Washington Law Review

Volume 68 | Number 2

4-1-1993

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SCOTT v. PACIFIC WEST MOUNTAIN RESORT: ERRONEOUSLY INVALIDATING PARENTAL RELEASES OF A MINOR'S FUTURE CLAIM

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Abstract: In *Scott v. Pacific West Mountain Resort,* the Washington Supreme Court held that parents do not have legal authority to waive their children's future claims for personal injuries caused by a third party's negligence. This Note argues that the court departed from Washington precedent and ignored the implications of existing Washington law. Moreover, the court erroneously analogized children's future claims to children's existing claims by failing to adequately analyze the differences between the two situations. This Note thus concludes that because parents can already waive their children's causes of action in many situations, they should be allowed to do so through preinjury releases.

In *Scott v. Pacific West Mountain Resort,*[1] the Washington Supreme Court held that a parent cannot waive her child's future cause of action against a third party for personal injuries. Although the court concluded that parental preinjury releases violate public policy, it failed to apply established Washington precedent. This Note analyzes the *Scott* court's reasoning and argues that the court improperly invalidated the release and that the decision is inconsistent with Washington law regarding both express assumption of risk and parental management of children's claims.

Part I of this Note sets forth the *Scott* opinion as it relates to parental waivers of children's personal injury claims. Part II examines Washington law on express assumption of risk and the *Scott* court's failure to apply this precedent. Part III discusses the inconsistencies between the *Scott* court's concern for injured children's ability to recover and the practical effects of existing Washington law, which already allows parents to control their children's claims. Finally, part IV compares the considerations underlying parental management of children's existing claims and children's future claims and concludes that the *Scott* court erroneously equated the two situations.

1. 119 Wash. 2d 484, 834 P.2d 6 (1992).

I. *SCOTT v. PACIFIC WEST:* THE WASHINGTON SUPREME COURT INVALIDATES PARENTAL PREINJURY RELEASES

Justin Scott, age twelve, wanted to take ski racing lessons at Grayson Connor Ski School.[2] The ski school required that one of his parents sign an application containing the following language:

> For and in consideration of the instruction of skiing, I hereby hold harmless Grayson Connor, and the Grayson Connor Ski School and any instructor or chaperon from all claims arising out of the instruction of skiing or in transit to or from the ski area. I accept full responsibility for the cost of treatment for any injury suffered while taking part in the program.[3]

Justin's mother, with Justin's father's knowledge, signed the application.[4]

After enrolling, Justin attempted to ski on a slalom race course laid out by the ski school owner and suffered severe head injuries when he left the course and collided with an unused rope-tow shack.[5] Following Justin's accident, Justin and his parents sued the ski school, alleging that the school improperly prepared the race course and negligently placed it too close to the shack.[6] The trial court granted summary judgment for the ski school based on the release Mrs. Scott signed, and the Scotts appealed the decision.[7] The Washington Supreme Court granted their petition for direct review.[8]

The supreme court addressed two questions regarding the Scotts' claim against the ski school: whether the application clearly conveyed the ski school's intent to limit its liability and whether a parent has the legal authority to waive a child's future cause of action for personal injuries resulting from a third party's negligence.[9] Addressing the first issue, the court held that the language of the application adequately notified Mrs. Scott that the ski school intended to disclaim all

2. *Id.* at 487–88, 834 P.2d at 8.

3. *Id.* at 488, 834 P.2d at 8.

4. *Id.*

5. *Id.*

6. *Id.* Justin and his parents also sued Pacific West Mountain Resort, the owner of the ski resort where the injury occurred. *Id.* This Note addresses only issues pertaining to the ski school.

7. *Id.* at 489, 834 P.2d at 9.

8. *Id.*

9. *Id.*

liability for its negligent conduct.[10] With respect to the second issue, the court held that granting a parent the authority to waive a child's future claim against a third party for negligence violates public policy.[11] Thus, the court concluded that a parent's signature on a preinjury release does not bar a child's cause of action.[12]

The court based its second holding on two factors. First, in many jurisdictions, including Washington, parents cannot release their children's existing claims without either judicial or statutory authority.[13] The court reasoned that to conclude that parents can release a child's claim before but not after an injury would be illogical.[14] Second, if parents release a child's future claim, that child will have no recourse if he suffers injuries and his parents cannot or will not pay the medical bills.[15]

II. THE *SCOTT* COURT DEPARTED FROM WASHINGTON PRECEDENT, ADOPTING AN ERRONEOUS APPROACH TO EXPRESS ASSUMPTION OF RISK

By invalidating the parental release on public policy grounds, the *Scott* court reached a result inconsistent with Washington precedent and created potential confusion and uncertainty for future public policy determinations. Under Washington law, a valid express assumption of risk such as the release in the Grayson Connor application completely bars a plaintiff's claim unless it violates public policy. Only four years prior to *Scott,* the Washington Supreme Court adopted a multifactored analysis to determine whether an express assumption of risk violates public policy. The release in *Scott,* however, did not contain enough of the articulated factors to violate public policy under this analysis, and therefore should have barred Justin's claim against the ski school.

10. *Id.* at 490, 834 P.2d at 9. While acknowledging that courts strictly construe such releases, the court noted that under Washington law, releases need not specifically refer to negligence so long as they use clear and unambiguous language. *Id.* at 490, 834 P.2d at 9–10.

11. *Id.* at 495, 834 P.2d at 12.

