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The ''officially released'' date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the ''officially released'' date appearing in the opinion. In no event will any such motions be accepted before the ''officially released'' date.

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NORCOTT, J., with whom BORDEN and PALMER, Js., join, dissenting. Although I concur in part I of the majority opinion, I disagree with its conclusion in part II, namely, that the prospective release of liability for negligence executed by the plaintiff, Gregory D. Hanks, in this case is unenforceable as against public policy. I would follow the overwhelming majority of our sister states and would conclude that prospective releases from liability for negligence are permissible in the context of recreational activities. Accordingly, I respectfully dissent from the majority's decision to take a road that is, for many persuasive reasons, far less traveled.

I begin by noting that "[i]t is established well beyond the need for citation that parties are free to contract for whatever terms on which they may agree. This freedom includes the right to contract for the assumption of known or unknown hazards and risks that may arise as a consequence of the execution of the contract. Accordingly, in private disputes, a court must enforce the contract as drafted by the parties and may not relieve a contracting party from anticipated or actual difficulties undertaken pursuant to the contract . . . ." *Holly Hill Holdings* v. *Lowman*, 226 Conn. 748, 755–56, 628 A.2d 1298 (1993). Nevertheless, contracts that violate public policy are unenforceable. See, e.g., *Solomon* v. *Gilmore*, 248 Conn. 769, 774, 731 A.2d 280 (1999).

In determining whether prospective releases of liability violate public policy, the majority adopts the Vermont Supreme Court's totality of the circumstances approach.[1] See *Dalury* v. *S-K-I, Ltd.*, 164 Vt. 329, 334, 670 A.2d 795 (1995). Although it also purports to consider the widely accepted test articulated by the California Supreme Court in *Tunkl* v. *Regents of the University of California*, 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963), the majority actually accords the test only nominal consideration. Because I consider the *Tunkl* factors to be dispositive, I address them at length.

"[T]he attempted but invalid [release agreement] involves a transaction which exhibits some or all of the following characteristics. [1] It concerns a business of a type generally thought suitable for public regulation. [2] 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. [3] The party 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. [4] As 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. [5] In exercising a superior bargaining power the party 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. [6] Finally, 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.'' Id., 98–101.

''[N]ot all of the *Tunkl* factors need be satisfied in order for an exculpatory clause to be deemed to affect the public interest. The [*Tunkl* court] conceded that '[n]o definition of the concept of public interest can be contained within the four corners of a formula' and stated that the transaction must only 'exhibit some or all' of the identified characteristics. . . . Thus, the ultimate test is whether the exculpatory clause affects the public interest, not whether all of the characteristics that help reach that conclusion are satisfied.'' (Citations omitted.) *Health Net of California, Inc.* v. *Dept. of Health Services*, 113 Cal. App. 4th 224, 237–38, 6 Cal. Rptr. 3d 235 (2003), review denied, 2004 Cal. LEXIS 2043 (March 3, 2004).

Notwithstanding the statutory origins of the *Tunkl* factors,[2] numerous other states have adopted them to determine whether a prospective release violates public policy under their common law. See, e.g., *Morgan* v. *South Central Bell Telephone Co.*, 466 So. 2d 107, 117 (Ala. 1985); *Anchorage* v. *Locker*, 723 P.2d 1261, 1265 (Alaska 1986); *La Frenz* v. *Lake County Fair Board*, 172 Ind. App. 389, 395, 360 N.E.2d 605 (1977); *Lynch* v. *Santa Fe National Bank*, 97 N.M. 554, 558–59, 627 P.2d 1247 (1981); *Olson* v. *Molzen*, 558 S.W.2d 429, 431 (Tenn. 1977); *Wagenblast* v. *Odessa School District*, 110 Wash. 2d 845, 852, 758 P.2d 968 (1988); *Schutkowski* v. *Carey*, 725 P.2d 1057, 1060 (Wyo. 1986).[3]

Applying the six *Tunkl* factors to the sport of snowtubing, I note that the first, second, fourth and sixth factors support the defendants, Powder Ridge Restaurant Corporation and White Water Mountain Resorts of Connecticut, Inc., doing business as Powder Ridge Ski Resort, which operate the Powder Ridge facility, while the third and fifth factors support the plaintiff. Accordingly, I now turn to a detailed examination of each factor as it applies to this case.

