Assumption of Risk and the Medical Malpractice Conundrum

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ASSOCIATION OF AMERICAN LAW SCHOOLS ANNUAL CONFERENCE – JANUARY 2019
I. Setting the Foundation: Yes, Virginia, there is assumption of risk in medical malpractice cases.

II. A Conundrum: When considering plaintiff’s knowledge of defendant’s breach, differing instincts in traditional assumption of risk cases and medical assumption of risk cases.

III. Possible Resolutions: Can these differing instincts be justified doctrinally?
Setting the Foundation

See Sawicki, Choosing Medical Malpractice, 93 WASH. L. REV. 891 (2018)
The Tunkl Story

“...[A]n agreement between a hospital and an entering patient affects the public interest and ... in consequence, the exculpatory provision included within it must be invalid[.]

Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 447 (Cal. 1963).

Tunkl reasoning has been extended to invalidate:

- Exculpatory agreements between patients and physicians
- Implied assumption of risk defenses by physicians and hospitals
Why Reject AoR and Waivers for Malpractice?

- Physicians hold **unwaivable duties**
- Imbalance in **bargaining power** between patients and physicians
- **Information disparity** between patients and physicians

*But see:* Experimental treatment cases; Jehovah’s Witness cases; and potentially many other contexts!
Why Reject AoR and Waivers for Malpractice?

- Physicians hold **unwaivable duties**
  - *But* when a medical service is deemed to be of social value, courts *will* waive the duty to comply with the standard of care
- Imbalance in **bargaining power** between patients and physicians
  - *But* when patients “choose malpractice,” there is no power imbalance – they are seeking out and receiving their first choice of treatment
- **Information disparity** between patients and physicians
  - *But* the purpose of informed consent is to correct this information disparity
Accepting AoR and Waivers for Malpractice

**According to courts:**
- Service is *societally valuable*, as determined by judge/jury
- Patient receives **first choice of treatment**, performed **per expectations**
- Patient has full **knowledge of risks and benefits**

**Proposed additional requirements for patient protection:**
- Physician satisfies **basic informed consent duties**
- Physician discloses **conflicts of interest**
- Physician discloses that treatment is **[arguably] outside the standard of care**
A Conundrum: Knowledge of Negligence
Accepting Medical Risks

A patient may knowingly choose to accept:

- Inherent risks of treatment
- Risks of negligent performance of treatment
- Inherent risks of treatment that is negligently offered
P accepts a X% risk of injury that is inherent in an activity performed by D, even when performed with all due care (*inherent risk*)

**A Medical Case:**
- D physician correctly informs P that 40% of patients experience nausea as a side effect of intravenous administration of medication X, and that 10% of patients experience infection at the IV site.
- P consents, and D exercises all due care in administering the treatment.
- P suffers nausea as a side effect.

**“Primary Assumption of Risk”:** D has breached no duty of care, so P cannot recover.
Inherent Risk

P accepts a X% risk of injury that is inherent in an activity performed by D, even when performed with all due care (inherent risk)

A Traditional Case:

- P, an experienced skier, chooses to ski what looks like an extremely difficult trail at D’s ski slope.
  - D has exercised all due care in maintaining the trail, which is intended to be extremely difficult.
- P knows that accidents happen even under the best of circumstances, and by looking at the condition of the trail – accurately estimates that there is a 10% chance that he will break his leg while skiing down it.
- P skis down the trail and breaks his leg.

“Primary Assumption of Risk”: D has breached no duty of care, so P cannot recover.
P accepts a X% risk of injury that is caused by D’s failure to exercise due care in performing the activity (negligent performance)

A Traditional Case:

- P, an experienced skier, chooses to ski what looks like an extremely difficult trail at D’s ski slope.
  - D has not exercised all due care in maintaining the trail, which is intended to be moderately difficult. Unbeknownst to P, the extreme condition resulted from D’s negligence.
- P knows that accidents happen even under the best of circumstances, and – by looking at the condition of the trail – accurately estimates that there is a 10% chance that he will break his leg while skiing down it.
- P skis down the trail and breaks his leg.

Secondary Assumption of Risk: D has breached a duty of care, but P voluntarily chose to encounter the resulting risk. P can bring a negligence suit, but recovery will be limited.
P accepts a X% risk of injury that is caused by D’s failure to exercise due care in performing the activity (negligent performance)

A Medical Case:
- D physician correctly informs P that 40% of patients experience nausea as a side effect of intravenous administration of medication X, and that 10% of patients experience infection at the IV site. The stated risk of infection takes into account the fact that something, somewhere, might go wrong; it does not assume perfect administration.
- P consents. Unbeknownst to P, D fails to wash his hands before administering the drug.
- P develops an infection at the IV site as a result of D’s breach of duty.