12. *Id.* The court also held, however, that an otherwise valid release could bar the parents' independent claim based on the injury to their child. *Id.*

13. *Id.* at 494, 834 P.2d at 11; *see infra* notes 92–95 and accompanying text.

14. *Scott,* 119 Wash. 2d at 494, 834 P.2d at 11–12.

15. *Id.* at 494, 834 P.2d at 12. While the court acknowledged that disallowing parental preinjury releases might increase the cost of children's sports, it considered this an insufficient reason to uphold such releases. *Id.* at 495, 834 P.2d at 12.

A. Express Assumption of Risk as a Bar to Recovery

The defense of assumption of risk limits or eliminates the duty that a potential defendant otherwise owes to a potential plaintiff. Generally, a plaintiff cannot recover damages where that plaintiff voluntarily assumes the risk that another person's negligence may cause harm and such harm occurs.[16] This doctrine developed relatively late in the common law,[17] and for years courts applied it in a confusing and often inconsistent manner to limit or deny recovery in a variety of situations.[18] Gradually, courts refined the doctrine and established several different categories of assumption of risk.[19]

One such category is express assumption of risk. An express assumption of risk consists of an agreement between two parties in which one expressly accepts the risk of injury caused by the other's negligence.[20] Such an agreement thus frees a potential defendant from the duty of care that she would otherwise owe to a potential plaintiff.[21] This voluntary shifting of legal responsibility prevents a plaintiff from recovering damages for injuries caused by a negligent defendant.[22]

Courts make exceptions to this rule, however. Washington courts in particular place four general limitations on express assumptions of risk. First, releases must be conspicuous enough to prevent people from unwittingly signing them.[23] Second, Washington courts strictly construe preinjury releases and demand that they unambiguously indicate the parties' intent to shift the risk of negligence.[24] Third, releases cannot eliminate liability for negligent conduct falling greatly below

16. RESTATEMENT (SECOND) OF TORTS § 496A (1965). To assert the defense successfully, the defendant must prove that the plaintiff (1) knew of the risk, (2) understood its nature, and (3) voluntarily chose to incur it. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68, at 487 (5th ed. 1984).

17. KEETON ET AL., *supra* note 16, § 68, at 480.

18. *Id.; see* John L. Diamond, *Assumption of Risk After Comparative Negligence: Integrating Contract Theory into Tort Doctrine,* 52 OHIO ST. L.J. 717, 717 n.1 (1991).

19. Courts commonly accept four types of assumption of risk: express, implied primary, implied reasonable, and implied unreasonable. KEETON ET AL., *supra* note 16, § 68, at 496–98. These four differ in the amount of risk assumed and in whether they merely limit or totally bar a plaintiff's recovery. *Id.* This Note addresses only parental preinjury releases, a subset of express assumption of risk.

20. *Id.* at 480.

21. *Id.* at 496.

22. *Id.*

23. Hewitt v. Miller, 11 Wash. App. 72, 78, 521 P.2d 244, 247, *review denied,* 84 Wash. 2d 1007 (1974).

24. Scott v. Pacific W. Mountain Resort, 119 Wash. 2d 484, 490, 834 P.2d 6, 9 (1992); *see Hewitt,* 11 Wash. App. at 79, 521 P.2d at 248. However, the release need not necessarily contain the word "negligence." *Scott,* 119 Wash. 2d at 490, 834 P.2d at 10; *Hewitt,* 11 Wash. App. at 79, 521 P.2d at 248.

the standard established by law for the protection of others.[25] Finally, courts will void otherwise valid releases that violate public policy.[26]

The document Mrs. Scott signed constituted an express assumption of risk. The application contained a written release, and by signing it, Mrs. Scott accepted the risk that the ski school would negligently injure Justin and consequently accepted the financial responsibility for Justin's care. The Washington Supreme Court had previously noted that such releases are express assumptions of risk.[27] Moreover, the *Scott* court determined that this release was valid as written; it was conspicuous and clearly written, and the Scotts did not allege that the ski school was grossly negligent.[28] Nevertheless, the court refused to enforce the release against Justin on the grounds that it violated public policy.[29]

B. Washington's Public Policy Exception: The Wagenblast *Analysis*

Although Washington courts have continually refused to enforce releases that violate public policy, for many years they lacked a systematic approach to public policy determinations. Courts holding releases void as against public policy drew that policy from several different sources, including legislative intent,[30] common law precepts,[31] and the specific facts of an individual case.[32] When voiding releases in these cases, however, the courts did not go beyond

25. Blide v. Rainier Mountaineering, Inc., 30 Wash. App. 571, 574, 636 P.2d 492, 493 (1981), *review denied,* 96 Wash. 2d 1027 (1982). Thus no one could contract out of liability for gross negligence, defined as "a heedless and palpable violation of legal duty." BLACK'S LAW DICTIONARY 1033 (6th ed. 1990).

26. Wagenblast v. Odessa Sch. Dist. No. 105-157-166J, 110 Wash. 2d 845, 848–52, 758 P.2d 968, 970–71 (1988).

27. *Id.* at 856, 758 P.2d at 974. The terminology in this area varies, and the documents signed may be called releases, waivers, or exculpatory clauses, among other things. This Note refers to them as releases.

28. *Scott,* 119 Wash. 2d at 490–92, 834 P.2d at 9–10.

29. *Id.* at 495, 834 P.2d at 12.

