a tax on the vendor's activity. In any event the pre-liability cost of the activity to the vendor may better approximate the activity's social costs if the patron's estimate of his cost of injury comes closer to his actual injury costs than does the cost of liability to the vendor. As Coase reminds us, the patron will inevitably take into account his estimate of his injury costs in deciding whether to purchase the activity at its pre-liability price.[152]

Another difficulty with the internalization explanation lies in its assumption that patrons, or their parents when the parents are the ones deciding to buy the activity, generally underestimate the activities' injury costs to the patron. But as Steven Shavell has written, consumers are more likely to appreciate the injury costs from recreational services than from higher technology services and products:

> [C]ustomers' knowledge of the risks attending use of a wide class of modern-day products (automobiles, drugs, power machines) is presumably limited in significant ways because of customers' quite natural inability to understand how the products function. And customers' knowledge of the quality of most professional services (medical, legal, architectural) is supposedly similarly limited. By contrast, customers' information about the risks of common items of fairly simple design (hammers, bicycles, can openers) is probably good on the whole, and the same is likely true of their knowledge of the risks of many of the services that they purchase in ordinary life (barbering, sports instruction).[153]

When patron knowledge of the risks is likely, internalization of injury costs on the vendor through liability is not needed to guarantee that the activity can pay its way and has the disadvantage

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have needed to pay on the amounts awarded for lost income and the benefits to plaintiff from not having to work to earn those amounts.

151. See *supra* text accompanying notes 128–41 for a discussion regarding patron valuation of vendor liability.

152. *See* Coase, *supra* note 130, at 6–8.

153. SHAVELL, *supra* note 69, at 54.

of diluting the incentive of the patron to protect himself during the activity.[154]

Naturally this dilution of the patron's incentives to protect himself argues most forcefully against internalizing the accident costs of those activities in which patrons are actually able to take precautions to protect themselves. Denying liability in such contexts encourages the patron to take, rather than disregard, such precautions. One can think of the law denying liability as preserving the patron's natural wish to protect himself. Because the proposed rule calls for enforcing releases only in contexts when precautions for patron self-protection are available, internalization of the accident costs in these contexts is not socially desirable.[155]

The internalization explanation for an activity's disappearance, namely that liability showed the activity to be too dangerous and too low in demand to be socially desirable, should not be uncritically accepted in any event. There are simply too many other reasons why increased liability may lead vendors to abandon a socially desirable activity.[156] To begin with, increased liability may dry up liability insurance for certain activities, not because of the activities' dangerousness, but because of particular features of the market for liability insurance. The lack of liability insurance for an activity will lead vendors who feel they must carry liability insurance to abandon even high demand and relatively safe activities. In other words, the patrons' demand for an activity may be great enough to enable the vendor to offer the activity profitably at the activity's full cost but yet be insufficient to overcome the unwillingness of the vendor to go without liability insurance. As a result, socially desirable recreational activities can disappear for insurance rather than deterrence reasons.

How can liability insurance for high demand and relatively safe activities become unavailable or prohibitively expensive? The factors which can cause liability risks to become uninsurable include: (1) the expected amount of payout becoming too unpredictable; (2) the risks in the pool becoming too correlated; (3) the size of the pool becoming too small to perform the diversification or

154. See *infra* Part IV for further discussion.

155. *Id.*

156. For a definition of when an activity is socially desirable, see *supra* note 144.

pooling function; and (4) the insurer's inability to contain either the moral hazard problem or the threat of risk pools unraveling due to adverse selection.[157] In other words, the insurer's decisions about whether to cover an activity, and at what premium, must take into account not only the actual danger of the activity to potential plaintiffs but also the pervasive influence of adverse selection, moral hazard, and the insurer's wish to maximize its diversification by avoiding coverage of correlated risks and of risks that cannot be pooled. Changes in the law can affect these factors. Since the 1960s the legal changes that may have affected these factors include not merely the pro-patron changes in tort law surveyed in the previous subsection, but also a variety of pro-vendor changes in insurance law (largely contract law) that have increased the insurer's liability to their vendor-insureds.[158] These changes, either alone or in combination with other legal changes, may well have driven vendors who feel they need reasonably priced liability insurance to abandon activities that were socially desirable in a welfare sense.[159]

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157. *See* KENNETH S. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY 67–76 (1986) (discussing the emergence and nature of insurance risk classification). Of course insurance for any risk is available for a sufficiently high price. When I speak of the reduced availability of insurance, I refer to the decreased gains to trade in the market rather than the absolute refusal of insurers to cover a risk at any price.

158. An example of an insurance law case which disappointed insurers by expanding the amount of coverage beyond that which the insurers thought their previously written policies provided is *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981). The court in *Keene* altered the interpretation of a key concept in liability insurance policies, an "occurrence." *Id.* at 1046–47. The new and much broader meaning of "occurrence" extended the liability insurers' contractual obligation to defend and indemnify the insured to many more lawsuits against the insured than the insurers expected.

159. An explanation for the unavailability of liability insurance for recreational activities that is also consistent with the activity being high in demand and relatively safe is the capacity constraint hypothesis. This hypothesis is that the cumulative losses over several years by liability insurers (partly due itself to adverse changes in tort law) lowers their net worth and depletes their capacity to insure, thereby rendering them vulnerable to a "capacity shock" which could be triggered by a sudden increase in their uncertainty about the frequency or size of claims. This sudden increase in uncertainty may stem from a single tort decision which changes the insurers' worst-case scenario. Rather than issuing enough outside equity to eliminate the capacity constraint—as one might expect—insurers react to this capacity shock by pulling back. They withdraw from territories and lines and offer only limited coverage for large or unusual risks. Indeed a great enough increase in the uncertainty about the frequency and size of claims in a particular line may lead to an indefinite, rather than a cyclical, withdrawal from those lines. For the industry overall, however, the capacity constraint lasts only until the reduced supply of insurance drives up premiums and profits enough for the accumulation of retained earning to restore capacity. The capacity constraint hypothesis calls for improving the performance of liability insurance markets and avoiding recurrent crises through tort reforms which reduce undertainty about the frequency and size of claims. *See* Ralph A. Winter, *The Liability Crises*

One feature of liability insurance at least when the vendor-insured can influence the risk of liability is that both the vendor and his insurer want the insurer to be able to contain the moral hazard problem which all liability insurance creates. The moral hazard problem is the tendency of vendors to reduce their precaution-taking against injury to patrons and thereby to increase the liability risk once they are insured against that risk.[160] The greater the moral hazard problem, the more expensive the liability insurance will be for the vendors. When the moral hazard problem is severe enough, the vendors' demand for insurance at the price that would be required to make the insurance profitable will be insufficient, and the insurers will no longer offer the insurance. To contain the moral hazard problem, both the vendors and their insurers want the insurers to be able to monitor at reasonable cost the vendors' precaution-taking. Perfect monitoring would eliminate the moral hazard problem because insurers would be able to make the terms of the policy, such as the policy premium, depend on the vendors' precaution-taking. This monitoring can take a great many forms, from experience rating of the vendors' accident record to feature rating of the vendors' activity itself. And monitoring need not be perfect or costless for insurance to be available. Nevertheless the difficulty of monitoring the insureds' precaution-taking can render the moral hazard problem so severe that liability insurance will no longer be offered.[161]

The liability insurers' ability to monitor certain activities better than others may explain the disappearance of the activities the avid sportsman loves. For while the insurers may relatively easily monitor fixed characteristics of vendors behavior that affect the liability risk, the insurers will have much greater difficulty monitoring the vendors' daily precaution-taking. This is because daily precaution-taking is so readily modified. For example, the insurer can monitor relatively easily and reliably whether a horse-riding vendor adopts a policy forbidding all patrons from taking a horse

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and the Dynamics of Competitive Insurance Markets, 5 YALE J. ON REG. 455 (1988) (presenting the capacity constraint hypothesis).

160. For further definition concerning moral hazard, see Priest, *The Current Insurance Crisis*, *supra* note 140, at 1547–48. Granted, when negligent vendors are not liable to injured patrons to begin with—the usual result under the proposed rule—the vendors' incentive to reduce the injury risk to the patron is also sub-optimal. That shortcoming in the proposed rule is discussed *infra* Part IV.

161. *See* Samuel A. Rea, Jr., *The Economics of Insurance Law*, 13 INT'L REV. L. & ECON. 145, 150 (1993).

unaccompanied; however, the insurer may have great difficulty monitoring whether a vendor who offers unaccompanied rides does so carefully by, say, day by day, refusing to offer this activity to novice riders or by matching each rider offered this activity with a suitable horse. The insurer may monitor relatively easily and reliably whether a day care center has no monkey bars on its playground, but have great difficulty monitoring whether a day care center that does offer monkey bars carefully supervises children's use of the bars day by day. Reacting to these different monitoring costs, the insurer who wishes to reduce liability may only seek to influence the fixed characteristics of vendor behavior that it can easily monitor. Hence, the conditions for coverage, or at least for lower premiums, that the insurer imposes on the vendor will focus on these easily monitored, fixed characteristics.[162] Examples of such conditions would be "accompany all riders" or "dismantle the monkey bars."

The vendors who carefully offer unaccompanied rides or monkey bars, and the sportsmen who love these activities, will view these conditions for coverage as absurdly crude and over inclusive. These vendors may rightly claim that these activities—as offered by them—present little liability risk in fact and, in light of the patron demand for the activities, are socially desirable. But the dilemma of these vendors and sportsmen resembles the dilemma of the single male car driver under the age of twenty-five who may not be able to find reasonably priced car insurance despite his individual carefulness. All are hurt because the insurer refuses to monitor more fully and to refine further his risk classifications. The insurer's refusal is understandable because the insurer's monitoring costs can easily exceed the advantage the insurer would gain from incurring them. From the insurer's perspective the competitive benefits from further monitoring and hence further refinement in its risk classifications are modest. The insurer soon discovers that it can no longer attract or make enough profit from additional low risk vendors to justify discovering and classifying them.

The insurer's unwillingness to incur further monitoring costs in order to refine further its risk classifications can be attributed to a market failure. For even if further refinement of a risk classifi-

162. *See id.*

cation system would be efficient, an individual insurer would in all probability lack an incentive to undertake such refinement. The reason is that competitors would take advantage of the classifications introduced by the innovating insurer and compete on an equal basis for the newly discovered low-risk insureds without having made the investment required of the innovator. Judicial efforts to reduce the vendor's liability could then be justified as a collective action designed to remedy unduly crude risk classifications that deny liability insurance to socially worthwhile activities.[163]

Granted, this explanation suggests that liability insurers should always have imposed such conditions as "accompanying all riders" or "dismantle the monkey bars"; it does not explain why insurers have imposed these conditions only with the increase in liability since the 1960s. But the increase in liability may well have made it worthwhile for insurers to develop and impose upon their vendors liability-reducing conditions, however crude, that were not worth developing and imposing before.

There is another way to explain why liability premiums will be higher, and liability insurance less available, for the daily behavior that insurers cannot monitor as easily or as reliably. The inability to monitor behavior means that insurers will be less able to reward the careful performance of that behavior with lower premiums and less able to punish the careless performance with higher premiums.[164] Not knowing how carefully the insured day care center supervises the use of its monkey bars, the insurer must charge the careful as high a premium as the careless, at least until the day care centers with monkey bars have estab-

163. Of course, it is the vendor's and the young but careful motorist's wish for liability insurance that gives rise to the insurer's monitoring costs in the first place. Absent the vendor's and careful motorist's wish for liability insurance, the insurer's monitoring costs would never enter the picture. The careful riding stable and day care center, like the young but careful motorist, know what their liability insurer cannot know, namely that they perform the activity in question with such care that the activity is low risk and socially desirable, and they can act on that knowledge by offering or engaging in the activity.

Once the liability insurer, saddled with his monitoring costs, enters the picture in response to the vendor's wish for liability insurance, his monitoring costs are, in effect, passed on to vendors in the form of restrictive conditions for coverage or increased premiums, and ultimately passed on to patrons in the form of either higher prices for the vendors' activities or the vendors' abandonment of those activities entirely.

164. *See* Priest, *The Current Insurance Crisis*, *supra* note 140, at 1539–40. For a detailed analysis of how insurance pools and individual risk are calculated, see *id.* at 1539–50.

lished a track record which enables the insurer to discriminate among them.[165] The effect is that, at least in the short run, vendors are given less incentive to perform the unmonitorable behavior carefully and, hence, should exercise marginally less care.[166] Thus, in deciding whether to cover an activity, in setting premium, and in imposing conditions, the insurer must assume that activities whose performance it cannot monitor and which can be performed in a dangerous way will tend, at least at the margin, to be performed in that dangerous way.[167] Those unmonitorable and potentially dangerous activities will be insured, if at all, only at a higher premium.[168]

There are other features of liability insurance markets that can explain why increased liability would render such insurance unavailable even for high demand and relatively safe activities. But one must recognize that this drying up of liability insurance need not stem—indeed logically would not stem—from a mere scalar increase in the amount of liability. An increase in the size of the liability risk raises both the supply and demand curves for coverage. As the vendors' liability exposure increases, the gains to trade between vendors and their liability insurers increases rather than decreases.[169] Provided that the insurers face no added problems in diversifying against this increased risk, they will see the increased risk as an opportunity and the availability of insurance should not decline.

Of all the imperfections in liability insurance markets, perhaps the most well-known are the imperfections from adverse selec-

165. *See id.* at 1540–42.

166. *See id.*

167. *See id.*

168. *See id.* To be sure, the disappearance of unmonitorable activities is only a social welfare loss when the activities as offered were not unduly dangerous in fact. Because the care with which these activities were offered could not be monitored, the vendor who offered them lacked the optimum incentive to be careful. *Ceteris paribus* unmonitorable activities are less likely than monitorable activities to be offered with care.

169. In contrast, a scalar increase in liability hurts those sportsmen who prefer a lower price for the activity to the possibility of suing for their injuries. They will need to pay the higher price the increased liability forces the vendor to charge, an increase tantamount to a transfer payment from patrons who do not sue to those who do. Accordingly, these sportsmen have much more reason to oppose a scalar increase in liability than does the vendor's liability insurer. The insurer's increase in business and profit is one reason sportsmen cannot rely on the lobbyists for the liability insurance industry to impress upon legislatures or courts the sportsmen's interest in reducing vendor liability.

tion.[170] Because of adverse selection, increased liability will often trigger an unraveling of insurance risk pools that may render even relatively safe and highly valued activities uninsurable—or insurable only at a premium incommensurate with their dangerousness.[171] The unraveling is avoided as long as the variance in the liability risks brought to the risk pool by the high risk insureds, compared to the low risk insureds, is contained.[172] Increased liability can increase that variance and thereby trigger an exodus from the pool by the low risk members that begins the unraveling process.[173] As applied to motels with diving boards, the increase in liability from having the board might have triggered an unraveling by slightly increasing the apparent variance in the liability risks brought to the motel insurers pool by the high risk motels (those with a diving board) and the low risk motels (those without a diving board).[174] The exodus of those low risk motels from the pool in response to that increase in apparent variance might have driven the liability insurers to create and offer separate policies for the high risk and low risk motels.[175] The higher insurance premiums for the motels with diving boards might have put those motels at a competitive disadvantage in attracting customers who know in advance they will not use a diving board.[176] If those customers sufficiently outnumbered customers who desired the board, that competitive disadvantage may have meant that the motels with boards profited more by dismantling the board and retaining their competitive appeal to the greater number of customers with no use for the board.[177]

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170. Adverse selection is generally defined as "the tendency of persons with relatively greater exposure to risk to seek insurance protection." Priest, *The Current Insurance Crisis*, *supra* note 140, at 1541.

