# Assumption of Risk

I. Contractual [a.k.a. Express] Assumption of Risk

A. Survives as a separate, complete defense everywhere.

1. Unless contract is void as a matter of public policy.

a. *Tunkl* Factors:

1. The business is of a type generally thought suitable for public regulation.

2. ∂'s service is of great importance to the public, and perhaps a practical necessity.

3. ∂ is holding itself out as performing the service generally for the public.

4. The need for the service and the economic setting give the defendant decisive advantage of bargaining strength.

b. Other public policy reasons.

2. Unless the harm/negligence is outside the scope of the contractual release.

B. Expressed in writing or orally.

II. Implied Assumption of Risk

A. Appears to survive as a separate, complete defense in traditional contributory negligence jurisdictions. Elements: Plaintiff knows and understands the risk and voluntarily incurs it.

B. Often does not survive as a truly separate, complete defense in comparative-negligence jurisdictions.

1. Some simply "merge" the doctrine into comparative fault.

2. But old scenarios may now be treated as creating no duty owed to the π, a limited duty (meaning a more lenient or specific standard of care), or no breach as a matter of law.