30. Thomas v. Housing Auth. of Bremerton, 71 Wash. 2d 69, 76–80, 426 P.2d 836, 841–43 (1967) (contract exempting housing authority from liability to tenants for negligence violates legislative public policy goal of providing safe low-income housing).

31. McCutcheon v. United Homes Corp., 79 Wash. 2d 443, 450, 486 P.2d 1093, 1097 (1971) (release limiting private landlord's liability for negligent failure to maintain common areas violates public policy because it contravenes common law rules of landlord-tenant liability).

32. Reeder v. Western Gas & Power Co., 42 Wash. 2d 542, 551, 256 P.2d 825, 830 (1953) (although gas companies normally have no duty to inspect customers' pipes, enforcement of contract disclaiming liability for failure to inspect violated public policy where the need for inspection was readily apparent).

examining the particular release at issue to discuss the larger issue of what types of releases in general violate public policy.

Washington courts similarly failed to engage in extensive analysis when upholding releases. For example, in *Hewitt v. Miller,*[33] the court upheld a release signed by a participant in a scuba diving class. The court simply stated that it required little discussion to conclude that scuba diving instruction does not involve a public duty.[34] Similarly, in *Blide v. Rainier Mountaineering, Inc.,*[35] the court upheld a release signed by a participant in a mountaineering expedition. The opinion merely remarked that although mountaineering is a popular sport in Washington, it does not involve a public interest.[36]

Recently, in *Wagenblast v. Odessa School District No. 105-157-166J,*[37] the Washington Supreme Court clarified the analysis to be used when determining whether a release violates public policy. In *Wagenblast,* the defendant school districts required the plaintiffs, public school students and their parents, to sign releases before the students could participate in school athletic programs.[38] Recognizing that Washington courts lacked a clear method for determining whether or not specific releases violate public policy, the *Wagenblast* court adopted a multifactored public policy analysis to clarify matters. The court then held that agreements releasing school districts from the consequences of their future negligence violate public policy.[39]

The analysis adopted by the *Wagenblast* court identified six factors commonly present in releases which violate public policy. The validity of a release depends on whether (1) the release concerns an activity thought suitable for public regulation; (2) the party seeking to enforce the release provides a service of great public importance, often one of practical necessity; (3) that party provides the service to anyone meeting certain established standards; (4) the party seeking the release possesses greater bargaining strength than those seeking the service; (5) the release consists of a standardized adhesion contract; and (6) the party providing the service has control over the person or property of those seeking the service.[40] Although a court need not find all of these factors to invalidate a release, the court reasoned that the more factors

33. 11 Wash. App. 72, 79–80, 521 P.2d 244, 248, *review denied,* 84 Wash. 2d 1007 (1974).
34. *Id.* at 74, 521 P.2d at 245.
35. 30 Wash. App. 571, 574, 636 P.2d 492, 493 (1981), *review denied,* 96 Wash. 2d 1027 (1982).
36. *Id.*
37. 110 Wash. 2d 845, 758 P.2d 968 (1988).
38. *Id.* at 847, 758 P.2d at 969.
39. *Id.* at 848, 758 P.2d at 970.
40. *Id.* at 852–56, 758 P.2d at 972–73.

that appear in a given release, the more likely the release violates public policy.[41]

The *Wagenblast* court found all six factors present in the releases required by the school districts and concluded that the releases violated public policy.[42] First, the court found that school sports are subject to extensive public regulation. State law, local school boards, and the Washington Interscholastic Activities Association regulate everything from eligibility standards to athletic awards.[43]

Next, the *Wagenblast* court concluded that public school sports provide important services to the public in general, and to students in particular. Interscholastic athletics play an integral part in Washington's overall educational program, as evidenced by the significant expenditure of time, effort, and money on school sports.[44] Interscholastic athletics also provide a link between schools and the community at large, and sports programs keep some students in school who might otherwise drop out.[45] Moreover, school districts make athletic programs widely available, and any student meeting skill and eligibility requirements can participate.[46]

The court further concluded that the school districts possessed greater bargaining strength than the students and their parents and that the releases constituted adhesion contracts. Students and their parents have limited choices, given the dearth of alternative organized competitive sports programs.[47] Even where private programs exist, they lack the "inherent allure" of school sports and may be too expensive for some students.[48] The lack of alternatives, coupled with the school districts' "unwavering policy" regarding releases,[49] gave the districts great bargaining strength. Thus, the required releases constituted adhesion contracts.[50] Students and their parents had to sign the releases or forego the opportunity to participate in school athletic programs.[51] Thus, they could not negotiate for better terms or more protection against negligence.[52]

41. *Id.* at 852, 758 P.2d at 971.
42. *Id.* at 856, 758 P.2d at 973.
43. *Id.* at 852–53, 758 P.2d at 972.
44. *Id.* at 853, 758 P.2d at 972.
45. *Id.*
46. *Id.* at 854, 758 P.2d at 973.
47. *Id.* at 855, 758 P.2d at 973.
48. *Id.*
49. *Id.*
50. *Id.* An adhesion contract is a standardized contract offered on a take-it-or-leave-it basis without any opportunity to bargain. BLACK'S LAW DICTIONARY 40 (6th ed. 1990).
51. *Wagenblast,* 110 Wash. 2d at 855, 758 P.2d at 973.
52. *Id.*

Finally, the court found that the school districts exercised significant control over student athletes. The court recognized that the duty of care a school district owes to its students extends to students engaged in interscholastic sports.[53] Thus students, while under the supervision of school coaches, are subject to the risk that the school district or its agent, the coach, will breach that duty.[54] The students remained under the close supervision and, consequently, the extensive control of the school district.[55]

C. Wagenblast *Represents the Correct Approach to Public Policy Determinations*

In reaching its conclusion that parental preinjury releases violate public policy, the *Scott* court failed to follow the precedent established in *Wagenblast.* By failing to follow or to explain its departure from the public policy analysis established by its own precedent, the court abrogated its responsibility to provide clarity and guidance for lower courts. Had the court applied the *Wagenblast* analysis, it likely would have concluded that the Grayson Connor release did not violate public policy.

