Water Sports and Recreational Liability Issues (Come on in, the Water's Fine!)[†]

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I. Introduction

Taking a vacation is a quintessential American activity. Unfortunately, when vacationing tourists get hurt or injured, they engage in another quintessential American activity—litigation. Lawsuits over water sports and recreational liability issues have proliferated over the past decades. Specifically, many people participate in ocean and water activities. They are also suing the persons involved in providing such activities for the injuries suffered. Many people also engage in recreational activities such as horseback riding, golfing, hiking, and attending sports events. These can also lead to injuries and lawsuits. These types of lawsuits are increasingly common in Hawaii and across the nation. Hawaii's law relating to ocean sports and recreational liability tends to reflect the general law of other states when dealing with similar situations. It may foreshadow new developments in the law applicable to other jurisdictions. This article will discuss some of the different types of cases that arise, various legal theories propounded by plaintiffs, common defenses asserted by defendants, statutory protections afforded by legislatures, special considerations for different types of defendants, and strategies in defending such cases.

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As an example, lawsuits stemming from injuries suffered due to ocean waves are common in Hawaii. The majority involve catastrophic injuries that stem from an injured person's attempts to catch ocean waves while bodysurfing or boogie boarding. In order to catch a wave, bodysurfers purposefully position themselves in front of waves in order to catch the waves and are propelled forward or down by the force of the waves. Bodysurfers risk injury each time as they surrender complete control over their bodies, since there is no way to predict the waves' movements. When bodysurfers are flipped by waves, they are especially vulnerable to serious injury or death because their bodies may land on compacted sand along the ocean floor. Injuries and lawsuits also arise when persons are in the ocean and are thrown about by breaking waves. Other types of ocean liability cases involve persons injured due to diving from seawalls into shallow or rocky areas; swimmers who are caught in riptides, undertows, or other ocean currents; persons injured while SCUBA diving; persons injured while parasailing over the ocean; persons injured by boats or other marine vessels; and persons injured while waterskiing.

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Plaintiffs in such cases often claim that they were unaware of the dangers of the ocean and the harsh power of breaking waves, and that they should have been warned or protected by the hotels and landowners near to where the accident occurred. Many plaintiffs in such cases claim that they were lulled into a false sense of security as to the dangers of the ocean by advertising materials showing calm, gentle waves. In Hawaii, due to the configuration of the beaches and the power of the waves, even small waves can break in a powerful manner directly on the shore. Plaintiffs usually claim that such waves constitute a hidden or latent danger of which they should have been warned.

Other types of recreational liability cases occur when persons are injured in a variety of leisure activities such as horseback riding, playing golf, riding all terrain vehicles (ATVs), hiking in the mountains or on trails, and riding bicycles. As in the ocean liability cases, the plaintiffs often seek to paint a picture that they were unsuspecting innocents who were not informed of any latent or hidden dangers, and were given insufficient instruction or warnings as to potential problems. Plaintiffs in such cases generally claim that they relied upon a hotel or activity vendor, who had superior knowledge and control, so as to provide proper safety precautions.

In general, a successful defense of these cases involves many different approaches and factors. In many cases, a defendant starts off with the adverse presumption that it has superior knowledge and control of the situation and of potential hazards. Consequently, the defense will want to show that the defendant proactively attempted to address the risks involved, formulated some type of response or plan to foster safety, and provided warnings or instructions to the plaintiffs. Sometimes, the risks and potential dangers of an activity are either inherent or so open and obvious that no warnings are required. Oftentimes, plaintiffs can be shown to have substantial knowledge and appreciation of the risks and dangers, but to have failed to properly protect themselves. The defense will want to investigate and

assert the existence of any waivers or releases, and attempt to show that they were knowingly and intentionally given by the plaintiffs. The defense will also want to conduct research to see if there are specific protections or immunities provided by statute that may be asserted.

II.
Typical Legal Liability Theories

The most common legal liability theories asserted by plaintiffs in these types of actions include negligence, duty to warn, and attractive nuisance.

A. *Negligence*

Negligence is conduct which falls below the standard of care "established by law for the protection of others against unreasonable risk of harm."[1] The elements of a negligence action consist of the following:

- A duty, or obligation, recognized by the law, requiring the defendant to conform to certain standards of care to protect others against unreasonable risk.
- A failure to conform to the standards required.
- A reasonable connection between the conduct of the defendant and the resulting injury or loss.
- Actual loss or damage to the plaintiff.[2]

"[A] negligence action lies only where there is a duty owed by the defendant to the plaintiff."[3] "Whether such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other is a question of law to be determined by reference to the body of statutes, rules, principles, and precedents, which make up the law."[4] The Hawaii Supreme Court has stated that a defendant owes a duty of care only to those "who are foreseeably endangered by the conduct and only with respect to

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[1] Restatement (Second) of Torts § 282 (1965).

[2] Bruce B. Hronek & John O. Spengler, Legal Liability in Recreation and Sports 57-58 (2002) (citing William L. Prosser, Law of Torts 143-44 (4th Ed. 1971).

[3] Bidar v. Amfac, Inc., 669 P.2d 154, 158 (Haw. 1983) (citing Hulsman v. Hemmeter Dev. Corp., 647 P.2d 713, 719 (Haw. 1982)).

[4] Hayes v. Nagata, 730 P.2d 914, 916 (Haw. 1986) (internal quotations omitted).

those risks or hazards whose likelihood made the conduct unreasonably dangerous."[5] "Without a reasonable and proper limitation of the scope of duty of care, [defendants] would be confronted with an unmanageable, unbearable and totally unpredictable liability."[6] The elements of a negligence action are almost identical in other states. Whether a duty exists is a question of law for the court, while the issues of breach and proximate cause are decided by the jury as factual matters.[7]

B. *Duty to Warn*

The primary plaintiff's legal liability theory which is presented in water sports and recreational liability cases, involves the defendant's duty to warn. Whether the defendant is a landowner, hotel, activity vendor, or sports equipment manufacturer, the argument is always advanced that the defendant failed to inform the injured person of the risk and danger involved. The plaintiff's approach is usually that the defendant had superior knowledge and control of the situation, but failed to take proper safety precautions and failed to let the plaintiff know of the hidden or latent dangers so that the plaintiff could be aware of the risks.

In 1969, the Hawaii Supreme Court abolished the common law distinction between the duty owed by landowners to licensees from that owed to invitees on the premises. Although the courts of some other states have preserved this distinction, the Hawaii court believed that the common law distinctions between classes of persons had no logical relationship to the exercise of reasonable care for the safety of others. It therefore held that a landowner has a duty "to use reasonable care for the safety of all persons reasonably anticipated to be upon the premises, regardless of the legal status of the individual."[8] The issue, of course, is generally whether the defendant used reasonable care to protect the plaintiffs.

With regard to ocean liability cases, in 1989 the Hawaii Supreme Court set forth a rule further defining the scope of landowner liability. Essentially, the court held that if a condition exists that creates an unreasonable risk of harm, and the possessor of the land knows or should have known of the unreasonable risk, then the possessor owes a duty to take reasonable steps to eliminate the unreasonable risk, or adequately warn persons against it.[9] For ocean liability cases, Hawaii courts will consider whether the landowner impliedly invited

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5 *Hulsman*, 647 P.2d at 720.

6 Janssen v. Am. Hawaii Cruises, Inc., 731 P.2d 163, 166 (Haw. 1987).

7 Bier v. Leanna Lakeside Prop. Ass'n, 711 N.E.2d 773, 778 (Ill. App. Ct. 1999).

8 Patricia Mathias NaPier & Jill Murakami Baldemor, *Landowner Liability Under Hawaii Law*, HAW. BAR J., at 4-12 (Apr. 2004) (citing Pickard v. City & County of Honolulu, 452 P.2d 445 (Haw. 1969)).

