Junk Food and Assumption of Risk

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Avihay Dorfman, *Assumption of Risk, After All*, 15 Theoretical Inquiries in Law 293 (2014), available at SSRN.

Avihay Dorfman has written an excellent law review article that ably defends claims about junk-food-and-obesity law, the nature of primary assumption of risk, and the validity of anti-libertarian critiques of assumption of risk doctrine.

Dorfman's own words (with markers I have added) provide the best synopsis of the three objections he raises to assumption of risk doctrine:

> First, it is a conclusory doctrine in the sense that (1) its prescriptions are reached by reference to either other tort doctrines, such as (a) duty analysis, or (b) contract law . . . Second, . . .(2) choosing to be exposed to a risk created by others cannot absolve these others of liability, since such consent is not an analytical feature of liability waiver . . . Third, on a philosophical level, (3) the assumption of risk doctrine is none other than a surface manifestation of a *laissez-faire* vision of labor markets (and probably of other spheres of action). (P. 295)

Here, briefly, are Dorfman's responses to each:

(1)(a) *AOR is simply no-duty*: Dorfman accepts that AOR is indeed a form of no-duty argument, but rejects the proposition that it is misleading to retain a special category for it. His view is that AOR involves saying in particular that *because of the plaintiff's own autonomous choice to participate in the risky activity in question*, the defendant is not obligated to refrain from conducting the activity in question; respect for the plaintiff's choice entails not regarding defendant as having acted wrongfully by generating this risk.

(1)(b) *AOR is simply contractual waiver*. This objection has things backwards, on Dorfman's view. Contractual agreement is but one way a person can affect what level of risk a defendant would be entitled to generate toward plaintiff; manifested choice to confront the risk is another way. It does not involve contracting out of liability as such, but rendering it nonwrongful for the defendant to generate the risk.

(2) *Waiving a right against such risks is analytically distinct from waiving a right to redress*. In tort law, Dorfman observes, the right to redress is predicated on a right against such defendant conduct. If there is not a right against such conduct, there cannot be liability based on the violation of a right.

(3) *AOR is simply a holdover from a regressive regime of laissez faire.* Individuals who make significant, free, and well-informed choices concerning which risks to confront are entitled to be respected. Many of the concerns of the laissez-faire critique are more deeply characterized in terms of the conditions of choice: well informed consumer/plaintiff, lack of need or duress, outside options, etc.

The final part of the paper argues that the analysis of the idea of assumption of risk in torts is continuous with its analysis in thinking about some putatively paternalistic measures in public law. Thus, for example, Dorfman wants to be able to judge how much importance we should give to individual choice in debating whether government qua public health protector should ban junk foods. Should government be out of the business of regulating junk food, given that consumers voluntarily choose it?

Dorfman rightly contends that thinkers ought to be able to get beyond a *paternalism versus laissez-faire* version of the food policy debate and he plausibly suggests that the depth of analysis needed on assumption of risk in tort law can illuminate the debate in this area of public law. His own analytical framework for a *liberal egalitarian conception of fair allocation of responsibility* looks a lot like California's *Tunkl* factors for assessing when to strike down a contractual exculpatory clause (utilizing express assumption of risk doctrine).

The principal thesis is that, in determining "whether it is appropriate to hold responsible one whose injury is a result of encountering a known risk" we must identify and answer the questions that "ought to be raised about the connection between a voluntary act of encountering a risk and the attribution of personal responsibility for so acting." (P. 318). Four such questions (or categories of questions are identified: (i) the degree to which the plaintiff had the confronting of the risk as such as one of her actual purposes; (ii) whether the plaintiff was genuinely well-informed as to the nature and magnitude of the risk; (iii) the degree to which the activity in question is an essential one; (iv) the availability of alternate options.

The latter part of Dorfman's article displays insight, cross-disciplinary research, and thoughtful analysis in applying this framework to the junk food public policy debate. Food consumers (unlike skydivers) are typically not seeking risk as such; they are typically underinformed on nutritional value and potential health risks; food is clearly an essential matter; and many urban areas are virtual deserts for healthy and nutritional food.

There is much to say about many aspects of the article, but for the purposes of this jot, I will identify only one thread of possible critical commentary. In tort law, the defense of assumption of risk bears only a strong family resemblance to the defense of consent; they are not identical. One of the many differences is that, under the defense of consent to an intentional tort, one *consents* to what would otherwise be a wrongful interference or injuring of oneself. In the defense of assumption of risk, one accepts that the other person will engage in certain conduct, but one does not otherwise have a legal right against that conduct. One has a legal right against being injured by that conduct, but one does *not consent* to being so injured; one *assumes the risk* of being so injured. Note that this distinction allows one to be agnostic on the issue of whether the risk in question is an unreasonable, excessive, or wrongful risk. As Calabresi and others have pointed out, assumption of risk is a valuable legal tool in part for this very reason. It permits our legal system to finesse the often difficult question of whether the risk is wrongful by making it clear in advance that the plaintiff will not be able to hold the defendant accountable for the ripening of the risk into an injury.

On this account, primary assumption of risk is not always (and perhaps not even primarily) a tool for no-duty rulings (which, in any case, is a misnomer; it should be no-breach-as-a-matter-of law). It applies where the presence of a knowing acceptance of the terms of interaction allows courts to bracket the heart of the breach question. We do not have to decide if the risk of running a sky-diving operation is excessive, for the plaintiff's understanding that she was taking the risk is sufficient to undercut the claim that there is liability; she is, by her conduct, accepting that the behavior of the defendant shall not be treated as a wrong to her.

Although I mention this line of thinking in part to enrich Dorfman's account (for I believe that there is more than one function that the doctrine plays), it also raises a red flag with respect to Dorfman's treatment of liberalism. Even if one shares (as I do), Dorfman's view that liberalism in law is committed to enforcing fair and equal terms of interaction, that is plainly not all liberalism is about. One of its key commitments, from Mill through Rawls, plainly involves a sort of anti-paternalistic instinct that strives to keep the state out of the business of making controversial value judgments in areas where people hold widely different opinions. Most New Yorkers bridled at Mayor Bloomberg's efforts to control sugary beverages. Regardless of whether many of these New Yorkers were under-informed and under-supplied with good alternatives, there is no question that an authentically *liberal* conviction was among their reasons for opposition: contempt for government's judgmentalism about how one should eat. Dorfman's own example – junk food regulation – ironically provides a vivid illustration of the tension between two aspects of liberalism in the doctrine of assumption of risk.

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