1. Public Policy Determinations Demand Clarity and Consistency

Public policy, although often invoked by courts as a basis for legal decisions, is often a poorly defined and ambiguous concept.[56] When making a decision based on public policy, courts consider general social interests.[57] In the absence of a legislative or constitutional declaration of policy, however, a court will depend largely on its own sense of community values.[58] Thus courts risk using "public policy" as a basis to pursue their individual views of morality.[59] The courts therefore bear a special responsibility to analyze public policy decisions carefully because of their unavoidable subjectivity.

Careful and consistent public policy analysis serves several purposes. First, policy determinations serve as the legal basis for future decisions. Thus, courts essentially create policy as they adjudicate;

53. *Id.* at 856, 758 P.2d at 973.
54. *Id.*
55. *Id.*
56. *See generally* Robert F. Brachtenbach, *Public Policy in Judicial Decisions,* 21 GONZ. L. REV. 1 (1985–86); James D. Hopkins, *Public Policy and the Formation of a Rule of Law,* 37 BROOK. L. REV. 323 (1971).
57. Hopkins, *supra* note 56, at 323.
58. *Id.* at 330–31.
59. *Id.* at 324.

courts cite public policy to support their decisions, and those very decisions in turn help to define the policies that later courts invoke. Courts thus have a responsibility to clearly define both the public policies that their decisions serve and the principles on which those policies are based.[60] Such clarity not only helps future courts make consistent decisions, but it also helps the general public. Court statements of policy often affect individual conduct and choices.[61] If courts make unclear or inconsistent decisions, people will have difficulty predicting the legality of their behavior. Finally, requiring courts to engage in and articulate a careful analysis will force courts to fully consider the basis for their decisions. Otherwise, courts may all too easily hide uncertain reasoning under the rubric of public policy.[62]

2. *The* Scott *Court's Equivocal Treatment of* Wagenblast *Causes Confusion*

The *Scott* court tacitly retreated from the *Wagenblast* approach by concluding that parents can never sign releases for their children, rather than considering the nature of ski schools and the circumstances in which Mrs. Scott signed the release.[63] The *Wagenblast* court provided a well-reasoned approach to cases involving preinjury releases. It considered several significant factors and concluded that the school district releases violated public policy due to the essential nature of the activity and the unequal bargaining strength of the parties.[64] Although it could have reached its decision on the same basis as the *Scott* court—both parties in *Wagenblast* briefed the issue of parental power to sign releases[65]—the *Wagenblast* court instead took the opportunity to clarify public policy determinations in cases involving preinjury releases. It established an analysis that evaluates releases in context, examining the particulars of each transaction, rather than making a blanket rule that certain types of releases are always valid or

60. Brachtenbach, *supra* note 56, at 17.

61. Hopkins, *supra* note 56, at 331.

62. *Id.* at 333.

63. One author has argued that although Washington courts prior to *Wagenblast* analyzed releases inconsistently, they actually reached consistent results because courts always considered the practical public importance of an activity when deciding whether to uphold a release. Note, *School Districts Cannot Contract Out of Negligence Liability in Interscholastic Athletics,* 102 HARV. L. REV. 729, 734 (1989). Even under this theory, the *Scott* court's reasoning fails, because ski racing lessons are not of public importance. See *infra* note 70.

64. *See supra* notes 41–55 and accompanying text.

65. Brief of Appellants at 26–28, Wagenblast v. Odessa Sch. Dist. No. 105-157-166J, 110 Wash. 2d 845, 758 P.2d 968 (1988) (No. 53627-9); Brief of Respondents at 9–11, *Wagenblast* (No. 53627-9).

never valid.[66] By failing to apply the *Wagenblast* analysis in *Scott,* the Washington Supreme Court undermined its own goal to establish a consistent approach to public policy determinations.

Moreover, although the *Scott* court distinguished *Wagenblast,* it did so by questionable reasoning. The *Scott* court simply stated that *Wagenblast* did not apply because the *Wagenblast* court decided a different issue.[67] Such reasoning implies that *Wagenblast* applies only to releases required by public schools, and thus ignores the *Wagenblast* court's intention to promote consistency, establish an approach that would apply to all releases, and provide the guidance lacking in previous public policy holdings. Such an analysis is meaningless, however, if, as in *Scott,* subsequent courts disregard it any time the facts do not precisely parallel the original case. The *Scott* court, therefore, should have applied the *Wagenblast* test.

If the *Scott* court intended to abandon or to qualify *Wagenblast,* it should have done so explicitly. The *Scott* court was free to create a reasoned exception to the *Wagenblast* analysis if it could not void the ski school release under the multifactor test. It could have found that other factors mitigated against upholding the release even though it was valid under *Wagenblast.* By failing to provide a convincing explanation for its decision not to apply the *Wagenblast* analysis, however, the *Scott* court recreated the confusion in analyzing public policy determinations that *Wagenblast* sought to resolve. Lower courts and future litigants will find it increasingly difficult to determine which releases are effective and which ineffective in terms of public policy.