The first of the *Tunkl* factors, that the business is of a type thought suitable for regulation, cuts squarely in favor of upholding the release. Snowtubing runs generally are not subject to extensive public regulation. Indeed, the plaintiff points to no statutes or regulations that affect snowtubing, and I have located only one statutory reference to it. This sole reference, contained in No. 05-78, § 2, of the 2005 Public Acts, explicitly exempts snowtubing from the scope of General Statutes (Rev. to 2005) § 29-212, which applies to liability for

injuries sustained by skiers.[4] Thus, while the legislature has chosen to regulate, to some extent, the sport of skiing, it conspicuously has left snowtubing untouched.

The second *Tunkl* factor also works in the defendants' favor. Snowtubing is not an important public service. Courts employing the *Tunkl* factors have found this second element satisfied in the contexts of hospital admission and treatment, residential rental agreements, banking, child care services, telecommunications and public education, including interscholastic sports. See *Henrioulle* v. *Marin Ventures, Inc.*, 20 Cal. 3d 512, 573 P.2d 465, 143 Cal. Rptr. 247 (1978) (residential rental agreements); *Tunkl* v. *Regents of the University of California*, supra, 60 Cal. 2d 92 (hospitals); *Gavin W.* v. *YMCA of Metropolitan Los Angeles*, 106 Cal. App. 4th 662, 131 Cal. Rptr. 2d 168 (2003) (child care); *Vilner* v. *Crocker National Bank*, 89 Cal. App. 3d 732, 152 Cal. Rptr. 850 (1979) (banking); *Morgan* v. *South Central Bell Telephone Co.*, supra, 466 So. 2d 107 (telephone companies); *Anchorage* v. *Locker*, supra, 723 P.2d 1261 (telephone companies); *Wagenblast* v. *Odessa School District*, supra, 110 Wash. 2d 845 (public schools and interscholastic sports). The public nature of these industries is undeniable and each plays an important and *indispensable* role in everyday life. Snowtubing, by contrast, is purely a recreational activity.

The fourth *Tunkl* factor also counsels against the plaintiff's position that snowtubing affects the public interest because snowtubing is not an essential activity. The plaintiff's only incentive for snowtubing was recreation, not some other important personal interest such as, for example, health care, banking or insurance. The plaintiff would not have suffered any harm by opting not to snowtube at Powder Ridge, because snowtubing is not so significant a service that a person in his position would feel compelled to agree to any terms offered rather than forsake the opportunity to participate. Furthermore, "[u]nlike other activities that require the provision of a certain facility, snowtubing occurs regularly at locations all across the state, including parks, backyards and golf courses." *Hyson* v. *White Water Mountain Resorts of Connecticut, Inc.*, 265 Conn. 636, 650 n.4, 829 A.2d 827 (2003) (*Norcott, J.*, dissenting). Thus, the plaintiff had ample opportunity to snowtube in an environment of his choosing, which he could have selected based on whatever safety considerations he felt were relevant. In the absence of a compelling personal need and a limited choice of facilities, I cannot conclude that the defendants enjoyed a significant bargaining advantage over the plaintiff.

Finally, the sixth *Tunkl* factor weighs against a determination that the release implicates the public interest. The plaintiff did not place his person or property under the defendants' control. Unlike the patient who lies unconscious on the operating table or the child who is

placed in the custody of a day care service, the Powder Ridge patron snowtubes on his own, without entrusting his person or property to the defendants' care. In fact, the attraction of snowtubing and other recreational activities often is the lack of control associated with participating.

In contrast, the third and fifth *Tunkl* factors support the plaintiff's position. With respect to the third factor, although the defendants restricted access to the snowtubing run to persons at least six years old or forty-four inches tall, this minimal restriction does not diminish the fact that only a small class of the general public is excluded from participation. See *Tunkl* v. *Regents of the University of California*, supra, 60 Cal. 2d 102 (research hospital that only accepted certain patients nevertheless met third prong of *Tunkl* because it accepted anyone who exhibited medical condition that was being researched at hospital). Such a small exclusion does not diminish the invitation to the public at large to partake in snowtubing at the defendants' facility, because the snowtubing run is open to any person who fits within certain easily satisfied parameters. See id., 99–101.

