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Scuba Diving Buddies: Rights, Obligations, and Liabilities

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A common misconception is that scuba[1] diving is dangerous; the reality is that divers are more likely to be hurt in their cars driving to the dive site than in an underwater accident.[2] Arguably one reason the sport is

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1. "SCUBA" stands for "Self-Contained Underwater Breathing Apparatus." A scuba diver breathes compressed air through a regulator attached to a tank. DENNIS GRAVER, SCUBA DIVING 4 (Human Kinetics 3rd ed. 2003).

2. 2DIVE4, Frequently Asked Questions, http://www.2dive4.co.uk/bubbles-faqs.html (last visited Mar. 16, 2008). *See also* MICHAEL R. ANGE, DIVER DOWN, at ix (McGraw-Hill Companies 2006):

> Read the label on any piece of scuba equipment or the opening pages of any training manual and you will no doubt be informed that scuba diving is inherently dangerous. Of course, the same can be said for driving your car or any number of other daily activities that we all participate in. Although it is counterintuitive to think of strapping a high-pressure cylinder of compressed gases to your back, sucking air from a hose, and descending dozens of feet below the surface of the water as being relatively safe, the statistical fact is that diving is safe.... In fact, the biggest unanswered question has to be: Why is it that an activity that has such a high potential for disaster in reality

so safe[3] is the widespread, and often mandatory, use of the buddy system.[4]

A buddy expects his partner to perform a variety of tasks, which include assisting during an emergency. However, a glaring omission in the legal literature is the important issue of what happens when a diver's failure to act results in his buddy's death or serious injury.[5] This article explores whether a diver (or his heirs) can recover damages resulting from his buddy's negligence.

Part I provides a succinct discussion of scuba diving. It contains a very brief history, summarizes basic training courses, and then highlights the sport's growing popularity and safety concerns.

Part II focuses on buddies. It looks at who they are, obligations the buddy relationship creates, and solo diving as a possible alternative.

Part III analyzes the few existing appellate decisions and suggests three reasons for the scarcity of cases. First, the reality is that because buddies tend to be friends or even relatives, they are unlikely to sue one another. Second, a dive partner generally does not have "deep pockets," so suing a buddy often seems pointless. A third hurdle is the legal doctrine that imputes the negligence of one joint venturer to all, preventing, or at least severely limiting, any damage award.

This section also reinforces the importance of a recreational diver having a competent buddy. One reason is that most participants never advance to a high level of proficiency.[6] Further, because many divers wait years between dives, their skills decline and their need for an experienced partner increases. As ability generally improves with practice, the person who has logged a greater number of—as well as more recent—dives is likely to be better prepared to help if something goes wrong.

Finally, recognizing that these suits are probably going to become

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has so few accidents?

Id.

3. *See generally* DIVERS ALERT NETWORK, REPORT ON DECOMPRESSION ILLNESS, DIVING FATALITIES AND PROJECT DIVE EXPLORATION (2005), https://www.diversalertnetwork.org/medical/report/index.asp (complete the form to enter the secured site; then click on the 2005 report cover).

4. *See* GRAVER, *supra* note 1, at 74.

5. *But see* Robert K. Jenner, *Diving into Scuba Litigation*, 37 TRIAL 18, 20 (Aug. 2001) (providing a brief discussion of buddy diving).

6. Christina Johnson, *Next Best Thing to Being a Fish—Young Scuba Diver Plumbs the Depths and Reaches the Heights of His Sport*, STAR-LEDGER (Newark, N.J.), Jan. 5, 2006, at 1, *available at* 2006 WLNR 281928. Notably, only one percent of all divers achieve master rank. *Id.*

more frequent as society becomes more litigious,[7] Part IV recommends steps divers can take to avoid potential liability while minimizing the likelihood of injuries to themselves and their buddies: (1) Obtain insurance; (2) Draft and sign specific liability releases; and (3) Carefully select qualified partners and always properly perform the obligations of a buddy.

I. SCUBA DIVING

A. History[8]

Commercial diving has existed for thousands of years. In fact, as early as 1000 B.C., fishermen retrieved sponges from up to 100 feet of water by holding their breath.[9]

References to diving can be found in Homer's *Iliad*[10] and Alexander the Great is said to have gone down "in a barrel into the briny to steal a look at the diver's world"[11] by putting a bucket over his head. While this provided air below the water, it restricted both ability to see and mobility. No further significant developments occurred until the late 1700's, when the addition of a hose provided the diver access to air from the surface.[12] Despite some subsequent innovations, recreational diving did not really become possible[13] until two Frenchmen (one of whom was Jacques Cousteau),[14] developed the aqualung in the early 1940's.[15] The invention

7. Many scuba accidents take place outside the United States where, historically, fewer legal actions were filed. However, in the last few years, the number of lawsuits by divers injured in other countries has also increased. Patricia A. Fousek, *Lawsuits: No Longer an American Phenomenon*, THE UNDERSEA J., First Quarter 2003, at 8, 8.

8. For more detailed descriptions of the evolution of scuba diving, *see, e.g.*, KAREN BERGER, SCUBA DIVING: A TRAILSIDE GUIDE 10–12 (W. W. Norton & Co. 2000); Phyllis G. Coleman, *Scuba Diving Injuries: Causes, Remedies, and Defenses*, 29 J. MAR. L. & COM. 519, 520–24 (1998).

9. Coleman, *supra* note 8, at 520.

10. Lee H. Somers, *History of Diving: Selected Events*, http://www.hanaumabay-hawaii.com/History_of_diving.htm (last visited Dec. 10, 2007).

11. JOHN RESECK, JR., SCUBA SAFE AND SIMPLE 14 (rev. ed. 1990).

12. BERGER, *supra* note 8, at 11.

13. Initially, only commercial or military professionals engaged in diving. However, after a dramatic shift, "[t]oday, the vast majority of people who strap on a tank and go underwater are diving for recreation, not for work." *Id.* at 12.

14. Interestingly, Cousteau later became a critic of the sport he helped to popularize. He is said to have claimed "too many people have been drawn to the sport for all the wrong reasons. Diving . . . is a means to an end—and that end is not mere recreation, but science and enlightenment." Bill Belleville, *Reefs: Look, Don't Touch*, ORLANDO SENTINEL, Nov. 5, 1995, at G1, *available at* 1995 WLNR 4674349.

of this "demand-type" regulator allowed divers to swim underwater for longer periods of time.[16] As a result, people began diving for fun and the sport has been increasing in popularity since it was brought to the United States in 1950.[17]

B. Courses

As the equipment improved and underwater experiences became more enjoyable, dive shops sprung up offering lessons. Recognizing the importance of ensuring quality and consistency, the industry self-regulated primarily through accrediting agencies such as the Professional Association of Diving Instructors ("PADI"), National Association of Underwater Instructors ("NAUI"), and the Young Men's Christian Association ("YMCA"). All follow the American National Standards Institute ("ANSI") guidelines.[18] This means courses typically utilize a similar format and teach essentially the same information (with some differences in terms of instructors' proficiency and style).

Basic courses are between thirty and forty hours—usually spread over a few weeks.[19] They include three components: classroom lectures, pool sessions, and open water dives. During the classes, instructors explain fundamental diving knowledge and safety. Notably, ANSI lists the buddy system as a subject that must be covered[20] and, thus, all courses stress the

15. BERGER, *supra* note 8, at 11–12.

16. Coleman, *supra* note 8, at 523.

17. GRAVER, *supra* note 1, at 4. *See also* BERGER, *supra* note 8, at 12 (pointing out the shift from commercial and military diving to sport diving).