3. *Under* Wagenblast *the Release in* Scott *Is Effective*

Under the *Wagenblast* analysis, the release that Mrs. Scott signed was an effective release of her son's future cause of action against Grayson Connor Ski School for his personal injuries. The majority of the *Wagenblast* factors were absent in the circumstances surrounding the *Scott* release. The release therefore was not void as against public policy.

First, unlike public school athletic programs, private ski schools do not operate under an extensive network of regulations. The Grayson Connor Ski School is a private business that was operating at a pri-

66. *See supra* notes 40–55 and accompanying text.

67. Scott v. Pacific W. Mountain Resort, 119 Wash. 2d 484, 493, 834 P.2d 6, 11 (1992). The *Scott* court notes that the *Wagenblast* court struck down the school district releases on public policy grounds without reaching the question of whether parents may release their children's future right to recover for a third party's negligence. *Id.*

vately owned resort.[68] Thus, few state statutes or regulations govern the school.[69]

Second, ski racing lessons do not constitute a practical necessity. While discussing the public necessity of school sports, the *Wagenblast* court specifically distinguished such activities from private recreational activities such as skydiving and mountain climbing.[70] Despite their great recreational value and appeal, skiing lessons are similarly private and nonessential activities; they are not matters of public necessity.

Third, ski school operators do not possess vastly greater bargaining power than their patrons, given the nonessential and competitive nature of the business of ski instruction. In the Northwest, numerous ski schools compete with one another.[71] Justin's parents were free to send their son to any one of a number of ski schools if they objected to the terms of the Grayson Connor Ski School application or if they feared that Grayson Connor conducted his ski school unsafely. They also had the option of hiring a private individual instructor. Thus, Grayson Connor did not have the "near-monopoly power" that the school districts possessed in *Wagenblast.*[72]

Fourth, the competitive nature of the business of ski instruction counters the possibility that the release constituted an adhesion contract. Unlike the plaintiffs in *Wagenblast,* who had to sign the releases before the students could participate in school athletics, the Scotts did not have to sign a release before Justin could ski because not all local ski programs use identical releases. Some do not use any releases at all.[73] Competition among ski schools gives parents considerable bargaining power; to successfully attract students, a ski school operator must listen when potential customers complain about the terms of the application. Therefore, although Grayson Connor Ski School, like the school districts in *Wagenblast,* may well have had an "unwavering

68. Brief of Respondents Grayson Connor, Patricia Connor, and Grayson Connor Ski School at 15–16, *Scott* (No. 57944-0) [hereinafter Grayson Connor brief].

69. *Id.* Although some Washington statutes do apply to skiing and commercial ski activity, those statutes focus on the duties of ski area operators and patrons. The only reference to ski schools requires them to maintain liability insurance if they operate a tramway. *See* WASH. REV. CODE §§ 70.117.010–.040 (1992).

70. Wagenblast v. Odessa Sch. Dist. No. 105-157-166J, 110 Wash. 2d 845, 854 n.21, 758 P.2d 968, 972 n.21 (1988).

71. Grayson Connor brief, *supra* note 68, at 16. The *1992-93 Seattle Yellow Pages* lists 19 local ski schools, and many ski areas have their own programs. Interview with Ruth Nielsen, attorney for Grayson Connor, in Seattle, Wash. (Nov. 5, 1992) (notes on file with the *Washington Law Review*).

72. *Wagenblast,* 110 Wash. 2d at 855, 758 P.2d at 973.

73. Interview with Ruth Nielsen, *supra* note 71.

policy"[74] regarding its release, the release nonetheless did not amount to an adhesion contract.

Fifth, the control that ski school operators have over their customers does not compare to the control that school coaches have over their students. Private instructors command less obedience from students than do school coaches. Participants who pay for private instruction can act more independently than members of a school team. Private students who dislike the instruction of a given ski school can refuse to participate in any particular activity which appears dangerous. Those students could, however, most likely return to the instruction at any time. On the other hand, a member of a school football team who sits out a practice because he believes the coach has not taken adequate safety precautions risks permanently losing his place on the team. Thus, while the students at a ski school or a public school may be subject to the supervision and guidance of the instructor, public school coaches have the power to penalize students who choose not to participate.

More significantly, because private instructors have less control over their students, those instructors have limited ability to prevent students from endangering themselves. School coaches control practice sessions, equipment, and procedures; they have the power to govern virtually everything a student does while engaged in athletics. They also can invoke a disciplinary system and effectively deal with an unruly student who may endanger himself or others.

Private ski instructors, however, do not operate under such circumstances. While they may have some initial control over the venue of the activity, they have little control over student behavior. School coaches have the power to prevent students from using athletic equipment or facilities while unsupervised. A gym can be locked while not in use; a slalom race course cannot. For example, in *Scott,* some evidence indicated that Justin was injured while he was skiing unsupervised and on his own initiative during a lunch break.[75] Furthermore, a paid instructor does not command the same disciplinary authority over a customer as a school coach commands over his team members. Thus, given the limited authority of its private instructors, Grayson Connor Ski School had limited control over Justin.

While the foregoing *Wagenblast* factors were absent in *Scott,* the activities at issue in *Wagenblast* and *Scott* do share one similarity: both allow any qualified individual to participate. Any student who meets

74. *Wagenblast,* 110 Wash. 2d at 855, 758 P.2d at 973.

