NOTE

SIGN ME UP?:
A CRITIQUE OF THE PENNSYLVANIA SUPREME COURT’S APPROACH TO PRE-INJURY SPORTS LIABILITY WAIVERS IN THE WRONGFUL DEATH CONTEXT*

I. INTRODUCTION

It is common practice for a consumer to release a company from liability in order to receive its products or services. An ordinary means of securing such liability waivers online is through “clickwrap,” which requires users to click a box indicating their agreement to the vendor’s terms. The use of these liability waivers is particularly prevalent during the registration process for recreational sports. Organizers of events such as triathlons and distance-running races often require them as a condition of participation. Indeed, the use of such liability waivers during the registration process is encouraged by USA Triathlon, that sport’s national governing body.

It is settled law in Pennsylvania that contracts waiving a party’s right to recover for the other party’s own negligent acts are generally enforceable if they meet certain criteria that follow general principles familiar to most first-year law students. Until recently, however, Pennsylvania courts had not considered whether this liability waiver might also serve as a complete defense to a spouse’s separate wrongful death action, despite her

* David L. Teklits, J.D. Candidate, Temple University Beasley School of Law, 2022. Thank you to Professor Bonny Tavares for her prompt and insightful guidance. Thank you to Temple Law Review, especially Kayla Martin and Courtney Kurz, for their excellent work. I extend my profound appreciation to my family and my employer for their outstanding support, patience, and flexibility. Lastly, I dedicate this work to all of the endurance athletes out there; hopefully, we can safely get back out on the racecourse someday soon.
1. Doyice Cotten, Electronic or Online Waivers: How Good Are They?, SportWaiver (Feb. 6, 2017), http://www.sportwaiver.com/electronic-or-online-waivers-how-good-are-they/ [https://perma.cc/F5ST-J58] (describing a clickwrap agreement as an agreement under which “'[t]he client is required ‘to affirmatively click a box on the website acknowledging awareness of and agreement to the terms of the waiver before he or she is allowed to proceed with further utilization of the website or complete the registration process’” (citations omitted)).
2. See Gina Pauline, Barbara Osborne & John J. Miller, Do Entry Form Waivers Properly Inform Triathlon Participants of the Dangers of the Sport?, 26 J. LEGAL ASPECTS SPORT 106, 108–09 (2016) (noting that a majority of triathlon managers indicated that participants had to sign a release to participate).
4. See infra notes 54–58 and accompanying text for an explanation of the elements of an enforceable release in Pennsylvania.
This Note argues that neither the majority nor the dissenting opinions’ rationales in Valentino were satisfactory. First, Section II enumerates the relevant facts and procedural history by explaining the Superior Court of Pennsylvania’s decision to uphold the liability waiver. Next, Section III explains the prior law the Valentino decision implicates. It devotes attention primarily to the prior law bearing on the enforceability of liability waivers and the development of the wrongful death cause of action. Section IV explains the Pennsylvania Supreme Court’s rationale for its holding and the dissenting opinions’ arguments in opposition to that rationale.

Finally, Section V argues that both the affirming and dissenting positions in Valentino are inadequate. First, this Section critiques the majority’s decision because it relied on an incomplete analysis of the duty of care, one that is inconsistent with the public policy underlying the state’s Wrongful Death Act. Second, this Section critically assesses the dissent’s narrow focus on upholding the liability waiver with respect to the decedent, but not his wrongful death beneficiaries. It explains how upholding the release with respect to the decedents’ wrongful death beneficiaries would be untenable by examining the impracticality of requiring participants to obtain separate liability waivers from their wrongful death beneficiaries.

Section V goes on to consider the logical solution of banning the use of these liability waivers entirely to resolve this contradiction. It concludes, however, that this solution is not feasible at this time. Given Pennsylvania precedent and the limited severity of this issue in the triathlon context, this Section advocates instead for insurance- and information-based solutions that event organizers should implement to better protect their customers.

II. FACTS AND PROCEDURAL HISTORY

In Valentino, the Pennsylvania Supreme Court faced the issue of whether a pre-injury liability waiver that a decedent signed could relieve the event organizer from liability for the decedent’s spouse’s separate third-party wrongful death claim, even though the spouse did not sign the liability waiver.

When Derek Valentino signed up to participate in the Philadelphia Triathlon (Triathlon) in January of 2010, the Triathlon organizer required him to waive claims for negligence against the organizer through the online registration process. Nearly five months later, he tragically drowned in the Schuylkill River during the swim portion of

5. See Valentino I, 150 A.3d at 501–02, 502 n.3 (Ford Elliott, P.J.E., concurring and dissenting) (discussing tangentially related cases but looking to case law in other jurisdictions that considered the identical issue as sources of persuasive authority).
8. 42 PA. STAT. AND CONS. STAT. ANN § 8301 (West 2020).
10. Valentino I, 150 A.3d at 485–86.
the Triathlon, Michele Valentino, Derek’s widow, brought survival and wrongful death claims against the Triathlon organizer and other defendants in 2012. She alleged that the defendants were grossly negligent and reckless, and engaged in outrageous acts based on expert testimony.

Mrs. Valentino’s testimony indicated that the Triathlon organizer (1) failed to supply an adequate number of lifeguards, (2) allowed too many swimmers in the water during wave launches, (3) failed to permit triathletes to wear buoyant wetsuits, and (4) failed to adequately train and instruct the lifeguards. Mrs. Valentino also introduced evidence to cast doubt on whether her husband actually executed the liability waiver. The trial court later struck her allegations relating to gross negligence, recklessness, and outrageous conduct, finding that as a matter of law her allegations were specific enough to demonstrate only ordinary negligence. The court also found the liability waiver was validly executed based on testimony from the company responsible for the online registration process.

Mrs. Valentino agreed to the dismissal of all defendants except the Triathlon organizer. The trial court then granted the event organizer’s motion for summary judgment for unspecified reasons. On reconsideration, she argued that the trial court erred in its findings regarding (1) her allegations of gross negligence, recklessness, and outrageous acts; (2) whether Mr. Valentino effectively executed the liability waiver; and (3) the credibility of the expert testimony she introduced. The Pennsylvania Superior Court affirmed the trial court’s ruling on all of these matters.

In addition to these matters, however, Mrs. Valentino raised a new issue in light of the Pennsylvania Superior Court’s decision in *Pisano v. Extendicare Homes, Inc.* She argued that under *Pisano*, the liability waiver could not bar her wrongful death claim because she was not a signatory. The court also found this argument unpersuasive, distinguishing *Pisano* from the facts of this case. It then affirmed the trial court’s grant of summary judgment on the grounds that the liability waiver rendered the Triathlon

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11. *Id.* at 486.
12. *Id.*
13. *Id.* at 488, 499.
14. *Id.* at 499. Most of these lifeguards were only familiar with conditions in swimming pools rather than open water. *Id.*
15. *Id.* at 490–91 (discussing alleged discrepancies between the release documents introduced in the Triathlon organizer’s motions).
16. *Id.* at 486.
17. *Id.* at 491.
18. *Id.* at 486.
19. *Id.*
20. *Id.* at 487.
22. *Id.* at 488–92.
23. *See id.* at 492.
25. *Valentino I*, 150 A.3d at 492.
26. *See id.* at 494 (reaching this conclusion on the grounds that because the release in *Pisano* involved an arbitration clause, it was a “procedural” rather than “substantive” issue).
organizer’s conduct nontortious and served as a complete defense to Mrs. Valentino’s wrongful death claim.27 In reaching this conclusion, the Pennsylvania Superior Court found California case law persuasive.28 Mrs. Valentino then appealed only the court’s decision regarding the wrongful death claim to the Pennsylvania Supreme Court, which agreed to hear the case.29

III. PRIOR LAW

The issue in Valentino implicates many different categories of law—contract through the online liability waiver agreement, tort via the wrongful death action, and (tangentially) property through Pennsylvania’s approach to tenancy by the entirety. Because other jurisdictions’ approaches influenced the Pennsylvania courts that were involved in this case, understanding prior law related to this issue requires analyzing it at both the national and state levels. This Section will proceed to do that in three Parts.

Part III.A provides an overview of pre-injury recreational liability waivers and factors affecting their enforceability generally. Part III.B explains the historical context behind the wrongful death cause of action and the relevance a liability waiver may have as a defense to a wrongful death claim. Lastly, Part III.C discusses Pennsylvania precedent that is uniquely relevant to the issue.