18. Scuba Diving Organizations, http://www.iit.edu/~elkimar/design/organizations/index.html (last visited Dec. 10, 2007).

ANSI coordinates development and use of voluntary consensus standards in the United States and represents Americans' needs and views in standardization forums around the world. In addition, the Institute "oversees the creation, promulgation and use of thousands of norms and guidelines that directly impact businesses in nearly every sector . . . . ANSI is also actively engaged in accrediting programs that assess conformance to standards—including globally-recognized cross-sector programs . . . ." American National Standards Institute, About ANSI Overview, http://www.ansi.org/about_ansi/overview/overview.aspx?menuid=1 (last visited July 16, 2006).

19. Sometimes the courses are much more condensed. *See generally* REG VALLINTINE, LEARN SCUBA DIVING IN A WEEKEND (Alfred A. Knopf 1998) (providing "a concentrated, highly structured program that shows the novice—step by step, hour by hour—how to master the fundamental skills of scuba diving in one weekend"). In addition, hotels or other providers may offer a "resort course" that consists of a lecture, pool session, and 20 to 40 minute open water ocean dive. *See, e.g.*, Randy Keil, *So You Want to Be a Scuba Diver?*, http://www.scubamom.com/keil/resortcourse.htm (last visited Mar. 15, 2007).

20. AMERICAN NATIONAL STANDARDS INSTITUTE, ENTRY-LEVEL SCUBA CERTIFICATION—MINIMUM COURSE CONTENT 10 (1989).

importance of not diving alone. Students learn about equipment and practice using the gear in the pool. Finally, trainees must demonstrate mastery of actual diving situations in the open water to obtain certification.[21]

C. Popularity

The fact that approximately one million people get their scuba certification in the United States each year[22] demonstrates that Americans are intrigued with the idea of swimming underwater. Estimates of the total number of certified divers in this country vary widely from sixteen million[23] to 1.6 million.[24] An additional seventy-five million said they would like to find out about the sport.[25] Thus, according to a consumer study commissioned by the Diving Equipment and Marketing Association, it is possible to argue that forty-five percent of the population are either active divers or at least interested in learning more.[26]

D. Safety

Scuba diving is not dangerous if participants are careful and

21. BERGER, *supra* note 8, at 17–21.

22. R. Tempel & H. W. Severance, *Proposing Short-Term Observation Units for the Management of Decompression Illness*, 33 UNDERSEA & HYPERBARIC MED. J. 89, 89 (Mar. 2006).

23. Alan R. Graefe & Sharon L. Todd, *Economic Impacts of Scuba Diving on New York's Great Lakes*, *in* N.C. COASTAL PLAINS PADDLE TRAILS INITIATIVE CONFERENCE PROCEEDINGS 116 (2001), *available at* http://www.nysgextension.org/underwater/underwfiles/scubareport2.html (last visited Dec. 17, 2007).

24. Johnson, *supra* note 6, at 1. *See also* CLAY COLEMAN, THE CERTIFIED DIVER'S HANDBOOK 1 (McGraw-Hill 2004) (according to studies, 60 to 80 percent of new divers drop out of the sport and "many would-be divers end their diving careers with their certification dives").

It is difficult to evaluate the degree of risk associated with diving because problems exist with the way information is reported and no one really knows exact numbers. *See* Interview by Phil Davis with Dr. William Morgan, Dir., Sport Psychology Lab., Univ. of Wis.-Madison Dep't of Kinesiology, in Madison, Wis. (1997), *available at* Ten Questions and Answers About the Risks of Panic in Scuba Diving, http://www.seagrant.wisc.edu/communications/diving/panicq&a.htm (last visited Dec. 13, 2006).

For example, most studies of fatalities define a diver as someone who is certified. *Id.* However, some individuals (1) dive but are not certified, (2) are certified and never dive, and (3) obtain up to 25 advanced-level certifications and are treated as 25 different divers. *Id.* Further, estimates do not account for the fact that someone who dives once in a given year is figured the same as another person who makes several hundred dives in that same time period. *Id.*

25. Graefe & Todd, *supra* note 23, at 116.

26. *Id.*

knowledgeable about potential difficulties they may encounter. This means divers need proper training and certifications in addition to well-maintained equipment. If too much time elapses between dives, experts strongly recommend taking a refresher course that includes practice in the water.[27]

While accidents and deaths do occur, their frequency is minimal compared to the number of dives annually. Indeed, with so many divers, it is remarkable that fatalities since 1980 have remained relatively constant, averaging only ninety per year.[28] Of course, not all accident victims die; some are hurt. Even so, divers actually suffer fewer injuries than participants in most other sports.[29] According to the Divers Alert Network ("DAN"),[30] although "during diving's infancy, fatalities and serious diving injuries were common, [t]oday, they are rare and often seem to be associated with unsafe . . . behaviors or hazardous conditions, but they also occur without apparent cause."[31]

II. BUDDIES

Basic scuba courses stress the importance of diving with a buddy. Usually, buddies are friends or relatives.[32] In other cases, however, divemasters assign the unaccompanied diver a partner he does not even

27. *See* BERGER, *supra* note 8, at 21–22 (arguing for continuing education).

28. David McD. Taylor et al., *Experienced Scuba Divers in Australia and the United States Suffer Considerable Injury and Morbidity*, 14 WILDERNESS & ENVTL. MED. 83, 83 (2003).

29. Diving is actually one of the safer sports. For example, each year, bowlers experience more injuries (General Scuba Questions and Answers, http://www.geocities.com/rainbowreefrangers/faq.html (last visited Dec. 8, 2007)) and basketball accidents claim more lives than diving injuries (2DIVE4, Frequently Asked Questions, http://www.2dive4.co.uk/bubbles-faqs.html (last visited Dec. 8, 2007)). *See also* ALBERT PIERCE, SCUBA LIFE SAVING, at Preface (1985). "In spite of the many potential problems that may arise in scuba diving, it is really a very safe sport. Of the increasing millions in the United States and Canada who enjoy the thrill of gliding weightlessly through the fascinating and beautiful underwater world, very few are injured or killed." *Id.*

30. DAN is a nonprofit organization associated with Duke University Medical Center in Durham, North Carolina. Divers Alert Network, About DAN, http://www.diversalertnetwork.org/about/index.asp (last visited Dec. 13, 2007). According to its mission statement: "DAN helps divers in need with medical emergency assistance and promotes diving safety through research, education, products and services." *Id.*

31. Daniel Orr, DAN, *Welcome Gesture: The Gift of DAN Membership Shows You Care*, ALERT DIVER, Nov./Dec. 2003, at 1, *available at* http://www.diversalertnetwork.org/membership/alert-diver/article.asp?ArticleID=517.