75. Grayson Connor brief, *supra* note 68, at 16–17.

certain eligibility requirements can participate in school athletics, just as anyone who attains a certain level of skiing skill can participate in ski racing classes. Nonetheless, this represents only one factor of the *Wagenblast* analysis. Moreover, Washington courts have upheld releases for many recreational activities that allow anyone with the requisite abilities to participate, including scuba diving and mountaineering.[76] Making an activity widely available is thus not in itself sufficient reason to invalidate releases for injuries suffered from that activity.

The Grayson Connor Ski School release therefore should have barred Justin's claims against the ski school. As a clearly written, knowingly signed express assumption of risk, it is effective against claims for ordinary negligence unless it violates public policy. Had the court applied the multifactored analysis established by *Wagenblast,* it would have found the release was not void as against public policy, and would have upheld it against Justin's claim.

III. THE *SCOTT* COURT REACHED A DECISION INCONSISTENT WITH PARENTS' ABILITY TO CONTROL CHILDREN'S LITIGATION

The *Scott* court reached a decision inconsistent not only with Washington's approach to public policy analysis, but also with other areas of Washington law. The court invalidated the parental preinjury release partially due to the fear that such a release, if effective, might prevent an injured child from recovering the money needed for medical care.[77] Existing Washington laws, however, give parents the power to prevent their injured children from recovering damages. Parents control both the timing of a child's lawsuit and the substance of many claims. As evidenced by its reasoning, however, the *Scott* court failed to account for this element of Washington law.

A. Parents Decide Whether or Not to Pursue Their Children's Claims

Washington law effectively gives parents the power to initiate their children's litigation. Children under the age of eighteen cannot litigate except through a guardian.[78] While children over fourteen years old may apply independently for a court-appointed guardian, a relative or

76. *See supra* notes 33–36 and accompanying text.
77. Scott v. Pacific W. Mountain Resort, 119 Wash. 2d 484, 494, 834 P.2d 6, 12 (1992).
78. WASH. REV. CODE § 12.04.140 (1992).

friend must apply for children under fourteen years old.[79] If their parents do not bring suit, children have only one option: the statute of limitations on most actions for negligence is tolled during minority, and thus children can bring suit after they turn eighteen.[80]

The practical effect of Washington statutes undercuts the *Scott* court's concern for injured children's inability to recover damages if parents can release their children's future claims. The court failed to acknowledge that because children cannot litigate on their own, parents already possess the power to hamper their children's ability to recover damages. Justin Scott in particular could not have brought this lawsuit by himself. Because he was twelve years old when his injuries occurred, he could not have sued independently or applied for a court-appointed guardian.[81] Although he could have waited and sued when he turned eighteen, in the six-year interim he might have suffered if his parents could not pay for his care. In practical terms, his parents had the power to decide whether he could recover damages.

The *Scott* court either ignored or did not recognize the implications of these existing Washington laws. The court did not question the premise that parents control the pursuit of their children's litigation.[82] However, it failed to recognize that the practical effect of Washington law undermines its conclusion that because preinjury releases would prevent children from recovering damages such releases violate public policy. A parent's decision not to sue on an existing claim can also leave a child with no way to recover damages. While the tolling of the statute of limitations preserves some claims, injured children may still have to wait as long as eighteen years if a parent decides not to sue. Thus, whether a parent decides not to sue before or after a claim arises, the end result for the child is the same: the delay or elimination of potential recovery. If a parent can decide not to sue on an existing claim even though a child is left with no immediate recourse, a parent should likewise be able to decide not to pursue an as-yet-nonexistent claim, even if it might result in depriving an injured child of needed resources.

79. *Id.* § 4.08.050.

80. *Id.* § 4.16.190.

81. *See supra* notes 78–80 and accompanying text.

82. *See* Scott v. Pacific W. Mountain Resort, 119 Wash. 2d 484, 493–94, 834 P.2d 6, 11 (1992).

B. Parents Control Substantive Aspects of Their Children's Claims

Washington statutes enabling parents to eliminate substantive aspects of their children's claims further undercut the reasoning of the *Scott* court's decision. The *Scott* court expressed concern that preinjury releases allow parents to terminate their child's right to recover.[83] While in some instances children whose parents do not initiate a lawsuit may have later opportunities to sue on their own,[84] some Washington statutes nonetheless allow parents to permanently eliminate part or all of their children's claims.

The Washington legislature has recognized that parents can make binding decisions regarding their children's substantive rights. Particularly, where at least one parent consents to a medical procedure for a child, neither the other parent nor the child can bring an action based on lack of consent.[85] Furthermore, in medical negligence actions the parent's knowledge will be imputed to a child for purposes of the statute of limitations.[86] This imputation supersedes the normal tolling of the statute of limitations during a child's minority,[87] thus eliminating potential claims whose statute of limitations runs out during that time. The legislature enacted this provision as part of the 1986 tort reform package, suggesting a recent legislative recognition that in certain situations other policies can outweigh the need to preserve children's claims.[88]

The practical effect of these two pieces of legislation counters the *Scott* court's assertion that parents should not be able to relinquish a child's right to recover damages. Washington statutes allow parents to do precisely that. A parent's consent to a medical procedure eliminates a child's cause of action for battery.[89] Furthermore, if a parent knows that his child suffered injuries caused by medical negligence but does nothing, that child's claim may vanish before the child can take

83. *Id.* at 494, 834 P.2d at 12.