9 Corbett v. Ass'n of Apartment Owners of Wailua Bayview Apartments, 772 P.2d 693 (Haw. 1989).

persons to the beach or ocean and whether the ocean conditions were extremely dangerous and not readily apparent to persons of ordinary intelligence.[10]

In *Kaczmarczyk v. City & County of Honolulu*,[11] the plaintiff entered the ocean fronting the City's beach park, was caught in the current while swimming, and drowned. The court noted the duty of the owner and occupier of land to take reasonable care for the safety of all persons known or reasonably anticipated to be upon its premises, and it found a very narrow expansion of that duty stating that: "[w]here the premises front upon the ocean, this responsibility extends to those swimming in the waters along the property's beach frontage."[12] Additionally, the court found that the city has a duty to warn users of a beach park "of extremely dangerous conditions in the ocean along its beach frontage which were not known or obvious to persons of ordinary intelligence, and which were known or in the exercise of reasonable care ought to have been known to the city."[13]

One type of landowner that is often a defendant in these cases is a hotel. Hotels as innkeepers owe their guests a duty to warn of dangerous conditions in the ocean. Hawaii law imposes a higher duty of care upon parties having "special relations" with others.[14] According to Hawaii law, a special relationship is created between a hotel and its guests or invitees.[15] "When the relation is a special one of innkeeper and guest, the former is under a duty to take reasonable action to protect the latter against unreasonable risk of physical harm."[16] The Hawaii courts have considered two main factors with regard to ocean liability cases: 1) whether the landowner invited or induced persons to use the beach or ocean, and 2) whether the dangerous conditions were apparent to persons of ordinary intelligence.[17]

In *Tarshis v. Lahaina Investment Corp.*,[18] the plaintiff, a registered guest at the defendant's hotel and was injured when thrown by a huge wave in the ocean fronting the hotel. The Ninth Circuit Court of Appeals reversed the trial court's order granting summary judgment in favor of the defendant. The basis was that a genuine issue of material fact existed as to whether the dangers of the ocean on the day in question should have been apparent to the plaintiff. However, the court also acknowledged that a hotel owes a duty to its guests to warn of dangerous conditions that are not known to the guest or obvious to an

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[10] Birmingham v. Fodor's Travel Publ'ns, Inc., 833 P.2d 70 (Haw. 1992).

[11] 656 P.2d 89 (Haw. 1982).

[12] *Id*. at 92.

[13] *Id*.

[14] Restatement (Second) of Torts § 314A (1965).

[15] Maguire v. Hilton Hotels Corp., 899 P.2d 393 (Haw. 1995).

[16] Knodle v. Waikiki Gateway Hotel, Inc., 742 P.2d 377, 384 (Haw. 1987).

[17] *See* Birmingham v. Fodor's Travel Publ'ns, Inc., 833 P.2d 70 (Haw. 1992).

[18] Tarshis v. Lahaina Investment Corp., 480 F.2d 1019 (9th Cir. 1973).

ordinarily intelligent person and that either are known or in the exercise of reasonable care should have been known by the hotel.

Some cases have also extended this duty to warn to encompass conditions on property beyond which the hotel owns, possesses, or controls. This duty has been extended to such places in or about the premises as the hotel's invitees may be reasonably expected to go in the course of the visit.[19] The question for the defense, of course, is where does the duty end?

In *Geremia v. Hawaii*,[20] the Hawaii Supreme Court addressed the duty to warn of dangerous conditions of both an occupier of land and a non-occupier. The case arose from the drowning of a boy at the Waipahee Slide on the island of Kauai, which "is located in mountainous terrain, on land which is privately owned, and is reached by a trail of approximately one-third mile originating at a parking area beside a canefield road."[21] The plaintiffs brought suit against the State since the State had improved a parking area and trail and had erected a direction and warning sign. Although the State did not own the slide, the State was still held liable. The court reasoned:

> Circumstances may exist in which a non-occupier must take cognizance of dangerous conditions existing on the land of another in discharging a duty of care which he owes to a third person. The existence of such a dangerous condition, although not under the control of the actor, may be the fact which renders negligent an otherwise blameless act.[22]

It held that a party will be liable in tort when he or she voluntarily takes action to induce another to engage in an activity and therefore creates a false appearance of safety upon which the other relies to his detriment.

In *Littleton v. Hawaii*,[23] the Hawaii Supreme Court extended the duty of a landowner to warn of hazards, existing elsewhere than on its premises, about which it knew or ought to have known. There the plaintiff entered the beach fronting a Honolulu park by going through the park, and was injured by a telephone pole in the water. The Hawaii Supreme Court affirmed the trial court's conclusion of law that the telephone pole in question "had its most

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19 *See* Littleton v. Hawaii, 656 P.2d 1336 (Haw. 1982).

20 573 P.2d 107 (Haw. 1977).

21 *Id*. at 109.

22 *Id*. at 111.

23 656 P.2d 1336 (Haw. 1982).

recent origin in the abutting waters of the State," and therefore, the State's negligence was at least a proximate cause of the plaintiff's injuries.[24] Further, the court stated that "it would be unreasonable for the City to expect that those to whom it invited to use its park and beach facilities would confine their activities strictly within the beach and waters along and adjacent to the park's beach frontage."[25] As the owner of the beach park, the City had a duty to exercise reasonable care for the plaintiff's safety and to warn her of any dangerous conditions in the ocean that were not known to her and which reasonably should have been known to the City.

On the other hand, in some cases the duty to warn has been found to have been met. In *Rygg v. County of Maui*,[26] a wrongful death action was brought against the County for breach of its duty to warn of the dangerous shorebreak. At the time of the accident, Mr. Rygg was in chest deep water and attempting to body surf or swim to shore. A relatively small wave broke over him that caused him to go headfirst into the sandy bottom, rendering him a quadriplegic. The case ultimately turned on whether the County had met its duty to provide a warning, when it did not post flags or portable signs to warn of the extremely dangerous shorebreak and strong currents at the County park. The court found that the shorebreak warning sign and pictogram that was displayed was within the standard of care, and that the County met its duty to warn the public of the extremely dangerous shorebreak conditions that existed at the time. The County's alleged failure to post portable warning signs did not breach its duty when the waves that day were one to one and one-half feet high, red flags were posted, permanent signs were on display, and the injured swimmer never knew of the county's use of portable signs. Therefore, the County was not liable for Mr. Rygg's injuries.

In Illinois, plaintiffs sued the owner of a dam near where minors drowned, alleging that the owner was negligent in failing to place or maintain warning signs regarding dangerous man-made underwater currents.[27] The court held that the dam owner owed the minors a duty to warn, since the underwater currents were not apparent from the surface, were man-made by the owner, and the owner knew of six previous drownings in the area. "Under Illinois law, persons who own, occupy, or control and maintain land are not ordinarily required to foresee and protect against injuries from potentially dangerous conditions that are open and obvious."[28] Whether a body of water is natural or artificial, it is still "deemed

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[24] *Id*. at 1342.

[25] *Id*. at 1345.

[26] 122 F. Supp. 2d 1140, 1141-56 (D. Haw. 2000).

[27] Ward v. Mid-American Energy Co., 729 N.E.2d 861, 863-64 (Ill. App. Ct. 2000).

[28] *Id*. at 863.

to present an open and obvious danger."[29] However, the court reasoned that although certain dangers of the water were obvious, such as strong currents and submerged obstacles, the increased risks caused by the owner including the man-made currents were hidden beneath the surface. Therefore, the defendant owed a duty to warn the plaintiffs' decedents of the dangerous conditions.

C. *Travel Agents and Activity Ticket Vendors*

When accidents occur during vacation activities, in addition to the usual defendants such as landowners, hotels, government agencies, and activity providers, plaintiffs' attorneys have also attempted to enlarge the roster of potential defendants by bringing claims against travel agents, commentators, and activity ticket vendors. For example, a plaintiff would normally sue the helicopter company (activity provider) involved in the crash of a sight-seeing helicopter flight, but might also sue the travel agent or activity ticket vendor who merely made the arrangements for the flight.

In Hawaii, the courts have not had the opportunity to address the issue of whether travel agents and similarly situated entities are liable for the negligence of third parties. However, other jurisdictions that have squarely addressed the issue "have generally declined to impose liability on travel agents and tour operators for injuries sustained by clients aboard vessels, buses, and other modes of transportation, or at hotels or other destinations."[30] These courts have found that there is no special relationship that would give rise to a duty on the part of the travel agent to investigate the safety of third parties over which it had no knowledge or control. Cases addressing this issue have focused upon various types of defendants including, but not limited to, travel agents, ticket agents, tour operators, booking agents, and vacation reservation and referral services. These defendants are similarly situated in that their function is limited to making ticket reservations and organizing tours through third-party vendors.[31] Generally, where "the travel agent's actions are limited to making reservations or packaging tours, the companies providing the actual services are considered to be independent contractors, precluding liability against the travel agent for any of the contractor's tortious activity."[32] In situations in which a defendant completely lacks control over the allegedly negligent conduct of a third-party that caused a plaintiff's injuries, liability should not be imposed.