171. *See id.* at 1562.

172. *See id.* at 1541. The variance is simply the difference in the risk presented by the high and low risk insureds in the same insurance pool. Technically it is measured by the square of the sum of the difference between the expected liability of each member of the pool and the expected liability of the member of average risk. *See id.*

173. *See id.* at 1563–64.

174. *See id.* at 1564–65.

175. *See id.* at 1573.

176. *See id.* at 1571.

177. *See id.* The same phenomena may be at work when airlines offer no-frills service, not because the forgone amenities cost more than the value consumers assign to them, but because the airline feels keeping low rates will attract those who might otherwise drive. *See id.* at 1572.

The explanation may be followed more easily if one considers the situation from the perspective, not of the insured motel, but of its liability insurer. From the insurer's perspective, the enhanced liability of motels with boards, though itself causing only a minor increase in the variance of the risk pool of motels, raises the cost of insuring that pool by a prohibitive amount because it increases the chance of motels without diving boards dropping out of the insurance pool and triggering the unraveling process.[178] Minor increases in the variance of a risk pool often have such a disproportionate effect. And insurers will predictably react to any phenomenon which threatens to increase the variance of the pool and to trigger unraveling by reconstituting the pool so as to restore the variance to manageable limits.[179] If certain activities of the insured, like offering a diving board, disproportionately appear to increase the variance of the pool so as to threaten the unraveling process, the insurer's reconstitution of the pool may take the form of refusing to cover those activities. That refusal may merely represent the insurer's wish to reduce the apparent variance of risk in the eyes of the low risk insureds, with the insurer's goal being to keep those low risk insureds in the pool.

Note that if those motel customers who know they will not use the diving board receive a better value from motels without boards thanks to the lower liability insurance premiums those motels must pay, any flight of those customers from motels with boards will also mean higher insurance premiums for motels with boards no matter how carefully motels with boards behave.[180] In the insurers' eyes, motels with boards have become more dangerous just because of the nature of the customers attracted to them. A similar unraveling of risk pools occurred when manufacturers of four-wheel drive trucks became increasingly liable for injuries suffered during off-road use of the trucks.[181] The many customers for such trucks who were not interested in off-road use but who enjoyed other advantages of four-wheel drive appeared to react to the modest increase in liability (which they experienced as a modest increase in their liability insurance premiums) by switching to four-wheel drive vans and station wagons that could not be

178. *See id.* at 1541.

179. *See id.* at 1542.

180. *See id.* at 1571. For a discussion regarding adverse selection, see *supra* note 170 and accompanying text.

181. *Id.* at 1564–65.

used off road.[182] That flight of the low risk members of the risk pool significantly raised the truck manufacturers' liability insurance premiums per truck, just because of the nature of the customers who still bought the trucks.[183]

Unexpected expansions of liability also hurt vendors because they seem to exert an *in terrorem* effect on those who promote the vendors' activities. Trade associations of travel agents and travel managers have reacted to damage awards against motels with diving boards by advising their members against booking clients into such hotels out of fear the travel agent or manager will be subject to liability as well, apparently on the ground of negligent booking.[184] Given the absence of reported opinions holding travel agents and managers liable for negligent booking, this reaction is hard to explain. But an operator of such a motel who was able to find liability insurance or brave enough to do without it might well dismantle his board rather than see such travel agents and managers steer his customers away. Hence, the *in terrorem* effect of expanded liability, by raising the specter of still further expansions, ripples through the industry.

And because a motel's diving board may serve as a "litogen" (i.e., any aspect of an activity that triggers liability out of proportion to its actual dangerousness), even an accurate and reliable estimate of the extent to which retaining the diving board increases the motel's liability may tell little about the actual danger of the board.[185] For this reason alone, the liability insurer's judgment not to insure motels with boards or to raise the premium charged such motels will not support a reliable inference about the board's social value.

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182. *Id.* at 1565.

183. *Id.*

184. *See* 23 AM. SOC'Y OF TRAVEL AGENTS NEWS & NOTES 1 (1974).

185. The term was originally used by Robert L. Brent, M.D., to describe bendectin, a drug used to combat nausea in pregnant women and also the source of much litigation in the 1970s and 80s. As a result of the litigation, bendectin was pulled off the market by its manufacturer in 1983, yet it has never been proven to cause birth defects. MARCH OF DIMES, BENDECTIN MAKING A COMEBACK, *at* http://www.marchofdimes.com/professionals/681_1820.asp (last visited Nov. 19, 2003). Hence Dr. Brent called it a "litogen," a word similar to carcinogen (a substance that causes cancer) and teratogen (a substance that causes birth defects), but meaning a substance that causes litigation. Editorial Comment, *Teratogen Update: Bendectin*, 31 TERATOLOGY 429–30 (1985). The word was used again in PHANTOM RISK: SCIENTIFIC INFERENCE AND THE LAW 28 (Kenneth R. Foster et al., eds., 1999). For the specific claim that a diving board is a litogen, see Sobo, *supra* note 2, at 179 (describing the necessary conditions for "litogen" but never stating the term).

There are other insurance concerns—other features of liability insurance markets—that explain why increased liability may lead liability insurers to refuse to cover high demand and relatively safe activities. Again, no one should uncritically assume that the availability and price of liability insurance for offering an activity depends only on the activity's actual dangerousness. For example, increased liability through pro-patron changes in tort law or pro-vendor changes in insurance law can dry up liability insurance for vendors simply because it increases the insurers' uncertainty about its future pay-out rates beyond a manageable limit.[186] That uncertainty can stem from the insurers' lack of experience with how courts will apply the legal changes in practice or from the insurers' concern about the heightened chance of further legal changes increasing liability still more.

While liability insurance exists to deal with a certain level of uncertainty about future liability, too much uncertainty about payouts destroys insurability. Liability insurance is still predominantly "occurrence" insurance, that is, the insurer insures the insured against liability arising from the insured's actions within the coverage period even though the insured's liability, and hence the insured's need to pay, may not be determined for years in the future and will be determined under the liability rules and systems prevailing then. Hence, the risk that further legal changes will increase liability falls almost entirely on the insurer. Insurers who underestimate the liability risk will charge inappropriately small premiums which will not cover their payouts. Insurers who overestimate liability risks will charge excessive premiums with the result that they will sell too little insurance. Enough uncertainty about either the chance that liability will be imposed or the amount of that liability when imposed and the insurer cannot set appropriate premiums and may opt against insuring the activity at all.

The risk that the vendor's liability will increase because of the changes in legal doctrine or in the operation of the litigation system is especially costly to insure against because it is not an independent risk.[187] That is, the increased liability from a pro-

186. Priest, *The Current Insurance Crisis*, *supra* note 140, at 1550–63.

187. *See* Neil A. Doherty & Georges Dionne, *Insurance with Undiversifiable Risk: Contract Structure and Organizational Form of Insurance Firms*, 6 J. RISK & UNCERTAINTY 187, 188 (1993) (stating that liability insurance suffers from nonindependence where the

patron legal change is likely to raise the liability burden of all of the insurer's vendors and not merely of a few of them.[188] Hence, the insurer cannot diversify against the risk of legal changes by insuring a large number of stables or a large number of motels with diving boards.[189] In the words of the insurance industry, the liability risk is not diversifiable within the insurance pool.[190] Even insuring vendors in different states will not adequately diversify against the risk of legal changes because the chance of a legal change increasing vendor liability in one state is positively correlated with the chance of similar legal changes in all other states.[191] Nor will insuring many different types of vendors diversify against the risk of a legal change, for the risk of a legal change which would increase the liability burden of one type of vendor correlates with the risk of a legal change increasing the liability of other types of vendors.[192] That such correlation inevitably results from *stare decisis* and the manner in which the common law evolves gives no comfort to the insurer.[193]

Once vendors start abandoning an activity, the liability insurer for the remaining vendors will incur increased costs in continuing to provide coverage simply because there are not enough vendors offering the activity or enough patrons purchasing the activity.[194] Merely insuring a sufficient number of vendors who sell to a sufficient number of patrons helps a liability insurer diversify its risk.[195] If there are not enough vendors or patrons, then, in the eyes of the insurer, the patrons and vendors are performing too little of the diversification or pooling function themselves. The liability insurer needs to find many vendors whose risks of liability are uncorrelated and who each serve an ample number of patrons

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rules under which liability is determined and damages are assessed change over the life of the insurance contract because new legislation or judicial precedent might change the rules altogether).

188. *See id.* (theorizing that the "risk will not be eliminated by pooling").

189. *See id.*

190. *See* U.S. DEP'T OF JUSTICE, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT, AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INS. AVAILABILITY AND AFFORDABILITY 79 (1986).

191. *See id.*

192. *See id.*

193. *See* Doherty & Dionne, *supra* note 187, at 200 n.3 (discussing how mass torts and toxic torts challenge courts to create new innovative liability rules that could redefine coverage).

194. *See* Priest, *The Current Insurance Crisis*, *supra* note 140, at 1562.

195. *See id.* at 1542.

in order to achieve the pooling efficiency of insurance.[196] When the number of bungee jump vendors declined somewhat following legal restrictions on bungee jumping in Florida, some liability insurers withdrew entirely from the bungee jumping market and gave as their reason that too few vendors remained for adequate diversification of the liability risk.[197] The insurers' testimony further undermines the claim that the reason for an activity's disappearance after a liability increase is that the activity is so much more dangerous than patrons appreciate, and so little in demand, that it could not be offered profitably once part of its injury costs were internalized through liability.

Of course the lack of liability insurance for an activity would not lead vendors to abandon the activity if vendors did not feel a need for liability insurance. But vendors, typically small businesses, are generally more risk averse against liability losses than large businesses. Owners of large businesses are more able to diversify risk by varying the content of their portfolios. Moreover small businesses improve their internal prospects more when they can count on the relatively stable earnings configuration for the future that liability insurance provides. Their small size not only makes vendors more risk averse, it eliminates the option of self-insurance, an option that reportedly appeals to the few vendors as huge as Disney World. Perhaps one reason self-insurance is not an option for smaller vendors is because they do not offer enough activities so that their liability risks will tend to average out within their activities themselves. The sportsmen's hope—that the shields of limited liability and bankruptcy would induce some small vendors to go bare or that fly-by-night and undercapitalized vendors would step up to offer the activities established vendors no longer offer—has not materialized. In light of the substantial fixed costs of developing a horse riding stable, hotel, motel, YMCA, amusement park, day care center, or trampoline center, not to mention a ski area or a private school, this is hardly surprising.[198]

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196. *Id.*

197. Thomas H. Ehrhardt, Note, *What Price Human Flight? Bungee Jumping Accidents Indicate Need for More Expeditious Regulation of Potentially Hazardous Activities*, 25 RUTGERS L.J. 853, 865–67 (1994).

198. Individual sportsmen who endanger others seem much more willing than vendors to proceed without insurance. Perhaps that is because they suspect that without liability insurance, they either won't be sued by those they injure or won't actually pay even if they

Similarly, no one should infer from risk averse vendors refusing to offer activities for which they cannot obtain liability insurance that the activity is socially undesirable. Imagine how many risk averse individuals would refuse to drive a car if no automobile insurance was available. No policymaker should, therefore, conclude that driving by these individuals is too dangerous to be socially desirable. Rather, the policymaker should recognize that one reason the absence of insurance is socially harmful is precisely that the risk averse will refuse to engage in socially desirable activities. Likewise, imagine the likely driving behavior, if no liability insurance was available, of many who would be willing to drive.[199] On witnessing their slow speed and their precautions to avoid liability, should the policymaker conclude that these precautions are socially desirable? On the contrary, the policymaker should suspect that these precautions, not being taken when insurance was available, are excessively costly. The policymaker should recognize that another reason the absence of insurance is socially harmful is precisely because the risk averse will resort to excessively costly precautions. In short, the vice lies in the lack of readily available and competitively priced liability insurance, not in the activities which the lack of insurance leads people to forego.[200] If the tort liability imposed on those activities, for whatever reason, including the peculiarities of insurance markets, contributed to the lack of insurance, the policymaker should reconsider that tort liability.

Before the 1960s, common law courts were more sensitive to the possibility that imposing tort liability which was difficult to insure against would drive businesses that needed liability insurance to abandon worthwhile activities. Courts rightly saw it was no small evil for tort liability to eliminate worthwhile activities

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are sued successfully. The effect of a New York law mandating that snowmobiles carry liability insurance suggests that individual sportsmen prefer not to have insurance. N.Y. INS. LAW § 5202(a) (Consol. 2001). Both before and after the law, snowmobilers were liable for injuries caused by their negligence. *See* Michael Levy, *Snowmobilers Ask Higher Fees to Maintain Trails*, BUFF. NEWS, Nov. 10, 1999, at 1B, *available at* 1999 WL 4585135. In that respect, the law did not increase snowmobilers' liability at all. *See id.* Nevertheless the law markedly reduced the number of snowmobilers. *See id.*

199. The benefit of encouraging desirable behavior by reducing risks is common to all insurance, not just liability insurance. For example, the property insurance portion of homeowner's insurance induces more people to buy homes.