A. Pre-injury Recreational Liability Waivers

Two distinctions are relevant to this discussion. The first distinction is between waivers that relieve the other party from liability prior to the occurrence of the injury and those that are entered into post-injury. Waivers entered into pre-injury necessarily implicate questions of duty when evaluating a defendant’s negligence because they relate to questions of liability for future conduct.30 Those that are entered into post-injury do not implicate these questions, however, because they involve settling a post-injury claim arising out of past conduct.31

The second distinction is between liability waivers that involve an activity considered essential (i.e., a public good) and those involving nonessential recreational or similar private activities.32 This latter distinction relates to an essential component of the enforceability analysis—namely, the extent to which the liability waiver can fairly be considered the product of a voluntary and freely bargained exchange.33 The focus of this Note is on pre-injury liability waivers involving recreational activities.

27. Id.
28. See id. at 494–95 (discussing California’s approach to this issue and finding that it “align[s] with Pennsylvania law in a way that the decisional law of other states does not”).
32. See, e.g., Dalury v. S-K-I, Ltd., 670 A.2d 795, 798 (Vt. 1995) (discussing cases in which pre-injury releases involving parachute jumping and the Ironman duathlon were held enforceable because they did not involve a public interest).
33. C.f. Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 445 (Cal. 1963) (equating services that are of great importance to the public with “practical necessity”).
First, Part III.A.1 discusses general principles of formation and construction that are applicable to liability waivers. It describes how pre-injury recreational liability waivers are typically made and courts’ narrow construction of them in instances of ambiguity. Second, Part III.A.2 describes the crucial role public policy plays in liability waivers’ enforceability. It highlights some consistencies among jurisdictions regarding this issue, while also noting important areas of divergence.

1. Principles of Formation and Construction

A liability waiver is a contract between two parties.34 Therefore, general contract formation principles apply (i.e., offer, acceptance, and consideration).35 In the recreational sports context, the contract typically forms during the online registration process.36 The athlete accepts the event organizer’s proffered terms as a condition of participation.37 The event organizer’s grant to the athlete of the right to participate serves as consideration for the athlete’s agreement to release the event organizer from liability.38 Such liability waivers are generally disfavored by the law because they encourage a lack of care39 and, as such, are construed strictly against the drafter in the event of any ambiguity.40

This approach to construing liability waivers stems from the general policy underlying tort law: encourage people to exercise due care and refrain from negligently causing injury to others.41 The burden is therefore on the event organizer claiming protection under the liability waiver to “prove . . . that the provisions and terms of the contract clearly and unequivocally spell out the intent to grant such immunity and relief from liability.”42 Meeting this burden requires that the liability waiver identify with sufficient specificity the nature of the risks involved with the recreational activity.43 Even

34. See Restatement (Third) of Torts: Apportionment of Liab. § 2 (Am. Law Inst. 2000) (“When permitted by contract law, substantive law governing the claim, and applicable rules of construction, a contract between the plaintiff and another person absolving the person from liability for future harm bars the plaintiff’s recovery from that person for the harm.”).
35. See Restatement (Second) of Contracts § 3 cmt. d (Am. Law Inst. 1981) (“A bargain is ordinarily made by an offer by one party and an acceptance by the other party or parties, the offer specifying the two subjects of exchange to which the offeror is manifesting assent.”).
36. See Cotten, supra note 1 (“The preferred form of waiver usage in recreation and sport businesses is quickly becoming electronic (waiver available on a computer, tablet, or online).”).
38. Pauline et al., supra note 2, at 111–12 (discussing consideration in the triathlon context).
43. This does not necessarily require great detail, however. See Chepkevich v. Hidden Valley Resort, L.P., 2 A.3d 1174, 1188–91 (Pa. 2010) (finding that more specific language was unnecessary because of the public policy behind the Pennsylvania Skier’s Responsibility Act to promote skiing and put the risk on the skier).
if the organizer meets that burden, the validity of the liability waiver is contingent on it not contravening the public policy of the state, as is the case with any contract.44

2. Public Policy

In its seminal decision in Tunkl v. Regents of the University of California,45 the Supreme Court of California identified six factors relevant to the determination of whether a pre-injury liability waiver violates public policy.46 Those factors are as follows: (1) the service is “generally thought suitable for public regulation,” (2) the service is of “great importance to the public,” (3) the service is offered generally to any member of the public, (4) the service provider has a “decisive” bargaining advantage over the other party, (5) the service provider does not offer any provision for the buyer to forego the liability waiver for an additional fee, and (6) the buyer is placed under the exclusive control of the service provider through the transaction.47

Although all of these factors were present in Tunkl, the court clarified that not all of them must be present for a liability waiver to violate public policy.48 Many courts have since adopted the Tunkl factors, in whole or in part, when analyzing whether a pre-injury liability waiver violates public policy.49 Other courts have opted instead for a “totality of the circumstances” approach, in which the Tunkl factors are just one component of the court’s analysis.50 State legislatures in New York and Louisiana have expressly declared pre-injury liability waivers unenforceable as against public policy, although New York’s law applies only to for-profit operators.51 Moreover, in its singular decision in Hiett v. Lake Barcroft Community Association,52 the Supreme Court of Virginia declared that “an enlightened system of jurisprudence” mandated that all pre-injury liability waivers be held invalid as against public policy.53

Leaving aside the question of whether Pennsylvania’s jurisprudence is “enlightened” relative to that of Virginia, it is settled law in Pennsylvania that pre-injury

44. See infra Part III.A.2 for a discussion of the role of public policy in determining the enforceability of releases.
45. 383 P.2d 441 (Cal. 1963).
46. See Tunkl, 383 P.2d at 445–46.
47. Id.
48. Id. at 447.
51. See L.A. CIV. CODE ANN. art. 2004 (2019) (“Any clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party.”); N.Y. GEN. OBLIG. LAW § 5-326 (McKinney 2019) (“Every covenant, agreement or understanding in or in connection with, or collateral to, any contract . . . entered into between the owner or operator of any . . . place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be void as against public policy and wholly unenforceable.”).
53. Hiett, 418 S.E.2d at 896 (quoting Johnson’s Adm’x v. Richmond & Danville R.R. Co., 11 S.E. 829, 829 (Va. 1890)).
recreational liability waivers can be enforceable.\textsuperscript{54} While it remains to be seen what the future may hold for the doctrine of implied assumption of risk in Pennsylvania, the express assumption of risk by contract remains a valid affirmative defense in the state.\textsuperscript{55} Pennsylvania courts may still invalidate such liability waivers if they are against public policy, however.

For example, Pennsylvania courts have held liability waivers to be against public policy if the defendant’s conduct approximated an intentional tort\textsuperscript{56} or if the liability waiver eliminates protection afforded by statute.\textsuperscript{57} The elements of an enforceable liability waiver in Pennsylvania are as follows: the waiver (1) cannot violate public policy, (2) must pertain only to the parties’ private affairs, and (3) must be freely bargained for such that it is not a contract of adhesion.\textsuperscript{58} Unlike the \textit{Tunkl} court, Pennsylvania considers whether the liability waiver touches on public rather than private concerns in addition to whether it violates public policy when evaluating a liability waiver’s enforceability.\textsuperscript{59}

Thus far, this discussion has centered on cases involving claims made directly by the injured party who actually signed the liability waiver. The recreational sports liability waivers that are the subject of this Note often purport to waive other parties’ claims as well, such as those made by the athlete’s heirs or wrongful death beneficiaries.\textsuperscript{60} It may seem counterintuitive that a contract could bind a third party who is not a beneficiary of it in such a way. However, wrongful death claims occupy a unique position in tort law, as discussed in the following Part.

B. Wrongful Death Actions

Prior to the passage of wrongful death statutes in the mid-nineteenth century, the common law did not recognize a cause of action inherent to either the estate of the deceased or the deceased’s family member following death.\textsuperscript{61} In many jurisdictions, however, the head of household could pursue a claim for the death of his family member

\begin{itemize}
\item[56.] See Tayar, 47 A.3d at 1201 (finding waivers of reckless conduct unenforceable because such conduct is an “extreme departure from ordinary care” and thus closer to an intentional tort than it is to negligence (quoting 57A AM. JUR. 2d Negligence § 274 (2020))).
\item[57.] See Boyd v. Smith, 94 A.2d 44, 46 (Pa. 1953) (“[P]ublic policy does not permit an individual to waive the protection which the statute is designed to afford him. . . . Where public policy requires the observance of a statute, it cannot be waived by an individual or denied effect by courts, since the integrity of the rule expressed by the Legislature is necessary for the common welfare.”).
\item[58.] \textit{Id.}
\item[59.] \textit{Id.}
\item[60.] See Pauline et al., \textit{supra} note 2, at 118 tbl.1 (finding that 70.23% of a random sampling of releases waived rights of nonparticipants to sue).
\end{itemize}
or household servant to recover damages. These damages were based on the value of the deceased’s services and the consequent loss to the patriarch of that person’s services. This system, known as coverture, did not legally recognize the wife as a distinct person from the husband. She was instead “covered” by him, and as such, the common law did not recognize her as having a separate claim.