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[29] *Id*.

[30] Gabrielle v. Allegro Resorts Hotels, 210 F. Supp. 2d 62, 69 (D. R.I. 2002).

[31] *See, e.g.*, Lavine v. General Mills, Inc., 519 F. Supp. 332 (N.D. Ga. 1981) (holding that a travel agent does not have a duty to investigate the safety of third parties because the sole function of a travel agent is "to sell and arrange travel tours for those who might wish to purchase them.").

[32] Russell v. Celebrity Cruises, Inc., 2000 WL 1013954 at *1 (S.D.N.Y. July 24, 2000).

The Hawaii Supreme Court has held that a publisher of a travel guide did not have a duty to warn of the dangerous condition of the beach which it describes. In *Birmingham v. Fodor's Travel Publications, Inc.*,[33] an injured swimmer and his wife brought an action against the publisher of a travel guide. The publisher did not guaranty, warrant, or endorse the locations and subjects listed in the guide. The court held that, "a publisher of a work of general circulation, that neither authors nor expressly guarantees the contents of its publication, has no duty to warn the reading public of the accuracy of the contents of its publication."[34] It found that as a matter of law, Fodor's did not owe a duty to warn the plaintiffs of the accuracy of the contents of the guide.

D. *Attractive Nuisance*

Another common legal liability theory for cases involving children is the doctrine of attractive nuisance. A possessor of land may be liable for injuries to children under this doctrine if the child's presence should have been reasonably anticipated or foreseeable. According to the Restatement (Second) of Torts, section 339:

> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
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> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
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> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
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> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
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> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.[35]

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[33] 833 P.2d 70 (Haw. 1992).

[34] *Id.* at 77.

[35] Restatement (Second) of Torts § 339 (1965).

This doctrine has generally applied to artificial or manmade conditions rather than natural conditions and depends upon whether the owner knew of the condition, could have taken precautions against it, and reasonably anticipated that children could be injured from it. The attractive nuisance doctrine generally does not apply to water, unless there are unusual dangers, hidden perils, or traps that a child would be unlikely to appreciate.[36] Therefore, a property owner does not have a legal duty to "erect barriers or other safeguards to protect children who are not invitees from water hazards."[37]

Some courts have determined that children of a certain age are held to know that bodies of water are dangerous. In *Townes v. Hawaii Properties, Inc.*,[38] an action was brought to recover for the wrongful death of an eight-year-old girl who accidentally drowned in an apartment building swimming pool. The defendants in this case owned the apartment complex with the pool. The Eighth Circuit Court of Appeals held that the child's own negligence was the proximate cause of the death and that the child's negligence exceeded that of the pool owner who did not have the required safety equipment. The court reasoned that children who are eight-years old are held to be responsible for knowing that bodies of water are dangerous and that the doctrine of attractive nuisance is inapplicable to artificial or natural bodies of water unless there are unusual elements of danger that exist such as a trap or hidden hazzard that an immature mind would not appreciate.

III.
TYPICAL DEFENSES

Defendants usually will assert a variety of legal defenses such as contributory negligence, open and obvious condition, primary assumption of the risk, and waiver and release.

A. *Contributory Negligence*

At common law, any contributory negligence of a plaintiff was often held to be a complete bar to recovery. Because of the perceived harshness of this rule, many courts and legislatures have established the framework of comparative negligence. With comparative negligence or fault, the pro rata share of negligence of each party is determined by the jury. Where such a system is utilized, the jurisdictions vary in their approach as to the amount of comparative negligence or fault of a plaintiff that may bar a claim. In some jurisdictions, a plaintiff will be barred from recovery only if his or her percentage of fault is greater than that of the person or persons sued.[39] In others there will be a bar if the plaintiff's percentage

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[36] 62 AM. JUR.2d, *Premises Liability* § 369 (2005).

[37] *Id.*

[38] 708 F.2d 333, 334-35 (8th Cir. 1983).

[39] HRONEK & SPENGLER, *supra* note 2, at 65.

of fault equals those sued. If the plaintiff is not barred, his or her damages will be reduced, however, by the percentage of fault attributed to him or her. The term "pure comparative negligence" usually refers to a scheme whereby a plaintiff may recover damages, reduced by his or her percentage, unless the plaintiff is found totally at fault for the situation that produced harm.

Hawaii follows the comparative negligence rule that if the plaintiff is found to have a greater percentage of negligence than the person or persons sued, then the claim is barred. Other states have followed different schemes. For example, California and New York follow a pure comparative negligence scheme, while Illinois follows a modified comparative negligence scheme.

B. *No Duty to Warn*

Defendants usually assert that no duty to warn existed because the danger complained of was open and obvious. Therefore, a landowner is not liable for all injuries sustained on its premises, since it does not owe a duty to provide protection from, or warn against, conditions that would have been obvious to a reasonable person.[40] Whether a condition is open and obvious is a question of law to be determined by the court.[41]

In *Jones v. Halekulani Hotel, Inc.*,[42] a teenage boy dove off a seawall into shallow water and fractured his neck. The plaintiff brought an action against the hotel whose land bordered the beach where the seawall was located, claiming failure to warn. The court found that when the landowner did not create the dangerous condition, alter it, or put it to special use, it had no duty to the plaintiff and could not be held liable for plaintiff's injuries.

In *Fredrich v. Department of Transportation,*[43] a plaintiff was permanently paralyzed when he slipped on a water puddle on a pier, fell over the edge of the pier and struck his head on the ocean floor. The court held that the "obviousness of a risk substitutes for an express warning and satisfies this obligation."[44] The State was not required to eliminate a known or obvious hazard that plaintiff would reasonably be expected to avoid. The court reasoned,

> People can hurt themselves on almost any condition of the premises. . . . But it takes more than this to make a condition *unreasonably* dangerous. If people who are likely to encounter a condition may be expected to take perfectly good care of themselves without further precautions, then the condition is not unreasonably

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[40] *See* Richardson v. Sport Shinko, 880 P.2d 169 (Haw. 1994).

[41] Tabieros v. Clark Equip. Co., 944 P.2d 1279 (Haw. 1997).

[42] 557 F.2d 1308 (9th Cir. 1977).

[43] 586 P.2d 1037 (Haw. 1979), superceded by statute, Act 190, sec. 2(a), 1996 Haw. Sess. Laws 435, *as recognized in* Bhakta v. County of Maui, 124 P.3d 943 (Haw. 2005).

[44] *Id*. at 1040.

> dangerous because the likelihood of harm is slight. . . . The knowledge of the condition removes the sting of unreasonableness from any danger that lies in it, and obviousness may be relied on to supply knowledge. Hence the obvious character of the condition is incompatible with negligence in maintaining it. If plaintiff happens to be hurt by the condition, he is barred from recovery by lack of defendant's negligence towards him, no matter how careful plaintiff himself may have been.[45]

Similarly, in *Tabieros v. Clark Equipment Co.*,[46] the court ruled that the defendant was not negligent for failing to warn plaintiff of an open and obvious danger since the plaintiff encountering the conditions was "in just as good a position as the [defendant] to gauge the dangers associated with the [conditions] and nothing is gained" by requiring the defendant to warn the plaintiff.[47] The court reasoned that the defendant could not be liable for not warning plaintiff because the failure to warn could not be a proximate cause of the plaintiff's injury when the plaintiff was already aware of the risk of injury.