84. *See supra* note 80.

85. WASH. REV. CODE § 26.09.310 (1992).

86. *Id.* § 4.16.350. The statute of limitations on such actions requires that the plaintiff bring an action within three years of the negligence complained of, or within one year of discovery of the injury. *Id.*

87. *Id.*

88. Act of Apr. 4, 1986, ch. 305, § 502, 1986 Wash. Laws 1361. The statute was apparently designed to cut short the "long tail" of liability which previously left health care providers potentially exposed for as long as 26 years if a child suffered injuries at birth. Charles K. Wiggins et al., *Washington's 1986 Tort Legislation and the State Constitution: Testing the Limits*, 22 GONZ. L. REV. 193, 250 (1986–87).

89. Battery is often far easier to prove than negligence because the plaintiff need only show that she was subjected to an intentional and unwanted physical contact. KEETON ET AL., *supra* note 16, § 9, at 39–42.

action herself.[90] Whether by action or inaction, Washington parents already effectively possess the power to relinquish some of their children's claims. The *Scott* court's holding thus ignored this effect of existing Washington law.

IV. THE *SCOTT* COURT FAILED TO ANALYZE THE DIFFERENCES BETWEEN PRE- AND POST-CLAIM PARENTAL MANAGEMENT

The Scott court incorrectly analogized parental release of a child's future claim to parental management of a child's existing claim. The *Scott* court concluded that because parents cannot settle children's existing claims, parents should not have the power to waive future claims.[91] The *Scott* court erroneously equated the two situations. Courts and legislatures require that courts approve parental settlements of existing claims in order to protect children's property from parental conflicts of interest. Whether motivated by need, greed, or ignorance, a parent whose child has an existing tort claim has many opportunities to act against his child's best interests. A parent's decision to waive a future claim, however, involves a situation with fewer pressures on parents to act contrary to their children's long-term interests.

A. Parental Management of Existing Claims: Courts Strive to Protect Children's Property

Most jurisdictions, including Washington, accept the proposition that parents cannot settle or release their children's existing tort claims without judicial or statutory approval.[92] Courts take this responsibility seriously, refusing to merely rubber-stamp the settlements presented to them.[93] In Washington, a child's right to recover for personal injuries is a property right.[94] Court supervision aims to protect that right. Parents cannot settle a child's claim without court

90. *See supra* notes 86–88 and accompanying text.

91. Scott v. Pacific W. Mountain Resort, 119 Wash. 2d 484, 494, 834 P.2d 6, 11 (1992).

92. *See* 59 AM. JUR. 2D *Parent & Child* § 40 (1987); *see infra* notes 94–95 and accompanying text.

93. Salmeron v. United States, 724 F.2d 1357, 1363 (9th Cir. 1983) (court in which minor's claims are litigated has duty to protect minor's interests and must independently investigate any settlement recommended by a parent or guardian ad litem).

94. Hunter v. North Mason High Sch., 85 Wash. 2d 810, 539 P.2d 845 (1975); *see also* American Mut. Liab. Ins. Co. v. Volpe, 284 F. 75 (3d Cir. 1922); Therriault v. Breton, 95 A. 699 (Me. 1915).

approval, and a guardian ad litem or independent counsel must represent the child in any proceedings.[95]

A child's existing tort claim or recovery, although the child's property, is vulnerable to parental control or mismanagement. When a parent releases or settles a child's claim, a conflict of interest with the child's rights may arise. For example, when a parent accepts a settlement for a child's claim and signs an indemnity agreement, the parent becomes liable to the defendant for any damages that the child recovers.[96] This creates a strong motive for the parent not to sue.[97] Outright parental dishonesty may also threaten children's property; a parent might squander or misappropriate a child's settlement or recovery.[98] At times parents may also act ignorantly, or may be coerced or defrauded into signing a release or settlement.[99] For example, they might release a claim hastily in the immediate aftermath of an accident.[100] Parents coping with an injured child may be susceptible to offers of a quick settlement. The emotional trauma and financial pressure of the child's injury may compel the parents to agree to an immediately attractive but ultimately inadequate settlement, or prevent them from inquiring into terms that they normally would question. Thus, absent court supervision, numerous parental actions can threaten children's property rights in an existing tort claim or recovery.

B. Parental Management of Existing Claims and Parental Waiver of Future Claims Involve Different Considerations

The *Scott* court erroneously equated parental management of existing claims with parental waiver of future claims.[101] The concerns

95. 4A LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE Rule 98.16W, at 51 (4th ed. 1990).

96. *See, e.g.*, Loesch v. Vassiliades, 86 A.2d 14 (N.J. Super. Ct. App. Div. 1952).

97. *See* Ohio Casualty Ins. Co. v. Mallison, 354 P.2d 800 (Or. 1960) (parent's fiduciary duty to child not discharged by entering into agreement creating conflicting interests; child also may be dissuaded from suing if he or she knows parents will ultimately pay recovery).

98. *See, e.g.*, Colfer v. Royal Globe Ins. Co., 519 A.2d 893 (N.J. Super. Ct. App. Div. 1986) (child's claim not barred where court had not approved settlement and father used funds for his own expenses).

99. *See, e.g.*, Gordon v. Agaronian, 171 N.Y.S.2d 131 (N.Y. Sup. Ct. 1957) (release signed by parents ineffective where parents were told by insurance company that they did not need an attorney or court approval).