32. Diving with the same person has obvious advantages. For example, buddies become familiar with their partner's habits making it easier for them to stay together and function as a team. STEVEN BARSKY, ADVENTURES IN SCUBA DIVING 166 (Mosby Lifeline 1995).

know. Nevertheless, no matter what the personal relationship between them, buddies assume a variety of roles. They are responsible for: (1) checking and monitoring equipment before and during the dive; (2) creating and diving a safe dive plan; (3) sharing air if needed; (4) staying close to each other; (5) untangling a companion caught in debris; and (6) getting both to the surface in the event of an emergency.[33]

Before entering the water buddies should discuss the following:

- How and where to enter the water
- What the course and destination will be
- Anything special underwater that either buddy may want to linger over
- Whether to use dive computers or tables
- How long to stay underwater
- What the maximum depth of the dive will be
- The air pressure at which to stop the dive
- What to do if buddies get separated
- Where and how to exit the water
- Procedures in case of an out-of-air emergency[34]

Naturally, not all divers agree that having a buddy is a good idea.[35] In fact, even some scuba professionals who generally support the buddy system concede that going alone might actually be safer because a panicked[36] or less competent companion puts both divers at risk.[37] In addition, most solo advocates point out that the majority of divers do not actually follow the buddy system because they are frequently too far apart to either notice if a problem arises or help if an emergency occurs.[38] One commentator suggests that:

> Solo diving is more common than many would like to admit, and it's not, as they would have you believe, a dangerous and reckless form of diving. It is, however, an activity that

33. Jenner, *supra* note 5, at 20. *See also* GRAVER, *supra* note 1, at 74–75 (suggesting that a diver should confirm his buddy's position "every few seconds").

34. BERGER, *supra* note 8, at 146.

35. *See, e.g.*, ROBERT VON MAIER, SOLO DIVING: THE ART OF UNDERWATER SELF-SUFFICIENCY 14–18 (Watersport Publishing 1993).

36. Panic is "a sudden, uncontrolled, irrational reaction to a perceived danger." GRAVER, *supra* note 1, at 83.

37. *C.f.*, David Taylor et al., *27 Dumb Things Divers Do*, RODALE'S SCUBA DIVING, Apr. 1997, at 82, 86 (stating that buddies often engage in risky behavior like not staying with a buddy).

38. COLEMAN, *supra* note 24, at 249–56.

> shouldn't be conducted by just anyone. It requires . . . 110% competency and proficiency as well as a strong working knowledge of the particular area to be dived.[39]

III. CASE ANALYSIS

Only a few appellate decisions address buddy liability. There are at least three possible reasons for this scarcity of case law. First, buddies are frequently friends or relatives, people a diver is unlikely to sue.[40] Second, a dive partner probably does not have "deep pockets," so a lawsuit against him would seem to be pointless.[41] A third hurdle is the defense that imputes the negligence of one joint venturer to all, preventing or at least severely limiting, damage awards.[42] Nevertheless, some divers or their heirs have sued buddies either alone or as one defendant among others.[43]

As is generally true in negligence claims, plaintiffs must prove duty, breach, proximate cause, and damages.[44] The underlying legal analysis varies but the outcome of legal action against a buddy is usually the same: The judge acknowledges that the relationship creates a duty, and plaintiff suffered damage, but the buddy still escapes responsibility for the accident due to breach, causation, or assumption of risk issues.

A defendant typically seeks this result by arguing: (1) His actions did not breach his duty; (2) Even if his actions constituted a breach, they were not the proximate cause of plaintiff's injury; or (3) Despite a finding of negligence, plaintiff (or deceased) assumed the risks inherent in the sport, either due to the nature of the activity or by signing a release.

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39. VON MAIER, *supra* note 35, at 18.

40. *But see* Rasmussen v. Bendotti, 29 P.3d 56, 107 Wash. App. 947 (Wash. Ct. App. 2001) and discussion *infra* notes 163–88.

41. *See, e.g.*, Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 606–07 (2006) (Professor Gilles states, "everyone knows that plaintiffs' lawyers prefer to sue 'deep pockets' . . . and . . . that it is pointless to sue persons living at the subsistence level.").

42. *See* Lyon v. RANGER III, 858 F.2d 22 (1st Cir.1988) and discussion *infra* notes 109–41.

43. In a recent action filed by a deceased's widow against the manufacturer of an allegedly defective rebreather, a Pennsylvania federal district court held that the deceased's dive buddies were neither indispensable nor necessary parties. Barrett v. Ambient Pressure Diving, Ltd., 235 F.R.D. 263, 272 (E.D. Pa. 2006). This is because, even without the buddies, defendant manufacturers could present a defense based upon the alleged negligence of the divers. *Id.*

44. *See, e.g.*, E. STEVEN COREN, THE LAW AND THE DIVING PROFESSIONAL 16–18 (Professional Association of Diving Instructors 1986).

A. Duty

Deciding whether a person owes a duty to another requires an analysis of the relationship between them. For example, because buddies depend on each other to perform routine tasks such as equipment checks, as well as to provide assistance in an emergency, the law imposes an obligation on these partners to: (1) act reasonably and (2) not increase the risks associated with the sport.[45] Even in cases where there is a duty, however, divers or providers raise two defenses that might absolve them from liability. One is assumption of the risk and the second is waiver.

In fact, because courts tend to view diving as an inherently dangerous activity,[46] the doctrine of primary assumption of the risk frequently bars recovery. Under this theory, "by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury."[47]

For example, in *Yace v. Dushane*,[48] Dennis Dushane and Katherine Sentner agreed to be buddies for the day.[49] He left her in about sixty feet of water and ascended to get his bearings.[50] When he returned, he did not see her.[51] Shortly thereafter, Dushane felt Sentner reach for his regulator, indicating she needed to buddy breathe.[52] Although he had sufficient air left in his tank to get both of them to the surface safely, rather than share as the basic course teaches students to do in such situations, Dushane panicked and abandoned Sentner.[53] She drowned.[54]

The reasoning in *Yace* relied on the California Supreme Court's analogy to other sports where participants are not liable to each other for

45. Yace v. Dushane, No. B162789, 2003 WL 22953762, at *2 (Cal. Ct. App. Dec. 16, 2003) (applying doctrine from Knight v. Jewett, 3 Cal. 4th 296, 834 P.2d 696, 11 Cal. Rptr. 2d 2 (1992)).

46. *See, e.g.*, Olivelli v. Sappo Corp., Inc., 225 F. Supp. 2d 109, 118, 2003 AMC 101, 112 (D. P.R. 2002).

47. *Yace*, 2003 WL 22953762, at *1 (quoting *Knight*, 3 Cal. 4th at 314–15).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Yace*, 2003 WL 22953762, at *1.

53. *Id.*

54. *Id.*

ordinary careless conduct committed during the game.[55] Instead, a co-participant only breaches his duty of care if he "intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport."[56]

While there may be circumstances where a diver's negligent acts might increase the risks to his buddy and give rise to a duty of due care, the court found this was not true during an underwater emergency: "Unlike most other sports, the possibility of a life-threatening emergency in scuba diving is apparent, and indeed anticipated. Just as an emergency problem with air supply is itself an inherent risk of the sport, so also is the reaction to that emergency of one's diving buddy."[57] In other words, plaintiffs' action was barred by the primary assumption of risk defense because panic constitutes an inherent risk of diving. Because Dushane panicked, or suffered "a sudden overpowering fright," his behavior could not "be characterized as careless, much less as reckless or intentional" so as to overcome the doctrine.[58]

It is important to note that panic[59] is the main reason people die in underwater accidents.[60] The majority of mishaps, including the one in *Yace*, would not be catastrophic if divers remained calm and followed their training.