200. This is not to recommend making more liability insurance available to vendors. In the modern legal environment more liability insurance encourages courts to expand liability further. *See* Priest, *The Current Insurance Crisis, supra* note 140, at 1538–39.

for insurance reasons, thus narrowing the options available for the rest of society. Courts were not as myopically fixed as modern courts on compensating the injured plaintiff and deterring the causally negligent defendant and were more open to the possibility that larger concerns argued against liability. In a famous article, Professor Charles O. Gregory pointed out that several lines of cases from the pre-1960 era denying liability could best be explained by the judicial conviction that, for one reason or another, defendants would not be able to insure themselves at a reasonable cost against the liability that plaintiffs sought and, hence, might abandon desirable activities.[201] In the city-wide fire cases, for example, where owners of property destroyed by the fire sued either the business whose negligence caused the fire or the water works company whose negligence caused the spread of the fire, the courts found some rubric, typically lack of proximate cause or lack of duty, on which to turn away the property owners.[202] The courts appreciated, Professor Gregory argued, that the liability risks being insufficiently independent, liability insurers for the defendant could not diversify against this potentially huge liability risk at a reasonable cost.[203] The potential chill on risk-creating businesses threatened by the specter of liability without insurance required the court to dismiss negligence suits against the defendant businesses in such sweeping terms that any future suits would be stopped at their inception.[204] To let the cases go forward, the courts realized, would let the fear of uninsured against liability unduly curtail worthwhile activities.[205] The fear of liability

201. Charles O. Gregory, *Gratuitous Undertakings and the Duty of Care*, 1 DEPAUL L. REV. 30, 59–60 (1951).

202. *See* H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 897 (1928) (holding that neither the city nor the water company has a legal duty to supply water to city residents); Ryan v. N.Y. Cent. R.R., 35 N.Y. 210, 216–17 (1866) (holding that defendant is not liable for damages to remote buildings).

Even in the 19th century *Ryan* was not universally adopted. *See* THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE 33–34 (1898). Occasionally a modern court will consider the impact of liability on the continued existence of socially valuable activities and products. *See, e.g.*, McCarthy v. Olin Corp., 119 F.3d 148, 155 (2d Cir. 1997) (dismissing a negligent marketing claim in order to avoid driving handguns off the market); Enright v. Eli Lilly & Co., 570 N.E.2d 198, 204 (N.Y. 1991) (refusing to allow a third generation of drug victims to sue drug manufacturer on the ground that these suits would unduly burden the distribution of drugs).

203. Gregory, *supra* note 201, at 59–60.

204. *See, e.g.*, *Enright*, 570 N.E.2d at 155 (dismissing plaintiff's claim at the summary judgment stage).

205. *See id.* (recognizing the important public policy of having prescription drugs available).

would share the effect of Hamlet's fear: "enterprises of great pith and moment [w]ith this regard their currents turn awry [a]nd lose the name of action."[206]

The various reasons why increased liability can cause the disappearance of recreational activities are, of course, merely possible explanations for the disappearance of the activities in question. Given the multitude of explanations for why an activity disappears—from changing consumer tastes, to the appearance of substitute activities—no explanation can be put forth with confidence. As others have emphasized, even industry experts may not be able to distinguish when an activity is abandoned due to consumer preference from when it is abandoned due to increased liability.[207] For instance, the timing surrounding the disappearance of hotel and motel diving boards strongly suggests that increased liability was the culprit there. Almost all hotel and motel chains removed their diving boards from their swimming pools within a few months of each other in 1974. The triggering event appeared to be a $7 million judgment against the Sheraton Park Hotel (now renamed the Sheraton Washington) awarded to eighteen-year-old Thomas Hooks.[208] Hooks dove from a three meter board of the Sheraton pool and continued underwater until he ultimately struck his head on the part of the pool's bottom which was sloping upward.[209] Apparently, Hooks' winning theory of negligence was that the Sheraton was negligent for installing an Olympic-style aluminum diving board in place of the previous wooden board.[210] According to the plaintiff—and apparently the jury—the aluminum board, which followed the design used in the 1972 Munich Olympics, projected divers too high in the air.[211] Within a few days of that judgment Joseph McInerney, Vice-President and Director of Operations for the Sheraton Corporation, issued the fateful letter that marked the end of the diving board era. Referring to the Hooks award, and on the advice of Sheraton's attor-

206. WILLIAM SHAKESPEARE, HAMLET act 3, sc. 1.

207. *See* Priest, *The Current Insurance Crisis*, *supra* note 141, at 1562.

208. Hooks v. Wash. Sheraton Corp., 578 F.2d 313, 314 (D.C. Cir. 1977).

209. *Id.*

210. *Id.* at 316.

211. *Id.* Those offering swimming pools with diving boards have also been sued on the basis that their diving board did not have "enough spring." Earnsberger v. Griffiths Park Swim Club, No. 20882, 2002 Ohio App. LEXIS 3792, at *5 (Ohio App. July 24, 2002) (stating that the plaintiff attributed his knee injury to the fact that the diving "board 'did not give' or have 'enough spring'").

neys, McInerney concluded, "[b]ecause of this award, Sheraton is removing all diving boards from all its properties." Hotel chains around the country soon followed Sheraton's lead.[212]

On the other hand, some pool manufacturers believe diving boards were doomed to disappear soon in any event because lap swimming and family play while wading, which benefit more from a shallow pool, have increased in popularity more than diving has.[213] The popularity of diving, which provides few fitness benefits, did not gain from the fitness craze of the 1970s and 1980s as did the popularity of lap swimming.[214] A pool of the size and depth appropriate for a one-meter diving board[215] may have progressively become a poorer investment for motels and hotels than a shallow pool of uniform depth given the cost savings of the latter and given that the diving area will probably cut in half the area for lap swimming or family play. Patron tastes may also have changed simply because the income of patrons has risen. As income rises, the patrons' opportunity costs of incurring an injury should also rise, creating a stronger patron preference for safer activities. Shallow pools of uniform depth would then come to replace pools with diving boards simply because the shallow pools appeared safer.

While a possible change in patron tastes may explain the absence of boards in new pools, those tastes would hardly change so suddenly as to explain the dismantling of boards in pools designed for boards. Only liability concerns seem to explain the willingness of hotels, motels, and YMCAs in the months following the McInerney letter in 1974 to undertake such value-decreasing be-

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212. For an account of the facts surrounding *Hooks*, and the subsequent removal of diving boards from hotels and motels around the country, see Anthony Marshall, *Remembrance of an Incident that Changed Hotels Forever*, 211 HOTEL & MOTEL MGMT. 15 (1996), *available at* LEXIS, Markets & Industry Archive News Library. Eventually plaintiff agreed to a remittitur of damages and the judgment for plaintiff was upheld on appeal. *Hooks*, 578 F.2d at 319.

213. Telephone Interview with Joseph Grimes, Owner, Grimes Pools, Inc. (Oct. 11, 1998).

214. *See id.*

215. I mean appropriate for divers exercising minimal care to keep from striking the bottom or sides of the pool. For such a diver the standard water depth, the standard slope rise, and the standard throw area recommended by the National Pool and Spa Institute are fully adequate. Some courts have found that pools with boards must be adequate for the foolish or drunken diver as well. *See supra* text accompanying notes 70–75. To the extent that diving boards have disappeared because of such requirements, their disappearance is, of course, attributable to liability.

havior. Moreover, the dismantling of boards in so many pools may itself have caused the relative decline in diving's popularity by depriving patrons of a convenient opportunity to discover the joy of diving, to learn to dive, or, at least, to overcome their natural fear of diving.

In sum, this section argues for an agnostic attitude when previously commonplace and popular recreational activities disappear during a period in which the vendors of the activities face increased liability. Rarely can one be confident that the increased liability caused the disappearance of an activity. But, most importantly, no one can be confident that the activities that have disappeared were so dangerous and provided patrons such modest benefit that their disappearance has increased social welfare.[216]

III. THE VALUE OF THE LOST ACTIVITIES

"They hate us youth."

Falstaff

The agnosticism argued for in the previous section in no way supports the current law's harsh treatment of vendors and avid sportsmen. On the contrary, the possibility that tort liability has reduced social welfare by eliminating worthwhile and lawful activities is sobering. A law that deprives people of socially desirable options has much to answer for.

Once one can no longer presume that the loss of an activity increased social welfare, a glance at the value of what has been lost becomes appropriate. The lost or at least endangered activities, such as taking a horse on a trail unaccompanied, diving at motel

216. Even if an activity is so dangerous to the unprepared or foolish patrons that its disappearance increases social welfare, the activity might yet increase social welfare if there was some way it could profitably be made available only to those who prepared, and then took care, to protect themselves. Those who rent equipment and sell air to scuba divers, and probably all those selling to the scuba diving industry, may have survived the modern expansion of liability only because of the industry's certification system. By keeping scuba diving unavailable to novices and those without minimal qualifications, PAUI and NAUI have helped to hold the industry's liability burden to manageable levels without the need to rely on release agreements. This is not to suggest that similar efforts at industry self-regulation will bring back the activities that have disappeared. If the vendors of those activities could have profitably limited access to their activities to the qualified, they would have done so.

pools, renting a boat for waterskiing, or hanging from monkey bars in a daycare playground, share certain features besides the risk of injury they all present to the patron.[217] They are what others have called flow activities in that they offer patrons an opportunity for a flow experience.[218] While not easily defined, flow refers to that inner reverie from the temporary merging of an actor's actions and awareness.[219] Typically, flow also involves a temporary loss of ego as the actor takes respite from negotiating between his own needs and the social demands placed upon him.[220] According to Mihaly Csikszentmihalyi of the University of Chicago, flow activities must avoid boredom and anxiety by matching an actor's abilities with his opportunities for applying those abilities.[221] That is, flow activities must be neither too easy (hence boredom) nor too difficult (hence anxiety) and ideally should give the actor himself a chance to calibrate finely the difficulty to his abilities.[222] While flow can come from work as well as play, for instance the surgeon's flow from surgery, the flow experience appears to need no goals or rewards external to itself.[223] Nevertheless, flow rarely comes from activities in which mistakes carry no penalty.[224] Mistakes inevitably carry penalties when flow comes from work, but that need not be the case with play.[225] With play the risk of physical injury can constitute that penalty.[226] Moreover, the risks can serve as a means to focus attention on the activity and to provide feedback to the actor's skill.[227] Rather than

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217. Throughout this section of the article "risk" refers only to the risk to the patron himself and not to the risk to others.

218. MIHALY CSIKSZENTMIHALYI, FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE 72 (1990) [hereinafter FLOW]; *see* BOREDOM, *supra* note 63, at 38–49. Following Max Weber, Jessie Bernard's name for eustress-seeking behavior is "eudemonism." Jessie Bernard, *The Eudaemonists*, *in* WHY MAN TAKES CHANCES 10 (Samuel Z. Klausner ed., 1968) (citing MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 78 (1948)). Johan Huizinga also maintains that earnest play can transport the player to another state of consciousness. Johan Huizinga, HOMO LUDENS: A STUDY OF THE PLAY ELEMENT IN CULTURE 19–21, 44–45 (1938).

219. FLOW, *supra* note 218, at 39–40.

220. *Id.* at 41–42.

221. *Id.* at 74–77.

222. *See* BOREDOM, *supra* note 63, at 49; FLOW, *supra* note 220, at 74–75.

223. *See* BOREDOM, *supra* note 63, at 47, 123–39.

224. *See id.* at 138.

225. *See id.*

226. *See id.*

227. *See id.* at 46.

being a hindrance to the actor's enjoyment, the risks of injury are part of the challenge that provide the flow experience.[228]

Some researchers have suggested that flow activities provide a wide range of benefits beyond the often exquisite pleasure of the flow experience itself.[229] Flow activities provide the stimulation needed to satisfy the actor's physiological need for optimal arousal.[230] Flow activities seem to aid creativity, in particular adaptive flexibility—the ability to change strategies when confronted with a problem.[231] They also seem to increase spontaneous fluency, render actors less dependent on others, and improve mood.[232] Meeting the challenge of a flow activity builds one's feeling of "effectance"[233] and of "potential control,"[234] two aspects of self-confidence. Even those lucky persons for whom work is a flow experience benefit significantly from finding different areas in which to experience flow.[235]

The possibility of flow aside, the activities in question share further benefits that other varieties of physical play may not. By providing an opportunity for an actor continually to test his skills, they allow the actor to measure himself and learn his limits.[236] They allow the actor's skills and his ability to protect himself to develop.[237] Several of the activities help the actor learn to cope

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228. *See id.* at 45.

229. *Id.* at 99 (stating that rock climbers experience a "heightened sense of physical achievement, a feeling of harmony with the environment, trust in climbing companions, and clarity in purpose").

230. M.J. ELLIS, WHY PEOPLE PLAY 80 (1973). *See also* GEORGE LEONARD, THE ULTIMATE ATHLETE 220 (1974) (noting that researchers have seen a qualitative difference between the arousal potential of volleyball or tennis which tend to exhaust participants, on the one hand, and rock climbing and skiing which tend to exhilarate participants, on the other).

231. *See* BOREDOM, *supra* note 63, at 44.

232. *Id.* at 156.

233. Robert W. White, *Motivation Reconsidered: The Concept of Competence*, 66 PSYCHOL. REV. 297, 321–23 (1959) [hereinafter *Motivation*].

234. *See* Lyn Y. Abramson et al., *Learned Helplessness in Humans: An Attributional Analysis, in* HELPLESSNESS: THEORY AND APPLICATIONS 3–4 (Judy Garber & Martin E.P. Seligman eds., 1980); MARTIN E. SELIGMAN, HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH 105 (1975) (stating that a feeling of a lack of control can foster depression and helplessness). Others have described the adoptive function of risk-taking in evolution. *See generally* MELVIN KONNER, WHY THE RECKLESS SURVIVE . . . AND OTHER SECRETS OF HUMAN NATURE 4–16 (1990).

235. *See* BOREDOM, *supra* note 63, at 139; FLOW, *supra* note 218, at 162–63.

236. *See* BOREDOM, *supra* note 63, at 139.

237. *Id.*

with relatively unsanitized nature.[238] Coping with the challenges of nature appears to build self-esteem better than does coping with artificially created environments.[239] It also reduces any estrangement of the actor from his physical environment.

The activities in question also share the benefits of all physical play. These include providing an outlet for aggression and for self-expression, discharging super-abundant energy and relaxing after exertion.[240] Because the activities are physically stimulating, they also provide the usual physiological benefits.[241] At least one researcher maintains that the benefits extend beyond the patron himself. Samuel Klausner asserts that allowing some in society to risk physical injury for no apparent utilitarian purpose "contributes to the general optimism that society will indeed have the strength to achieve its goals" and, if properly controlled, contributes to social cohesion.[242]

Because the activities do not appeal to everyone or to every group in society equally, the burden of the tort decisions which tend to eliminate the activities falls unevenly across society. Marvin Zuckerman, Ralph Keyes, and others have demonstrated that individuals differ in their need for physical stimulation and variation.[243] Their research has identified a sensation-seeking trait that can be measured and that has been empirically linked

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238. *Id.*

239. *See id.*; Robert W. White, *Competence and the Psychosexual Stages of Development, in* NEBRASKA SYMPOSIUM ON MOTIVATION 100–03 (Marshal R. Jones ed., 1960); *Motivation, supra* note 233, at 297, 317–18.