In a California case,[48] family members of individuals who were killed when a motorboat struck their canoe brought an action against the State, County and City. The court found that the State, County, and City did not have a duty to warn canoers, and that the risks of the conditions and activities at the site of the collision were "so obvious or inherent that they had to have been reasonably assumed," regardless of the canoers' subjective awareness of the risk.[49]

In another case,[50] a minor who injured her knee while jumping on a trampoline brought an action against the trampoline's owner and manufacturer on theories of negligence and product liability. Applying Illinois law, the court held that a reasonable 14-year-old would appreciate the open and obvious danger of jumping on a trampoline. It therefore found that there was no duty on the part of either the owner or manufacturer. The court reasoned that while jumping on a trampoline, "falling from a height, falling while attempting to land a 'trick,' or even falling off, are open and obvious" to either teenagers or adults.[51]

In New York, the plaintiff brought an action against the host of the party and owner of a house for injuries he sustained while diving into a swimming pool from the second-floor balcony of the house.[52] The plaintiff admitted that entering the pool from the balcony was

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[45] *Id*.

[46] *Tabieros*, 944 P.2d at 1279.

[47] *Id*. at 1306.

[48] Wood v. County of San Joaquin, 4 Cal. Rptr. 3d 340 (Ct. App. 2003).

[49] *Id*. at 349.

[50] Ford v. Nairn, 717 N.E.2d 525 (Ill. App. Ct. 1999).

[51] *Id*. at 529.

[52] Testaverde v. Lyman, 793 N.Y.S.2d 182, 183 (Sup. Ct. App. Div. 2005).

dangerous and that diving head-first would present a risk of serious injury even if the defendants had taken precautions. The court found that their alleged failures to post water-depth markers and "no diving" signs around the pool, to provide proper illumination for the pool, and to warn guests of danger of entering the pool from the second-floor balcony were not the proximate cause of plaintiff's injury, since plaintiff was well aware of the dive.

In Illinois, a swimmer brought an action against a lakeside property association for injuries he sustained when he fell from a rope swing into a lake and was rendered a quadriplegic.[53] The court held that the association did not owe the swimmer a duty to protect him from the open and obvious danger of the rope swing. It reasoned that even though placing a duty on the association to remove the rope swing would not have been a great financial burden, the swimmer at least had knowledge of the condition equal to that of the association and was able to appreciate the risk involved with the height, water, and the rope swing, yet nevertheless decided to undertake it.

C. *Primary Assumption of the Risk*

Under the common law, a plaintiff who voluntarily assumed a risk of harm arising from another's conduct could not recover if harm resulted. As with the defense of contributory negligence, in some jurisdictions this harsh rule was ameliorated and merged into the doctrine of comparative negligence, so that a plaintiff's assumption of risk was simply a factor to be applied in determining the plaintiff's comparative fault. However, in certain situations and activities where there are inherent risks that are voluntarily assumed by a plaintiff, the doctrine of primary implied assumption of the risk remains as a potential bar to a plaintiff's recovery. The Hawaii courts, as well as other courts, have recognized primary assumption of the risk as a bar to recovery for injuries sustained while engaging in certain recreational activities.[54]

Primary implied assumption of the risk considers two factors: 1) whether the defendant owed a legal duty to protect the plaintiff from a particular risk of harm that caused injury, and 2) whether the plaintiff had both knowledge and full appreciation of the danger involved and voluntarily and deliberately exposed himself to the risk.[55] "Such intentional exposure to a known risk negates a defendant's liability."[56]

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[53] Bier v. Leanna Lakeside Prop. Ass'n, 711 N.E.2d 773 (Ill. App Ct. 1999).

[54] *See* Larsen v. Pacesetter Sys., Inc., 837 P.2d 1273 (Haw. 1992); *see also* Tacrendi v. Dive Makai Charters, 823 F. Supp. 778, 788 (D. Haw. 1993) *overruled on other grounds as recognized by* McClenahan v. Paradise Cruises, Ltd., 888 F. Supp. 120 (D. Haw. 1995); Foronda v. Hawaii Int'l Boxing Club, 25 P.3d 826, 836 (Haw. Ct. App. 2001).

[55] *Tacrendi*, 823 F. Supp. at 788.

[56] *Id*.

The Hawaii Supreme Court held that the implied assumption of risk doctrine bars claims for injuries sustained by persons participating in sports or recreational activities. Participants cannot recover damages as a matter of law, because they assume the risk of injury caused by known or reasonably foreseeable or inherent dangers.[57]

> Implied assumption of risk has been used in the context of negligence cases to describe two distinct theories under which a defendant may avoid liability. . . **Used in its primary sense, assumption of risk describes the act of a plaintiff, who has entered voluntarily and reasonably into some relation with a defendant, which plaintiff knows to involve the risk. It is an alternate expression of the proposition that a defendant owes no duty to a plaintiff**. Primary implied assumption of risk may be illustrated by the case in which a plaintiff has been injured as a natural incident of engaging in a contact sport. It may also be seen in the act of a spectator entering a baseball park, thereby consenting that the players proceed without taking precautions to protect her from being hit by the ball.[58]

In *Tancredi v. Dive Makai Charters*,[59] the parents of a deceased scuba diver brought a wrongful death and survivor's action against the dive charter company, its owners, vessel captain, and dive master. The defendants argued that implied assumption of the risk operates as a complete bar to the plaintiff's recovery. However, the court found that while the "plaintiff was or should have been aware of the inherent dangers of scuba diving, he did not have the knowledge and experience to appreciate the inherent dangers of the type of dive that caused his death."[60] In short, his decision to participate in the deep dive was not a fully informed decision and could not be considered totally voluntary. Therefore, the court held that under the circumstances of the case, primary implied assumption of the risk was not a defense. At the time of the *Tancredi* case, the Hawaii Supreme Court had not yet addressed either secondary or primary implied assumption of risk in the context of recreational sports. It considered the position taken by the California courts demonstrating that the defense of primary implied assumption of the risk survived the adoption of California's comparative negligence statute. The *Tancredi* court believed that the Hawaii Supreme Court would allow the defense in an appropriate sports-related case.

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[57] *Foronda*, 25 P.3d 826.

[58] *Larsen*, 837 P.2d at 1290-91 (citations omitted) (emphasis added).

[59] *Tacrendi*, 823 F. Supp.at 778.

[60] *Id*. at 790.

Although not a water liability case, the Hawaii Supreme Court in *Foronda v. Hawaii International Boxing Club*,[61] affirmed the dismissal of a wrongful death lawsuit stemming from fatal injuries sustained by a boxer when he fell through the ropes of a boxing ring. The primary implied assumption of risk doctrine barred the plaintiffs' claims because the risk of falling through the ropes was an inherent risk related to boxing. Damages were not recoverable, since the plaintiff had previously given his consent to relieve the defendant of an obligation of conduct toward him. Essentially, the plaintiff took his chances of injury from a known risk arising from what the defendant would do or leave undone. As a result, the defendant was relieved of a legal duty to the plaintiff, and therefore, being under no duty, could not be charged with negligence.

A plaintiff's subjective knowledge of risks is not dispositive with regard to injuries barred by this doctrine. Whether a particular plaintiff knew or did not know about the risks of the sport cannot be controlling. Inherent risk implies indwelling risk and is independent of the participant's subjective knowledge or perception of it. Rather, the inquiry is an objective one. The focus "is not on the particular participant's actual knowledge, but on the risks inherent in participation by one with the skill and experience of the plaintiff."[62]

In *American Golf Corp. v. Superior Court*,[63] the plaintiff was injured when the ball hit by his companion ricocheted off the yard marker and struck the plaintiff in the eye. The court ruled in favor of the golf club reasoning that the injured golfer's personal injury action against the golf course for negligent design and placement of the yard marker was barred by the primary assumption of the risk doctrine. It held that golf is an active sport, that errant shots are an inherent risk of golf, that yardage markers are an integral part of the sport, and that the golf course as recreation provider did not increase the risk of injury by its design and placement of the yardage marker.

Similar reasoning has been followed in other state courts. In Illinois, an amateur hockey player hit in the eye with a puck during a warm-up game brought a suit against a co-participant whose shot at an open net struck him.[64] The court held that the amateur hockey player knowingly and voluntarily assumed the risks inherent in playing the game since he had played in organized leagues for about ten years prior to the accident. The player was aware that there was a risk of being hit by the puck and accepted the dangers inherent in the game of hockey or due to his co-participant's negligence.

Under New York law, a defendant may be relieved of liability for injuries to a plaintiff who participates in a sporting event or recreational activity when the plaintiff is aware of the risks inherent in the activity, has an appreciation of the nature of such risks, and volun-

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[61] *Foronda*, 25 P.3d 826.