Finally, I examine the fifth *Tunkl* factor, namely, whether the release agreement is an ''adhesion contract . . . .'' Id., 100. ''[The] most salient feature [of adhesion contracts] is that they are not subject to the normal bargaining processes of ordinary contracts.'' *Aetna Casualty & Surety Co.* v. *Murphy*, 206 Conn. 409, 416, 538 A.2d 219 (1988). Although the plaintiff made no attempt to bargain as to the terms of the release, it defies logic to presume that he could have done so successfully. As the majority correctly notes, the defendants presented patrons with a ''take it or leave it'' situation, conditioning access to the snowtubing run on signing the release agreement. Accordingly, the fifth *Tunkl* factor indicates that the agreement does affect the public interest.

In sum, I conclude that, under the *Tunkl* factors, the defendants' release at issue in this case does not violate public policy with respect to the sport of snowtubing. This conclusion is consistent with the vast majority of sister state authority, which upholds releases of liability in a variety of recreational or athletic settings that are akin to snowtubing as not violative of public policy. See, e.g., *Barnes* v. *Birmingham International Raceway, Inc.*, 551 So. 2d 929, 933 (Ala. 1989) (automobile racing); *Valley National Bank* v. *National Assn. for Stock Car Auto Racing*, 153 Ariz. 374, 378, 736 P.2d 1186 (App. 1987) (spectator in pit area at automobile race); *Plant* v. *Wilbur*, 345 Ark. 487, 494–96, 47 S.W.3d 889 (2001) (same); *Madison* v. *Superior Court*, 203 Cal. App. 3d 589, 602, 250 Cal. Rptr. 299 (1988) (scuba diving), review denied, 1988 Cal. LEXIS 1511 (October 13, 1988); *Heil Valley Ranch, Inc.* v. *Simkin*, 784 P.2d 781,

785 (Colo. 1989) (horseback riding); *Theis* v. *J & J Racing Promotions*, 571 So. 2d 92, 94 (Fla. App. 1990) (automobile racing), review denied, 581 So. 2d 168 (Fla. 1991); *Bien* v. *Fox Meadow Farms Ltd.*, 215 Ill. App. 3d 337, 341, 574 N.E.2d 1311 (horseback riding), appeal denied, 142 Ill. 2d 651, 584 N.E.2d 126 (1991); *Clanton* v. *United Skates of America*, 686 N.E.2d 896, 899–900 (Ind. App. 1997) (roller skating); *Boucher* v. *Riner*, 68 Md. App. 539, 551, 514 A.2d 485 (1986) (skydiving); *Lee* v. *Allied Sports Associates, Inc.*, 349 Mass. 544, 551, 209 N.E.2d 329 (1965) (spectator at automobile race); *Lloyd* v. *Sugarloaf Mountain Corp.*, 833 A.2d 1, 4 (Me. 2003) (mountain biking); *Gara* v. *Woodbridge Tavern*, 224 Mich. App. 63, 66–68, 568 N.W.2d 138 (1997) (recreational sumo wrestling); *Schlobohm* v. *Spa Petite, Inc.*, 326 N.W.2d 920, 926 (Minn. 1982) (weightlifting at fitness center); *Mayer* v. *Howard*, 220 Neb. 328, 336, 370 N.W.2d 93 (1985) (motorcycle racing); *Barnes* v. *New Hampshire Karting Assn., Inc.*, 128 N.H. 102, 108, 509 A.2d 151 (1986) (go-cart racing); *Kondrad* v. *Bismarck Park District*, 655 N.W.2d 411, 414 (N.D. 2003) (bicycling); *Cain* v. *Cleveland Parachute Training Center*, 9 Ohio App. 3d 27, 28, 457 N.E.2d 1185 (1983) (skydiving); *Manning* v. *Brannon*, 956 P.2d 156, 159 (Okla. App. 1997) (skydiving); *Mann* v. *Wetter*, 100 Or. App. 184, 187–88, 785 P.2d 1064 (1990) (scuba diving); *Kotovsky* v. *Ski Liberty Operating Corp.*, 412 Pa. Super. 442, 448, 603 A.2d 663 (1992) (ski racing); *Huckaby* v. *Confederate Motor Speedway, Inc.*, 276 S.C. 629, 631, 281 S.E.2d 223 (1981) (automobile racing); *Holzer* v. *Dakota Speedway, Inc.*, 610 N.W.2d 787, 798 (S.D. 2000) (automobile racing); *Kellar* v. *Lloyd*, 180 Wis. 2d 162, 183, 509 N.W.2d 87 (App. 1993) (flagperson at automobile race); *Milligan* v. *Big Valley Corp.*, 754 P.2d 1063, 1065 (Wyo. 1988) (ski race during decathlon).[5]