240. *See* KONRAD LORENZ, ON AGGRESSION 243–45 (Marjorie Kerr Wilson trans., 1963) (stating that aggression must be discharged for humans to flourish). *See generally* PHYSICAL ACTIVITY AND MENTAL HEALTH (William P. Morgan ed., 1997); P.H. FENTEM ET AL., BENEFITS OF EXERCISE: THE EVIDENCE (1990) (listing articles explaining benefits of exercise).

241. For example, they provide better muscle tone, improved coordination, strength, balance, and some improvement in fitness.

242. Samuel Z. Klausner, *The Intermingling of Pain and Pleasure: The Stress-Seeking Personality in Its Social Context, in* WHY MAN TAKES CHANCES: STUDIES IN STRESS-SEEKING 164 (Samuel Z. Klausner ed., 1968).

243. *See* DONALD W. FISKE & SALVATORE R. MADDI, FUNCTIONS OF VARIED EXPERIENCE 444 (1961). *See generally* RALPH KEYES, CHANCING IT: WHY WE TAKE RISKS 21 (1985); MARVIN ZUCKERMAN, BEHAVIORAL EXPRESSIONS AND BIOSOCIAL BASES OF SENSATION SEEKING (1994) [hereinafter BEHAVIORAL EXPRESSIONS]; MARVIN ZUCKERMAN, SENSATION SEEKING: BEYOND THE OPTIMAL LEVEL OF AROUSAL (1979) [hereinafter SENSATION SEEKING]. That some individuals crave and appear to need much more stimulation than others is often a subject of art. *See, e.g.*, MY DINNER WITH ANDRE (Fox Lorber Studios 1981) (depicting the story of two characters who need vastly different amounts of stimulation to stay emotionally "alive").

with voluntary risk-taking behavior.[244] Their research suggests that predisposition toward high or low levels of sensation-seeking is associated with different levels of the neurotransmitter norepinephrine which stimulates neural activity and which in turn is regulated by the enzyme Monamine Oxidase ("MAO").[245] High MAO levels are associated with low norepinephrine levels.[246] High sensation-seekers tend to have lower MAO levels which suggests that they have a greater level of norepinephrine.[247] More recently, a group of scientists in Israel have identified a gene associated with sensation-seeking.[248] In contrast, other researchers claim that "social factors, perhaps in combination with personality predispositions, have more influence on various forms of risk-taking behavior than underlying physiological traits."[249]

Whatever its origin, a preference for high sensation-seeking is shared by a minority in society that identifies itself by its voluntary risk-taking behavior. That preference correlates with many positive characteristics. High sensation-seekers tend to possess a receptive and tolerant attitude toward unfamiliar ideas and experience and relatively little fear for physical safety.[250] They view their emotions positively and express them openly.[251] A psychological study of rock climbers concluded that they share a "tendency to regard conventional norms as provisional not because of an antisocial posture but because of experience seeking or developmental aspirations toward self-actualization."[252]

The alienated, defined here as those who derive less enjoyment from normal instrumental activities, suffer more from the ab-

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244. Michael R. Levenson, *Risk Taking and Personality*, 58 J. PERSONALITY & SOC. PSYCHOL. 1073, 1074 (1990); ZUCKERMAN, BEHAVIORAL EXPRESSIONS, *supra* note 243, at 124 ("[I]n those situations that do entail risk, high sensation seekers find the sensations or experiences worth the risk, whereas the low sensation seekers either do not value the sensations of the activity, or do not think they are worth the risk."); ZUCKERMAN, SENSATION SEEKING, *supra* note 246, at 339–44 (discussing MAO levels and their inverse relationship with sensation-seeking).

245. ZUCKERMAN, SENSATION SEEKING, *supra* note 243, at 340.

246. *Id.* at 344.

247. *Id.*

248. Marvin Zuckerman, *Are you a Risk-Taker?*, PSYCHOL. TODAY, Nov. 1, 2000, at 54–56, 87.

249. Levenson, *supra* note 244, at 1074.

250. ZUCKERMAN, SENSATION SEEKING, *supra* note 243, at 181–82.

251. *Id.*

252. Levenson, *supra* note 244, at 1078.

sence of high sensation-seeking activities.[253] The alienated depend more on non-instrumental activities like the recreational activities which liability has curtailed for their self-perception and enjoyment.[254] High sensation-seeking activities offer the alienated one of their relatively few opportunities to experience competence.[255]

High sensation-seeking appears disproportionately in western males compared to non-western males and in males across all cultures compared to females.[256] Sensation-seeking also appears to decline with age.[257] Among the boys and young men who disproportionately suffer from the loss of the activities in question, the less wealthy are hit the hardest. Enough wealth helps the avid sportsman to overcome the loss of some of the activities. When horses cannot be rented and taken unaccompanied, the wealthy can more easily buy and maintain them. When all ski slopes are groomed, the wealthy can more easily pay for a helicopter ride to an off-piste area. When no public or YMCA pools offer diving boards, the wealthy can more easily install their own board, if they are able to find a willing seller.

The disparate impact of liability on less wealthy boys and young men would be of less concern if one could be confident that any judge would appreciate the importance to high sensation-seekers of having affordable and spirited recreational activities available. But the research of Ralph Keyes suggests that the high sensation-seeker's perspective on risky activities is almost unintelligible to low sensation-seekers.[258] In her work on sensation-seeking in couples, Ilda Ficher also found that the "difference between a high and low sensation-seeker represents a basic difference in values, risk estimations, and general outlook on life."[259] If only because of their age, judges are disproportionately likely to be low sensation-seekers themselves.

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253. *See* BOREDOM, *supra* note 63, at 174–75.

254. *See id.*

255. *See id.*

256. Marvin Zuckerman, *Sensation Seeking, Mania, and Monoamines,* 13 NEUROPSYCHOBIOLOGY 121, 122 (1985) [hereinafter *Mania and Monoamines*].

257. *Id.* at 122.

258. KEYES, *supra* note 243, at 51.

259. Ilda V. Ficher, et al., *Sensation-Seeking Congruence in Couples as a Determinant of Marital Adjustment: A Partial Replication and Extension,* 44 J. CLINICAL PSYCHOL. 803, 803 (1988).

High sensation-seekers are not content with normal recreation presenting little risk, such as running or bowling. They seek activities presenting the challenge of taking an authentic risk, meeting and overcoming the fear it evokes, and persevering to success.[260] According to Zuckerman, whether the high sensation-seeker can find a satisfactory way of life may depend on the opportunities for expressing his trait that his culture provides him.

> [High sensation-seekers] seek the particular phenomenal expressions of the trait that are provided by a particular culture. Conversely, the low-sensation seekers will "burrow into" whatever forms of security and stability are provided by the social order. Since most social structures are built on impulse inhibition, there are usually more opportunities for low sensation-seekers to find a satisfactory way of life than there are for highs.[261]

Like Zuckerman, sociologist Jessie Bernard maintains that modern Western society fails to provide enough lawful activities for high sensation-seekers to flourish.[262]

Perhaps because its origin is at least partly biochemical, the sensation preference is not easily suppressed. Raise the cost or curtail the availability of lawful sensation-seeking and at least some persons will turn to substitutes. One possible substitute is antisocial and self-destructive sensation-seeking—most commonly drug and alcohol abuse and crime, especially delinquency. That much antisocial and self-destructive conduct springs from the wish for sensation has been well documented.[263] The extent to which those who engage in such undesirable conduct will actually substitute risky recreational activities, in contrast, remains unknown.

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260. LEONARD, *supra* note 230, at 220.

261. ZUCKERMAN, SENSATION SEEKING, *supra* note 243, at 375; *see also* ZUCKERMAN, BEHAVIORAL EXPRESSIONS, *supra* note 243, at 166 ("Very often the only exciting things in lower socioeconomic class neighborhoods are crime and drugs.").

262. BERNARD, *supra* note 218, at 46–47.

263. *See* ZUCKERMAN, SENSATION SEEKING, *supra* note 243, at 278–79; Thomas S. Szasz, M.D., *The Role of the Counterphobic Mechanism in Addiction*, 6 J. AM. PSYCHOANALYTIC ASS'N 309, 323 (1958) (stating that anti-social and self-destructive conduct such as drug use creates "sham adversaries" that one then tries to master when ordinary life lacks sufficient challenge). *See generally* Dean G. Kilpatrick et al., *Deviant Drug and Alcohol Use: The Role of Anxiety, Sensation Seeking, and Other Personality Variables*, *in* EMOTIONS AND ANXIETY: NEW CONCEPTS, METHODS, AND APPLICATIONS 247 (Marvin Zuckerman & Charles D. Spielberger eds., 1976).

Like low risk sports, watching TV and playing computer and video games would not qualify as substitutes because they do not supply the high sensation-seeker with appropriate stimulation. The sensation-seekers' resort to them is tantamount to giving up the search. Yet, as Sydney Margolin tried to show in his psychoanalytical and psycho-sociological studies of the Prairie Indians, giving up the search exacts a heavy psychoanalytical toll on the high sensation-seeker.[264] The Prairie Indians that Margolin studied, especially the Utes, were acknowledged to suffer from an extraordinary incidence of pathological symptoms, in particular illness, neurosis, and accident proneness.[265] Through interviews, Margolin found a disproportionate number of the Prairie Indians to be extremely aggressive and extremely high sensation-seekers.[266] Margolin believes this is a result of selection pressure over centuries of their ancestors living lives that consisted almost entirely of war and raids.[267] The ordered conditions of the Prairie Indians' modern life on their reservations, Margolin argues, offered far too little opportunity to discharge their aggression and sensation-seeking.[268] Margolin attributes the Indians' pathological symptoms to this repressed aggression and sensation-seeking.[269]

Some may claim that the lost activities did not add that much to the many recreational activities that remain available. They can claim, for example, that people are skiing more than ever; therefore, there is no reason to care whether ski areas feel driven to groom every run. But those who take this view are looking at skiing quantitatively without paying attention to how skiing's profoundly aesthetic quality is diminished when every run is groomed.

Others may claim that the modern playground—sanitized through the taking of every precaution that a judge, jury, or liability insurer may deem cost-justified—represents an improvement over previous playgrounds. But many authorities in playground design sharply disagree.

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264. LORENZ, *supra* note 244, at 240 (citing Sydney Margolin, Lecture at Menninger School of Psychiatry (1960)).

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 245.

269. *Id.*

> Because local authorities fear accidents (and litigation), the playgrounds they make are dull. Though they may realize that children are tireless explorers, they are not prepared to encourage them . . . .
>
> It is a rewarding experience for children to take and overcome risks and to learn to use lethal tools with safety. Life demands courage, endurance and strength, but we continue to underestimate the capacity of children for taking risks, enjoying the stimulation of danger, and finding things out for themselves. It is often difficult to permit children to take risks, but over-concern prevents them from growing up. This is all too clearly seen in the dull, 'safe' playgrounds that continue to be devised.[270]

As previously discussed, judges and jurors often will not appreciate fully the extent to which the apparently innocuous precautions asked for by the plaintiff spoil the recreation. This full appreciation is not easily achieved.[271] The judicial treatment of the spectator injury cases, in which an errant baseball, hockey puck, or tire wheel injure a spectator, illustrates the reluctance of many courts to acknowledge the value of preserving the quality and appeal of play.[272] In the spectator's action against the stadium or sports club, a frequent theory of negligence is that the defendant should have screened off more of the seats, including—naturally—the plaintiff's seat.[273] One would think that the courts would, at least occasionally, rule as a matter of law that the defendant was not negligent because a larger screen would have impaired the enjoyment of watching the sport far too much. Instead, however, courts have searched for some other ground, such as lack of duty or assumption of risk, on which to keep the spectator's case from reaching the jury.[274]

Simply because professionals have studied the play benefits of various playground designs, unlike the play benefits of the other recreational activities discussed here, literature exists suggesting

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270. LADY ALLEN OF HURTWOOD, PLANNING FOR PLAY 16–17 (1968) (citations omitted).

271. The value of more enriching play may be one of those "abstract" values that, as Professor Gerla has warned, judges and jurors applying the Learned Hand test for negligence will consistently undervalue. Harry S. Gerla, *The "Reasonableness" Standard in the Law of Negligence: Can Abstract Values Receive Their Due*, 15 U. DAYTON L. REV. 199, 205 (1990).

272. *See, e.g.*, Enhardt v. Perry Stadium, Inc., 46 N.E.2d 704, 705 (Ind. Ct. App. 1943); Thurmond v. Prince William Prof'l Baseball Club, Inc., 574 S.E.2d 246, 248 (Va. 2003).

273. *E.g., Thurmond*, 574 S.E.2d at 248.

274. *E.g., id.* at 250 (holding "that as a matter of law, a spectator assumes the normal risks of watching a baseball game, which includes the danger of being hit by a ball batted into an unscreened spectator area").

how easily liability-driven precautions can spoil play. Consider, for instance, the precaution of removing loose materials like wooden blocks, old car tires, and other discarded building materials from a playground area for pre-school and early elementary school children. When this precaution would have avoided serious injury to a child using the playground, would any judge or juror fail to deem the precaution cost-justified? Yet many child psychologists insist that loose materials are an essential ingredient for a successful playground:

> Many playgrounds are most popular while they are under construction, when there are small bits of wood and mounds of earth all over the place. When it is finished, the children's interest often wanes. The playing equipment is soon explored, and planned play activities are a diminishing enticement if the possibilities of variation are limited.
>
> What is most often lacking in playgrounds ... is loose material which will serve the child's inventive and creative drive. Everything is normally so finished, so well-arranged that nothing is left to the child's initiative. This is a mistake; children want a part in creating their own play world.[275]

Similarly, many liability insurers are insisting as a condition of coverage that newly constructed day-care centers install large windows in their playrooms or take other precautions so that the center's staff and the children are always visible.[276] When this precaution would have been inexpensive and would probably have avoided a plaintiff child's abuse by the center's staff, a jury is likely to deem the precaution cost-justified and thus the center's failure to take it negligent.[277] In such a case, how many defense attorneys will even present evidence of how that precaution impairs the children's play? Yet child psychologists emphasize that children, especially those in cities and towns, flourish best when centers allow them to construct hiding places.

> We are too concerned that every corner should be in full view .... Must we really know everything, see everything and control everything in a child's life? ... Anything capable of use as a hiding-place can be desirable from a child's point of view.

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275. ARVID BENGTSSON, ENVIRONMENTAL PLANNING FOR CHILDREN'S PLAY 156 (1970).

276. *See, e.g.*, Soper v. Hoben, 195 F.3d 845 (6th Cir. 1999).

277. *Id.* at 855 (holding that the school's quick and effective response—installation of windows in the classroom doors—was not "'clearly unreasonable,'" whereas failure to respond has been held unreasonable) (quoting Davis v. Manre County Bd. of Educ., 526 U.S. 629, 649 (1999)).

. . . .