[62] *Id.* at 842-43.

[63] 93 Cal. Rptr. 2d 683 (Ct. App. 2000).

[64] Savino v. Robertson, 652 N.E.2d 1240 (Ill. App. Ct. 1995).

tarily assumes those risks. The assumption of the risk doctrine was applied to a case involving a fifty-four-year-old plaintiff who sustained personal injuries after climbing onto a high trampoline located in defendant's backyard and fall onto the grass while attempting to stand. The court found that the plaintiff had assumed the risk of using the trampoline.[65]

Utilizing the doctrine of assumption of the risk, a New York court in *Salas v. Town of Lake Luzerne*,[66] determined that a swimmer who drowned on town property while bodysurfing assumed the risk of his own injuries, which relieved the town of liability for his injuries. The *Salas* court cited the Court of Appeals of New York which reasoned that:

> by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation risks which various participants are legally deemed to have accepted personal responsibility for because they commonly inhere in the nature of those activities.[67]

The court found that the hazardous water conditions on the property were readily observable and that the decedent had consented to the "risks which are inherent in and arise out of the nature of" his activity.[68]

With lawsuits dealing with waterskiing incidents, the effect of the alleged fault of the skier is often critical to the outcome of the case. The California Supreme Court has held that a water-skier assumes the risk of negligent conduct by other participants in the activity. In *Ford v. Gouin*,[69] an injured water skier brought a personal injury action against a ski boat operator after the water skier was struck in the back of his head by a tree limb extending over the channel in which he was skiing. The court held that a co-participant in an active sport does not bear liability for an injury resulting from conduct in the course of a sport that is merely careless or negligent. Generally, a co-participant has a duty to avoid intentionally injuring another participant or engaging in conduct so reckless as to bring it outside the range of ordinary activity involved in a sport. The court stated that:

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[65] Koubek v. Denis, 799 N.Y.S.2d 746 (App. Div. 2005).

[66] 745 N.Y.S.2d 108 (App. Div. 2002).

[67] Id. at 110-11.

[68] *Id.* at 111.

[69] 834 P.2d 724 (Cal. 1992).

> [T]he assumption of the risk doctrine operates as a complete bar to a plaintiff's action only in instances in which, in view of the nature of the activity at issue and the parties' relationship to that activity, the defendant's conduct did not breach a legal duty of care owed to the plaintiff.[70]

It further reasoned that the water skier could not recover against the ski boat operator for injuries incurred when he struck the tree since the ski boat operator was at most careless in steering the boat.

D. *Waiver and Release*

It is a common practice to require that participants of water sports and other recreational activities agree in writing to assume all risks and release the organizer or vendor from liability. A release is a voluntary relinquishment of a claim, right, or privilege by a person to someone against whom it might be enforced.[71] Such waivers are intended to reduce or release recreation and sport provider's liability exposure. In order to be effective, such waivers or releases must be made knowingly and voluntarily. The effectiveness of any particular waiver or release document will generally depend upon a number of factors, including the clarity of the written waiver, the size of the type face and font in providing notice of the waiver to the participant, the amount of time given to the participant to read and review the waiver, whether the terms of the waiver were verbally explained to the participant, and the like. Even if all of these factors weigh in favor of the waiver, some courts have held that recreational liability waivers are against public policy. In Hawaii, and in other states, the efficacy of waiver documents may also be determined by statutory provisions.

In Hawaii, a purported waiver document for water sports activities may be affected by Hawaii Revised Statutes section 663-1.54, which provides:

> (a) Any person who owns or operates a business providing recreational activities to the public, such as, without limitation, scuba or skin diving, sky diving, bicycle tours, and mountain climbing, shall exercise reasonable care to ensure the safety of patrons and the public, and shall be liable for damages resulting from negligent acts or omissions of the person which cause injury. (b) Notwithstanding subsection (a), owners and operators of recreational activities shall not be liable for damages for injuries to a patron resulting from inherent risks associated with the recreational activity if the patron participating in the recreational activity voluntarily signs a written release waiving the owner or operator's liability for damages for

[70] *Id*. at 726.

[71] 66 Am. Jur. 2d, *Release* § 1 (2005).

> injuries resulting from the inherent risks. No waiver shall be valid unless: (1) The owner or operator first provides full disclosure of the inherent risks associated with the recreational activity; and (2) The owner or operator takes reasonable steps to ensure that each patron is physically able to participate in the activity and is given the necessary instruction to participate in the activity safely. (c) The determination of whether a risk is inherent or not is for the trier of fact. As used in this section an "inherent risk": (1) Is a danger that a reasonable person would understand to be associated with the activity by the very nature of the activity engaged in; (2) Is a danger that a reasonable person would understand to exist despite the owner or operator's exercise of reasonable care to eliminate or minimize the danger, and is generally beyond the control of the owner or operator; and (3) Does not result from the negligence, gross negligence, or wanton act or omission of the owner or operator.[72]

The effect of this statute is to make the issue of waiver a jury question as to whether there was full disclosure of the inherent risks, and whether the owner/operator exercised reasonable care. It, unfortunately, precludes summary judgment on the part of the defendant. Under this statute, the owner or operator who seeks to apply such a waiver must exercise reasonable care and shall be liable for damages resulting from their negligent acts or omissions. Subsection (b) provides for a "qualified privilege" from liability on the part of the operator of the recreational activity if it can prove, via a valid waiver, that the participant voluntarily waived liability for injuries caused by "inherent risks" associated with the activity. A waiver cannot be valid unless there is full disclosure of the inherent risks associated with the activity and the owner or operator takes reasonable steps to ensure that a participant was physically able to do the activity and was given the necessary instruction to perform the activity safely.

In contrast, under New York law, agreements exempting pools, gymnasiums, places of public amusement or recreation, and similar establishments from liability for negligence are void and unenforceable. The relevant statute states:

> 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

[72] HAW. REV. STAT. § 663-1.54 (2006).

> 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.[73]

The intent of this New York statute voiding assumption of the risk agreements is to prevent amusement parks and recreational facilities from enforcing exculpatory clauses printed on admission tickets or membership applications, since the public is unaware of them or not cognizant of their effect. This statute was analyzed by a New York court in a case brought by a member of a fitness center, who was injured during a supervised weight lifting exercise, against the center and his instructor.[74] The court held that the statute voiding the assumption of risk agreements entered into by users of amusement and recreation facilities did not apply to assumption of risk and waiver documents executed by the member. The statute did not apply because the member was at the fitness center for instructional purposes and not recreational purposes when he was injured during his supervised weight lifting exercises. Therefore, the waiver was found to be valid and enforceable.

In *King v. CJM Country Stables*,[75] a horseback rider and her husband brought an action against the owner of a horse that bit her during a trail ride. The plaintiffs had signed waivers which released the owners from liability prior to riding the horses. The court held that Hawaii's recreational activity statute, which provides that owners and operators of recreational businesses are liable for damages arising out of negligent acts and omissions, but not for injuries resulting from the inherent risks related to the activity, applied to the case. However, the court did not rule on whether the recreational use statute would relieve the defendant of liability, since genuine issues of material fact existed as to whether the plaintiff was injured as an inherent risk of the horseback riding and whether the owner was negligent which precluded the granting of summary judgment.

In a New York horseback riding case, a horseback rider brought an action against the owner of a horse ranch to recover for injuries sustained when she fell from a horse.[76] Prior to the accident, the plaintiff had completed a "Horse Rental Agreement and Liability Release Form," which indicated that she had over ten hours of riding experience and had initialed the agreement demonstrating that she was warned of the risks inherent in the activity.[77] The court found that the plaintiff assumed the risk of injury of falling from the horse, since being thrown from a horse or the horse acting in an unintended manner were dangers inherent in horseback riding. It reasoned that, "[v]oluntary participants in a sport-

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[73] N.Y. Gen. Oblig. Law § 5-326 (McKinney 2006).

[74] Evans v. Pikeway, Inc., 793 N.Y.S.2d 861 (Sup. Ct. 2004).

[75] 315 F. Supp. 2d 1061 (D. Haw. 2004).