This near unanimity among the courts of the various states reflects the fact that ''[m]ost, if not all, recreational activities are voluntary acts. Individuals participate in them for a variety of reasons, including to exercise, to experience a rush of adrenaline, and to engage their competitive nature. These activities, while surely increasing one's enjoyment of life, cannot be considered so essential as to override the ability of two parties to contract about the allocation of the risks involved in the provision of such activity. When deciding to engage in a recreational activity, participants have the ability to weigh their desire to participate against their willingness to sign a contract containing an exculpatory clause.'' *Hyson* v. *White Water Mountain Resorts of Connecticut, Inc.*, supra, 265 Conn. 649 (*Norcott, J.*, dissenting). It also is consistent with the view of the American Law Institute, as embodied in 2 Restatement (Second) of Contracts § 195 (1981),[6] and Restatement (Third) of Torts, Apportionment of Liability § 2 (2000).[7]

Notwithstanding the foregoing authority, the majority

adopts the Vermont Supreme Court's holding in *Dalury* v. *S-K-I, Ltd.*, supra, 164 Vt. 334, and concludes that the release agreement in the present case violates public policy. In *Dalury*, the plaintiff ''sustained serious injuries when he collided with a metal pole that formed part of the control maze for a ski lift line. Before the season started, [the plaintiff] had purchased a midweek season pass and signed a form releasing the ski area from liability.'' Id., 330. The release signed by the plaintiff in *Dalury* clearly disclaimed liability for negligence. Id. Citing the *Tunkl* factors, but fashioning an alternative test based on the totality of the circumstances, the *Dalury* court held the release invalid as against public policy. Id., 333–35. The *Dalury* court, like the majority in the present case, concluded that a recreational activity affected the public interest because of the considerable public participation. Id., 334. I find the Vermont court's opinion unpersuasive.

Although the number of tickets sold to the public is instructive in determining whether an agreement affects the public interest, it is by no means dispositive. Private, nonessential industries, while often very popular, wield no indomitable influence over the public. The average person is capable of reading a release agreement and deciding not to snowtube because of the risks that he or she is asked to assume.[8] By contrast, in those fields implicating the public interest, the patron is at a substantial bargaining disadvantage. Few people are in a position to quibble over contractual obligations when seeking, for example, insurance, medical treatment or child care. A general characteristic of fields entangled with the public interest is their indispensability; snowtubing hardly is indispensable. Under the majority's reasoning, nearly any release affects the public interest, no matter how unnecessary or inherently dangerous the underlying activity may be.[9] That position remains the distinct minority view, followed only by the courts of Vermont and Virginia.[10] See *Hiett* v. *Lake Barcroft Community Assn.*, 244 Va. 191, 194, 418 S.E.2d 894 (1992) (''[t]o hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct . . . can never be lawfully done where an enlightened system of jurisprudence prevails'').

The majority also contends that, because of the status of Connecticut negligence law, my conclusion would have broader public policy implications than the decisions of other courts upholding releases. Specifically, the majority contends that because the law of Connecticut does not recognize differing degrees of negligence, my position allows snowtube operators to insulate themselves from liability even for grossly negligent acts. This is a contrast from states that do recognize a separate claim for gross negligence. Thus, the majority avers, in this state, it would be possible to insulate oneself from liability for all acts not rising to the level

of recklessness, whereas elsewhere only simple negligence may be disclaimed.