> As children, we have all discovered the cozy "room" under a well-draped table, where the tablecloth almost reaches the floor. The child's fantasy seems to flourish best when the adult world is completely shut out.[278]

A study of one experimental playground concluded:

> The greatest amount of creativity, in terms of both frequency and span, took place behind and in the playhouse. It is suggested that one of the reasons for this was the sense of enclosure there . . . . Kids the world over enjoy the feeling of secrecy and sharing it with a few intimates. Through imaginative play they were quite able to turn a far corner of the playhouse into a 'secret place,' even though every kid on the playground knew the playhouses had a 'far corner.' The need is for the sense of privacy rather than physical isolation.[279]

Some playground designers also echo the broader claim that the risk of physical injury to oneself, while never desirable standing alone, is nevertheless an inseparable part of much enriching recreation:

> [O]ne of the principal characteristics of play . . . [is] that it involves risks. Children are designed by nature to take chances; their bodies are resilient and able to take bumps and mend easily. Consider how many times a child falls down in the process of learning to walk; that same punishment would break bones in most adults' bodies.
>
> Moreover, children have resilient bodies because they need to take risks in order to explore their physical selves and to find out what they can do. If this self-discovery is prevented, children are unable to recognize their own potentials. They won't develop confidence in themselves, for they won't know where their centers of gravity are, physically or psychologically. So the notion of safety must accommodate risk if the intimate environment—the psychological health of children—is not to be threatened.[280]

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278. BENGTSSON, *supra* note 275, at 154.

279. Robin C. Moore, Dipl. Arch. University College, London, Submitted in partial fulfillment of the requirements for the degree of Master of City and Regional Planning at the Massachusetts Institute of Technology, November, 1966 (on file with author).

280. JEREMY JOAN HEWES, BUILD YOUR OWN PLAYGROUND!: A SOURCEBOOK OF PLAY SCULPTURES, DESIGNS, AND CONCEPTS FROM THE WORK OF JAY BECKWITH 10 (1974). Unfortunately, the notion that society should aim at preventing all accidental physical injury to children has been gaining ground. Perhaps the ultimate expression of this notion was the declaration in June 2001 by the British Medical Journal that it was banning the word "accident" from its pages on the ground that all eventualities can be foreseen and measures taken to avoid adverse outcomes. Ronald M. Davis & Barry Pless, *BMJ Bans "Accidents": "Accidents Are Not Unpredictable,"* 322 BRIT. MED. J. 1320, 1320–21 (2001). This

Other playground designers emphasize that the wide range of individual skills and individual desire for sensation require an equally wide range of activities of varying difficulty and risk. "Children and young people of all ages—like adults—should be able to 'go shopping' for their play. They need a great variety of activities. The essence of our provision for them must be to give them freedom to choose."[281]

Sanitized playgrounds have become so widespread in the United States that one may have difficulty imagining alternatives. But one need only look to Western Europe and Japan where the liability expense of those designing and offering playgrounds is dramatically less. There one sees over the last forty years the spread of Adventure Playgrounds and One O'Clock Clubs. These evolved out of what were descriptively called "waste material playgrounds" which were little more than areas set aside where children were allowed to play with old cars, boxes, and timber.[282] While the current versions differ from each other in so many ways that no single description is possible, they all strive to let children "do it themselves" and to give children many opportunities to test themselves against new challenges. They also share the view toward risks and child development that was advanced on behalf of Adventure Playgrounds more than twenty years ago:

> It is too often forgotten that small children, like older children of school age, need a place where they can develop self-reliance, where they can test their limbs, their senses and their brain, so that brain, limbs and senses gradually become obedient to their will. If, during these early years, a child is deprived of the opportunity to educate himself by trial and error, [and] by taking risks . . . , he may, in the end, lose confidence in himself and lose his desire to become self-

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declaration, far from representing an advance, extinguishes an essential difference between our mentality and that of the primitives. As Professors Douglas and Wildavsky have written, the invention of the notion of a regular accident rate, like that of a natural death or a normal incidence of disease, was a triumph for modern science. That was because primitive cultures attributed all physical injuries to human agency, usually behavior by members of the culture which broke some taboo. MARY DOUGLAS & AARON WILDAVSKY, RISK AND CULTURE 29–32 (1982).

281. LADY ALLEN OF HURTWOOD, *supra* note 270, at 17; *see also* Bob Huges, *Play Deprivation Play Bias and Playwork Practice, in* PLAYWORK: THEORY AND PRACTICE 71 (Fraser Brown ed., 2002) ("[T]here is a deep impact on the human psyche if we cannot play, *or if the scope of our play is limited.*" (emphasis added)).

282. C. TH. SORENSEN, OPEN SPACES FOR TOWN AND COUNTRY (1931) (proposing the idea). The first 'waste material playground' was opened at Emdrup, England in 1943. *See generally* Tony Chilton, *Adventure Playgrounds in the Twenty-first Century, in* PLAYWORK: THEORY AND PRACTICE 114–17 (Fraser Brown ed., 2002).

> reliant. Instead of learning security, he becomes fearful and withdrawn . . . . It is difficult for children to grow up emotionally stable if they are denied space and freedom to take and overcome risks.[283]

This article does not contend there is any constitutional impediment to courts and legislatures regulating flow or high stimulation activities. After all, many crimes and much socially undesirable conduct can also provide the stimulation and, for that matter, the developmental benefits of the recreational activities in question. That Willie Sutton robbed banks and Leopold and Loeb murdered Billy Stevens "for the thrill of it" or to test themselves may explain, but hardly justifies, their conduct. No one has any constitutional "right" to engage in whatever recreational activities they favor. Nor need courts consider whether such criminal activities as racing cars on the public highway qualify as a flow or a high stimulation activity before deeming that conduct negligent.

Nevertheless, an important argument for regulating crimes and other socially undesirable activity does not apply to the recreational activities in question. The activities in question incur liability not because those activities endanger others, as crimes generally do, but because of a paternalistic wish to protect the patrons themselves. And of course the patrons are being protected not just from their choice to purchase the activity despite its risks to them, but—because they have signed a release—from their further choice to do so without the background possibility of a negligence suit against the vendor. Upholding releases, as contended for here, would in no way compromise societies' wish to regulate activities which endanger people other than the patron and those claiming through him. Others who are injured by the way the vendor offers his activities—such as other boaters on the lake who are injured by the way the vendor offers his water-skiing rental—would be as able to recover by showing the vendor's negligence as they are now.

While the paternalistic wish to protect people from their choices is clearly a constitutionally valid ground for regulation, there is no reason that wish should drive tort law. A court that overcomes a release and allows the patron to recover strips a patron of his capacity to bind himself not to sue in return for the

283. LADY ALLEN OF HURTWOOD, *supra* note 270, at 14.

vendor offering the activity. The court's decision demeans the patron and robs him of his choice. In place of the patron's choice about whether the benefits of the activity outweigh the risk of injury to him, the court substitutes its own choice. Overcoming a release denigrates not just the activity but any right the patron had to choose the activity. Professor Donald Judges has argued forcefully that courts should recognize a patron's right to choose the level of risk from a recreational activity that he or his children will encounter.[284] He claims that making one's own choices about the risks one will encounter is an important aspect of individual autonomy.[285] Especially because individuals vary so much in the amount of stimulation they wish, Judges argues, their choice of the level of risks they will encounter, at least when the activity does not endanger others, deserves respect:[286]

> In summary, the liberty to make one's own decisions about risk [to one's self], in accordance with one's own character, is an important component of both individual and social self-realization. In a society based on mutual respect for each individual's freedom to define his or her own terms of self-fulfillment and self-actualization, institutions that interfere with risk choice ought to carry a high burden of justification.[287]

What Professor Judges terms the right of "risk choice" would not be of constitutional dimension, but it should count heavily in favor of enforcing releases.[288]

Perhaps surprisingly, Professor Judges' right of risk choice resembles the increasingly recognized right of physically handicapped people to reasonable accommodation in the workplace.[289] Both rights spring from a wish to increase the right-holder's autonomy. Both reflect the judgment that an individual should have the opportunity to prefer an active life with all its perils over a passive but safer life. Indeed both seem to privilege the active life over the passive. Both seem to acknowledge that in order to flourish, individuals must engage in satisfying activities. Both lack any constitutional origin, at least as the Constitution has

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284. Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1, 26 (1993).

285. *Id.*

286. *Id.*

287. *Id.*

288. *See id.*

289. *See* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 393–94 (2002) (discussing "reasonable accommodation" and its limits).

thus far been interpreted. Both may reduce social welfare. Certainly society's cost of accommodating the wish of physically handicapped people to work seems likely to exceed the benefit of that work to society's welfare.[290] Indeed when the costs of injury to handicapped people and to others from including handicapped people in the workplace is added to the other costs of accommodating handicapped people, one suspects society's welfare would increase if this right was not recognized and if handicapped people were encouraged to stay at home.[291] While less certain, it is possible that the recreational activities which have disappeared were also unable to pay their way. If that is so, society's decision to accept a welfare loss in order to help handicapped people lead a fuller life provides a precedent for accepting a welfare loss in order to preserve the risk choice of sportsmen. Moreover, the tort rules which allow the physically handicapped to prevail in an action against them for negligence, even though their behavior would be deemed negligent were they not handicapped, provide a precedent for restricting liability for negligence in order to encourage an active life.[292]

The recreational activities could also be compared to dangerous employment. Because worker's compensation laws ban negligence actions against employers, many jobs remain available that would likely be too dangerous to pay their way in the absence of that ban. Worker's compensation laws reflect a societal judgment to preserve these jobs nonetheless. That judgment may stem from the legislatures' recognition that employment itself carries with it

290. Because a disproportionate number of handicapped people work at the minimum wage, the contribution of their work to society's wealth is probably modest. Moreover, from the perspective of handicapped people, their purely financial gain from working will often be modest as well. My point is that the psychological and emotional benefits of an active life must be considerable for, say, the blind to venture out or for society to want them to venture out.

291. Legislative limits on tort liability are often imposed to preserve an activity that could not "pay its way" because of the many injuries and tort suits it would engender. An example would be the legislative bans on liability for transfusions of contaminated blood. *E.g.*, COLO. REV. STAT. § 13-22-104 (2002); GA. CODE ANN. § 51-1-28 (2000).

292. Most states hold physically handicapped people who are sued for injuring others to the lower standard of the ordinary care of a person with their handicap, not to the standard of the ordinary care of a reasonable person. The natural result is that those who are injured by handicapped people will have more difficulty showing negligence and will be less likely to recover. *See, e.g.*, Traphagan v. Mid-America Traffic Marking, 555 N.W.2d 778, 787 (Neb. 1996) (holding that "'[o]ne who is ill must conform to the standard of a reasonable person under like disability. . . .'" (quoting Storjohn v. Fay, 519 N.W.2d 521, 530 (Neb. 1994)).

emotional and psychological benefits which help a worker lead a fuller life. And the method of preserving these jobs with their benefits, like the method proposed here for preserving recreational activities, is to eliminate the negligence action that would increase the cost of offering the jobs lest that cost reach the point where offering the jobs is no longer profitable.

The value of the activities in question, therefore, warrants some sadness at their passing. The modern traveler will never know the rush from ending a hot day on the road with that first dive into a motel pool, nor the tonic throughout the day from the anticipation of that dive. Nor will many horse-lovers know the challenge of controlling an unfamiliar horse on a trail unaccompanied, nor the serenity of the ride, nor the communion with the horse once that challenge is met. Nor will skiers know the invitation to audacity, nor the balm to high spirits, offered by an ungroomed slope. The loss of these activities has left society a duller place for all.

This section has surveyed the many benefits of the activities. It has pointed out that the tort liability which raises the activities' costs discriminates against identifiable sections of society and tends to drive those discriminated against to less desirable substitutes. It has suggested some of the less obvious ways in which proposed safety measures destroy the benefits of recreational activities. Finally, it has argued that imposing liability on negligent vendors in the face of a release accords too little respect to the patron's autonomy.

IV. THE PROPOSED RULE

A. *Explanation of the Rule*

"There is always a certain risk in being alive, and if you are more alive, there is more risk."

Ibsen

Bemoaning the disappearance of activities that give joy is one thing. Crafting a defensible and workable rule of law that will preserve these activities without unduly sacrificing the other goals of torts is another. Like all rules, the rule proposed here—enforce the release unless the court finds that the vendor's con-

duct as alleged was outrageous or that the injury occurred in a context where patrons generally lack any significant opportunity for self-protection—requires some intellectual labor to apply and yields results at the margin that seem difficult to defend. The rule's merits turn on the extent to which it holds the sum of these decision-making and error costs to a minimum. This subsection explains how the rule would apply to recreational activities while reserving most of the defense of the rule to the following subsection.

As explained in the Introduction,[293] the rule comes into play when the defendant vendor moves before trial to enforce the release and thereby to dismiss the case on the pleadings or on summary judgment. The rule calls on the court, after interpreting the release, to assess two matters in deciding whether to enforce the release as interpreted. First, the court should find whether the plaintiff patron's injury occurred in a context where patrons generally lack any significant opportunity for self-protection. Second, the court should find whether defendant's behavior, as alleged in plaintiff's complaint or as subsequently stipulated by the parties, rises to the level of outrageous. An affirmative finding on one of these matters would eliminate any need to undertake the other and would result in the case proceeding as if the release had been deemed unenforceable. Through a motion to dismiss at the close of plaintiff's evidence or at the close of all evidence, the defendant could again move for a negative finding on both matters and a consequent dismissal. Should a case reach the jury, the proposed rule will not affect the jury instructions or the jury deliberations. To be sure, because outrageous here means outrageous in regard to safety, a court finding at the close of all the evidence finds that the release was unenforceable because the vendor's conduct was outrageous will logically find that the vendor's conduct was also negligent as a matter of law. Such a finding may leave to the jury only the remaining elements such as cause-in-fact, proximate cause, damages, and the elements of the vendor's contributory negligence defense as well as, in an appropriate case, the apportionment of culpability or causality called for by the jurisdiction's comparative negligence rule. Of course, a judicial finding that the vendor's behavior was outrageous is fully consistent with a jury verdict for the vendor whenever the jury

293. *See supra* text accompanying notes 12–15.

could have resolved one of these remaining matters in the vendor's favor.

One challenge to courts will be identifying those relatively rare recreational contexts in which the patron lacks significant opportunity for self-protection. As indicated, the release would be deemed unenforceable in these contexts. Examples include the skier on the chair lift who is injured because the lift collapses; the sky-diver who is killed because his parachute, packed by the defendant sky-diving vendor, failed to open upon the sky-diver properly deploying them; the bungee jumper injured because the vendor's line breaks; the scuba diver injured because the pressurized air purchased from the vendor dive shop turns out to be contaminated; or the amusement park patron injured because the park's ride flies off its track. Further examples include the renter of a water-skiing boat who is injured when the tow line breaks; the diver injured when the vendor's diving board breaks or comes off its fulcrum; or the renter of time on a trampoline or mechanized bull who is injured when the trampoline rips or the "bull" comes off its base.[294] To be sure, as in almost any accident, the patron injured in these contexts could improve his chances of avoiding injury, or at least of mitigating his injury, by maintaining his fitness. But in these contexts there is no amount of care or preparation on the patron's part which can protect him from the accident itself. Moreover, no one would claim that the challenge to the patron of protecting himself against these risks is an inseparable and often desirable part of the recreational experience.