What this means is that, to impose liability in these cases, courts would have to hold a diver has a duty to his partner not to panic. This is something the *Yace* court decided it could not do.[61] Thus, this decision effectively insulates buddies from responsibility for all but the most

55. *Id.* at *1 (citing *Knight*, 3 Cal. 4th at 319–20). The idea is that participants voluntarily assume the risk that other participants may be careless and will not be responsible for injuries they cause. As a result, each player tacitly agrees to the possibility of other players' negligence and assumes the risk for himself. Mario R. Arango & William R. Trueba, Jr., *The Sports Chamber: Exculpatory Agreements Under Pressure*, 14 U. MIAMI ENT. & SPORTS L. REV. 1, 9 (1997).

56. *Yace,* 2003 WL 22953762, at *1 (quoting *Knight*, 3 Cal. 4th at 320).

57. *Id.* at *2.

58. *Id.*

59. According to a recent study, panic affects more than half of divers on one or more occasions. Phil Davis, *Panic Under Water!*, http://www.seagrant.wisc.edu/Communications /diving/panic.htm (last visited Dec. 27, 2007). Dr. William Morgan, the director of the University of Wisconsin-Madison Sport Psychology Laboratory, conducted this national diver panic study over a 10-year period. It was funded by the University of Wisconsin Sea Grant Institute.

60. Coleman, *supra* note 8, at 541. "Many experts believe that panic contributes to most drowning deaths." *Id.* "Divers who panic often perish." GRAVER, *supra* note 1, at 83.

61. *Yace*, 2003 WL 22953762, at *2.

egregious conduct.

The existence of a waiver acts to relieve a plaintiff of financial responsibility for what might otherwise be a legal duty. For example, in *Madison v. Superior Court*,[62] when Ken Sulejmanagic enrolled in a scuba class, he had to sign a document releasing the school, as well as its agents and employees, from liability for negligence associated with the course.[63]

Because Sulejmanagic missed his final check-out dive, he participated in a make-up with the instructor, Rene Rojas, and another "recently certified student named Robbins."[64] When Sulejmanagic indicated he was running low on air, Rojas accompanied him to the surface and told him to swim toward the buoy while he continued the dive with Robbins.[65] Unfortunately, when they came back up about ten minutes later, Sulejmanagic was missing.[66] After a search, his body was located at the bottom of the ocean.[67]

Under these circumstances, the instructor and school would ordinarily be liable. Rojas was negligent because he failed to observe the "buddy system" when he left Sulejmanagic alone and his actions proximately resulted in Sulejmanagic's death.[68] Decedent, however, had signed a release.[69] Therefore, the issue was whether the document absolved defendants of responsibility for the accident.[70]

The court began its analysis by resolving that Sulejmanagic "had no power or right to waive" any action for wrongful death on behalf of his heirs.[71] Nevertheless, the opinion stated that by signing the release, decedent provided defendants with "a complete defense."[72] Looking to the specific language of the release, Sulejmanagic manifested his intent to assume the risk of injury and to relieve others of any duty to him.

62. 203 Cal. App. 3d 589, 250 Cal. Rptr. 299 (Cal. Ct. App. 1988).

63. *Id.* at 593–94.

64. *Id.* at 593.

65. *Id.*

66. *Id.*

67. *Madison*, 203 Cal. App. 3d at 593.

68. *Id.* at 595.

69. *Id.* at 593–94.

70. *Id.* at 595.

71. *Id.* at 596.

72. *Madison*, 203 Cal. App. 3d at 597 (quoting Scroggs v. Coast Community College District, 193 Cal. App. 3d 1399, 1402, 239 Cal. Rptr. 916, 918).

Therefore, defendants could not be charged with negligence.[73]

To invalidate a waiver, courts also look to whether it violates a public policy.[74] In *Madison*, the court held that it did not as it was merely a "private, voluntary transaction[] in which one party, for a consideration, agree[d] to shoulder a risk which the law would otherwise have placed upon the other party."[75] The release did not involve a public interest because: (1) Scuba diving is not generally thought to be suitable for public regulation; (2) Diving lessons are not a service of great importance and not a matter of practical necessity; and (3) Customers did not place themselves under defendants' control.[76] According to the court, Sulejmanagic certainly could have opted not to take the class; considering the dangerous nature of scuba diving, the school could reasonably require students to sign a waiver as a condition of enrollment.[77] Furthermore, the document satisfied the typical requirement against vagueness as the language in the waiver was "clear, unambiguous and explicit in expressing the intent of the parties."[78]

The court also rejected plaintiffs' claim that the release must fail because defendants had not expressly notified Sulejmanagic about the particular risk that ultimately resulted in his death: possible failure of a dive partner to follow the "buddy system" rule.[79] Such specific knowledge is only mandated under the doctrine of implied assumption of the risk.[80]

By contrast, a person may expressly assume all risks of a particular situation, even those of which he is not expressly informed.[81] Similarly, it is not necessary to discuss "every possible specific act of negligence."[82] Rather, all that is required is that the conduct that results in injury "be reasonably related to the object or purpose for which the release is given."[83] In this case, the purpose for which the waiver was issued was to learn to

73. *Id.*

74. *Id.* at 598.

75. *Id.* (quoting Tunkl v. Regents of Univ. of California, 60 Cal. 2d 92, 101, 383 P.2d 441, 446, 32 Cal. Rptr. 33 (1963)).

76. *Id.* at 598–99.

77. *Madison*, 203 Cal. App. 3d at 599.

78. *Id.* at 598.

79. *Id.* at 600–01.

80. *Id.* at 601 n.8.

81. *Id.* at 601.

82. *Madison*, 203 Cal. App. 3d at 601.

83. *Id.*

dive. Defendants' negligent conduct—failure to follow the buddy system—reasonably relates to dive training.[84]

The court in *Gershon v. Regency Diving Center, Inc.*,[85] reached the opposite conclusion on this issue and held that a waiver is "unenforceable and void as against public policy when it is invoked to preclude decedent's heirs from prosecuting a wrongful death action."[86]

Eugene J. Pietroluongo had seventeen years diving experience and an advanced diving certification when he went to the Regency Diving Center ("RDC") for additional training.[87] RDC president and owner Costas Prodromou, along with John Berghoefer (another instructor), took fellow students Paul Kulavis and Pietroluongo on a preliminary dive to assess their skills.[88]

The two students were sandwiched between Berghoefer in front and Prodromou in the rear.[89] Unfortunately, Kulavis embedded himself in the mud at the bottom of the quarry.[90] Panicked, he mistakenly pressed the button to deflate rather than inflate his buoyancy compensator.[91] Flustered, he kicked up silt and struggled to gain control of his buoyancy and a loose fin.[92] The instructors both went to help Kulavis, bringing him to the surface.[93] During this process, they lost sight of decedent.[94]

Once they realized Pietroluongo was missing, Prodromou descended again but could not locate him in the cloud of silt.[95] Prodromou followed "lost buddy" protocol and returned to the surface within one minute of

84. *Id.* The court discounted expert testimony that only focused on dangers and risks inherent in scuba diving that can occur in the *absence* of negligence. *Id.* at 602 n.11. Rather, the court preferred to focus on the scope of the agreement that expressly waived liability for instructor negligence. *Id.* "It seems obvious that if the parties had attempted expressly to anticipate the various acts of such negligence which could reasonably be foreseen, an instructor's neglect of a student while in the water (i.e., the very act which occurred here) would head the list." *Id.*

85. 368 N.J. Super. 237, 845 A.2d 720 (App. Div. 2004).

86. *Id.* at 241.

87. *Id.*

88. *Id.* at 241, 242.