[76] Eslin v. County of Suffolk, 795 N.Y.S.2d 349 (App. Div. 2005).

[77] *Id*. at 350.

ing activity are presumed to have consented to those injury-causing events which are known, apparent, or reasonably foreseeable."[78]

In contrast, in another New York horseback riding case, the plaintiff sought to recover damages for injuries sustained when she was thrown from a horse at a farm. The court found that the release executed by the rider absolving the lessee and owner of the farm from any liability for personal injury did not clearly insulate the lessee and owner from liability for their own negligent acts. Therefore, the release of liability was not applicable to the alleged negligence of the lessee and owner.[79]

IV.
STATUTORY PROTECTIONS AND IMMUNITIES

Depending upon the jurisdiction, the state legislature may have enacted statutes that provide some measure of protection to landowners, hotels, innkeepers, activity vendors, and others from lawsuits relating to water sports and recreational activities.

A. *Recreational Use Statutes*

Along with most states across the nation, Hawaii has developed a statutory exemption limiting liability for those who open their lands to the public for recreational uses. Hawaii Revised Statutes section 520-1 encourages owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes."[80] Hawaii Revised Statutes section 520-4 provides that:

> an owner of land who either directly or indirectly invites or permits without charge any person to use the property for recreational purposes does not: (1) Extend any assurance that the premises are safe for any purpose; (2) Confer upon the person the legal status of an invitee or licensee to whom a duty of care is owed; (3) Assume responsibility for, or incur liability for, any injury to person or property caused by an act of omission or commission of such persons . . . .[81]

In other words, when an owner of land does not charge for the land to be used for recreational purposes, there is no duty of care owed. The statute provides for liability when a landowner has charged a fee for use of the land or where the injured person was a houseguest.[82]

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[78] *Id.*

[79] DiPilato v. Biaseti, 776 N.Y.S.2d 581 (App. Div. 2004).

[80] HAW. REV. STAT. § 520-1 (2006).

[81] *Id.* § 520-4.

[82] *Id.* § 520-5.

The initial Hawaii cases interpreting this recreational use statute were decided by federal courts and were generally favorable to the defense in providing maximum protection to landowners against liability. However, that trend was reversed by the Hawaii Supreme Court's first ruling on the statute, in *Crichfield v. Grand Wailea Co*.,[83] in which it narrowly construed the statute.

In *Palmer v. United States*,[84] the plaintiff brought an action against the government to recover for injuries he sustained when he slipped and fell while descending a flight of stairs at a government-owned pool. The Ninth Circuit determined that the recreational liability statute precludes all theories of liability based upon mere negligence and provides liability only in circumstances where conduct is wilful or malicious. Therefore, the government was immunized and not liable for plaintiff's injuries.

In *Covington v. United States*,[85] a father brought an action against the United States alleging negligent creation of a dangerous condition and willful failure to warn of the condition which arose from the staffing of lifeguards at the beach where his son drowned. The court held that the recreational use statute precluded all liability based on mere negligence, "including where a landowner has voluntarily undertaken safety measures."[86] However, the court acknowledged that immunity under chapter 520 is not absolute and reasoned that a "land owner will still be liable for 'wilful or malicious failure to guard or warn against a dangerous condition, use, or structure which the owner knowingly creates or perpetuates and for wilful or malicious failure to guard or warn against a dangerous activity which the owner knowingly pursues or perpetuates.'"[87]

The court reasoned that a false appearance of safety was created by the placement of inadequate or untrained lifeguards on the beach, which resulted in a potentially dangerous condition above and beyond the danger created by ocean currents and surf. It found that the government would be liable to the extent that it created, and willfully or maliciously failed to guard or warn against the danger, since such liability is not based on mere negligence.

In *Viess v. Sea Enterprises Corp.*,[88] an action was brought for injuries suffered by a swimmer using a modified surf board in ocean waters. The plaintiff was facing the shore when he was struck from behind by a large wave that lifted him up and threw him on his head, fracturing his neck and rendering him a quadriplegic. The court held that the Hawaii recreational use statute relieved the owner of the shoreline property above the high-tide mark from liability where the owner made no direct charge upon the swimmer in return for

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83 6 P.3d 349 (Haw. 2000).

84 945 F.2d 1134 (9th Cir. 1991).

85 902 F. Supp. 1207 (D. Haw. 1995).

86 *Id*. at 1212.

87 *Id*. at 1211-12 (citing Haw. Rev. Stat. § 520-5).

88 634 F. Supp. 226 (D. Haw. 1986).

access to the beach. The owner had no duty to warn of dangerous surf conditions. The court reasoned that for liability to arise, "a landowner must willfully or maliciously fail to warn against a dangerous condition which he knowingly perpetuates," and that the failure to warn could only be considered willful or malicious if the landowner had an independent duty to warn.[89] The court found that the landowner did not perpetuate the condition of the ocean surf and thus had no duty to warn.

In *Atahan v. Muramoto*,[90] the plaintiff was rendered quadriplegic in a surfing accident and brought suit against the owner of the lot in front of which they parked their vehicle. Under the recreational use statute, the owner of the beachfront lot owed no duty to the plaintiff to prevent the plaintiff from parking on and walking over the lot to access the public beach and beach fronting another lot, or to warn of dangers associated with the ocean in front of that lot. The plaintiff was indirectly permitted without charge to use the owner's land for the recreational purpose of assessing the public beach and ocean and therefore was not an invitee or licensee to whom a duty of care was owed.

In *Crichfield v. Grand Wailea Co.*,[91] the plaintiff was a hotel guest who decided to go for a walk with her husband on the grounds of another hotel. While walking at the second hotel, the plaintiff injured her wrist as she stepped off the pathway and onto the grass to look at the sculptures and fishpond. She slipped and fell. Although no charge had been assessed against the plaintiff for her use of the second hotel's premises, the plaintiff alleged in an affidavit that she had a subjective intent to make purchases at the commercial businesses on the premises, and thus was a business invitee, not a recreational user. The Hawaii Supreme Court reversed the trial court's grant of summary judgment in favor of the hotel, reasoning that there was a genuine issue of material fact as to whether the plaintiff was on the land for a recreational purpose. The supreme court held that a person's subjective intent is essential to determining whether the person is a recreational user engaged in a recreational purpose, thus limiting the broad protection once afforded to landowners under the recreational use statute.

Other state legislatures have enacted similar statutes that limit or eliminate a landowner's liability for personal injuries suffered by a person using his land for a recreational use and usually only if that use is without charge. California law provides that landowners must warn of any "dangerous condition, use, structure or activity" on the premises.[92] The limiting language of the Hawaii statute, "which the owner knowingly creates or perpetuates,"[93]

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[89] *Id.* at 231.

[90] 984 P.2d 104 (Haw. Ct. App. 1999) *overruled by* Lansdell v. County of Kauaii, 130 P.3d 1054 (Haw. 2006).

[91] 6 P.3d 349 (Haw. 2000).

[92] CAL. CIV. CODE § 846 (West 2006).

[93] HAW. REV. STAT. § 520-5 (2006).

is not included. Thus, California law requires landowners to warn of dangerous natural conditions. Recreational use liability is governed by the California Civil Code section 846. It states that an owner of the estate does not extend any assurance that the premises are safe for the recreational purpose, does not grant the legal status of invitee or licensee upon whom a duty of care is owed upon the person entering the land, and does not assume responsibility or liability for any injury to a person or property caused by the person upon whom permission is granted to enter upon the land. The section does not limit liability for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity, or for injuries when the landowner was paid for access to the land, or to persons who are expressly invited rather than permitted onto the land by the landowner.

In *Shipman v. Boething Treeland Farms, Inc*.,[94] a trespasser was injured when he drove his all-terrain vehicle (ATV) into a privately-owned tree farm and collided at an intersection with a vehicle driven by a farm employee. Applying California law, the court held that under the recreational use statute, the owner and employee owed no duty of care to the trespasser and reasoned that when an uninvited, nonpaying recreational user is injured on private land, any recovery from the owner is barred under the recreational use statute. Even if the landowner was negligent, negligence was insufficient to overcome a landowner's immunity under the recreational use statute.