In contrast, patrons of recreational activities often operate in a context where the risk of injury to the patron can be patron-influenced, if not patron-controlled, to a much more significant extent. Skiers, for example, retain ample opportunity for self-protection while on the slopes. Their decisions about how and where to ski, heavily influence the risks they will encounter. Indeed, part of what a skier buys from a ski area is a chance to see if he can, and a chance to show that he can, protect himself while skiing as he wishes. Part of the skiing experience is the skier's opportunity to anticipate and protect himself against the hazards

294. Steven Shavell would deem these accidents "unilateral." SHAVELL, *supra* note 69, at 21–26; William M. Landes and Richard A. Posner would deem these situations "alternative care" situations. LANDES & POSNER, *supra* note 15, at 60–61. Both argue that the utilitarian case for liability is especially strong in these accidents or situations.

of the ski area, including those hazards for which some modern courts have deemed the ski area negligent.[295] This is not to say that the skier injured by such a hazard should blame himself or is in any way negligent, nor that the ski area was not negligent or did not increase the risk to the skier. The goal of the proposed rule is not to assess fault, but to identify contexts where the patron's promise not to sue the vendor for negligence should be respected. Skiers also retain significant opportunity for self-protection against the risks presented by the normal operation of chair lifts, t-bars, and rope tows, even though that normal operation would include the commonplace starts and stops and reactions to fallen skiers for which the ski area could be deemed negligent. Still one can imagine t-bar, o-bar, and rope tow accidents which are analogous to a collapsing chair lift in that the skier lacked any opportunity for self-protection.

It may be harder to imagine horse-riding contexts in which the patron-rider so lacked the opportunity for self-protection that the patron's release of the vendor stable would not be enforced. The rider's opportunity to control or at least to influence the horse so as to avoid injury to himself is a central and ubiquitous feature of the horse-riding experience. In accidents that are at all attributable to the horse's behavior, the rider's opportunity for self-protection through control over the horse exists almost by definition.[296] That the stable's negligence in choice of horse or choice of route or in letting the rider take the horse unaccompanied may have increased the difficulty or importance of the rider controlling the horse should be irrelevant as long as that opportunity for control remains for riders generally. Indeed, the difficulty or importance of the rider controlling the horse may be what makes the recreational experience enjoyable.

For many recreational activities, determining whether the patron enjoyed a significant opportunity for self-protection in the context at hand should be straightforward. As mentioned above,

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295. *See, e.g.*, Sunday v. Stratton Corp., 390 A.2d 398, 401 (Vt. 1978) (holding that a ski area was negligent for not discovering and marking a clump of brush on a ski trail).

296. This is likewise the case in the bicycling context. For instance a bicyclist during a bicycle race retains a significant opportunity for self-protection against car drivers who wrongly enter the course. Hence the cyclist could not sue the organization offering the race, although the release would not be relevant to his action against the car driver. For the opposite result on these facts, see *Bennett v. United States Cycling Federation*, 239 Cal. Rptr. 55 (Cal. Ct. App. 1987).

sky-diving vendors could not enforce the release when the parachutes they packed failed to open. On the other hand, in landing accidents after a parachute does open, the sky-diver's ability to adjust the direction he is blown and the direction he faces by pulling on his straps, while far from perfect, combined with his ability to adjust his posture on descent so as to strike the ground at a safer angle, provide sufficient scope for self-protection that releases should be routinely enforced. Releases should be enforced without difficulty in almost all contexts involving swimming and diving, water-skiing, the use of trampolines, mechanical bulls, and playground equipment. Wilderness trekkers, rock climbers, and rafters generally retain sufficient opportunity for self-protection throughout their activity that releases of guides or instructors should be enforced.

An important feature of any tort rule is the level of generality at which it is to be applied. Is the court to determine case by case whether the particular patron under the peculiar facts of that case had significant opportunity to protect himself? When the rule is applied at that low level of generality, which might be called the case by case level, a good deal of fact-finding may be needed, and the resolution of the issue in one case will have little importance as precedent in subsequent cases. Or is the court to determine in sweeping fashion, for example, that patrons have a significant opportunity for self-protection in all horse-riding cases, with the result that releases in all horse-riding cases will be enforced? If so, one could call the very high level of generality at which the rule is to be applied the activity by activity level. Because the proposed rule is ordinarily to be applied on the pleadings, it must be applied at a relatively high level of generality. Application at the case by case level will so subject vendors to the expense of discovery as to threaten the goal of preserving the availability of the recreational activity. Moreover, the pleadings should provide enough information about the case so that the court need not apply the rule at a level of generality quite so high as activity by activity. Rather, the proposed rule is to be applied at the level of generality that has been called here context by context. For example, as explained above, skiing accidents from a lift collapse occur in a different context than skiing accidents while on the slopes. Once a court determines from the pleadings that the case before it involves, say, a patron's accident while on the slopes, the court need not inquire further about the extent to which the risk that materialized in that particular case was pa-

tron-influenced. Admittedly there are sure to be cases where the pleadings do not reveal whether patrons generally can protect themselves in the context before the court. In these cases further inquiry will be needed.[297]

Patrons injured while riding amusement park or carnival rides seem to lack a significant opportunity for self-protection. An activity where patrons sit passively under constraint is hardly a patron-influenced activity; indeed amusement park rides may seem the antithesis of the patron-influenced activities that are the focus of this article. And when patrons are injured by a ride's malfunction, releases on behalf of the amusement park or carnival should be ignored.[298]

Occasionally, however, patrons sue amusement parks when rides function normally but injure a small percentage of patrons nevertheless. An example would be a roller coaster or bungee jump whose normal and intended operation causes an occasional patron emotional distress, nausea, soreness of the neck, or bruises.[299] Here, releases should be enforced even though the patron lacks any opportunity for self-protection during the ride. One could explain this on the ground that in these situations the patron's opportunity to protect himself by observing the normal operation of the ride and by declining to purchase rides whose ordinary operation endanger him should be deemed significant. Invariably in these cases the patron or his parents observed the ride's normal and intended operation before purchasing it. That ability gave the patron or his parents an opportunity to evaluate the risk from the ride's normal and intended operation in light of what is surely the most important factor bearing on that risk—the patron's particular emotional and physical condition and susceptibility to injury. Granted, the vendor whose ride has malfunctioned, like the amusement park whose roller coaster leaves its

297. Again, this is not an inquiry into the fault of the patron. Some facts relevant to the extent of potential patron influence, however, will also be relevant to fault. Examples would include the duration of the ride, the role played by forces under the patron's influence, like the horse itself, and the extent of patron forewarning.

298. By analogy, releases should also be ignored in product liability actions which arise from a product's malfunction. For example, the risks that a diving board will break or come off its fulcrum are not patron-influenced risks and no release by the injured patron would be relevant in his product liability actions or his actions for negligent installation or maintenance.

299. *See, e.g.*, Beroutsos v. Six Flags Theme Park, Inc., 713 N.Y.S.2d 640 (N.Y. App. Div. 2000) (alleging neck and back injuries caused by riding a roller coaster).

tracks, could make this same argument in order to enforce the release against injured patrons who had witnessed previous malfunctions. Those patrons too, the amusement park could argue, were equally able to protect themselves by declining to purchase the ride. Elevating the patron's obvious ability to decline purchase into a significant opportunity for self-protection against some injuries from rides but not against others, the amusement park could protest, is simply arbitrary. The difference is that the risk of injury from a ride's malfunction, unlike the risk of injury from the ride's normal and intended operation, does not turn so heavily on the individual patron's personal susceptibility to injury and hence is not a risk that the individual patron or his parents is far better able to evaluate than the vendor is. Hence there is more reason to view the ability not to buy as an opportunity for self-protection, and thus to enforce a release, when the patron's injuries stem from the activity's normal operation than when the injuries stem from the activity's malfunction. When a patron knows of his susceptibility to injury from what he observes to be the normal operation of the ride—knowledge about himself which the patron acquires simply from living—the simple precaution of declining to purchase the ride is a precaution worth encouraging.

A key feature of the proposed rule is the absence of any need for a court to consider the particular patron's state of mind and, in particular, his knowledge and appreciation of the risk that materialized. This feature distinguishes the proposed rule from the many versions of the assumption of risk defense.[300] Decades of experience with assumption of risk have demonstrated the shortcomings of any test that turns in part on whether a plaintiff knew and appreciated the risk.[301] The problem is not just the severe invitation to perjury inherent in a test which turns heavily on a plaintiff's own claims about his lack of knowledge, especially when those claims are not likely to be contradicted by documents

300. *See* RESTATEMENT (SECOND) OF TORTS § 496D cmt. b (1965) (stating that the assumption of risk defense turns on a plaintiff's knowledge and appreciation of the risks he would encounter). The versions of assumption of risk include express, implied, primary, secondary, reasonable, and unreasonable. Leslie Hastings, Comment, *Playing with Liability: The Risk Release in High Risk Sports*, 24 CAL. W. L. REV. 127, 155–56 (1988).

301. *See* Knight v. Jewett, 834 P.2d 696, 706 (Cal. 1992) (recognizing the inherent difficulties and shortcomings of an inquiry into a plaintiff's subjective expectations regarding assumption of risk). From the vendor's perspective, another disadvantage of the assumption of risk defense is that it was rarely available when patrons were children.

or other available evidence.[302] An equally serious problem comes from uncertainty about what dimensions of risk are relevant. Does risk mean simply the chance of injury and the severity of injury should it occur? Or must a plaintiff also know and appreciate the type of risk and the manner of risk, meaning the manner or method by which his injury came about? If so, any plaintiff can advance some plausible claim that he did not know or appreciate some dimension of the risk that materialized. Unfortunately, the use of the word "opportunity" in the proposed rule is sure to trigger the reply that a patron does not have a meaningful opportunity to protect himself from risks he does not know and appreciate. This reply misconceives the inquiry. The inquiry is not about the fault of the individual patron nor is it much about the individual patron at all. The inquiry is about identifying recreational contexts where the advantages of enforcing releases generally outweigh the disadvantages.

Once the court determines that the injury occurred in a context which affords the patron significant opportunity for self-protection, the enforceability of a release then turns on whether the alleged behavior of the vendor was outrageous. While regrettably open-ended, the concept of outrageous behavior is not as open-ended as it might appear. Because outrageous behavior is the central element in the tort of infliction of emotional distress, courts have been applying and providing content to the concept of outrageous behavior for more than half a century.[303] Judicial experience with the emotional distress tort has answered many questions about outrageous behavior, and those answers can guide courts in identifying outrageous behavior here. Courts have determined that outrageous behavior can be committed with no intent to injure others but merely with disregard toward the possibility of injury to others.[304] Courts have further determined that the relationship between the defendant and the plaintiff is a legitimate factor in assessing whether the defendant's behavior was outrageous. For instance, a psychiatrist's behavior in having con-

302. *See id.*

303. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965).

304. *See, e.g.*, Blakeley v. Shortal's Estate, 20 N.W.2d 28, 31 (Iowa 1945) (concluding that "[a] willful wrong may be committed without any intention to injure anyone"); *see also* RESTATEMENT (SECOND) OF TORTS § 46(1) (1965) (stating that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm").

sensual sex with his patient has been widely deemed outrageous even though that behavior would not be viewed as culpable in the absence of the psychiatrist-patient relationship.[305] Hence courts could deem a vendor's behavior toward a patron outrageous without any fear of that ruling creating a precedent outside of the vendor-patron relationship. Courts have further determined that for behavior to be outrageous it must be more culpable than mere negligence.[306] To be sure, behavior that is outrageous in light of the risk of causing another person emotional distress likely differs from behavior outrageous in light of the risk of causing physical injury to another person.

Historically, the words used to describe behavior more unreasonably dangerous than negligence have been "willful and wanton" and "reckless." Were it not for an occasional court decision construing those words so broadly that they are all but synonyms for negligence,[307] the proposed rule would incorporate those terms. In *Knight v. Jewett*,[308] the California Supreme Court described the conduct that would render one participant in a recreational activity liable to an injured fellow participant as "conduct that is so reckless as to be totally outside the range of the ordinary [conduct] involved in the sport."[309] That test gives further definition to what is meant by outrageous vendor conduct here.

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305. *See* RESTATEMENT (SECOND) OF TORTS § 46(1) cmt. e (1965) (stating that "[t]he extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests"). A number of states have enacted statutes making therapist-patient consensual sexual contact a criminal offense. *See, e.g.*, MINN. STAT. ANN. § 609.345(h)(ii) (West Supp. 2003).

306. *See, e.g.*, Merriweather v. Int'l Bus. Machs., 712 F. Supp. 556, 565 (E.D. Mich. 1989) (stating that for conduct to surpass mere negligence and be regarded as atrocious it must be "outrageous in character, extreme in degree and [go] beyond all bounds of decency").

307. *See, e.g.*, Rost v. United States, 803 F.2d 448, 450 (9th Cir. 1986) (construing California's test of willful or wanton behavior to mean virtually the same as negligence).

308. 834 P.2d 696, 711 (Cal. 1992).

309. *Id.* at 711.

B. *Defense of the Proposed Rule*

"At lilac evening I walked . . . , feeling that the best the white world had offered was not enough ecstasy for me, not enough life, joy, kicks . . . ."

Jack Kerouac

Why should the enforcement of a release turn so heavily on whether patrons in the context at hand generally possess a significant opportunity for self-protection? Why this emphasis on whether the risks to patrons in that context are generally patron-controlled or at least patron-influenced? And how can one defend a rule calling on courts to decide whether to enforce a release at the context by context level of generality rather than the case by case level?

First, the *Tunkl* criteria for enforcing releases expressly identifies a plaintiff's opportunity for self-protection as an important factor favoring enforcement. *Tunkl* announced six characteristics of releases and of their accompanying transactions that call for refusing enforcement.[310] The sixth is that "as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents."[311] That the purchaser was not under the

310. Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 444–46 (Cal. 1963).