Although the majority's theory initially appears compelling, closer examination reveals that the line it draws is a distinction without a difference because many states that prohibit prospective releases of liability for gross negligence define gross negligence in a way that mirrors Connecticut recklessness law.[11] See Mich. Comp. Laws § 691.1407 (7) (a) (2005) (governmental immunity statute defining gross negligence as ''conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results''); see also *Williams* v. *Thude*, 188 Ariz. 257, 259, 934 P.2d 1349 (1997) (''[W]anton misconduct is aggravated negligence. . . . [W]illful, wanton, and reckless conduct have commonly been grouped together as an aggravated form of negligence.'' [Citations omitted; internal quotation marks omitted.]); *Cullison* v. *Peoria*, 120 Ariz. 165, 169, 584 P.2d 1156 (1978) (''[W]anton [or gross] negligence is highly potent, and when it is present it fairly proclaims itself in no uncertain terms. It is in the air, so to speak. It is flagrant and evinces a lawless and destructive spirit.'' [Internal quotation marks omitted.]); *Ziarko* v. *Soo Line R. Co.*, 161 Ill. 2d 267, 274–75, 641 N.E.2d 402 (1994) (''[U]nlike intentionally tortious behavior, conduct characterized as willful and wanton may be proven where the acts have been less than intentional—i.e., where there has been a failure, after knowledge of impending danger, to exercise ordinary care to prevent the danger, or a failure to discover the danger through . . . carelessness when it could have been discovered by the exercise of ordinary care. . . . Our case law has sometimes used interchangeably the terms willful and wanton negligence, gross negligence, and willful and wanton conduct. . . . This court has previously observed that there is a thin line between simple negligence and willful and wanton acts . . . .'' [Citations omitted; internal quotation marks omitted.]); *Murphy* v. *Edmonds*, 325 Md. 342, 375, 601 A.2d 102 (1992) (''gross negligence . . . has been defined in motor vehicle tort cases as a wanton or reckless disregard for human life in the operation of a motor vehicle'' [internal quotation marks omitted]); *Stringer* v. *Minnesota Vikings Football Club*, 686 N.W.2d 545, 552–53 (Minn. App. 2004) (''Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty, and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others.'' [Internal quotation

marks omitted.]), quoting *State* v. *Bolsinger*, 221 Minn. 154, 159, 21 N.W.2d 480 (1946), review granted, Nos. A03-1635, A04-205, 2004 Minn. LEXIS 752 (November 23, 2004); *State* v. *Chambers*, 589 N.W.2d 466, 478–79 (Minn. 1999) (person is grossly negligent when he acts ''without even scant care but not with such reckless disregard of probable consequences as is equivalent to a willful and intentional wrong'' [internal quotation marks omitted]), quoting *State* v. *Bolsinger*, supra, 159; *Bennett* v. *Labenz*, 265 Neb. 750, 755, 659 N.W.2d 339 (2003) (''[g]ross negligence is great or excessive negligence, which indicates the absence of even slight care in the performance of a duty''); *New Light Co.* v. *Wells Fargo Alarm Services*, 247 Neb. 57, 64, 525 N.W.2d 25 (1994) (relying on New York law characterizing gross negligence as ''conduct that evinces a reckless indifference to the rights of others''); *Sommer* v. *Federal Signal Corp.*, 79 N.Y.2d 540, 554, 593 N.E.2d 1365, 583 N.Y.S.2d 957 (1992) (''Gross negligence, when invoked to pierce an agreed-upon limitation of liability in a commercial contract, must smack of intentional wrongdoing. . . . It is conduct that evinces a reckless indifference to the rights of others.'' [Citations omitted; internal quotation marks omitted.]); *Wishnatsky* v. *Bergquist*, 550 N.W.2d 394, 403 (N.D. 1996) (''[Where] [g]ross negligence is defined [by statute] as the want of slight care and diligence. . . . This court has construed gross negligence to mean no care at all, or the omission of such care which even the most inattentive and thoughtless seldom fail to make their concern, evincing a reckless temperament and lack of care, practically willful in its nature.'' [Citation omitted; internal quotation marks omitted.]); *Harsh* v. *Lorain County Speedway, Inc.*, 111 Ohio App. 3d 113, 118–19, 675 N.E.2d 885 (1996) (upholding release for negligence but not ''willful and wanton conduct'');[12] *Bogue* v. *McKibben*, 278 Or. 483, 486, 564 P.2d 1031 (1977) (''[g]ross negligence refers to negligence which is materially greater than the mere absence of reasonable care under the circumstances, and which is characterized by conscious indifference to or reckless disregard of the rights of others'' [internal quotation marks omitted]); *Albright* v. *Abington Memorial Hospital*, 548 Pa. 268, 278, 696 A.2d 1159 (1997) (Pennsylvania Supreme Court approved a trial court's characterization of gross negligence for purposes of governmental immunity statute as ''a form of negligence where the facts support substantially more than ordinary carelessness, inadvertence, laxity, or indifference. The behavior of the defendant must be flagrant, grossly deviating from the ordinary standard of care.''); *Jinks* v. *Richland County*, 355 S.C. 341, 345, 585 S.E.2d 281 (2003) (For the purposes of a governmental immunity statute, gross negligence is defined as ''the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. . . . It is the failure to exercise slight care. . . . Gross negligence has also been defined as a relative