According to Illinois law:

> [A]n owner of land owes no duty of care to keep the premises safe for entry or use by any person for recreational or conservation purposes, or to give any warning of a natural or artificial dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.[95]

Almost identical to the law of California, an owner of land who invites or permits without charge any person to use such property for recreational or conservation purposes does not extend any assurance that the premises are safe, confer upon such person the legal status of invitee or licensee to whom a duty of care is owed, assume responsibility or liability for any injury to person or property caused by an act or omission of such person who enters the land, or assume responsibility or liability for any injuries to such persons or property caused by a natural or artificial condition, structure, or personal property on the land. This section does not limit liability for wilful or wanton failure to guard against a dangerous condition, use, structure, or activity, or for injuries suffered when an owner charges the person to enter the land.

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[94] 92 Cal. Rptr. 2d 566 (Ct. App. 2000).

[95] 745 Ill. Comp. Stat. 65/3 (2006).

In *Johnson v. Stryker Corp.*,[96] a person was injured when he dove into a pond on the defendant's property. Applying Illinois law, the court found that the defendant was entitled to the protection of the Recreational Use of Land and Water Areas Act, despite the fact that he did not make his land available to general public, since he did permit his land to be used recreationally on a casual basis. The court reasoned that there was no willful or malicious failure to guard or warn against a dangerous condition and therefore no liability could be imposed.

Illinois has developed a vehicle code provision that immunizes owners, lessees, and occupants of land from liability when someone is injured on their land while using an ATV, unless liability exists as a result of willful or malicious failure to guard or warn against a dangerous condition.[97] According to the Illinois statute, "an owner, lessee, or occupant of premises owes no duty of care to keep the premises safe for entry or use by others for use by an [ATV] or off-highway motorcycle, or to give warning of any condition, use structure[,] or activity on such premises."[98] However, liability is not limited for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.[99]

In a personal injury action brought by a thirteen-year-old minor through his parents against farm lessors, farm land lessee, and a subdivision association, the Illinois Appellate Court found that the evidence did not establish that the lessee's conduct was willful and wanton. The court reasoned that the failure of the farm land lessee to warn the thirteen-year-old operator of the ATV of the hole in the ground created by erosion, or to guard the minor operator against such danger was not willful and wanton, and therefore, the exception to the Illinois Vehicle code provision was unmet. The facts were insufficient to demonstrate that the lessee's actions were willful, since he did not intentionally cause the harm or exhibit a reckless disregard for the safety of others.[100]

In close alignment, New York's recreational use liability statute also mirrors that of California and Illinois law. According to New York law, an owner, lessee, or occupant of premises owes no duty to keep the premises safe for entry or use by others for recreational purposes.[101] An owner does not extend any assurance that the premises are safe for such a purpose, constitute the person to whom permission is granted an invitee to whom a duty of care is owed, or assume responsibility or liability for any injury to person or property cause by the person upon whom permission was granted. Liability is not limited when there is a willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity; for injuries suffered where permission to enter the land was conditioned upon

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96 388 N.E.2d 932 (Ill. App. Ct. 1979).

97 Morris v. Williams, 834 N.E.2d 622 (Ill. App. Ct. 2005) (citing 625 ILL. COMP. STAT. 5/11-1427 (2005)).

98 625 ILL. COMP. STAT. 5/11-1427(g) (2006).

99 *Morris*, 834 N.E.2d at 622.

100 *Id.*

101 N.Y. GEN. OBLIG. LAW § 9-103 (McKinney 2006).

the landowner being paid; or for injuries when the owner owed a duty to keep the premises safe or warn of danger.

B. *Hotel Beach Liability Statutes*

Some jurisdictions have enacted statutes relating to the specific liabilities of certain enumerated defendants. Hawaii Revised Statutes section 486-5.5 specifically applies to hotels with beach front properties. Enacted in 1994, section 486K-5.5 imposes liability upon a hotelkeeper only if the hotelkeeper fails to warn against a hazardous condition when it knew or should have known of the condition and the condition would not be known to a reasonably prudent guest. It also immunizes hotels from liability arising from injuries suffered by non-guests on the beach or ocean fronting the hotel. Hawaii Revised Statutes section 486K-5.5 provides that:

> In a claim alleging injury or loss on account of a hazardous condition on a beach or in the ocean, a hotelkeeper shall be liable to a hotel guest for damages for personal injury, death, property damage, or other loss resulting from the hotel guest going onto the beach or into the ocean for a recreational purpose, including wading, swimming, surfing, body surfing, boogie boarding, diving, or snorkeling, only when such loss or injury is caused by the hotelkeeper's failure to warn against a hazardous condition on a beach or in the ocean, known, or which should have been known to a reasonably prudent hotelkeeper, and when the hazardous condition is not known to the guest or would not have been known to a reasonably prudent guest. A hotelkeeper owes no duty and shall have no liability for conditions which were not created by the hotel to a person who is not a guest of the hotel for injury or damage resulting from any beach or ocean activity. As used in this section, "beach" means the beach fronting the hotel, and "hotel guest" means a guest of that particular hotel and other persons occupying the assigned rooms.[102]

By enacting section 486K-5.5, the Hawaii Legislature narrowed the hotelkeeper's duties. Both Hawaii common law and Hawaii legislation have refused to impose a duty upon hotelkeepers unless the hotelkeepers occupy land "fronting," that is immediately adjacent to the beach or ocean where an accident occurred. The Hawaii appellate courts have defined the duty of an occupier of land adjacent to the shoreline as the "duty to warn users . . . of extremely dangerous conditions in the ocean along its beach frontage which were not known or obvious to persons of ordinary intelligence, and which were known or in the exercise of reasonable care ought to have been known to the [occupier]."[103]

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[102] Haw. Rev. Stat. § 486K-5.5 (2006).

[103] Kaczmarczyk v. Honolulu, 656 P.2d 89. 92 (Haw. 1982) *superceded by statute*, Act 190, sec. 2(a), 1996 Haw. Sess. Laws 435, *as recognized in* Bhakta v. County of Maui, 124 P.3d 943 (Haw. 2005).

Hawaii Revised Statutes section 486K-5.6 also sets forth a hotelkeeper's liability with respect to the rental or other use of certain recreational equipment.[104] A hotelkeeper does not have a duty to instruct or train a user of recreational equipment or to supervise the use of such equipment where the recreational equipment is in fact used without supervision, and during the time of use, it is not part of an activity guided or managed by representatives of the hotelkeeper. Recreational equipment "includes skin diving masks, snorkels, swim fins, bodysurfing boards, surfboards, canoes, kayaks, bicycles, skates, tennis or golf equipment, weights and exercise equipment, air mattresses, and flotation devices provided by the hotel."[105] Liability against a hotelkeeper is limited for negligence in the maintenance of recreational equipment; or when "a loss or injury is suffered by a hotel guest and is caused by the hotelkeeper's failure to warn against a hazardous condition on a beach or in the ocean, known, or which should have been known to a reasonably prudent hotelkeeper."[106]

C. *Act 190*

In 1996, in response to a plethora of lawsuits, the Hawaii Legislature decided that the state and the counties needed protection from liability arising from dangerous natural conditions in the ocean adjacent to public beach parks. As a result, the Hawaii Legislature enacted Act 190, entitled an "Act Relating to Public Land Liability Immunity."[107] This Act went into effect on July 1, 1996, and initially was to be repealed on June 30, 1999, but was extended to June 30, 2007. The stated purpose of Act 190 was to "increase public safety, reduce ocean-related accidents, and protect the State and Counties from the unlimited liability they face with regard to activities in the ocean and at public beaches."[108] It established a process by which "the state and counties could provide both meaningful and legally adequate warnings to the public regarding extremely dangerous natural conditions in the ocean adjacent to public beach parks."[109] The Act has not been codified into a state statute due to its short-term existence, but has remained effective as a session law.[110]

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[104] HAW. REV. STAT. § 486K-5.5 (2006).

[105] *Id.* § 486K-5.6.

[106] *Id.*

[107] Act 190, 1996 Haw. Sess. Laws 435.

[108] *Id.* § 1.

[109] *Id.*

[110] *See* Bhakta v. County of Maui, 124 P.3d 943 (Haw. 2005).