Against the backdrop of economic and cultural changes that took place during the mid-nineteenth century, many states, including Pennsylvania, passed legislation that replaced coverture with the wrongful death action. Under this new cause of action, the right to bring a claim lay instead with the beneficiaries named in the statute. Instead of being based on the claimant’s loss of the services of a family member or servant, the statute granted the named beneficiaries a cause of action to recover damages based on the loss of support the family member’s death represented. One of the primary purposes of the new law was to place the burden of providing support to the deceased’s widow and children on the person who acted wrongfully in causing the decedent’s death.

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62. See id. at 731–32 (noting that some American jurisdictions recognized a cause of action for wrongful death that lay with the “master,” father, or other third party with an interest in the loss of the family member or servant’s services).

63. See id. at 732–33.

64. See Thomas E. Simmons, Medicaid as Coverture, 26 HASTINGS WOMEN’S L.J. 275, 285 (2015) (“Marriage functioned to transfer property owned by the wife to the husband by operation of law. This automatic divestment of the woman’s separate property rested on the notion of the unity of person between the spouses—that they are one person in law ‘so that the very being and existence of the woman is suspended during the coverture.’” (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *433)).

65. See id. at 286 n.47 (“Feme covert is an archaic French legal term for married woman or literally ‘covered woman.’” (quoting Feme Covert, BLACK’S LAW DICTIONARY 737 (10th ed. 2014))).

66. See Witt, supra note 61, at 721 (discussing the shift in gender roles in the wake of the rise of the new wage labor economy); see also GAIL BEDERMAN, MANLINES & CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES, 1880–1917, at 124–25 (1995) (identifying the creation of the “woman’s sphere” and nineteenth century attitudes toward civilization as being measured in part by the degree to which women were kept within the home).

67. See, e.g., Kaczorowski v. Kalkowski, 184 A. 663, 664 (Pa. 1936) (discussing the creation of Pennsylvania’s original wrongful death statute in 1851). These statutes were patterned after England’s legislation, popularly known as Lord Campbell’s Act. Id.; see also Fatal Accidents Act 1846, 9 & 10 Vict. c. 93 (Eng.); Witt, supra note 61, at 734–35 (discussing New York’s early adoption of similar legislation).

68. See, e.g., 24 PA. STAT. AND CONS. STAT. ANN. § 8301(b) (West 2020) (identifying beneficiaries as the “spouse, children or parents of the deceased, whether or not citizens or residents of this Commonwealth or elsewhere”).

69. See Amato v. Bell & Gossett, 116 A.3d 607, 626 (Pa. Super. Ct. 2015) (“[D]amages awarded under the wrongful death act are intended to compensate the decedent’s enumerated family members for damages arising as a result of the death. Included in a wrongful death award may be a recovery for loss of post-death services, including society and comfort.”); Hatwood v. Hosp. of the Univ. of Pa., 55 A.3d 1229, 1235 (Pa. Super. Ct. 2012) (“Under the wrongful death act the widow or family is entitled, in addition to costs, to compensation for the loss of the contributions decedent would have made for such items as shelter, food, clothing, medical care, education, entertainment, gifts and recreation.” (quoting Machado v. Kunkel, 804 A.2d 1238, 1245–46 (Pa. Super. Ct. 2002))); see also Witt, supra note 61, at 720, 730–31.

70. See Amadio v. Levin, 501 A.2d 1085, 1087 (Pa. 1985) (“[O]ur wrongful death . . . statute[] . . . should be liberally construed to accomplish the objective of the act, which is to provide a cause of action against one whose tortious conduct caused the death of another.”); see also Kaczorowski, 184 A. at 665 (stating that the Wrongful Death Act is “an attempt to compensate an independent wrong to the parties named in the statute”).
a family member’s right to bring a wrongful death claim has a statutory, rather than common law, basis.

The following two Parts explain the distinction between survival and wrongful death actions. First, Part III.B.1 briefly describes the grounds on which a decedent’s estate may bring a survival action. Second, Part III.B.2 explains how those grounds may differ with respect to wrongful death claims, depending on the jurisdiction’s approach.

1. Survival Actions

Distinct from wrongful death claims, survival actions also arose by statute in the wake of the statutory dismantling of the prior coverture system.71 These actions permit the decedent’s estate to recover for damages incurred as a result of tortious conduct.72 However, they are not based on the economic damages the decedent’s loss of support represents to beneficiaries.73 Instead, these damages are based on the decedent’s pain and suffering experienced from the time of injury until the time of death.74 They are also based on other related expenses incurred during that time period, such as medical care and funeral expenses.75

A survival action merely continues a cause of action the decedent would have had if she had survived.76 Therefore, the action is entirely contingent on the decedent having a viable claim.77 As such, a valid liability waiver signed by the decedent would be sufficient to bar recovery under a survival action.78 Contrarily, the extent to which wrongful death beneficiaries’ claims derive from the viability of the decedent’s underlying claim varies, as discussed in the next Part.

2. What Does “Derivative” Mean in the Wrongful Death Context?

Many states’ wrongful death statutes include a condition that in order for a beneficiary to bring a claim, the decedent must have been able to bring the claim had she

71. See, e.g., 42 PA. STAT. AND CONS. STAT. ANN. § 8302 (“All causes of action or proceedings, real or personal, shall survive the death of the plaintiff or of the defendant, or the death of one or more joint plaintiffs or defendants.”); see also Amadio, 501 A.2d at 1093 (noting that the survival action “abrogates the common law rule that an action abates on the death of a party”); Centofanti v. Pa. R.R. Co., 90 A. 558, 560 (Pa. 1914) (“At common law a right of action for an injury resulting in death did not survive. This has been changed in many, if not all, of the states by [wrongful death and survival] statutes which give a right of action and designate the party who shall bring the suit, and for whose benefit it shall be brought.”).


73. See id.

74. Id. (defining survival claim damages as “pain and suffering prior to death and loss of gross earning power from the date of injury until death, less the probable cost of maintenance as proved by evidence and any amount awarded for wrongful death”).

75. Id.

76. Id. (noting the survival claim simply “continues, in the decedent’s personal representative, the right of action which accrued to the deceased at common law”).

77. Cf. Dealey v. DynCorp Int’l, Inc., 8 A.3d 1156, 1165 (Del. 2010) (holding that an estate’s survival claim was barred because of a release signed by the decedent).

78. See infra note 80 for examples.
survived. The beneficiary’s claim is therefore wholly derivative of the underlying decedent’s claim. States that follow the wholly derivative approach generally recognize the validity of a liability waiver as a bar to both the survival claim and a spouse’s separate wrongful death claim. This is because, by expressly assuming the risk, the decedent—and by extension, her wrongful death beneficiaries—would not have been able to recover if she had survived. The basis for the wrongful death cause of action in such jurisdictions is therefore really no different than the survival action. In both cases, the decedent’s ability to recover personally if she had survived is an essential element.

Courts following the wholly derivative approach may still consider other factors in reaching their decisions, however. For example, the Delaware Supreme Court in Deuley v. DynCorp International, Inc. upheld the enforceability of liability waivers signed by security personnel employed in Kabul, Afghanistan, who were injured or killed in a terrorist attack. The liability waivers were part of employment agreements that provided insurance to the employees and their family members in the case of death or injury in lieu of their right to sue the employer. The employees and their family members brought wrongful death, loss of consortium, and survival actions against the employer but also accepted the proceeds of such insurance following the attack.

The court consequently reached its holding, in part, because it found that the liability waivers functioned like a workers’ compensation substitute, which the employer would have been required to provide if the incident had occurred in Delaware. Deuley is a useful reminder of the importance of the liability waiver’s role relative to the public policy of the state. In Deuley, the fact that the liability waiver replicated, rather than waived, protections afforded under state law was a key factor in the court’s decision.

79. See, e.g., Del. Code Ann. tit. 10, § 3721(5) (West 2020) (defining “wrongful act” such that it is limited to actions in which the decedent would have been entitled to recover if death had not occurred); N.Y. Est. Powers & Trusts Law § 5-4.1(1) (McKinney 2020) (conditioning recovery on the tortfeasor being liable to the decedent “if death had not ensued”); Tex. Civ. Prac. & Rem. Code Ann. § 71.003(a) (West 2019) (conditioning the cause of action on instances in which the decedent “would have been entitled to bring an action for the injury if the individual had lived or had been born alive”).