89. *Id.* at 242.

90. *Gershon*, 368 N.J. Super. at 243.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Gershon*, 368 N.J. Super. at 243.

being separated.[96] Given his advanced open water certification, decedent should have been familiar with this procedure.[97]

When Pietroluongo did not surface, Prodromou swam to shore to get help and begin a search.[98] Rescuers eventually found Pietroluongo's body the next evening in sixty-six feet of water with his equipment in working order and an "ample supply of air in his tank."[99] The medical examiner ruled the death an accidental drowning.[100]

The court faced an issue of first impression in New Jersey: "[W]hether an exculpatory release, executed by decedent as a condition of receiving scuba diving instructions from defendants, precludes decedent's heirs from bringing a wrongful death action . . . ."[101]

The decedent, a lawyer, signed an exculpatory clause that contained clear language binding him and his heirs.[102] It stated that anyone connected with the dive would be shielded "from all liability or responsibility whatsoever for personal injury, property damage or wrongful death however caused, or arising out of, directly or indirectly, including, but not limited to, the negligence of the released parties, whether passive or

96. *Id.*

97. *Id. See, e.g.*, GRAVER, *supra* note 1, at 75 (explaining that if buddies become separated, they should ascend slightly and turn in a circle while looking for bubbles. If they cannot locate each other after one minute, they should ascend and wait for their buddy at the surface).

98. *Gershon*, 368 N.J. Super. at 243.

99. *Id.*

100. *Id.*

101. *Id.* at 240. The *Gershon* court also contrasted its conclusions with those in *Madison* and explained its reasoning. *Id.* at 247–48.

First, the court pointed out that the test to evaluate validity of an exculpatory clause is different in California where the release only "must be clear, unambiguous and explicit in expressing the intent of the parties." *Gershon*, 368 N.J. Super. at 248 (quoting *Madison*, 203 Cal. App. 3d at 598). In New Jersey, on the other hand, such a clause will be enforced if "(1) it does not adversely affect the public interest; (2) the exculpated party is not under a legal duty to perform; (3) it does not involve a public utility or common carrier; or (4) the contract does not grow out of unequal bargaining power or is otherwise unconscionable." *Id.* at 248.

Second, the court also noted that enforcing the agreement would "adversely affect the public interest" that the Wrongful Death Act was enacted to protect. *Id.* at 249. Thus, even if a diver may legally bargain away the statutory right of his potential heirs, society has an interest in assuring the ability of his dependents to seek financial compensation in a wrongful death action that outweighs the decedent's freedom to contract. *Id.* Indeed, "a person's heirs are not defined until the time of his or her death. . . . It is therefore legally impossible for an exculpatory agreement to bar the legal claims of a class of litigants that were not legally in existence at the time of its execution." *Id.* at 249–50.

102. *Gershon*, 368 N.J. Super. at 241, 242.

active . . . *on behalf of myself and my heirs.*"[103] Nevertheless, the New Jersey court invalidated the provision.[104]

Not surprisingly, defendants in *Gershon* had relied on *Madison* as persuasive authority.[105] Even after acknowledging the striking similarity between the facts in the two cases, however, the court refused to follow *Madison*, calling the California decision "internally inconsistent."[106] It reasoned that the right to bring a wrongful death claim for damages, to which decedent, had he lived, would have been entitled, "pertains only to the character of the injury, and is not a procedural or jurisdictional requirement."[107]

Although the *Gershon* court did not expressly state its underlying assumption, the message is clear. Buddies owe a duty to each other. Leaving Pietroluongo alone in the water constituted negligence on the part of RDC's owner and instructor. Such a failure to follow the buddy system amounts to a breach that could lead to liability for damages even when a buddy, albeit a professional, leaves the diver to help another student in distress.

B. Breach

A breach occurs when, based on a relationship, the law imposes a duty on a person and he fails to follow the appropriate standard of care.[108] This duty applies to buddies and also to providers in their relationship to divers as buddies.

Breach was the issue in *Lyon v. RANGER III.*[109] Plaintiffs did not sue decedent's buddies when he was struck and killed by a whale-watch ship during a dive.[110] Still, when Thomas Lyon's survivors brought an

103. *Gershon*, 368 N.J. Super. at 242 (emphasis added).

104. *Id.* at 251. The defense attorney warned this decision "could eliminate scuba diving in New Jersey." Steven C. Schechter, *Gershon v. Regency Diving Center, Inc.*, N.J. LAW., Dec. 2004, at 42, 42 (citation omitted). While this is unlikely, it certainly does reduce the value of exculpatory clauses. Phyllis Coleman, *Those Dreadful Liability Releases: Well, They Aren't Ironclad*, UNDERCURRENT, (Undercurrent, Sausalito, Cal.) Sept. 2006, at 14, 14–15.

105. *Gershon*, 368 N.J. Super. at 244.

106. *Id.* at 244, 245.

107. *Id.* at 245.

108. *See* Collins v. Arnold, No. M2004-02513-COA-R3-CV, 2007 WL 4146025, at *13–15 (Tenn. Ct. App. Nov. 20, 2007) (explaining section 324A of the Restatement of Torts on conditions of liability under an assumed duty).

109. 858 F.2d 22 (1st Cir. 1988).

110. *Id.* at 24.

action against the craft and its owner-operator, Gerald Costa, defendants impleaded buddies Marc Paul and Norbert Therien, the other "highly experienced" members of Lyon's team.[111]

The group used an inflatable rubber boat to get to the site where they planned to search for clams and lobsters.[112] Massachusetts law required divers to remain within 100 feet of their dive flags while at or near the surface to warn vessels of their presence underwater.[113] Because the divers were not carrying individual warning flags, Paul assumed the duty to remain in the boat and monitor the men in the water by watching their air bubbles.[114]

Paul, however, lost sight of them just as the RANGER III approached.[115] Costa saw the rubber boat but Paul gave no warning to him that divers might be present in the area.[116] Suddenly, 350 feet away from the inflatable vessel which flew the dive flag, well beyond the 100-foot maximum, Lyon and Therien surfaced in front of the RANGER III.[117] The vessel struck and killed Lyon.[118]

The First Circuit found that the three divers were equally responsible for creating a "seriously flawed" dive plan—one that failed to provide either for using individual float flags or for signaling the divers should visual contact (*i.e.*, "air bubbles") be lost.[119] Thus they breached their duty to one another.[120] Furthermore, Lyon himself was forty-five percent responsible for the accident, notwithstanding his buddies' negligence.[121]

The appellate court rejected the claim that the trial judge improperly relied on a joint enterprise theory[122] in holding that each of the divers, including Lyon, was forty-five percent negligently responsible for the

111. *Id.* Defendants apparently did not join the fourth member of the team, Bernard Desjardins, who was a novice. *Id.*

112. *Id.*

113. *Id.* All states mandate how far a diver may stray from his flag and, while the distance varies, most choose 100 feet. *See* Coleman, *supra* note 8, at 531.

114. *RANGER III*, 858 F.2d at 24.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *RANGER III*, 858 F.2d at 25.