term and means the absence of care that is necessary under the circumstances.'' [Citations omitted.]).[13]

Furthermore, at least one other court has concluded that releases similar to the one in question are valid notwithstanding the absence of a gross negligence doctrine. New Hampshire, like Connecticut, does not recognize differing degrees of negligence, yet its highest court has upheld a release of liability for negligence, stating: ''The plaintiff cites a number of cases from other jurisdictions that hold on public policy grounds that an exculpatory agreement does not release defendants from liability for gross negligence. These cases are inapposite because New Hampshire law does not distinguish causes of action based on ordinary and gross negligence. . . . The plaintiff advances no reasons for abandoning this rule and we decline to create an exception to allow him to pursue his claims of gross negligence.'' (Citation omitted.) *Barnes* v. *New Hampshire Karting Assn., Inc.*, supra, 128 N.H. 108–109; but see *Ratti* v. *Wheeling Pittsburgh Steel Corp.*, 758 A.2d 695, 705 n.3 (Pa. Super. 2000) (declining to reach issue of whether agreement that released liability for gross negligence would violate public policy where agreement in question stated only ''negligence''); *Bielski* v. *Schulze*, 16 Wis. 2d 1, 18–19, 114 N.W.2d 105 (1962) (recognizing potential problems that Wisconsin's abolition of gross negligence might raise in area of exculpatory clauses).

The great weight of these numerous and highly persuasive authorities compels my conclusion that the release at issue herein does not violate public policy as it pertains to the sport of snowtubing. Accordingly, I conclude that the trial court properly granted summary judgment in the defendants' favor and I would affirm that judgment. I, therefore, respectfully dissent.

[1] The majority also cites *Wolf* v. *Ford*, 335 Md. 525, 535, 644 A.2d 522 (1994), in support of its totality of the circumstances approach. The *Wolf* court concluded that a release executed in the context of a stockbroker-client relationship did not implicate the public interest. Id., 527–28. Such a result is incongruous with the vast majority of American law and I am aware of no other case in which a court held that a release of liability for negligence in such a sensitive context did not implicate the public interest. In my view, *Wolf* illustrates the significant problem inherent in employing an amorphous ''totality of the circumstances'' test.

[2] The *Tunkl* court construed California Civil Code § 1668, which provides: ''All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.'' (Internal quotation marks omitted.) *Tunkl* v. *Regents of the University of California*, supra, 60 Cal. 2d 95. Despite the sweeping language of the statute, California courts had construed it inconsistently, with many allowing prospective releases from liability for negligence. See id., 95–98. The *Tunkl* court, in reconciling conflicting lower court decisions, confined the effect of § 1668 on releases from liability for negligence to situations affecting the public interest, stating: ''While obviously no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party, [circumstances affecting the public interest] pose a different situation.'' Id., 101.

[3] I note that still other states have chosen to adopt variations on the *Tunkl* factors. See, e.g., *Jones* v. *Dressel*, 623 P.2d 370, 376 (Colo. 1981) (''[i]n determining whether an exculpatory agreement is valid, there are four fac-

tors which a court must consider: [1] the existence of a duty to the public; [2] the nature of the service performed; [3] whether the contract was fairly entered into; and [4] whether the intention of the parties is expressed in clear and unambiguous language''); *Rawlings* v. *Layne & Bowler Pump Co.*, 93 Idaho 496, 499–500, 465 P.2d 107 (1970) (''[o]n the basis of these authorities we hold that express agreements exempting one of the parties for negligence are to be sustained except where: [1] one party is at an obvious disadvantage in bargaining power; [2] a public duty is involved [public utility companies, common carriers]'').