Secondary Assumption of Risk? D has breached a duty of care - but has P voluntarily chosen to encounter the resulting risk? Unclear.
P accepts a X% risk of injury that is caused by D’s failure to exercise due care in offering the activity (*negligent offer*)

**A Medical Case:**

- D physician correctly informs P that 40% of patients experience nausea as a side effect of intravenous administration of medication X, and that 10% of patients experience infection at the IV site.
  - D informs P that it is outside the standard of care to prescribe this medication for P’s condition; therefore, it is clear to P that D’s selection of this treatment was malpractice.
- P consents, and D exercises all due care in administering the treatment.
- P suffers nausea as a side effect.

**Secondary Assumption of Risk?** D has breached a duty of care - but has P voluntarily chosen to encounter the resulting risk? Probably yes.
Negligent Offer

P accepts a X% risk of injury that is caused by D’s failure to exercise due care in offering the activity (negligent offer)

A Medical Case:

- D physician correctly informs P that 40% of patients experience nausea as a side effect of intravenous administration of medication X, and that 10% of patients experience infection at the IV site.
  - Unbeknownst to P, it is outside the standard of care to prescribe this medication for P’s condition; therefore, D’s selection of this treatment was malpractice.
- P consents, and D exercises all due care in administering the treatment.
- P suffers nausea as a side effect.

Secondary Assumption of Risk? D has breached a duty of care - but has P voluntarily chosen to encounter the resulting risk? Many would say no.
Negligent Offer

P accepts a X% risk of injury that is caused by D’s failure to exercise due care in offering the activity (negligent offer)

A Traditional Case:

- P, an experienced skier, chooses to ski what looks like an extremely difficult trail at D’s ski slope.
  - D has exercised all due care in maintaining the trail, which is intended to be extremely difficult. However, the trail is so difficult that it is unreasonable for a ski slope operator to even offer such an opportunity to skiers, though P is unaware of this fact.
- P knows that accidents happen even under the best of circumstances, and – by looking at the condition of the trail – accurately estimates that there is a 10% chance that he will break his leg while skiing down it.
- P skis down the trail and breaks his leg.

Secondary Assumption of Risk? D has breached a duty of care - but has P voluntarily chosen to encounter the resulting risk? Many would say yes.
If $P$ knows that proceeding with an activity poses a $X\%$ risk of injury ... 

... does it matter, for assumption of risk purposes, whether $P$ also knows that the D’s offer of the activity in and of itself constitutes a failure to exercise due care?

- **Skiing**: Instinctual response, for many, is no – it doesn’t matter.
- **Medicine**: Instinctual response, for many, is yes – it matters!
Possible Resolutions
Factual Differences: Plaintiff’s Knowledge

A factual claim:

- Patients lack the expertise to know what treatments fall outside the standard of care (unless disclosed by the physician).
- People engaging in other risky activities do know whether those activities are unreasonably dangerous.

*But is this factual claim true?*
Factual Differences: Plaintiff’s Knowledge

A factual claim:

- Patients lack the expertise to know what treatments fall outside the standard of care (unless disclosed by the physician).
- People engaging in other risky activities do know whether those activities are unreasonably dangerous.

*But is this factual claim true?* Not really.

- See *Charrell v. Gonzales* (NY App. Div. 1998) (coffee enemas);
  *Boyle v. Revici* (2nd Cir. 1992) (“investigational” consumption of mineral compounds, baking soda, vinegar, and eggs)
Physicians in negligent offer cases are breaching two duties:

- Duty to select treatment that falls within the standard of care (malpractice)
- Duty to disclose when treatment falls outside the standard of care (informed consent)

But is this legal claim true?
Physicians in negligent offer cases are breaching two duties:

- **Duty to select** treatment that falls within the standard of care *(malpractice)*
- **Duty to disclose** when treatment falls outside the standard of care *(informed consent)*

**But is this legal claim true?** Not really.

- Informed consent only requires disclosure of treatment’s *inherent risks*
- *See e.g.*, FDA approval cases; alternative cancer treatment cases.
If P knows that proceeding with an activity poses a X% risk of injury...

... does it matter, for assumption of risk purposes, whether P also knows that the D’s offer of the activity in and of itself constitutes a failure to exercise due care?

- **Skiing**: Instinctual response, for many, is no – it doesn’t matter.
- **Medicine**: Instinctual response, for many, is yes – it matters!
If P knows that proceeding with an activity poses a X% risk of injury...

... does it matter, for assumption of risk purposes, whether P also knows that the D’s offer of the activity in and of itself constitutes a failure to exercise due care?

- Skiing: No – it doesn’t matter.
- Medicine: No – it doesn’t matter. Patient should be barred from recovery regardless of whether the MD disclosed that the treatment is outside the standard of care.
Am I missing something?

- Are there **other reasons** for differential treatment of medical assumption of risk cases when it comes to **P’s knowledge of D’s breach**?
Thank you!