120. *Id.*

121. *Id.*

122. *Id.*

accident.[123] Thus, the fact that all were equally at fault for failing to modify the dive plan did not diminish Lyon's own personal responsibility.[124] Indeed, because a person has a higher duty to protect himself than someone else, "his negligence vis a vis [sic] his own safety . . . exceeds theirs."[125] No rule requires reducing, "to inconsequential levels, such serious fault, simply because two (or three, or thirty) colleagues also failed to take proper care."[126] Such a rule would likely "diminish individual responsibility in direct proportion to the size of the group, thereby encouraging individual negligence."[127]

Moreover, damages can be apportioned among two or more causes only "(1) where there are 'distinct harms' or (2) where 'there is a reasonable basis for determining the contribution of each cause to a single harm.'"[128] Plaintiff met neither element. Here, "each cause" produced "the *whole* harm, for each diver failed to alter the dive plan."[129]

The holding does not nullify traditional joint and several liability that allows plaintiffs to seek all damages from a defendant who might only be partly at fault.[130] The RANGER III was held liable not only for its own forty-five percent negligence but also for the ten percent allocated to Paul's failure to warn.[131] This means defendants were responsible for all damages except those attributed to Lyon.[132] In other words, by finding Lyon forty-five percent comparatively negligent, the district court held that similar, causally related actions or omissions by third parties do not necessarily reduce personal responsibility.[133]

The First Circuit also explained that, even if its decision about Lyon's individual obligation were incorrect, the case falls within the "joint enterprise" doctrine.[134] Simply stated, where people agree to carry out a small number of acts or objectives under such circumstances that all have

123. *Id.*
124. *RANGER III*, 858 F.2d at 25.
125. *Id.*
126. *Id.*
127. *Id.* at 25–26.
128. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 433A).
129. *RANGER III*, 858 F.2d at 26.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *RANGER III*, 858 F.2d at 26.

an equal voice in conducting the enterprise, each is considered the agent or servant of the others.[135] Consequently, the act of one within the scope of the undertaking is charged vicariously against the rest.[136] For this reason, the law imputes his fellow divers' negligence to Lyon.[137] This allocation of fault, of course, decreases the likelihood that a buddy would be sued even if he breached his duty.

Further, unlike some jurisdictions, Massachusetts does not require a pecuniary interest to apply the rule.[138] Instead, the "essential characteristic" is the "right to control."[139] Therefore, the judges turned to somewhat analogous cases that hold individual defendants 100 percent liable when they act in concert with others.[140] The buddies had joint command over the "safety features" as "[a]ll three divers directly controlled the plan; all three 'participated actively and equally' in its generation; each alone could have suggested alteration."[141] Because this means plaintiff would be charged with the negligence of his buddy, any possible recovery in such a lawsuit would be reduced if not eliminated.

Similarly, in *In re Adventure Bound Sports*,[142] the court found the deceased divers acted negligently when they formed an unsafe, three-person team in which one member was to separate from the other two.[143] The surviving diver's testimony also indicated that decedents anticipated equalization difficulties but did not discuss them with the divemaster.[144] Had they followed proper PADI procedure, they might have survived.[145]

Nevertheless, plaintiffs' contributory negligence did not bar recovery because the vessel's crew also acted negligently when they engaged in "role reversal."[146] According to a statute, only a licensed captain can operate a vessel carrying paying passengers. Captain Meador violated this provision when he abandoned his duties so he could scuba

135. *Id.* at 26–27.
136. *Id.* at 27.
137. *See id.*
138. *Id.* at 27.
139. *RANGER III*, 858 F.2d at 28.
140. *Id.*
141. *Id.*
142. 837 F. Supp. 1244, 1994 AMC 1517 (S.D. Ga. 1993).
143. *Id.* at 1257–58.
144. *Id.* at 1258.
145. *Id.*
146. *Id.*

dive while the divemaster assumed control of the boat. The court found as a matter of law that defendants' acts were the proximate cause of the deaths.[147] Thus, while the deceased divers' conduct was "a substantial factor in their deaths, [it] did not supersede" the employees' negligence.[148] However, the degree of negligence attributable to decedents decreased their recovery by that percentage.[149]

In a number of buddy cases, the breach is the failure of negligent providers to assign a partner. Under those circumstances, defendants will often argue that the diver himself did not meet the appropriate standard of care and therefore was contributorily negligent. For example, in *Tancredi v. Dive Makai Charters*,[150] a Hawaii federal district court easily found that the charter company breached the industry standard of care by not assigning a buddy to Louis D. Tancredi, Jr, a recreational diver.[151] The court also found it probable that a buddy would have been able to assist Tancredi during the crucial life-saving timeframe by sharing air and helping Tancredi to the surface at the first sign of breathing difficulty.[152]

The heirs claimed defendants were also negligent for failing to inform decedent of the increased risks associated with the145-foot dive in which Tancredi participated.[153] Because of the inherent risks of deep scuba dives, well-respected agencies like NAUI and PADI recommend not going deeper than 100 feet and establish 130 feet as an absolute limit for non-commercial divers.[154] Further, both accrediting groups discourage sport dives that would require decompression stops.[155] Plaintiffs claim that the charter company had a duty to tell Tancredi of the NAUI and PADI recommendations.[156]

However, the court agreed with defendants and found Tancredi

147. *Adventure Bound Sports*, 837 F. Supp. at 1254.

148. *Id.* at 1257.

149. *Id.*

150. 823 F. Supp. 778, 1994 AMC 911 (D. Haw. 1993).

151. *Id.* at 787.

152. *Id.*

153. *Id.* at 786–87.

154. *Id.* at 786.

155. *Tancredi*, 823 F. Supp. at 786. A decompression stop occurs when the deep sea scuba diver pauses at predetermined depths when ascending to allow his body to eliminate excess nitrogen. ROBERT KURSON, SHADOW DIVERS 26 (2004). Because these dives are extremely difficult and risky, they are not appropriate for recreation. *See* BERGER, *supra* note 8, at 110–11. *See also* KURSON, *supra*.

156. *Tancredi*, 823 F. Supp. at 787.

twenty percent contributorily negligent.[157] When Tancredi, a diver with some experience, arrived at the pier and found out about the site, he "should have at least partially appreciated the significance of a dive to a maximum of 145 feet for 20 minutes and should have considered that it might be beyond his capabilities."[158] In other words, Tancredi also was responsible for himself.

Similarly, in *Kuntz v. Windjammer "Barefoot" Cruises*,[159] the court decided the diving instructor's failure to assign a buddy amounted to a breach that proximately caused Christine Kuntz's death.[160] Like Tancredi, however, Kuntz herself was contributorily negligent and her negligence amounted to a substantial contributing factor in her death.[161]

Tancredi and *Kuntz* are important in that they both reinforce not only the existence of a buddy's duty to help in emergencies but also the obligation of all divers to be careful and avoid getting into precarious situations.[162]

C. Proximate Cause

In *Rasmussen v. Bendotti*[163] the court found that a buddy breached

157. *Id.* at 790.

158. *Id.* The court added, "Once the boat left shore, Tancredi's only choice was to go on the deep dive with the others or sit it out, clearly a choice Tancredi could not be expected to make." *Id.* This conclusion is simply wrong. Divers learn to assess every situation and should opt not to get in the water if the risk is too great.

In addition, the law also does not support the statement that a diver in the boat has no choice but to dive. For example, the reason courts routinely uphold waivers is because even if divers cannot dive without signing a release, they can *simply choose not to go*. In *Marshall v. Blue Springs Corp.*, 641 N.E.2d 92, 95 Ed. Law Rep. 641 (Ind. Ct. App. 1994), for example, plaintiff signed a liability release for any accidents connected with his scuba class and diving. *Id.* at 93. Plaintiff argued that because he was compelled to either sign the release or not complete the course—thereby losing his fee, time, and effort—the waiver was akin to invalid adhesion contracts and should be void. *Id.* at 96. The court rejected this argument, reasoning that he indeed had alternatives such as looking for other courses or dive sites that did not require releases or abandoning his quest for scuba certification. *Id.* This statement is somewhat disingenuous, however, as virtually all scuba courses require releases.