80. See, e.g., Deuley, 8 A.3d at 1165 (noting that under Delaware’s wrongful death statute, the definition of “wrongful act” is predicated on the act being one that would have permitted the decedent to recover if that person had survived); In re Labatt Food Serv., L.P., 279 S.W.3d 640, 646 (Tex. 2009) (enforcing a release against a wrongful death claimant on the grounds that “[d]ecedent’s beneficiaries . . . stand in [decedent’s] legal shoes and are bound by his agreement”).

81. Labatt, 279 S.W.3d at 647 (discussing the law in several jurisdictions and noting that whether the wrongful death action is separate or wholly derivative generally determines whether the contract signed by the decedent is enforceable against her heirs).

82. See supra note 80 and accompanying text.

83. See supra notes 76–78 and accompanying text for an explanation of the effectiveness of a valid release as a bar to survival claims.

84. Deuley, 8 A.3d 1156 (Del. 2010).

85. Id. at 1159.

86. Id. at 1159–60.

87. Id.

88. See id. at 1164.

89. See id.
Unlike Delaware and other jurisdictions that follow the wholly derivative approach, Pennsylvania follows what could be called a partially derivative approach. This approach recognizes the beneficiary’s wrongful death claim as a separate cause of action arising out of the death of the family member. At the same time, it also derives from the same underlying tortious conduct that resulted in the family member’s death. In a jurisdiction following the partially derivative approach, the decedent’s right to recover if the decedent had survived is not a precondition for a viable wrongful death claim.

Many courts following this approach emphasize the remedial nature of the wrongful death statute and endeavor to construe it liberally to fulfill its purpose. Conversely, if holding the defendant liable for the separate wrongful death claim would represent a “new and unjust burden” to the defendant that otherwise would not have existed, such liability should not be imposed. Thus, even though the decedent’s personal right to recover is not a prerequisite in jurisdictions following the partially derivative approach, it is often relevant. As discussed in the following Part, this is particularly so in cases in which the decedent signed a liability waiver.

C. The Liability Waiver as a Defense to Partially Derivative Wrongful Death Claims

As discussed, Pennsylvania and other jurisdictions that follow the partially derivative approach to wrongful death claims consider them derivative only in the sense that they derive from the same injury suffered by the decedent that resulted in death. Thus, the key issue is whether the defendant’s conduct can actually be considered


91. See, e.g., Ruiz, 237 P.3d at 589.

92. See, e.g., Pisano v. Extendicare Homes, Inc., 77 A.3d 651, 663 (Pa. Super. Ct. 2013) (holding that the wrongful death claim “creates an independent action distinct from a survival claim that, although derived from the same tortious conduct, is not derivative of the rights of the decedent”); see also Madison v. Superior Court, 250 Cal. Rptr. 299, 303–04 (Cal. Ct. App. 1988) (finding that a release is legally ineffective to bind a decedent’s heirs’ wrongful death claims); Gershon v. Regency Diving Ctr., Inc., 845 A.2d 720, 725 (N.J. Super. Ct. App. Div. 2004) (noting the statutory language that limits heirs’ rights to bring a claim only if the decedent would have been entitled to do so if he had lived is relevant only to the “character of the injury”).

93. See supra notes 90–92 and accompanying text.

94. See, e.g., Gershon, 845 A.2d at 725 (noting the purpose of New Jersey’s Wrongful Death Act is “remedial” and therefore should be “liberally construed” so as to permit heirs to recover for wrongful death); Centofanti v. Pa. R.R. Co., 90 A. 558, 561 (Pa. 1914) (“The [wrongful death act] is remedial, and should be construed liberally so as to effect the intended purpose of changing the former law and permitting a recovery for torts resulting in death.”).

95. See Kaczorowski v. Kalkosinska, 184 A. 663, 664 (Pa. 1936) (identifying the decedent’s contributory negligence as an example of such a burden).

96. See supra notes 90–93 and accompanying text.
tortious in light of the pre-injury liability waiver signed by the decedent. In cases involving pre-injury recreational liability waivers, this necessarily entails considerations of public policy because the enforceability of any liability waiver is contingent on it not violating public policy. Pennsylvania has unique case law relevant to this issue, as discussed below.

Part III.C.1 considers two early Pennsylvania cases that are uniquely relevant to the enforceability of liability waivers against third parties. They illustrate two relevant principles: first, a wrongful death claimant may still be subject to defenses that could be asserted against the decedent; and second, a spouse’s right to jointly held property cannot be waived without her consent. Part III.C.2 discusses the evolution of Pennsylvania’s modified approach to assumption of risk. It further considers how the Pennsylvania Supreme Court has applied that doctrine to determine whether a defendant owed a plaintiff a duty of care in a case involving a liability waiver.

1. Pennsylvania Case Law Relevant to Pre-injury Waivers

In Kaczorowski v. Kalkosinski, the Pennsylvania Supreme Court held that a wrongful death claim could be maintained against a decedent’s spouse. Following a car accident that killed both a wife and husband, the wife’s mother brought a wrongful death action against the husband’s estate. The court held that the wrongful death action could be maintained against the husband’s estate despite the fact that the decedent herself could not have brought a claim against her husband.

The estate defended on the grounds that because there could be no tort between husband and wife under then-current law, there could be no wrongful death claim. The court rejected this argument. It determined first that the inability of the wife to sue as a result of her relationship with her husband was merely a “personal disability.” It distinguished this type of “personal disability” from acts she might have taken that would have prevented her from recovering, such as her own contributory negligence. Therefore, the court reasoned that the parties’ relationship had no bearing on whether the underlying act resulting in her death was wrongful.

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97. See supra note 27 and accompanying text for an example of the importance of this issue, as evidenced by the Pennsylvania Superior Court’s holding that the release in Valentino rendered the defendant’s conduct non-tortious.

98. See supra Part III.A.2 for a discussion of the importance of public policy in evaluating the enforceability of pre-injury releases.


100. See Kaczorowski, 184 A. at 665–66.

101. Id. at 663–64.

102. See id.

103. See id. at 664.

104. Id. at 664–66.

105. Id. at 665 (“There is no reason why the fortuitous circumstance that the tort-feasor, whose act deprived the parent of support, happened to be the husband of the person who was injured by that act, and who also furnished the support, should be a bar to recovery here. The disability of the wife to sue is personal.”).

106. Id.

107. See id. at 664 (“As to other parties, there may be an independent wrong for which recovery should be allowed.”).
Shroeder v. Gulf Refining Co., 108 however, provides an example of an instance in which the parties’ relationship was relevant. In Shroeder, the Pennsylvania Supreme Court held that a liability waiver signed by one spouse alone is ineffective with respect to property held by tenants by the entirety.109 Although the husband signed a liability waiver with the defendant in connection with the use of pumps at the couple’s gas station, the wife had not.110 When the defendant later overfilled those pumps and caused the station to explode,111 the court noted that properties held as tenants by the entirety in Pennsylvania cannot be alienated without the consent of both spouses.112 Since the couple owned the station as tenants by the entirety, the court found that the liability waiver signed solely by the husband was ineffective as a defense to the couple’s negligence claim.113

When viewed in tandem, Kacarowski and Shroeder provide guidance on two important—and potentially conflicting—principles. First, Kacarowski acknowledges that the decedent’s right to sue does not control the right of the wrongful death claimant to do so.114 The wrongful death claim itself, however, remains subject to any defenses that might have been asserted against the decedent had she survived, such as contributory negligence.115 Second, Shroeder provides that pre-accident liability waivers relating to property held by tenants by the entirety must be signed by both spouses to be effective.116

2. Pennsylvania’s Modified Approach to Assumption of Risk

One final element specific to Pennsylvania is its modified approach to the assumption of risk doctrine in the wake of the Comparative Negligence Act’s117 passage. The Act specifically preserved the doctrine only for downhill skiing and off-road racing.118 Nevertheless, in Carrender v. Fitzner,119 the Pennsylvania Supreme Court extended the doctrine more broadly to any instance in which plaintiffs voluntarily encounter “known or obvious” dangers.120 The court later clarified that the doctrine applies only as a matter of law when analyzing whether the defendant owed a duty of

108. 150 A. 663 (Pa. 1930).
110. Id.
111. Id. at 663–64.
112. Id. at 665; see also Madden v. Gosztorny Sav. & Tr. Co., 200 A. 624, 630 (Pa. 1938) (discussing this issue in the context of the Married Women’s Property Act of 1848 and noting “the very purpose of the [Act] was to protect [the wife’s] property from the common law dominion or control of the husband”).
113. Shroeder, 150 A. at 665.
114. See supra notes 99–107 and accompanying text for a description of Kacarowski.
115. This rationale has obvious parallels with California’s approach. See, e.g., Madison v. Superior Court, 250 Cal. Rptr. 299, 307 (Cal. Ct. App. 1988) (holding a legally enforceable release signed by the decedent served as a complete defense to separate wrongful death claims brought by his parents).
116. See supra notes 108–13 for an explanation of this principle in Shroeder.
117. 42 Pa. STAT. AND CONS. STAT. ANN. § 7102 (West 2020).
118. See id. § 7102(b.3)–(6).
120. Carrender, 469 A.2d at 123.
care to the plaintiff. It would no longer consider the doctrine as an affirmative defense.

