

Assumption of Risk and the Medical Malpractice Conundrum



NADIA N. SAWICKI, J.D., M.BE.

GEORGIA REITHAL PROFESSOR OF LAW
ACADEMIC DIRECTOR,
BEAZLEY INSTITUTE FOR HEALTH LAW & POLICY
LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW

ASSOCIATION OF AMERICAN LAW SCHOOLS ANNUAL CONFERENCE – JANUARY 2019

Roadmap



- 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



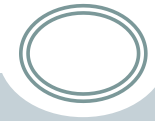
According to courts:

- 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**

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 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.

Negligent Performance



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.

Negligent Performance



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.*

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.
 - 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.*

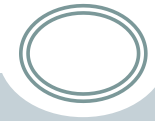
Negligent Offer



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 e.g.,* 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)

Legal Differences: Defendant's Breach



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?

Legal Differences: Defendant's Breach



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.

Are Our Instincts Wrong?



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!**

Are Our Instincts Wrong?



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.*

Other Resolutions



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!