[4] Public Act 05-78, § 2, which amended General Statutes (Rev. to 2005) § 29-212 effective October 1, 2005, provides: ''(a) For the purposes of this section:

''(1) 'Skier' includes any person who is using a ski area for the purpose of skiing or who is on the skiable terrain of a ski area as a spectator or otherwise, *but does not include (A) any person using a snow tube provided by a ski area operator*, and (B) any person who is a spectator while in a designated spectator area during any event;

''(2) 'Skiing' means sliding downhill or jumping on snow or ice using skis, a snowboard, snow blades, a snowbike, a sit-ski or any other device that is controllable by its edges on snow or ice or is for the purpose of utilizing any skiable terrain, *but does not include snow tubing operations provided by a ski area operator*; and

''(3) 'Ski area operator' means a person who owns or controls the operation of a ski area and such person's agents and employees.

''(b) Each skier shall assume the risk of and legal responsibility for any injury to his or her person or property caused by the hazards inherent in the sport of skiing. Such hazards include, but are not limited to: (1) Variations in the terrain of the trail or slope which is marked in accordance with subdivision (3) of section 29-211, as amended by this act, or variations in surface or subsurface snow or ice conditions, except that no skier assumes the risk of variations which are caused by the ski area operator unless such variations are caused by snow making, snow grooming or rescue operations; (2) bare spots which do not require the closing of the trail or slope; (3) conspicuously placed or, if not so placed, conspicuously marked lift towers; (4) trees or other objects not within the confines of the trail or slope; (5) loading, unloading or otherwise using a passenger tramway without prior knowledge of proper loading and unloading procedures or without reading instructions concerning loading and unloading posted at the base of such passenger tramway or without asking for such instructions; and (6) collisions with any other person by any skier while skiing, except that collisions with on-duty employees of the ski area operator who are skiing and are within the scope of their employment at the time of the collision shall not be a hazard inherent in the sport of skiing.

''(c) The provisions of this section shall not apply in any case in which it is determined that a claimant's injury was not caused by a hazard inherent in the sport of skiing.'' (Emphasis added.)

[5] See also *McAtee* v. *Newhall Land & Farming Co.*, 169 Cal. App. 3d 1031, 1034–35, 216 Cal. Rptr. 465 (1985) (motocross racing); *Hulsey* v. *Elsinore Parachute Center*, 168 Cal. App. 3d 333, 343, 214 Cal. Rptr. 194 (1985) (skydiving); *Jones* v. *Dressel*, 623 P.2d 370, 375 (Colo. 1981) (skydiving).

[6] Section 195 of 2 Restatement (Second) of Contracts provides in relevant part: ''(2) A term exempting a party from tort liability for harm caused negligently is unenforceable on grounds of public policy if

''(a) the term exempts an employer from liability to an employee for injury in the course of his employment;

''(b) the term exempts one charged with a duty of public service from liability to one to whom that duty is owed for compensation for breach of that duty, or

''(c) the other party is similarly a member of a class protected against the class to which the first party belongs. . . .'' 2 Restatement (Second), Contracts § 195, p. 65 (1981).

[7] Restatement (Third), Torts, Apportionment of Liability § 2, p. 19 (2000), provides: ''When permitted by contract law, substantive law governing the claim, and applicable rules of construction, a contract between the plaintiff and another person absolving the person from liability for future harm bars the plaintiff's recovery from that person for the harm. Unlike a plaintiff's negligence, a valid contractual limitation on liability does not provide an occasion for the factfinder to assign a percentage of responsibility to any party or other person.''