159. 573 F. Supp. 1277 (W.D. Pa. 1983), *aff'd*, 738 F.2d 423 (3d Cir. 1984), *cert. denied*, 469 U.S. 858 (1984).

160. *Id.* at 1282.

161. *Id.*

162. While the absence of a buddy was crucial in both cases, it seems that defendants in *Kuntz* should have been even more aware of a novice's need for a partner, especially one with only a few hours of instruction like Kuntz. *Id.* at 1281–82.

163. 29 P.3d 56, 107 Wash. App. 947 (Wash. Ct. App. 2001).

his duty but that his actions were not the proximate cause of the injury.[164]

Bonny Bendotti drowned while diving with her husband, Gene Bendotti. Her children sued their stepfather.[165] They claimed Gene's negligence in not connecting his power inflator to his buoyancy compensator led to their mother's death.[166]

The couple failed to discover the error because they did not adequately perform standard pre-dive buddy checks.[167] Almost as soon as they got in the water, however, Gene noticed the equipment problem and immediately ascended to the surface.[168] Unfortunately, left alone, Bonny apparently became "entangled in a rope at the 40-foot level 'perhaps while ascending herself.' She was unable to disentangle herself and drowned."[169]

Because they were buddies, "'Gene owed a duty to Bonny to act in the manner of a reasonably prudent diver.'"[170] This was based on findings that both had been trained to always dive with a partner so that they could assist each other in an emergency like the one Bonny Bendotti faced.[171]

The court concluded it was standard practice to check equipment prior to each dive.[172] "If these checks had been performed, any problem with Gene's power inflator would likely have been discovered."[173] Based on the duty a diver owes to his buddy, and the uncontested finding that the appropriate standard was not met, "the legal conclusion that Gene breached his duty to Bonny [was] inescapable."[174]

As an aside, although not addressed by the court, Bonny also breached her duty to Gene. Because she was his buddy, she was also supposed to check his gear. Arguably, her failure to do so contributed to her death.

Gene claimed his duty to his buddy had ended based on the common law emergency doctrine which states that a person faced with a crisis

164. *Id.* *Rasmussen* is also an example of that rare case where a buddy (or actually, the deceased buddy's relatives) sues family members.

165. *Id.* at 59.

166. *Id.*

167. *Id.*

168. *Rasmussen*, 29 P.3d at 59.

169. *Id.* (citation omitted).

170. *Id.* at 61 (citation omitted).

171. *Id.*

172. *Id.*

173. *Rasmussen*, 29 P.3d at 61.

174. *Id.*

should not be held to the same standards as someone given time for reflection and deliberation.[175] This protection, however, only applies when the defendant "undertakes the best course of action given an emergency not of his or her own making."[176] Gene created his own predicament by failing to properly connect his power inflator.[177] Thus, "[h]is conduct must . . . be evaluated at that time (when he was obligated to check his equipment) and not when he later discovered his negligent omission and reacted to it."[178] Under this analysis, the emergency did not discharge Gene's duty to Bonny.[179] Further, both Gene and Bonny created the problem and therefore, using the reasoning in *RANGER III*,[180] Bonny should not be able to recover, or at least, her damages should be reduced.

In the end, her heirs received nothing because Gene was found not liable.[181] While he had a duty to Bonny which he breached, his negligence was not the proximate cause of her death.[182] Simply stated, the question was, "if Gene had properly connected his power inflator would Bonny be alive today?"[183] The appellate court affirmed the trial judge's conclusion that the connection between Gene's breach and Bonny's death was too attenuated to answer "yes."[184] First, a scuba diving expert testified that a correlation did not exist between Gene's failure to attach his power inflator and Bonny's ensuing entanglement, or between the loss of buddy contact and her death.[185] Instead, he concluded it was Bonny's failure to carry a dive knife that proximately caused her demise.[186] Moreover, questions such as how Bonny became entangled, why she was unable to free herself, and whether Gene could have saved her remained unanswered.[187] Evidence that the result would have been different had Gene been available to help was too speculative.[188]

175. *Id.* at 62.
176. *Id.*
177. *Id.*
178. *Rasmussen*, 29 P.3d at 62.
179. *Id.*
180. *See RANGER III*, 858 F.2d 22, and discussion, *supra* notes 109–41.
181. *Rasmussen*, 29 P.3d at 63.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Rasmussen*, 29 P.3d at 63.
187. *Id.*
188. *Id.*

Contrast this with *Tancredi*, where the issue was whether defendant breached his duty. In that case, the Hawaiian court based its decision on a finding that "it was probable" that an assigned buddy would have shared air with Tancredi as soon as he indicated breathing difficulty and would have helped get him to the surface when he still could have been saved.[189]

As this section demonstrates, to recover against a buddy, a diver or his heirs must prove duty, breach, proximate cause, and damages. Defendants typically avoid liability by showing their actions did not breach their duty; even if their actions constituted a breach, they were not the proximate cause of plaintiff's injury; or despite their negligence, plaintiff (or deceased) assumed the risks inherent in the sport, either because of the nature of the activity or explicitly by signing a waiver.

IV. SUGGESTIONS

American society seems to be growing ever more litigious. As part of this trend, and also because attorneys often attempt to sue everyone connected with an accident, it is likely that more buddies will find themselves named as defendants. This section suggests steps divers can take to avoid potential liability while minimizing the risks of injuries to themselves and their buddies: (1) Obtain insurance; (2) Draft and sign specific liability releases; and (3) Carefully select qualified partners and always properly perform the obligations of a buddy.

189. *Tancredi*, 823 F. Supp. at 787.

A. Obtain Insurance[190]

Currently, limited coverage is available to help pay for diving injuries. For example, certain policies provide for emergency evacuation and transport to the nearest hospital, doctor and hospital treatment, as well as recompression fees. Premiums are reasonable, typically ranging from $49 to $99.[191]

Although some policies also reimburse for other expenditures, they generally do not provide sufficient compensation to the seriously injured diver or his heirs. Therefore, divers should attempt to persuade insurance agents and their companies to write special scuba policies as riders to health or life insurance policies. These policies would pay all costs if the insured is hurt while diving regardless of who is at fault. Such coverage is necessary to obtain adequate protection as insurers generally exclude certain dangerous activities,[192] and many people (including courts that have

190. For an interesting discussion of the interrelationship of liability, insurance, sportsmen, and providers, see Robert Heidt, *The Avid Sportsman and the Scope for Self-Protection: When Exculpatory Clauses Should be Enforced*, 38 U. RICH. L. REV. 381 (2004).

There are several different ways to approach the issue of insurance depending on the answer to the question: Who should bear the responsibility for a diver's safety? One view concludes that everyone must pay for his own injuries because scuba diving is a voluntary recreational pursuit that many believe to be dangerous.

An alternate view seeks to hold the person who caused the harm liable. This would mean that all dive providers as well as buddies, would need insurance. To make such policies available as well as affordable, the law-making bodies must pass legislation requiring these people to carry sufficient insurance to pay for clients' or buddies' injuries. The difficulty with this, however, is that such a requirement would arguably force many individuals out of the industry or out of the water.