100. *See, e.g.*, Wannemacher v. Tynan, 144 N.Y.S.2d 2 (N.Y. Sup. Ct. 1955) (release and indemnity agreement not valid where executed by parents within ten days of accident and before signs of injury appeared).

101. Several of the cases cited by the *Scott* court in support of its decision make the same erroneous analogy between parental management of existing and future claims. *See* Doyle v. Bowdoin College, 403 A.2d 1206, 1208 n.3 (Me. 1979) (parental preinjury releases invalid based

underlying the judiciary's reluctance to allow parents to dispose of a child's existing claim do not arise in the situation where a parent waives a child's future claim. A parent dealing with an existing claim is simultaneously coping with an injured child; such a situation creates a potential for parental action contrary to that child's ultimate best interests.[102]

A parent who signs a release before her child participates in a recreational activity, however, faces an entirely different situation. First, such a parent has no financial motivation to sign the release. To the contrary, because a parent must pay for medical care, she risks her financial interests by signing away the right to recover damages. Thus, the parent would better serve her financial interests by refusing to sign the release.

A parent who dishonestly or maliciously signs a preinjury release in deliberate derogation of his child's best interests also seems unlikely. Presumably parents sign future releases to enable their children to participate in activities that the parents and children believe will be fun or educational. Common sense suggests that while a parent might misjudge or act carelessly in signing a release, he would have no reason to sign with malice aforethought.

Moreover, parents are less vulnerable to coercion and fraud in a preinjury setting.[103] A parent who contemplates signing a release as a prerequisite to her child's participation in some activity faces none of the emotional trauma and financial pressures that may arise with an existing claim. That parent has time to examine the release, consider its terms, and explore possible alternatives. A parent signing a future release is thus more able to reasonably assess the possible consequences of waiving the right to sue.

The facts of *Scott* demonstrated the conditions typically prevailing when parents sign preinjury releases. Mrs. Scott signed the ski school release to give Justin an opportunity to ski. She gained no financial advantage for herself in doing so. She suffered no fraud or coercion. She was under no financial or emotional pressure when she signed the release. Thus, while she may have misjudged the risk to her son, Mrs. Scott did not mismanage or misappropriate Justin's property. She did

on rule that parents or guardians cannot waive their children's existing claims); Childress v. Madison County, 777 S.W.2d 1, 6–7 (Tenn. Ct. App. 1989) (release signed by mother before son's participation in Special Olympics invalidated based on Tennessee rule requiring court approval or statutory authority for settlement of a minor's claim).

102. *See supra* notes 96–100 and accompanying text.

103. While a parent might be defrauded in signing a preinjury release, courts could resolve such situations individually rather than invalidating all parental preinjury releases.

her best to protect Justin's interests, and the court need not step in to do so.

Although the *Scott* court showed a laudable concern for injured children's rights, it failed to analyze the differences between a parent's management of an existing claim and a parent's waiver of a future claim. The pitfalls inherent in parental management of an existing claim make judicial supervision desirable. By contrast, fewer dangers inhere in parental waiver of a future claim; consequently, courts should defer to parental judgment when examining such waivers. Therefore, by erroneously analogizing pre- and post-claim parental management, the *Scott* court arrived at a faulty conclusion and an unsatisfactory result.

V. CONCLUSION

In its desire to protect children's claims, the *Scott* court tacitly abandoned Washington's approach to analyzing preinjury releases and failed to acknowledge elements of Washington law that undermine its reasoning. By failing to articulate a new public policy analysis for preinjury releases or a narrow exception to the old one, the court retreated into the confusion that earlier opinions sought to alleviate. Moreover, the court's reasoning failed to account for existing law that confers upon parents the power to delay or eliminate their children's tort recoveries. Finally, the court mischaracterized preinjury releases by analogizing them to parental management of a child's claim rather than to a parent's decision not to sue at all.

The *Scott* court reached a flawed decision which threatens children's organized recreational activities.[104] Such activities already suffer from severe pressures. Increasing costs and the fear of litigation threaten to drive recreational activities for children out of the market.[105] Given the virtues of and need for children's recreational programs,[106] courts should do what they can to encourage such programs. Because recreation providers will take care of their customers in order

104. *Scott* could also hurt Washington employers. In International Union, UAW v. Johnson Controls, Inc., 111 S. Ct 1196 (1991), the Supreme Court held that employers could not ban all fertile women from jobs involving exposure to lead, even though lead exposure might cause birth defects. *Scott* implies that employers could not obtain releases from female employees that would be effective against claims brought by their future children. Thus, a Washington employer using substances that might cause birth defects now faces long-term liability.

105. *See generally* Steven Findlay, *Breaks of the Game,* U.S. NEWS & WORLD REP., Oct. 5, 1987, at 75; Lisa G. Markoff, *A Volunteer's Thankless Task: Liability Threat Looms,* NAT'L L.J., Sept. 19, 1988, at 1.

106. *See generally* Robert Scheer, *Southern California Voices: A Forum for Community Issues; Testimony/One Person's Story: Helping Kids on Skid Row; Nancy Berlin,* L.A. TIMES,

to assure their continued patronage, validating releases that protect a recreation provider would help to keep children's recreational programs available and affordable without diminishing the safety of such programs.

Sept. 28, 1991, at B5; *How to Enjoy Sports—And Avoid Injury,* U.S. NEWS & WORLD REP., Dec. 29, 1975, at 37.