The commentary to § 2 further supports our conclusion in the present case. See id., comment (b), p. 20 (''In appropriate situations, the parties to

a transaction should be able to agree which of them should bear the risk of injury, even when the injury is caused by a party's legally culpable conduct. That policy is not altered or undermined by the adoption of comparative responsibility. Consequently, a valid contractual limitation on liability, within its terms, creates an absolute bar to a plaintiff's recovery from the other party to the contract.''); see also id., comment (e), p. 21 (''Some contracts for assumption of risk are unenforceable as a matter of public policy. Whether a contractual limitation on liability is unenforceable depends on the nature of the parties and their relationship to each other, including whether one party is in a position of dependency; the nature of the conduct or service provided by the party seeking exculpation, including whether the conduct or service is laden with 'public interest'; the extent of the exculpation; the economic setting of the transaction; whether the document is a standardized contract of adhesion; and whether the party seeking exculpation was willing to provide greater protection against tortious conduct for a reasonable, additional fee.'').

[8] The majority apparently considers snowtubing to be so important that the average consumer would be unable to pass up participation, stating: ''Thus, the plaintiff, who traveled to Powder Ridge in anticipation of snowtubing that day, was faced with the dilemma of either signing the defendants' proffered waiver of prospective liability or forgoing completely the opportunity to snowtube at Powder Ridge.'' Because snowtubing, unlike the important societal considerations that other courts have concluded implicate the public interest, is wholly nonessential, I disagree with the majority's position that the mere inconvenience of having to forgo it creates an unacceptable disparity in bargaining power.

[9] Indeed, the majority states: ''Voluntary recreational activities, such as snowtubing, skiing, basketball, soccer, football, racquetball, karate, ice skating, swimming, volleyball or yoga are pursued by the vast majority of the population and constitute an important and healthy part of everyday life.''

[10] Although New York courts formerly upheld prospective releases from liability; see *Lago* v. *Krollage*, 78 N.Y.2d 95, 100, 575 N.E.2d 107, 571 N.Y.S.2d 689 (1991); that state's legislature superseded many of those precedents with New York Gen. Oblig. Law § 5-326 (McKinney 2001), which provides: ''Every covenant, agreement or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be void as against public policy and wholly unenforceable.''

[11] Recklessness entails ''something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them. . . . Wanton misconduct is reckless misconduct. . . . It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action. . . . [W]illful, wanton, or reckless conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent. . . . It is at least clear . . . that such aggravated negligence must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simply inattention.'' (Internal quotation marks omitted.) *Frillici* v. *Westport*, 264 Conn. 266, 277–78, 823 A.2d 1172 (2003).

[12] The Ohio Supreme Court has equated willful and wanton conduct with recklessness as that term is defined in the Restatement Second of Torts, stating: ''The actor's conduct is in reckless disregard of the safety of others if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.'' (Internal quotation marks omitted.) *Thompson* v. *McNeill*, 53 Ohio St. 3d 102, 104–105, 559 N.E.2d 705 (1990), quoting 2 Restatement (Second), Torts § 500, p. 587 (1965).

[13] Other states do, however, characterize gross negligence as more serious than ordinary negligence, while not rising to the level of recklessness. See

Calvillo-Silva v. *Home Grocery*, 19 Cal. 4th 714, 968 P.2d 65, 80 Cal. Rptr. 2d 506 (1998) (characterizing willful and wanton conduct as more serious than gross negligence), overruled on other grounds, *Aguilar* v. *Atlantic Richfield Co.*, 25 Cal. 4th 826, 854, 24 P.3d 493, 107 Cal. Rptr. 2d 841 (2001); *Travelers Indemnity Co.* v. *PCR, Inc.*, 889 So. 2d 779, 793 n.17 (Fla. 2004) (defining " 'culpable negligence' as 'reckless indifference' or 'grossly careless disregard' of human life" and gross negligence as "an act or omission that a reasonable, prudent person would know is likely to result in injury to another"); *Altman* v. *Aronson*, 231 Mass. 588, 592, 121 N.E. 505 (1919) (defining gross negligence as less serious than recklessness); *Parret* v. *Unicco Service Co.*, 2005 OK 54, *11–13, 2005 Okla. LEXIS 54, P.3d (June 28, 2005) (same); *Weaver* v. *Mitchell*, 715 P.2d 1361, 1369–70 (Wyo. 1986) (punitive damages cannot be awarded for gross negligence, which is less serious than reckless or wanton conduct). Despite these decisions, I am not persuaded that our conclusion provides inadequate protection to snowtube patrons.