Act 190 provides that the State or county has a duty to warn of dangerous shorebreak or strong current in the ocean adjacent to a public beach park, when these conditions are extremely dangerous, typical for the specific beach, and pose a risk of serious injury or death.[111] With regard to other ocean conditions, "[n]either the State nor any county shall have a duty to warn of dangerous natural conditions in the ocean other than as provided in this section."[112] The Act further provides that, "neither the State nor a county shall have a duty to warn on beach accesses, coastal accesses, or in areas that are not public beach parks of dangerous natural conditions in the ocean."[113]

Act 190 provides public entities protection from liability when they have provided "adequate warning" to the public though the design and placement of specific warning signs in beach parks. The Act specifies that

> [a] sign or signs warning of dangerous shorebreak or strong current shall be conclusively presumed to be legally adequate to warn of these dangerous conditions, if the State or County posts a sign or signs warning of the dangerous shorebreak or strong current and the design and placement of the warning sign or signs has been approved by the Chairperson of the Board of Land and Natural Resources.[114]

The Act further states that, "[t]he chairperson shall consult with the Governor's Task Force on Beach and Water Safety prior to approving the design and placement of the warning sign or signs."[115]

Essentially, Act 190 sets out the State's duty to warn of dangerous natural conditions in the ocean.[116] In *Bhakta v. County of Maui*,[117] a negligence action arose out of the drowning deaths of four men on the north shore of the island of Maui, when they were swept into the ocean from a landing area owned by the State. The county moved for summary judgment which the court granted on the ground that the county did not own or occupy the landing area.[118] The plaintiffs moved for summary judgment against the State on the basis that the State was negligent in failing to warn of and protect the plaintiffs from the dangerous ocean

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[111] Act 192, § 2(a), 1996 Haw. Sess. Laws 435.

[112] *Id.* § 2(f).

[113] *Id.* § 2(e).

[114] *Id*. § 2(b)

[115] *Id.*

[116] Bhakta v. County of Maui, 124 P.3d 943 (Haw. 2005).

[117] *Id.*

[118] *Id.*

and man-made conditions at the landing. Following a jury-waived trial, judgment was entered in favor of the State finding that Act 190 relating to public land liability immunity served to relieve the State of any liability to the plaintiffs.[119] The plaintiffs and the State agreed that the landing was not a "public beach park," but rather a "coastal access."[120] Therefore under the plain language of Act 190, section 2(e), the State did not have a duty to warn the plaintiffs of dangerous natural conditions in the ocean, specifically of the shore break, the strong current near the landing, and the high surf abutting the landing.[121] The State had a duty to warn of dangerous conditions in the ocean adjacent to a public beach, but it did not have a duty to warn of any dangerous natural ocean conditions on beach accesses, coastal accesses, or in other areas that are not public beach parks.[122] The court further found that even if Act 190 did not apply, the State still had no common law duty to warn the plaintiffs of the dangerous conditions in the ocean at the landing, since the conditions in the ocean were open and obvious to persons of ordinary intelligence on the day of the accident.[123]

D. *Equine Statutes*

The Hawaii legislature has provided a statutory exemption for horse owners with regard to equine activities. Hawaii Revised Statutes section 663B-2(a) provides that in any civil action for an injury of a participant, there shall be a presumption that the injury was not caused by the negligence of an equine activity sponsor, equine professional or their employees or agents, if the injury was solely caused by the inherent risk and unpredictable nature of the equine.[124] An injured person may rebut this presumption of no negligence by a preponderance of the evidence. However, liability is not limited when the equine activity sponsor, equine professional, or their employees or agents knew or should have known that the equipment or tack provided, which was the proximate cause of the injury, was faulty; failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity; knows or reasonably should have known of a latent condition that caused the injury and did not conspicuously post warning signs; commits gross negligence or wilful or wanton disregard for the safety of the participant; or intentionally injures the participant.[125]

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[119] *Id.*

[120] *Id.* at 958.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] HAW. REV. STAT. § 663B-2(a) (2006).

[125] *Id.*

Illinois has also developed a statute limiting the liability of equine activity providers. According to chapter 745 of the Illinois Compiled Statutes, section 47/15, participants who engage in equine activities expressly assume the risk and legal responsibility for injuries resulting from participation in such activities. Participants carry the sole responsibility for knowing the range of their own ability to manage, care for, and control a particular equine or perform a particular equine activity. Participants may execute a release assuming responsibility for the risks of equine activities, and such a release will remain valid until it is expressly revoked by the participant. Liability is not limited under the same exceptions as referenced to by Hawaii law above.[126]

V.
Conclusion

Lawsuits arising out of water sports and recreational liability issues have become quite common in our society. Plaintiffs generally claim that they should have been protected or warned of a hazard by the defendants. The most typical types of legal theories arising in such lawsuits include negligence, duty to warn and attractive nuisance. Some of the case law in this area has involved the extension of a duty to warn to encompass conditions on property beyond which a defendant landowner owns, possesses or controls. Often times the issue is whether a possessor of land may be held liable for injuries to persons on the land if that person's presence should have been reasonably anticipated or foreseeable.

On the other hand, defendants seek to limit the extent of their duties and to interpose various defense theories such as comparative fault, contributory negligence, open and obvious conditions, primary assumption of the risk, and waiver and release. Defendants may also have the benefit of looking toward statutory protections and immunities from liability, such as recreational use statues or other specific statutes that provide immunity for defendants engaged in offering activities such as skiing or horseback riding.

Attorneys who handle cases involving such claims should become familiar with the various liability theories and defenses so as to formulate winning strategies.

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[126] 745 Ill. Comp. Stat. 47/15 (2005).

APPENDIX A
BIBLIOGRAPHY

The following American Law Reports may be of assistance for attorneys handling water sports and recreational liability cases.

A. Pool Liability Cases

1. Thomas R. Trenker, Annotation, *Liability of Swimming Facility Operator For Injury or Death Inflicted by Third Person***,** 90 A.L.R.3d 533 (2004).

2. Thomas R. Trenker, Annotation, *Liability of Swimming Facility Operator For Injury or Death Allegedly Resulting From Condition of Deck, Bathhouse, or Other Area in Vicinity of Water,* 86 A.L.R.3d 388 (2004).

3. Thomas R. Trenker, Annotation, *Liability of Swimming Facility Operator For Injury to or Death of Swimmer Allegedly Resulting From Hazardous Condition in Water*, 86 A.L.R.3d 1021 (2004).

4. Thomas R. Trenker, Annotation, *Liability of Swimming Facility Operator For Injury to or Death of Diver Allegedly Resulting From Hazardous Condition in Water,* 85 A.L.R.3d 750 (2004).

5. Thomas R. Trenker, Annotation, *Liability of Operator of Swimming Facility For Injury or Death Allegedly Resulting From Absence of or Inadequacy in Rescue Equipment*, 87 A.L.R.3d 380 (1999).

6. M.O. Regensteiner, Annotation, *Liability of Private Owner or Operator of Bathing Resort or Swimming Pool For Injury or Death of Patron*, 48 A.L.R.2d 104 (2004).

7. Philip White, Jr., Annotation, *Products Liability: Swimming Pools and Accessories,* 65 A.L.R.5th 105 (2005).

B. Ocean Liability Cases

1. John B. Spitzer, Annotation, *Admiralty Jurisdiction: Maritime Nature of Tort—modern Cases,* 80 A.L.R.Fed. 105 (2005).

2. Jay M. Zitter, Annotation, *Validity, Construction, and Application of State Statutes and Local Ordinances Governing Personal Watercraft Use*, 118 A.L.R.5th 347 (2004).

3. Elizabeth E. Ewing, Annotation, *Liability For Injuries to, or Death of, Water-skiers*, 34 A.L.R.5th 77 (2004).

4. Michelle M. McCarthy, Annotation, *Tort Liability Arising From Skydiving, Parachuting, or Parasailing Accident,* 92 A.L.R. 5th 473 (2004).

C. General Recreational Liability

1. Robin C. Miller, Annotation, *Effect of Statute Limiting Landowner's Liability For Personal Injury to Recreational User*, 47 A.L.R.4th 262 (2005).

2. Tracy A. Bateman, Annotation, *Liability of Travel Publication, Travel Agent, or Similar Party for Personal Injury or Death of Traveler*, 2 A.L.R.5th 396 (2005).