Thus, if assumption of risk cannot be established as a matter of law, the case must proceed to the jury under a comparative negligence instruction. This “modified form” of the assumption of risk doctrine does not apply to liability waivers, however, which instead remain an affirmative defense under Pennsylvania law.

*Hughes v. Seven Springs Farm, Inc.* helps to illustrate the importance of the distinction between express and implied assumption of risk in Pennsylvania’s assumption of risk doctrine. In *Hughes*, the court held that a skier who signed a liability waiver and was injured by another skier while skiing in a common area at the base of the mountain assumed the risk of her injuries. It did not, however, base its holding strictly on the liability waiver. The court found instead that the injuries the wounded skier suffered were inherent to an activity that had been specifically carved out by Pennsylvania’s Comparative Negligence Act. It concluded on this basis that the resort owed no duty to the injured skier because she failed to demonstrate that the ski resort operator deviated from established custom.

The court noted the operator still had a duty to protect patrons from risks that are not inherent to the activity, such as injuries caused by the ski resort deviating from established custom. Thus, even though the skier signed a liability waiver, the *Hughes* court did not decide the question of duty on that basis. Instead, it based its analysis on whether the injury she suffered was a risk that was inherent to the activity (i.e., a risk of which she knew or should have been aware). The duty analysis employed under this modified approach to the assumption of risk doctrine played a role in the Pennsylvania Supreme Court’s decision in *Valentino*, as discussed in the next Section.

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121. See *Howell v. Clyde*, 620 A.2d 1107, 1113 (Pa. 1993) (plurality opinion) ("[I]f reasonable minds could not disagree that the plaintiff deliberately and with the awareness of specific risks inherent in the activity nonetheless engaged in the activity that produced his injury. . . . [T]he court would determine that the defendant, as a matter of law, owed plaintiff no duty of care.").

122. *Staub v. Toy Factory, Inc.*, 749 A.2d 522, 526 (Pa. Super. Ct. 2000) ("[A]ssumption of risk is no longer an affirmative defense in most cases; rather, it is incorporated into an analysis of whether the defendant owes a duty to the plaintiff."); see also *Howell*, 620 A.2d at 1112–13 (noting the “social utility” of the doctrine and finding that in cases where it applies, the question is not whether the plaintiff was comparatively negligent, but instead, whether by assuming the risk, the defendant is relieved of any duty to him).


125. Id. at 1113 n.10; see also *Staub*, 749 A.2d at 526 ("[U]ntil the supreme court adopts clearer standards, assumption of risk should be analyzed according to the lead (plurality) opinion in *Howell*."); *Hardy v. Southland Corp.*, 645 A.2d 839, 842 (Pa. Super. Ct. 1994) (concluding that the court was obligated to follow the plurality opinion in *Howell* because it “espouse[d] the approach most narrow in scope that can gain at least a concurrence of the majority of the [Pennsylvania Supreme] Court").


128. See id. at 340–44.

129. Id. at 341, 344.

130. Id. at 343–45.

131. Id. at 343–44.

132. See id. at 344.
IV. COURT’S ANALYSIS

In Valentino, an evenly divided Pennsylvania Supreme Court affirmed the superior court’s ruling that the liability waiver the decedent signed acted as a complete defense to his spouse’s separate wrongful death claim.133 This decision does not constitute binding precedent under Pennsylvania law, however.134 At the outset, the majority135 noted the spouse’s failure to raise public policy arguments in the lower courts.136 The court therefore declined to engage in what it saw as “judicial overreaching” by considering any such arguments sua sponte.137

Instead, the court discussed what it saw as the superior court’s “astute legal analysis.”138 It noted with approval the superior court’s finding that the decedent “extinguished” the defendant’s duty of care through the liability waiver, rendering the defendant’s conduct “not tortious.”139 The court explained that under Section 496A of the Second Restatement of Torts, a liability waiver serves to relieve the defendant of any duty of care to the plaintiff.140 The court further relied on prior Pennsylvania case law, including Carrender and Hughes.141 It noted that “one’s assumption of the risks inherent in a particular activity eliminates the defendant’s duty of care.”142 Therefore, the court affirmed the superior court’s ruling that the wrongful death plaintiff failed to prove the defendant’s conduct was wrongful because the liability waiver nullified the defendant’s duty of care to the decedent.143

The court also discussed the superior court’s analysis of Buttermore v. Aliquippa Hospital,144 with which it agreed because the case involved a release that did “not preclude a finding that the defendants acted tortiously.”145 The court reached this conclusion because the post-injury release in that case purported to waive the independent claims of third parties but did not waive the defendant’s underlying duty from which those claims derived.146 From there, the court noted that a wrongful death

135. Technically, because the court split evenly on this decision, the opinions are referred to as the “Order in Support of Affirmance” (OISA) and the “Order in Support of Reversal” (OSIR). In cases of a split decision, the lower court’s ruling is upheld. See PA. RULE GOVERNING APPELLATE COURT JUDICIAL DISCIPLINE 10(B)(4) (2019). This Note therefore refers to the OISA as the “majority” and the OSIR and its supporting opinion as the “dissents.”
137. Id. at 942 & n.1 (declining to consider the plaintiff’s separate argument that the assumption of risk doctrine should be abolished except where expressly permitted by the Comparative Negligence Act).
138. Id. at 942.
139. Id. at 945.
140. Id.; RESTATEMENT (SECOND) OF TORTS § 496A (AM. LAW INST. 1965).
141. See supra Part III.C.2 for a discussion of Carrender and Hughes in the context of Pennsylvania’s modified form of the assumption of risk doctrine.
142. Valentino II, 209 A.3d at 945.
143. Id. at 946.
144. 561 A.2d 733 (Pa. 1989).
145. Valentino II, 209 A.3d at 946.
146. See id. at 945.
claimant cannot “resurrect” a duty of care that the decedent had already eliminated by
signing the liability waiver prior to her death.\textsuperscript{147} It reiterated its refusal to consider public
policy because the plaintiff had not properly raised the issue in the lower courts.\textsuperscript{148}

Lastly, the court found the dissent’s position to be illogical. First, it reasoned that
upholding the liability waiver with respect to the decedent and yet invalidating it when
applied to the decedent’s wrongful death claimants was contradictory.\textsuperscript{149} It viewed such
a position as “elevat[ing] the rights of victims’ heirs over those of the victims themselves
. . . [and] immuniz[ing] wrongful death claims from ordinary and readily available
defenses.”\textsuperscript{150} Moreover, the court found no direct support in the text of the Wrongful
Death Act itself for such a position.\textsuperscript{151} As such, the court chose to exercise what it saw
as judicial restraint, cautioning that the dissent “comes dangerously close to displacing
the legislative process with judicial will.”\textsuperscript{152}

What were essentially two dissenting opinions met the majority.\textsuperscript{153} The first, Justice
Dougherty’s Order in Support of Reversal, rested on two basic principles.\textsuperscript{154} First, the
purpose of the Wrongful Death Act is remedial, and it should therefore be construed
liberally to “effect its purpose and promote justice.”\textsuperscript{155} Second, liability waivers are
disfavored by the law and should be construed narrowly against the drafter (i.e., the
defendant in this case).\textsuperscript{156}

Justice Dougherty also noted the elements required for a valid liability waiver in
Pennsylvania.\textsuperscript{157} He particularly stressed that a liability waiver’s validity is contingent
on it not violating the public policy of the state.\textsuperscript{158} He therefore provided a framework
for analyzing this issue in which the liability waiver is given a narrow interpretation
while the Wrongful Death Act is interpreted broadly.\textsuperscript{159} This framework led him to
conclude that the superior court erred by giving the liability waiver “the broadest
application possible while disregarding the remedial nature of the Act and the public
policy considerations underpinning it.”\textsuperscript{160}

Consequently, Justice Dougherty emphasized the lack of privity between the
decedent’s spouse and the defendant.\textsuperscript{161} He found that allowing the liability waiver to act
as a complete defense to separate wrongful death claims ignored the purpose and policy
underlying the Wrongful Death Act.\textsuperscript{162} Justice Dougherty reasoned that such actions