311. *Id.* at 446. Many courts which have enforced releases in the recreational context have pointed out that three of the other four *Tunkl* characteristics, which call for voiding releases, are likewise absent in recreational contexts. The first of the absent characteristics is that the "party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public." *Id.* at 445. The second absent characteristic is that "[a]s 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." *Id.* at 445–46. The third absent characteristic is that the release "concerns a business of a type generally thought suitable for public regulation." *Id.* at 445. While the first two are absent in virtually all recreational contexts, the third will be absent only in some. The only one of the six characteristics that is clearly present in the recreational context is that "the party [seeking exculpation] holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards." *Id.*

Whether the remaining characteristic is present depends on one's interpretation of it: "In exercising a superior bargaining power the party [seeking exculpatation] confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence." *Id.* at 446. Since *Tunkl* was decided, scholars have pointed out that "adhesion contracts" serve many useful functions and do not deserve the harsh treatment courts have accorded them. *See* POSNER, *supra* note 83, at 114–16 (noting that adhesion contracts

control of the seller but had retained significant opportunity for self-protection at the time of the injury, the opinion in *Tunkl* clearly implied, argues strongly for enforcing the release. In the surgery context at issue in *Tunkl*, the plaintiff-patients were typically unconscious or under medication at the time of the injury.[312] Their usual lack of opportunity to protect themselves contrasts sharply with the patrons' opportunity for self-protection in the recreational contexts discussed here. Perhaps most importantly, the courts applying the *Tunkl* standards for enforcing releases have understood it to call for resolving the enforcement issue context by context. For example, the *Tunkl* decision has been understood to invalidate all releases given by patients to their surgeons for negligence during surgery, with the result that no surgeon would be able to enforce a release by showing, for example, that his particular patient retained some opportunity to protect himself. This relatively high level of generality has enabled courts to decide whether to enforce releases before trial.

Long before *Tunkl*, the inability of plaintiff passengers on railroads, buses, and street cars to protect themselves from traffic accidents played a major role in leading common law courts to establish the common carrier doctrine.[313] That doctrine, when it existed, not only nullified any release on behalf of the defendant common carrier when sued by a passenger for a traffic injury, it also held the common carrier to a higher degree of care than the usual standard of ordinary care.[314] In clear, albeit implicit, recognition of the importance of a plaintiff's opportunity for self-protection, courts in the pre-1960s era held that ski areas were common carriers when sued by patrons injured while using a chairlift,[315] but not when sued by patrons injured while using a tow rope.[316] Again, the decision whether to deem the defendant a

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avoid the cost of negotiating and drafting a separate agreement with each buyer). Other scholars have attacked the notion of unequal bargaining power. *See* Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special References to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 623 (1982) (stating that the concept of unequal bargaining power may be internally incoherent).

312. *Tunkl*, 383 P.2d at 442 n.1.

313. *See, e.g.*, Hauser v. Chicago, R.I. & P. Ry. Co., 219 N.W. 60, 61 (Iowa 1928) (establishing the common carrier doctrine).

314. *Id.*

315. Fisher v. Mt. Mansfield Co., 283 F.2d 533, 534 (2d Cir. 1960) (holding that a chairlift is a common carrier and finding the defendant ski resort negligent for failing to assist the plaintiff out of the chair).

316. McDaniel v. Dowell, 26 Cal. Rptr. 140, 143 (Cal. Dist. Ct. App. 1962) (holding that

common carrier was made at a higher level of generality than case by case.[317] In other words, a defendant could not avoid being deemed a common carrier by pointing out that the particular plaintiff-passenger happened to retain significant opportunity for self-protection even though most persons in the plaintiff's position would not.[318] The level of generality courts employed in deeming a defendant a common carrier matches the context by context level of generality courts should employ in applying the proposed rule.

Courts have recognized that a plaintiff's opportunity to protect himself bears on a number of legal issues which judges in tort suits are regularly called upon to resolve. One such issue in negligence suits is widely called the duty issue, namely whether the defendant has any duty of care toward the plaintiff.[319] While duty issues turn on a wide variety of policy concerns, those concerns often include whether persons in plaintiff's position retain ample opportunity to protect themselves. The better the plaintiff's opportunity to protect himself, the stronger the case for resolving the duty issue in the defendant's favor.[320] Another issue for the court is whether those engaging in the defendant's activity should be subject to strict liability rather than held liable only on proof of negligence.[321] On this issue as well, courts have recognized the relevance of whether most persons in the plaintiff's position can take steps to protect themselves against the risks from defendant's activity.[322] Again, the better the plaintiff's opportunity for

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a tow rope is not a common carrier, and therefore, defendant ski resort did not owe the plaintiff a duty of utmost care and diligence).

317. *Id.*

318. *Id.*

319. *See generally*, Percy H. Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41 (1934) (discussing the meaning of duty in the context of tortious negligence and whether the idea serves any useful function).

320. *See, e.g.*, Brooks v. Eugene Burger Mgmt. Corp., 264 Cal. Rptr. 756, 762 (Cal. Ct. App. 1989) (finding that the defendant had no duty to install a fence to protect tenants when tenants have ample opportunity to protect themselves); Cygielman v. City of New York, 402 N.Y.S.2d 539, 542 (N.Y. App. Div. 1978) (finding that the defendant city has no duty of care to maintain sidewalks for the benefit of skateboarders partly because skateboarders have ample opportunity to protect themselves from defects in the sidewalk).

321. *See, e.g.*, City of Northglenn v. Chevron U.S.A., Inc., 519 F. Supp. 515, 516 (D. Colo. 1981) (finding that the storage of gasoline near a residential location was subject to strict liability).

322. Many scholars have recognized the extent to which the victim's opportunity for self-protection argues against imposing strict liability, but none more so than Professor Mark Grady. *See* MARK F. GRADY, CASES AND MATERIALS ON TORTS 90–95 (1994) (comparing strict liability and negligence cases).

self-protection, the stronger the defendant's case against imposing strict liability.[323] And on the issue of whether the defendant's activity should be deemed a private nuisance, the usual ability of persons in the plaintiff's position to protect themselves against the interference from the defendant's activity is, by consensus, a critical consideration.[324] The proposed rule's emphasis on a plaintiff's opportunity for self-protection, then, draws support from both the prior law concerning whether to enforce a release and, more generally, from the prior law concerning whether liability is in the best interests of society.

When a court decides a private nuisance case in a defendant's favor on the grounds that those in the plaintiff's position have ample opportunity for self-protection, the court is not attributing the plaintiff's loss of his case to the plaintiff's fault. Just so, enforcing a release on the same ground in no way suggests that the patron was at fault. The reasons for enforcing a release when the patron had ample opportunity for self-protection lie elsewhere.

A major utilitarian reason supporting the proposed rule is that the existence of the patron's opportunity for self-protection rules out the possibility that the accident in question was a unilateral accident which could only be prevented by the vendor taking care.[325] Professor Shavell has demonstrated that in such unilateral accidents the argument for liability is especially strong because there is no social gain from the legal creation of incentives for patron precaution-taking.[326] Not coincidentally, the contexts in which the proposed rule would void the release provide excellent examples of such unilateral accidents. The collapsing chair lift that injures a skier and the contaminated air that poisons a scuba diver can only be prevented by the vendor taking care—nothing is gained by creating incentives for the skier or scuba diver to take care. In contrast, when the patron has a significant opportunity to protect himself, social welfare calls for maintain-

323. *Id.*

324. *See, e.g.*, Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 62–63 (1979) (discussing private nuisance).

325. Accidents are deemed unilateral when they are most efficiently avoided by only one party taking care or lowering his activity level. Accidents which are most efficiently avoided by more than one party taking care or lowering their activity levels are deemed bilateral. SHAVELL, *supra* note 69, at 6–10. Landes and Posner use the terms "alternative care situations" and "joint care situations." LANDES & POSNER, *supra* note 15, at 60–61.

326. SHAVELL, *supra* note 69, at 6–10.

ing incentives for the patron to seize his opportunity by taking appropriate precautions. Enforcing the release whenever the patron's opportunity to protect himself exists is a rule well suited for this purpose. The rule takes full advantage of the patron's natural incentive to avoid injuring himself—avoiding the possible dilution of the incentive which would result from giving the patron the prospect of a tort recovery should the patron be injured. Now that comparative negligence has triumphed, that prospect of a tort recovery will exist for all patrons, however recklessly they plan to endanger themselves, if the release is ignored.

Admittedly, the notion that the prospect of tort recovery will lead a potential accident victim to forego cost-justified precautions to protect himself may not seem consistent with the way most individuals reason. That tort law may influence victim precaution-taking at the margin seems more plausible if one dispenses with imagining how an individual reasons and looks instead at how an assembly of individuals behave. Consider two states alike in every respect except that the first bars any tort recovery for traffic injuries by a person who was not wearing his seat belt when the injury occurred, and the second treats the failure to wear a seat belt just as any victim fault is treated under a comparative negligence regime. Would we now confidently dismiss the possibility of more widespread and consistent use of seat belts in the first state?

Another utilitarian reason supporting the proposed rule is that patrons who possess a significant opportunity for self-protection will often be able to avoid the injury to themselves at a lower cost than the vendor can.[327] There are a couple of reasons for suspecting that patron precautions are cheaper than vendor precautions. First, vendor precautions are more likely to carry the heavy cost of impairing the recreational benefits of the activity for other patrons. For instance, a skier may reduce the risk of injury from skiing an ungroomed slope by slowing down and not proceeding until he can see what lies ahead. But the ski area's only precaution may be to groom the slope, a precaution that further impairs the aesthetic and other benefits of skiing. Second, the patron will often derive satisfaction from preserving his safety through his own precautions rather than through the precautions of vendors.

327. *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 135–73 (1970).

Navigating an ungroomed slope without injury can be a challenge and meeting that challenge a source of satisfaction. This extra satisfaction can be viewed as either increasing the benefit from the use of the patron's own precautions or as decreasing the cost of those precautions. A substantial law and economics literature maintains that social welfare would increase if courts fashioned rules of law by denying liability in contexts where a plaintiff is likely the cheapest precaution-taker.[328] By maintaining incentives for plaintiffs to protect themselves when the plaintiffs are the cheaper precaution-takers, the law helps to minimize the social costs of accidents.[329] In such instances, pressuring the vendor to idiot-proof his activities substitutes the less efficient method of accident prevention for the more efficient method of patron care. Admittedly, the patron's possession of an opportunity for self-protection does not guarantee that the patron can take precautions against injury more cheaply than the vendor can. The administrative difficulties of any rule which requires a court to identify the cheaper precaution-taker are prohibitive. Thus, the proposed rule cannot be defended on the ground that a patron with an opportunity for self-protection will always be the cheaper precaution-taker.

But there is a utilitarian reason to enforce the release even if the vendor is the cheaper precaution-taker. When the vendor's negligence precedes the patron's opportunity to protect himself, the patron will often be able to alter his behavior through a cost-justified precaution that adjusts to or makes allowances for the vendor's previous negligence. A skier can typically adjust his skiing to accommodate any previous negligence by the ski area in failing to eliminate natural hazards on the slopes. Likewise a horse rider can adjust his riding to accommodate any earlier negligence by the stable in selecting an obstacle-ridden trail. A water skier can adjust for the vendor's negligence in renting the boat on a lake that was too crowded or in providing a motor that was too powerful. Because of the sequential nature of the parties' opportunities to take precautions, the patron will have the last clear chance to avoid the accident. In such cases an efficient law would want to avoid diluting the patron's incentive to take that last clear cost-justified precaution. That wish calls for enforcing the

328. *See id.*
329. *See id.*

release, lest the patron, on realizing the vendor's earlier negligence and hence his own prospect for a tort recovery should he be injured, relax his care and reject his last clear chance to protect himself.[330] The utilitarian case for the pro-plaintiff last clear chance rule rested on just such reasoning. In the days when any plaintiff's contributory negligence barred liability, the last clear chance rule allowed the plaintiff to recover, despite his negligence, when the defendant was shown to have the last clear chance of avoiding the accident.[331] For example, the last clear chance rule allowed a car driver who was negligently stranded in the wrong lane to recover against a driver who crashed into him by showing that the defendant driver negligently failed to avoid the accident after seeing him stranded and vulnerable.[332] The notion was that the defendant driver had, and negligently lost, the last clear chance to avoid the accident.[333] The utilitarian goal of the rule was to pressure the defendant to use his last clear chance to avoid the accident.[334] Without the last clear chance rule, a defendant might reason that the plaintiff's earlier contributory negligence relieved it of any need to be careful.

When risks are patron-controlled, or at least patron-influenced, and substantial enough so that rational ignorance is not the patron's best response to them, the law should encourage patrons at least to consider learning about, and preparing against, those risks. In the activities in question, novice patrons suffer a disproportionate percentage of injuries suggesting that the safety benefits of advance preparation, or, what amounts to the same thing, delaying participation until one undertakes advance preparation, may justify the costs.[335] Examples of advance preparation to protect oneself would include simply reading about how to reduce the activity's risks or beginning an exercise regimen appropriate for the activity. Yet under the current law, the injured patron's failure to prepare in advance to protect himself is never held against him. This is because delaying participation until one has pre-

330. POSNER, *supra* note 83, at 177.

331. *See* Kan. City S. Ry. Co. v. Ellzey, 275 U.S. 236, 240–41 (1927) (discussing the last clear chance doctrine).

332. *See, e.g.*, Hanson v. N.H. Pre-Mix Concrete, Inc., 268 A.2d 841, 843–44 (N.H. 1970).

333. *Id.*

334. *See Ellzey*, 275 U.S. at 240.

335. *See* Sobo, *supra* note 2, at 199 (discussing the "open and obvious danger defense").

pared in advance is an example of a reduction in activity level and, as others have pointed out, the current contributory negligence defense, even when a total bar to recovery, does not create any incentive for a plaintiff to reduce his activity level.[336] The proposed rule, in contrast, encourages advance preparation. The proposed rule implicitly signals patrons who contemplate signing a release to prepare for the risks of the activity in advance so they will be able to take advantage of their opportunities to protect themselves.

Encouraging patrons to develop the ability to protect themselves, as the proposed rule does, may yield other benefits as well. While no one claims patrons should disregard the safety instructions of vendors, there is surprising evidence that safety improves when patrons accept responsibility for their safety rather than depending on the vendor.[337] Experienced guides for advanced mountain-climbing and rock-climbing expeditions, where one might think utter dependence on guides would be appropriate, stress that the safety of patrons improves when they assume personal responsibility for their own safety and treat the guide as merely an experienced fellow climber offering advice.[338] Putting aside safety and other utilitarian goals, one can also see some social value in fostering the independence and self-confidence that come from learning to protect oneself.

Naturally, the principle of freedom of contract and the arguments for that principle support enforcing releases generally. The principle does not defend the proposed rule particularly well because it calls for enforcing the release even when the patron is injured in a context where he lacks opportunity for self-protection.[339] Nevertheless one could claim the arguments for freedom of contract apply with special force when the patron at the time of his injury had a significant opportunity to protect himself. The release could then be viewed as a choice by the pa-

336. LANDES & POSNER, *supra* note 15, at 73–79 (arguing that a rule of negligence even when combined with the contributory negligence defense does not create any incentive for plaintiffs to reduce their activity level).