It is certainly possible to argue that if providers cannot afford to properly protect their customers they should not be operating a business. The reality, however, is that many can barely manage to pay their bills. (One commentator has suggested that allowing waivers in sporting cases might actually be "judicial efforts to protect the existence of marginal enterprises against enormous potential liabilities." Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1249 n.243 (1983)). Such speculation is particularly compelling in this context because dive shops often fail. In fact, a well-known industry joke asks: "How do you make a small fortune in the dive business? Answer: Start with a large one." Reader Poll, *Love Those Logbooks*, SCUBA DIVING, Jan.–Feb. 1997, at 14.

Nevertheless, given that no other professional pays so little for coverage, at least one commentator has said that an instructor "must carry liability insurance or be a millionaire." Jay Wenzel, *Insurance and Liability*, SPORT DIVER, Winter 1979, at 178, 178. (Wenzel follows this by saying that he does not know of any millionaires who teach diving "so insurance is the only real alternative." *Id.*) As a professional, the dive instructor "must accept financial and moral responsibility" for students who put their trust in him. *Id.*

191. John Francis, *Dive Insurance 101*, SCUBA DIVING, July 2004, at 91, 92–93.

192. *See, e.g.*, Sylva v. Culebra Dive Shop, 389 F. Supp. 2d 189, 191, 2005 AMC 2344

addressed the issue), place diving in this category.[193] The problem with requiring special coverage for providers is that the additional cost is likely to be passed on to the consumer. Still, because diving really is a safe sport with rare catastrophic accidents,[194] the price should be very reasonable especially if most divers and providers buy the insurance and spread the risk.

If such specific coverage is not available, prepaid legal insurance is another possibility that would help defray legal costs when a diver has to defend himself in a buddy negligence case. Before purchasing such a policy, however, it is critical to make sure this type of litigation would be covered.

Ironically, because insurance reverses the "shallow pocket" problem, having coverage may actually increase the number of buddies who are sued.[195] Nevertheless, obtaining insurance if available is a good idea. The proper policy will provide the insured with an attorney to mount a legal defense. In addition, if an insured defendant is found liable, the policy would compensate an injured buddy at least up to policy limits. Further, where a defendant's actions are clearly negligent, the insurer should pay without the need for litigation, thereby saving attorney fees for both parties and getting money to the victim quickly.

B. Draft and Sign Specific Liability Releases

If insurance is not an option or is insufficient, divers who want to protect themselves against potential liability should create specific waivers or amend provider releases to include buddies on the list of people contractually shielded from liability. Based on existing case law, most jurisdictions should enforce such exculpatory clauses.[196]

(D.P.R. 2005) (insurance policy excluded "bodily injury . . . [or] death . . . while in the water in connection with any diving activity").

193. *See, e.g.*, Murley v. Deep Explorers, Inc., 281 F. Supp. 2d 580, 589 (E.D.N.Y. 2003) (calling scuba diving "a dangerous activity"); Madison v. Superior Court, 203 Cal. App. 3d 589, 599, 250 Cal. Rptr. 299, 305 (Cal. Ct. App. 1988) (concluding that because of the "dangerous nature" of scuba diving, defendants reasonably condition enrollment in their course on execution of a release); Marshall v. Blue Springs Corp., 641 N.E.2d 92, 95 (Ind. Ct. App. 1994) (quoting release stating "scuba diving is inherently dangerous").

194. *See, e.g.*, Kenneth Capek, *Hyperbaric Files: Diving Accidents*, J. FOR RESPIRATORY CARE & SLEEP MED., Sept. 22, 2005, at 50, *available at* 2005 WLNR 20575591.

195. One reason it is unattractive to sue negligent buddies today is because they often do not have enough money to make it worthwhile. A buddy with an insurance policy, however, makes a much more attractive defendant. Wenzel, *supra* note 190, at 178.

196. *See, e.g.*, Yace v. Dushane, No. B162789, 2003 WL 22953762, at *2 (Cal. Ct. App.

Moreover, if courts follow the theory discussed in *Yace*, a waiver will only be invalidated when a buddy's conduct was reckless or intentional and caused the injury.[197] This is consistent with the law concerning exculpatory clauses as they generally only shield people from responsibility for ordinary negligence.[198] Courts fear that imposing liability in cases where ordinary negligence resulted in an accident "might well deter friends from voluntarily assisting one another in such potentially risky sports."[199]

C. Be Careful and Choose Wisely

Of course, the real answer is that each diver needs to be a competent responsible buddy who follows proper procedures at all times. In addition, he should select a buddy who is also competent, knowledgeable, and reliable. A competent buddy is less likely to panic when faced with an unexpected obstacle.

V. CONCLUSION

Although many people worry about the dangers of diving, it is actually one of the safest sports. Nevertheless, accidents do happen. In the past, divers rarely sued their buddies even when someone was seriously injured or killed. But as popularity of the sport increases, and society becomes more litigious, buddies could become the target of such litigation.

As is true in any negligence action, to recover plaintiffs have to

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Dec. 16, 2003).

There may be circumstances where a waiver would not be necessary to protect a buddy from liability. If a buddy acted reasonably under the circumstances, but still caused or contributed to an accident, a court may not find him liable. (Of course, the problem then becomes determining what the "reasonable buddy" would have done under the circumstances.) If, for example, as the court in *Yace* concluded, panic is inherent in the sport, a buddy may have reasonably panicked and caused an accident, but may not be liable for any injuries that followed notwithstanding the absence of a release. *See* discussion, *supra* notes 48–61. Still, having a waiver is recommended because it provides an additional defense.

197. *Yace*, 2003 WL 22953762, at *4–5.

198. *But see* Borden v. Phillips, 752 So. 2d 69, 25 Fla. L. Weekly D470 (Fla. Dist. Ct. App. 2000). In *Borden*, the court upheld an exculpatory clause in which decedent assumed the risks inherent in scuba diving and released the boat owner, captain, and certifying association from "all liability or responsibility whatsoever . . . 'HOWEVER CAUSED, INCLUDING, BUT NOT LIMITED TO, THE NEGLIGENCE OF THE RELEASED PARTIES, WHETHER PASSIVE OR ACTIVE.'" *Id.* at 73. The majority concluded "negligence" is not limited, and therefore encompassed "all forms of negligence, simple or gross, with only intentional torts being excluded." *Id.* (citing Theis v. J & J Racing Promotions, 571 So. 2d 92, 94, 15 Fla. L. Weekly D3003 (Fla. Dist. Ct. App. 1990)).

199. Ford v. Gouin, 3 Cal. 4th 339, 345, 837 P.2d 724, 728, 1993 AMC 1216 (1992).

prove duty, breach, causation, and damages. The appellate cases that address the issue generally conclude the buddy relationship creates a duty to act reasonably and not increase the inherent risks associated with the sport. Further, while the exact amount might be contested, damages can usually be proven. The prongs that are typically litigated are whether there has been a breach and, if so, was the breach the proximate cause of the injury. Defendants also raise defenses including assumption of the risk and, if applicable, a signed waiver.

To minimize the likelihood of being sued, or the consequences of such a lawsuit, divers should: (1) Obtain insurance, (2) Draft and sign specific liability releases, and (3) Choose buddies wisely. In addition to protecting themselves, following these simple steps will help ensure a safe and enjoyable dive.