\textsuperscript{147} Id. at 946.
\textsuperscript{148} See id. at 946–47.
\textsuperscript{149} Id. at 947.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} See id. at 947–57, for both of these opinions.
\textsuperscript{154} See id. at 947–55 (Dougherty, J., dissenting).
\textsuperscript{155} Id. at 952.
\textsuperscript{156} Id. at 952–53.
\textsuperscript{157} Id. at 953. See supra note 58 and accompanying text for a description of these elements.
\textsuperscript{158} Valentino II, 209 A.3d at 953 (Dougherty, J., dissenting).
\textsuperscript{159} See id.
\textsuperscript{160} Id.
\textsuperscript{161} See id.
\textsuperscript{162} Id. at 953–54.
belong solely to the wrongful death claimant and are not the decedent’s to waive.163 Permitting such a result, he reasoned, would render the right of recovery that the legislature granted to wrongful death beneficiaries “illusory” and as such would violate public policy.164 Justice Dougherty concluded that such a liability waiver cannot be upheld, because to do so would “elevate[] a private contract above public policy embodied in a statutory enactment.”165

Justice Donohue, in a second dissent, concurred in part with Justice Dougherty.166 She explained that upholding the liability waiver in this case as a complete defense against the plaintiff’s wrongful death claim was contrary to public policy.167 She nevertheless stressed that she found the superior court’s application of the “mechanical operation” of the liability waiver to be correct.168 In her view, however, such an operation must be disregarded in cases, such as this, involving a “legally disfavored” liability waiver.169

Justice Donohue further explained why she found the liability waiver to be disfavored.170 First, she noted that upholding the liability waiver against a third party as the majority did in this case conflicted with past precedent, which held that a liability waiver eliminating a plaintiff’s statutory rights was unenforceable.171 Upholding this liability waiver required a “far more extreme reach” because it was not even signed by the wrongful death claimant.172

She also identified two other ways in which the liability waiver in this case violated public policy.173 First, she reasoned that the remedial nature of the Wrongful Death Act exists in part for society’s benefit.174 Second, she explained that to ensure financial security for surviving spouses, long-standing legislation prohibits spouses from disinheriting each other.175 She accordingly found that permitting a spouse to essentially disinherit the other spouse by signing a liability waiver like the one in this case was incompatible with longstanding public policy of the state.176

163. See id.
164. Id. at 954.
165. Id. at 955.
166. See id. at 955–57 (Donohue, J., dissenting).
167. See id. at 955.
168. Id.
169. Id.
170. See id. at 956.
171. Id. (discussing Boyd v. Smith, 94 A.2d 44, 46 (Pa. 1953)).
172. Id.
173. See infra notes 174–76 and accompanying text.
174. See Valentino II, 209 A.3d at 957 (Donohue, J., dissenting) (first citing Kaczorowski v. Kalkosinski, 184 A. 663, 665 (Pa. 1936); and then citing Gershon v. Regency Diving Ctr., Inc., 845 A.2d 720, 728 (N.J. Super. Ct. App. Div. 2004)). Justice Donohue explained that society benefits by ensuring that the decedent’s heirs are not required to go on public support because of the loss of the decedent’s income. Id.
175. Id.
176. See id.
V. PERSONAL ANALYSIS

Neither the majority nor the dissents in `Valentino` adequately addressed the issue in the case—namely, whether a liability waiver bars wrongful death claims from claimants who are not parties to the waiver. The majority sought to avoid the unavoidable when it declined to consider policy and indirectly engaged in policymaking without acknowledging it. The dissents’ policy-based rationales, on the other hand, were correct in their application to the specific facts of the case and the policy underlying the Wrongful Death Act—but the broader implications of their positions are not tenable. Ultimately, the majority reached the correct result but for the wrong reasons.

Part V.A explains that the dissents were correct in finding that the liability waiver in `Valentino` was against the public policy underlying the Wrongful Death Act. However, as discussed in Part V.B, the practical considerations following such a result conflict with other policy interests that are relevant in the recreational sports context. Part V.C explains that these practical considerations suggest that banning pre-injury sports liability waivers entirely is the logical consequence of the dissents’ position. There are better alternatives available in the form of insurance-based and information-sharing solutions. These solutions would help ensure the continued financial viability of event organizers while still protecting the interests of triathlon participants and their family members.

A. The Valentino Majority’s Incomplete Duty Analysis

The `Valentino` majority opinion sought to avoid policy considerations that are inherent to the issue in this case. First, Part V.A.1 counters the majority’s argument that the text of the Wrongful Death Act does not support the `Valentino` plaintiff’s claim with a contextual analysis that leads to the opposite conclusion. Then, Part V.A.2 considers the majority’s reliance on the `Carrender` case line and the Second Restatement. It highlights the policy arguments and distinguishable fact patterns on which the `Carrender` case line rest. Part V.A.2 further argues that in relying on these cases, the majority implicitly adopted a policy-based rationale in finding that the defendant owed no duty to the wrongful death plaintiff in `Valentino`. This Part also demonstrates that the Second Restatement requires an analysis of public policy when considering express assumption of risk.

Finally, Part V.A.3 explores the dissents’ statutory and property-based rationales for finding the liability waiver to be unenforceable. Part V.A.3 concludes that the public policy underlying the Wrongful Death Act requires finding that the decedent in `Valentino` could not waive his spouse’s wrongful death claim on her behalf. The wrongful death action under Pennsylvania law recognizes a separate property right in the wrongful death claimant that a decedent cannot waive without her consent.

1. Interpreting the Wrongful Death Statute

The dissents in `Valentino` could have countered the majority’s argument by employing statutory interpretation, which is appropriate considering that the wrongful death action arises from a statute. This Part will first analyze the majority’s claim that

177. See supra notes 66–70 and accompanying text for an explanation of the statutory basis for the wrongful death cause of action.
the statutory text provided no direct support for upholding the liability waiver with respect to the decedent and invalidating it when applied to the spouse’s wrongful death claim.\footnote{178} The relevant language in the statute can be found in section 8301(a).\footnote{179} Section 8301(a) permits the wrongful death claimant to recover damages for the occurrence of a death under the following conditions: (1) another person’s “wrongful act[,] . . . unlawful violence[,] . . . or negligence” must have caused the death; (2) the decedent must not have recovered the same damages claimed during her lifetime; and (3) all prior actions for the injuries claimed must be joined with the wrongful claim in order to preclude “duplicate recovery.”\footnote{180}

The context provided by the second and third elements suggests that the legislature focused on ensuring that defendants are not required to pay two separate plaintiffs for the same injury to avoid “duplicate recovery.”\footnote{181} Mrs. Valentino’s claim clearly meets those elements—her husband obtained no recovery during his lifetime for his injuries, and the court dismissed his estate’s survival claim such that he could not recover twice.\footnote{182} The plain meaning of the text therefore does support her position, since duplicate recovery was not an issue in this case. While it is not necessary to look beyond the statute’s plain meaning,\footnote{183} there is also legislative history to support this position.\footnote{184}

The first element, that the defendant’s “wrongful act” or “negligence” caused the decedent’s death, would still need to be met.\footnote{185} Because the statute is silent with regard to what a “wrongful act” or “negligence” means, this indicates that the legislature intended the ordinary meanings of those terms.\footnote{186} Thus, the issue rested entirely on whether the defendant’s conduct in this case was wrongful or negligent under Pennsylvania law.\footnote{187} Making that determination in this case necessarily required considering policy, as discussed in the next Part.

2. Inherent Policy Considerations

The \textit{Valentino} majority’s reliance on \textit{Carrender} and its progeny was misplaced.\footnote{188} First, these cases all involve a consideration of whether the plaintiffs themselves

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\footnote{178} See \textit{supra} note 151 and accompanying text.\
\footnote{179} 42 PA. STAT. AND CONS. STAT. ANN. § 8301(a) (West 2020).\
\footnote{180} \textit{Id.}\
\footnote{181} \textit{Cf.} Kaczorowski v. Kallosinski, 184 A. 663, 664 (Pa. 1936) (construing the statute in effect at that time to ensure no “new and unjust burden” is placed on the defendant).\
\footnote{182} See \textit{supra} notes 12–19 and accompanying text for an account of the superior court’s affirmation of the dismissal of these claims.\
\footnote{184} See \textit{infra} notes 210–12 and accompanying text for an explanation of an amendment to the Wrongful Death Act in 1911 supporting this interpretation.\
\footnote{185} See \textit{supra} note 180 and accompanying text.\
\footnote{186} See Commonwealth v. Bulicki, 518 A.2d 577, 578 (Pa. Super. Ct. 1986) (“Pennsylvania courts have stated that ‘in the absence of legislative definitions, the meaning of words are ascribed their ordinary definitions.’” (citations omitted)).\
\footnote{187} This is because the other two statutory requirements have been met. See \textit{supra} note 180 and accompanying text.\
\footnote{188} See \textit{supra} Part III.C.2 for a discussion of \textit{Carrender} and its progeny.}
implicitly assumed the risk and were therefore barred from recovery. For that reason, they are factually distinct from cases such as Valentino that involve express assumption of risk in the form of a liability waiver and a claim brought by a third party. Second, this distinction is important because the majority utilized these cases as part of its finding that the defendant did not act negligently or wrongfully based on the liability waiver. The majority’s reasoning is not consistent with the Carrender case line. Instead of relying solely on the liability waiver itself like the majority in Valentino, the courts rendering these decisions based their holdings on an analysis of duty in cases where the plaintiff had voluntarily assumed a known risk.