337. Jerry Beilinson, *Professional Help*, SKIING MAG., Mar./Apr. 2000, at 15–31 (quoting guides Doug Coombs and Lou Kasischke on the importance of patrons questioning guides and taking responsibility for their own safety).

338. *Id.*

339. *See, e.g.*, Enos v. Key Pharm., Inc., 106 F.3d 838, 840 (8th Cir. 1997) (enforcing a general release in a medical case where a child suffered brain damage from asthma medicine).

tron and the vendor to handle the risks of injury to the patron through patron rather than vendor precaution-taking whenever the patron is in a position to take precautions.

To be sure, it is not obvious why a rational patron would ever sign a release. After all, under the economic interpretation of the Learned Hand test for negligence, the vendor would only be negligent if it omitted a cost-justified precaution, meaning a precaution whose safety payoff to the patron exceeded the vendor's cost of taking the precaution.[340] Hence, in theory both the patron and vendor would be better off *ex ante* if the vendor took all such precautions and thereby avoided negligence. Moreover, as others have shown, allowing negligence principles to apply—the result when the release is not enforced—should, in theory, lead to optimal precaution-taking in all instances.[341]

Nevertheless the choice by the parties to substitute the patron's precautions for the vendor's can be rational. When patrons have an opportunity for self-protection, the parties may distrust the judge's and jury's estimate of whether vendor and patron precautions are cost-justified. The parties may fear the judge and jury will find that vendor precautions are cost-justified when they are not or that patron precautions are not cost-justified when they are. The parties may believe, for example, that patron precautions will eliminate any need for vendor precautions, or at least will so reduce the safety gain from the vendor precautions that those precautions are no longer cost-justified. Or the parties may believe that the patron will derive satisfaction from taking his precautions, rendering those patron precautions less costly and more likely cost-justified.[342] In short, the parties may have reason to prefer their own estimates of whose precautions are cost-justified to the judicial estimate. That preference provides a rational ground for agreeing to the release.

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340. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

341. LANDES & POSNER, *supra* note 15, at 75–79.

342. That a patron derives satisfaction from seizing his opportunities for self-protection does not mean the patron is generally risk-preferring. One who prefers the risks of death or physical injury over which he has no influence, like a person who likes to travel on commercial airlines because he enjoys taking the risk of a crash, is as foreign to the avid sportsman as he would be to any life-preferring or health-preferring person. The justification for the proposed rule does not rest on the possibility that an occasional patron may generally prefer risks. Because the proposed rule is to be applied to all patrons, arguments for enforcing releases only when they are signed by a fraction of patrons with unusual characteristics are not discussed.

Even those patrons who do not expect to have an opportunity to protect themselves are not necessarily acting irrationally when they sign a release. These patrons may rationally fear that without the release the vendor will be driven by his liability for negligence to take precautions that the patrons feel impair their enjoyment of the activity and for that reason are not cost-justified. For example, some vendor precautions—like running chairlifts especially slowly to reduce still further the risk of a lift collapse—may not be cost-justified in a patron's eyes because they impair the benefits of the recreation. However, the vendor and that patron may fear that judges and juries will fail to appreciate fully the cost of the precaution, will wrongly deem that precaution cost-justified, and will find the vendor who fails to run the lift that slowly negligent. Signing the release may be the best way for patrons to keep that risk of judicial error from driving the vendor to take the precaution. Again, enforcing the release in this instance allows patrons to prefer their own more informed estimate of the benefits and costs of a vendor precaution to the judicial estimate. While the proposed rule voids the release in this context—the patron not having a significant opportunity for self-protection—it does so because of the added importance in these contexts of preserving the incentive for vendor precaution-taking. It does not do so on the ground that the patron's decision to sign was irrational.

As previously suggested, recreational contexts where the patron retains a significant opportunity for self-protection overlap to a great extent with those recreational contexts where the patron's challenge of protecting himself is an inseparable and often desirable part of the recreational experience. When part of what the patron is buying is the challenge of protecting himself, the patron probably does not want the vendor taking every precaution to minimize that challenge which a judge and jury could deem cost-justified. When vendor care can easily destroy the challenge, the patron may not desire the vendor care that the duty of ordinary care requires. More likely, the patron merely wants the vendor to offer the activity in a manner that allows the patron to tailor the risks to his desires. Beyond that, the patron probably expects the vendor to avoid outrageously endangering his safety and to attempt to come to his rescue should an accident occur. Accordingly, the proposed rule may comply more closely with the expectations of the parties than a rule imposing liability merely on a finding of vendor negligence. At the least, the difficulty of applying the

Learned Hand test for negligence to vendor behavior in this context should lead courts to abandon the attempt. Applying the Learned Hand test would require separating vendor behavior that increases risk in a manner which preserves or enhances the patron's challenge of protecting himself—thereby enhancing the activities' recreational benefits—from that vendor behavior which increases risks in a manner that judges and juries can rightly condemn as negligent.

No proposed rule should be advanced without sensitivity to the practical limits of adjudication. One of those limits is the need for what Rudolph von Ihering called high "formal realizability."[343] By formal realizability, von Ihering meant the facility and certainty of applying the abstract rule to concrete cases.[344] A rule has high formal realizability when courts can easily identify the criteria of the rule in the concrete fact patterns likely to come before them.[345] Rudolph von Ihering contrasts the desirably high formal realizability of a rule such as—the beneficiary shall assume the management of the trust when he reaches the age of twenty-one—with the undesirably low formal realizability of a rule such as—the beneficiary shall assume the management of the trust when he acquires the maturity and judgment to regulate his own affairs.[346] The lower the formal realizability of a rule, the greater the decision-making costs it imposes on the legal system.[347] By this measure, a rule calling on courts to ascertain whether an injury from a recreational activity occurred during a phase of the activity which is generally patron-influenced would seem to possess acceptably high formal realizability. The lack of any need for a court to ascertain the individual patron's knowledge or appreciation of the risk should render the rule easier to apply than were any versions of the assumption of risk defense. Likewise, the test proposed here seems easier to administer and less open-ended than a test of whether the patron was the cheaper precaution-taker. The test proposed avoids any need for a court to consider the precautions both parties could take and to then compare the relative costs of those precautions.

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343. R. VON IHERING, DER GEIST DAS ROMISCHEN RECHT [THE SPIRIT OF ROMAN LAW] 114 (4th ed. 1954).

344. *Id.*

345. *Id.* at 115.

346. *See id.* at 117.

347. *See id.*

Although a social wish to spread losses is said to support vendor liability, the content of this loss-spreading argument is not clear. Insurance considerations aside, there is no reason to believe vendors, typically small and medium-sized businesses, are inherently less averse to the risk of liability than the individual patrons are averse to the risks of injury. If the vendor and patron are equally risk averse, then protecting vendors from the liability risk by denying liability and protecting patrons from the injury risk by imposing liability benefit social welfare equally. If the loss-spreading argument is that liability insurance is more readily available to vendors than first party injury insurance is available to patrons, the argument's premise is dubious. We have already discussed the difficulties vendors may face in obtaining liability insurance for their activities.[348] There is a distinct possibility the activities in question became less available for sportsmen because liability insurance became less available for vendors. In contrast, patrons are able to obtain first party insurance protection against their injury through many vehicles. Health insurance, accident insurance, disability insurance, sick pay, unemployment compensation, worker's compensation, and life insurance, may all satisfy this purpose. And typically these first party methods, because they protect against generally described risks, will be broad enough to cover any injury from the recreational activity. Moreover, full insurance coverage for either the vendor or the patron is not socially desirable as long as that party can, through its behavior, influence the patron's injury risk.[349]

No doubt the greatest disadvantage in enforcing releases whenever patrons have a significant opportunity for self-protection lies in the reduced incentive for vendor care. But other concerns than the wish to avoid tort liability will continue to provide that incentive. News of injury to a particular vendor's patrons often spreads to consumers quickly and widely through a number of channels. Economists have demonstrated that if patrons or, in the case of child patrons, their parents have good information about a vendor's safety record, their preference for safety alone will provide adequate incentive for that vendor to be careful.[350] The extent to which vendors advertise their safety sug-

348. LANDES & POSNER, *supra* note 15, at 284–307.

349. *See* SHAVELL, *supra* note 69, at 210–12. *See generally* Schwartz, *supra* note 123.

350. LANDES & POSNER, *supra* note 15, at 284–307. A tort remedy is needed less when patrons can punish negligent vendors by refusing to deal with them; it is needed more

gests consumer preference for safety is more than a theoretical concern. Day care centers and camps for children engage in an ongoing struggle to persuade parents that children left in their care will be safe. A bad reputation for safety can be fatal for these vendors. Many vendors such as ski areas believe their success hinges on attracting novices. And the safety concerns of novices—many of whom overestimate the risks of skiing—have led ski areas to develop and to advertise their safety features. Some pressure for safety even comes from rival vendors and trade associations because injuries to the patrons of one vendor typically tar the safety reputation of similar vendors. Moreover, trade associations for nearly every category of vendors promulgate safety standards to guide their members and, at least, to keep them informed of the latest safety information and precautions. In addition, many vendors are already subject to government safety regulations and many others are subject to the threat of government regulation should patron injuries increase. And, of course, tort liability's power to deter outrageous vendor behavior will remain unchanged. Indeed the liability burden of vendors in this country will almost certainly continue to exceed that of their counterparts in Western Europe, Australia, New Zealand, and Japan despite the roughly equal safety record of the vendors in all these countries.[351]

The proposed rule economizes on administrative costs. When it applies, it avoids the costs to society of deciding the issues of negligence, cause-in-fact, and proximate cause—both in the injured patron's prima facie case against the vendor and in the vendor's contributory negligence defense. It also avoids the costs of assessing damages and of allocating fault among the parties. As releases in patron-influenced activities become routinely enforced, the use of releases should spread, thus keeping a larger number of accidents out of the tort system altogether. Despite the widespread notion that the value of the tort system to society increases with the amount of liability imposed, these administra-

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when parties do not have contractual dealings with the negligent party. *Cf.* H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 899 (N.Y. 1928) (finding that a tort action against a negligent waterworks company was not needed, in part because the third party city can punish a negligent waterworks company by terminating the contract with it).

351. *See* Schwartz, *supra* note 105, at 28, 47–51 (stating that liability insurance premiums in these countries are typically one-ninth the premiums of those supplying the same services or products in the United States).

tive savings recommend the proposed rule as strongly as a corresponding, and equally likely, savings in accident costs would recommend a pro-patron rule.

V. CONCLUSION

"Her sin is her lifelessness."

Bob Dylan

The avid sportsman mentioned here resembles in some ways that archetypal figure so famous in the law of torts—the reasonable person.[352] The avid sportsman prepares for his participant-influenced recreational activities. Before beginning a new activity, his preparation entails not only reading or instruction but identifying the physical exercises especially tailored for that activity. Having done so, he expects to work on those exercises and to train for his activity no matter how often he has engaged in it safely in the past. His preparation is guided throughout by what he has learned over his lifetime about his particular abilities and vulnerabilities. When his children are to engage in participant-influenced recreational activities, he insists that they prepare in the same spirit.

The avid sportsman is intensely aware of the world of the senses. He appreciates the aesthetic qualities of the physical world. He relishes sensation and his moments of sensation may provide much of his happiness. He may never experience the happiness connected with compelling states of being or with notions of virtue and achievement. Indeed his relish of sensation may be a desperate and momentary consolation for his failure to experience that happiness. He may also feel his mastery of sporting technique adds some form or order to his life. He knows his relish of sensation may conflict with his natural human reaction of compassion for the injured, but he also knows he must not succumb to that reaction. Toward recreational vendors he feels the deepest gratitude; they help him enjoy his life. Their prices for the most part merely carry the message of their regrettably high costs. He views them as a table-setter, and often fellow reveler, in life's feast. He does not view them as his nanny. Unless they are

352. A.P. HERBERT, UNCOMMON LAW 2–5 (1960).

subjecting him to risks against which he cannot protect himself, he does not want them taking every precaution for his safety that a judge, jury, or liability insurer may deem cost-justified.

As suggested by his willingness to prepare against it, the avid sportsman never wants the risk of injury to materialize. As the reasonable man's motto was "safety first,"[353] his motto is "protect yourself at all times." He expects to use his influence over the risks and his knowledge of his own limitations to that end. Nevertheless, he accepts that the risk of injury adds to the relish. Should computers some day offer virtual skiing or the virtual counterpart of his other activities, he at least will find the activities, absent the risk of injury, boring. Why this is so he may not know. Perhaps risk taking confronts in dramatic terms his mortality and seems more appropriate the more he realizes his mortality. In any event the avid sportsman acknowledges that at some point in his recreational activities he will probably be injured. Should he be lucky enough to retain a chance of recovering from his injury, he expects to devote his energy to that end. As long as his injury occurred in a context where he could have influenced the risk and did not result from outrageous behavior, he does not expect to sue.

To the avid sportsman the last four decades bring a sigh. Before then every stop along the road of any substance, indeed nearly every motel and hotel, offered him at the end of a hot and humid summer day a diving board. And he knew the more he labored in the heat, the more intense the rush awaiting him when he finally broke the water's surface with his first gainer, swan, or jackknife. Back then, stables rented horses, occasionally with spirit, to whose undistracted personality the avid sportsman could introduce himself in the serenity of an unaccompanied ride. Back then, ski areas featured their most precipitous expert runs and deliberately left them, along with many intermediate runs, ungroomed.

Of all the legal principles that poisoned the pleasure of the avid sportsman, none was more pernicious than the principle that a vendor is negligent whenever he neglected a precaution that is cost-justified only because it would have better protected the foolish, drunken, and unprepared patron. In practice, although not in

353. *Id.* at 5.

theory, this principle disenfranchised the avid sportsman. It rendered him invisible in the eyes of the law. It meant, for instance, that when the foolish or drunken, having been injured, advanced some precaution which the vendor could have easily and cheaply taken for their benefit, only a rare judge would appreciate the sportsman's interest in leaving the activity as it was and in dealing with the activities' risks. Perhaps, however, the sportsman's true enemy was the negligence concept itself. Perhaps courts and juries applying the negligence concept in the face of an injured patron cannot be expected to add to the other costs of a proposed precaution the extent to which it will lead liability insurers to suck the life from the recreational activity in question or to eliminate that activity altogether.

By routinely enforcing releases for patron-influenced activities, the proposed rule allows courts to escape the disadvantages of the negligence concept when those disadvantages are most acute. The proposed rule substitutes an approach which may prove workable and which accords all patrons the dignity of being deemed capable of standing behind their promises.

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