Hughes, a case on which the majority relied, illustrates the importance of this distinction. As discussed, the Hughes court did not base its holding on the liability waiver in that case. Instead, it focused on whether the injury the skier suffered was an inherent risk of the activity. Consequently, to apply Hughes to Valentino would require a more thorough analysis of the information provided to the decedent regarding the risks and whether those risks were actually inherent to his death. This is a subject this Note will explore more fully below. It suffices for this Part’s purposes to demonstrate that the liability waiver alone does not preclude a finding that the defendant event organizer acted wrongfully or negligently, as the majority asserted.

Hughes, Carrender, and the cases that followed them stand for the principle that a defendant owes no duty in situations where the plaintiff is subjectively aware of a “known or obvious” danger inherent to the activity and voluntarily encounters it. Absent sufficient evidence to demonstrate that, the most one can conclude from the

189. See, e.g., Hughes v. Seven Springs Farm, Inc., 762 A.2d 339, 343–44 (Pa. 2000) (analyzing assumption of risk based on whether the risk of injury is inherent to the activity); Carrender v. Fitterer, 469 A.2d 120, 125 (Pa. 1983) (holding that defendant landowner could not be held liable for negligence because the plaintiff had assumed the risk when she walked across a slippery, icy parking lot (a “known and avoidable” danger)); Thompson v. Ginkel, 95 A.3d 900, 907 (Pa. Super. Ct. 2014) (holding that genuine issues of fact existed as to whether plaintiff assumed the risk of his injuries when setting up a fireworks display); see also Valentino II, 209 A.3d 941, 945 (Pa. 2019) (citing to each of the foregoing cases as support for the majority’s duty analysis).

190. See supra notes 142–43 and accompanying text.

191. See supra Part III.C.2.

192. See supra notes 126–32 and accompanying text for a discussion of Hughes.

193. See supra note 128 and accompanying text.

194. See supra note 132 and accompanying text.

195. See infra Part V.B.2 for a discussion of the inadequacy of the Valentino release with respect to identifying risks inherent to the swim leg of the event.

196. See supra notes 139–43 for the majority’s explanation of how the release “extinguished” the defendant’s duty of care.

197. See, e.g., Howell v. Clyde, 620 A.2d 1107, 1112 (Pa. 1993) (plurality opinion) (“The theoretical underpinning of these types of assumption of risk is that as a matter of public policy one who chooses to take risks will not then be heard later to complain that he was injured by the risks he chose to take and will not be permitted to seek money damages from those who might otherwise have been liable.”); Carrender v. Fitterer, 469 A.2d 120, 125 (Pa. 1983) (“By voluntarily proceeding to encounter a known or obvious danger, the [plaintiff] is deemed to have agreed to accept the risk and to undertake to look out for himself.”); Montagazzi v. Crisci, 994 A.2d 626, 635 (Pa. Super. Ct. 2010) (“[A]ssumption of the risk operates merely as a corollary of the absence of a duty; to the extent the injured plaintiff proceeded in the face of a known danger, he relieved those who may have otherwise had a duty, implicitly agreeing to take care of himself.”).
Carrender case line is that the liability waiver in Valentino might serve as an affirmative defense if the liability waiver itself is deemed enforceable. Making that determination requires consideration of public policy under Pennsylvania law.198

Regardless, Carrender and its progeny represent a policy decision made by the courts to preserve the assumption of risk doctrine in spite of a contrary legislative intent suggested by the state’s Comparative Negligence Act.199 Consideration of duty under Pennsylvania negligence law further requires consideration of policy,200 as does its requirements for evaluating the enforceability of liability waivers generally.201 Consequently, the majority inaccurately claimed that it did not engage in policy-related arguments—it in fact already implicitly relied on policy through the use of these cases.202 Simply put, the court’s holding necessarily implicated policy considerations by relying on these decisions.

The majority also relied on Section 496A of the Second Restatement of Torts to find that the liability waiver absolved the defendant of any duty of care to the decedent.203 Admittedly, commentary to that section does provide that a defendant is relieved from a duty of care it would otherwise owe to a plaintiff when the plaintiff signs a liability waiver.204 However, the majority should have continued on to Section 496B, which requires any such liability waivers to not be “contrary to public policy” in order to be valid.205 The effect of the liability waiver on the wrongful death claim in Valentino must therefore be considered in the context of public policy, as the dissents argued.206

3. The Public Policy Underlying the Wrongful Death Act Requires Obtaining Consent from Wrongful Death Beneficiaries To Waive Their Claims

Because it is necessary to consider public policy, this Part will first consider the dissents’ policy-based reasons for invalidating the liability waiver. The Valentino dissents’ arguments for this position can be broken up into two categories. The first

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198. See supra notes 55–59 for a description of policy-related factors relevant to the enforceability of releases in Pennsylvania.

199. See, e.g., Howell, 620 A.2d at 1114 (Nix, C.J., dissenting) (“Given the fundamental incompatibility between the Comparative Negligence Act and the doctrine of assumption of risk, there would be no way to achieve what the General Assembly sought to accomplish by passing the Comparative Negligence Act unless this Court concludes that, except in downhill skiing cases, assumption of the risk as an affirmative defense is no longer viable in this Commonwealth.”).

200. See, e.g., Montaguzzi, 994 A.2d at 631 (“The determination of whether a duty exists in a particular case involves the weighing of several discrete factors which include: (1) the relationship between the parties; (2) the social utility of the actor’s conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the [over all] public interest in the proposed solution.” (alteration in original) (emphasis added) (quoting Gutteridge v. A.P. Green Servs., Inc., 804 A.2d 643, 655 (Pa. Super. Ct. 2002))).

201. See supra note 58 and accompanying text for a list of such requirements.

202. See supra notes 135–37 and accompanying text.

203. See supra notes 197–99 and accompanying text.

204. See supra note 140 and accompanying text.

205. RESTATMENT (SECOND) OF TORTS § 496A, cmt. c.1 (AM. LAW INST. 1965).

206. Id. § 496B.

207. See supra notes 153–76 and accompanying text for an explanation of the dissents’ policy-based rationales.
category is based on the legislative intent behind the Wrongful Death Act. The second category is based on recognizing what amounts to a property right in the claim itself that the decedent alone cannot waive. The former position is somewhat tenuous, given the lack of specific legislative history to support it. Such an intent can be inferred, however, from changes the legislature made to the Wrongful Death Act in 1911.

The amended Act shifted Pennsylvania’s approach from one which considered wrongful death claims to be wholly derivative of the decedent’s underlying claim to the partially derivative approach that the statute currently reflects. This suggests that the legislature intended to liberalize wrongful death claimants’ ability to recover under the Act such that their claims no longer rested entirely on decedents’ right to recover if they had survived.

The Valentino dissents’ latter position, viewing the wrongful death claim as a property right that the decedent alone cannot waive, rests on a stronger foundation. This is especially the case when the claim is held by a spouse, considering Pennsylvania’s marital property law. This position is further bolstered by the purpose underlying legislation passed around the same time as the original Wrongful Death Act, which prohibited husbands from alienating marital property without their wives’ consent. Yet the dissents’ position regarding the inalienability of the spouse’s claim can be extended even further when considering this issue in the context of duty under Pennsylvania negligence law.

Pennsylvania recognizes a general duty of care not to injure others. The scope of this duty is limited to reasonably foreseeable risks. Thus, the defendant in Valentino arguably had a duty to the plaintiff that it breached. It deprived her of the economic support to which the Wrongful Death Act entitled her by negligently causing her

208. See supra notes 155–160, 167–76, and accompanying text for a description of this aspect of the dissents’ analyses.

209. See supra notes 161–65 and accompanying text for an explanation of the dissents’ property-based rationales.

210. See infra notes 211–12 and accompanying text.


212. See Centofanti v. Pa. R.R. Co., 90 A. 558, 561 (Pa. 1914) (discussing that the then recently amended Wrongful Death Act “is remedial and should be construed liberally so as to effect the intended purpose of changing the former law and permitting a recovery for torts resulting in death”).


214. See Madden v. Gosztonyi Sav. & Tr. Co., 200 A. 624, 630 (Pa. 1938) (“[T]he very purpose of the Married Woman’s Act of 1848 was to protect [the wife’s] property from the common law dominion or control of the husband.”).

215. See Zanine v. Gallagher, 497 A.2d 1332, 1334 (Pa. Super. Ct. 1985) (“Where . . . the parties are strangers to each other, such a relationship may be inferred from the general duty imposed on all persons not to place others at risk of harm through their actions.” (citing Gerdes v. Booth & Flinn, Ltd., 150 A. 483, 485 (Pa. 1930))).

216. Id. (first citing Paulsca v. Hoebler, 198 A. 646, 650 (Pa. 1938); and then citing RESTATEMENT (SECOND) OF TORTS § 284(a) (AM. LAW INST. 1965)).
husband’s death, notwithstanding the liability waiver he signed.\footnote{Cf. Witt, supra note 61, at 731–33 (discussing that the common law coverture system recognized the patriarch as having what amounted to a property right in the injured family member’s services).} While the relationship may seem too attenuated to establish such a duty, the liability waiver language itself indicates that the risk of this harm and the spouse’s resulting claim may have been reasonably foreseeable to the defendant in this case.\footnote{See Valentino II, 209 A.3d 941, 943 (Pa. 2019) (noting that the release required Mr. Valentino to indemnify the defendant for any claims brought either by himself or by anyone on his behalf).} The class of potential plaintiffs is also inherently limited by the wrongful death statute to “the spouse, children or parents of the deceased, whether or not citizens or residents of this Commonwealth or elsewhere.”\footnote{42 PA. STAT. AND CONS. STAT. ANN. § 8301(b) (West 2020).} This signifies that recognizing a separate duty here would not be an undue burden on defendants.

Such a position is also consistent with the property-based conceptions out of which the wrongful death cause of action arose.\footnote{See supra notes 62–65 and accompanying text for a discussion of the property-based coverture common law cause of action and its replacement by wrongful death legislation.} As such, if the defendant wanted to immunize itself completely from liability for such claims, it should have obtained a liability waiver from the decedent’s spouse as well.\footnote{Cf. Gershon v. Regency Diving Ctr., Inc., 845 A.2d 720, 728–29 (N.J. Super. Ct. App. Div. 2004) (recognizing that its decision would require insurers to obtain releases from wrongful death beneficiaries to obtain a complete release of claims, but finding that “[t]he policy favoring settlement and finality of claims, cannot defeat statutory rights created for the protection of survivors of one wrongfully killed” (quoting Alfone v. Sarno, 432 A.2d 857, 870 (N.J. 1981), overruled by LaFage v. Jani, 766 A.2d 1066 (N.J. 2001))); Walter T. Champion, Jr., Car Race Waivers’ Checkered Flag on Third Party Loss of Consortium Claims, 14 SETON HALL J. SPORTS & ENT. L. 109, 132 (2004) (arguing a similar position with respect to loss of consortium claims brought by racetrack divers’ spouses).} Considering the prevalence of language waiving the rights of nonparticipants to sue in the liability waivers utilized in triathlons generally,\footnote{See supra note 60 for one scholar’s study of the frequent use of such language in triathlon releases.} the dissents correctly viewed their use as frustrating the policy behind the Wrongful Death Act.\footnote{See supra notes 155–60 and accompanying text.} Consequently, if the analysis is limited solely to the policy underlying the Wrongful Death Act, the *Valentino* court should have invalidated the liability waiver with respect to the plaintiff’s wrongful death claim. There are competing policy interests in the recreational sports context, however.

### B. Competing Policy Interests in the Recreational Sports Context

Recognizing that event organizers owe a separate duty to a participant’s wrongful death beneficiaries is likely to have unintended consequences. Part V.B.1 argues that the *Valentino* dissents’ position would likely result in discouraging public participation in recreational sports, such as triathlons. It also argues that this position would increase the likelihood of litigation involving these types of liability waivers. Part V.B.2 then discusses the lack of information provided to participants regarding the unique risks of participating in the swim leg of triathlons. Ultimately, it concludes that these competing policy interests require a more effective resolution of this issue for triathlon participants and their dependents than the one the *Valentino* dissents offer.
1. Problems with Obtaining Consent from Beneficiaries

Requiring a participant’s wrongful death beneficiaries to sign separate liability waivers is impractical. First, most participants and organizers utilize an online registration process for convenience.224 Requiring the event organizer to obtain consent from the participant’s spouse and children to waive their respective wrongful death claims would make such a process quite inconvenient and is likely to discourage participation.225 Of course, some do not necessarily view decreased participation in a negative light.226 Nevertheless, encouraging public participation in events that promote physical activity such as triathlons seems the better policy in light of the nation’s obesity epidemic and the toll it is taking on the national economy.227

Additionally, if obtaining the beneficiaries’ consent were made part of the registration process itself, it would be all too easy for participants to simply agree on their beneficiaries’ behalf. The result would be to increase the likelihood of litigation around this issue when beneficiaries dispute that they signed the liability waiver.228 Of course, the online registration company could implement protocols to verify the beneficiaries’ identities to alleviate this problem.229 But since the beneficiaries are the participant’s family members, this hardly seems like a foolproof method of ensuring they actually consent to the liability waiver.230 It is also likely to further frustrate participants and organizers alike, as it would hamper the participant’s ability to register for the

224. See 5 Advantages to Taking Your Event Registration Online, ACTIVE NETWORK, http://www.activenetwork.co.uk/event-management-resources/articles/5-advantages-to-taking-your-event-registration-online.htm [https://perma.cc/7SWD-EJFT] (last visited Feb. 1, 2021) (describing one of the advantages of online registration as “[a] quick and easy registration for the participant”).


226. See, e.g., Douglas Leslie, Sports Liability Waivers and Transactional Unconscionability, 14 SETON HALL J. SPORTS & ENT. L. 341, 359 (2004) (arguing that since the event organizer is in a better position to internalize these costs than the consumer, they should be required to do so by eliminating these releases, even if it means pricing some out of the sport).


228. See infra note 230 and accompanying text for a discussion of issues arising from familial waivers.


2. Inadequate Information Regarding the Risk of the Swim Leg of Triathlons

These issues are compounded when viewed in light of the lack of information provided to participants regarding the risks of the swim legs of triathlons. With respect to liability waivers that a participant signs online, their enforceability ought to be based on the extent to which the participant understands the nature of the risk they are assuming. Although the ability of each participant to understand these terms may vary, they should generally be drafted well enough such that the average person could understand them. This is especially so when considering that voluntariness and awareness of the risk are essential elements of the assumption of risk doctrine in Pennsylvania. It is therefore essential that participants understand what they are agreeing to if the liability waiver can be deemed valid.

There are reasons to believe that this awareness is lacking for many triathlon participants, however. Although the risk of death probably cannot ever be entirely eliminated, Valentino does highlight a peculiar issue specific to the triathlon event—namely, the difficulties of preparing for the swim leg and an increased risk of cardiac arrest for middle-aged and older men. Swim legs in particular appear to be

231. Cf. Valentino I, 150 A.3d 483, 496 n.8 (Pa. Super. Ct. 2016) (“[I]t would be extremely impractical to expect defendants to acquire signatures from all such potential plaintiffs. Indeed, it should almost go without saying that event organizers and hosts of activities that entail a risk of injury would likely cease operations if valid liability waivers could not be enforced against non-signatory statutory claimants . . . .”), aff’d, 209 A.3d 941 (Pa. 2019).

232. See Cheryl B. Preston, “Please Note: You Have Waived Everything”: Can Notice Redeem Online Contracts?, 64 AM. U. L. REV. 535, 565 (2015) (“The law’s approach to adhesion contracts that developed over the [twentieth] century becomes so much more tenuous and fictional online. The context in cyberspace is different, and the law should account for the increased opportunity for abuses.”).

233. See Daryl Barton, Release of Liability Forms: How Enforceable Are They in Outdoor Water Sports Activities?, MICH. B. J., Aug. 2003, at 22, 25 (arguing for including explicit language about the nature of the risks posed by the activity, including the possibility of death, in order for event organizers to ensure the releases are enforceable); see also Preston, supra note 232, at 581–82 (proposing a simplified “calorie and content” box for consumers that makes it easier for them to understand the terms and compare them to terms used by other companies).

234. See Pauline et al., supra note 2, at 123.


236. See Pauline et al., supra note 2, at 110–13 (discussing, inter alia, the following generally applicable requisite elements of an enforceable release in the triathlon context: (1) clarity of the instrument, both in terms of the identity of the parties and intended third party beneficiaries; and (2) use of clear unambiguous language); see also Matthew S. Thor, Note, This Is Not Sparta: The Extensive and Unknown Inherent Risks in Obstacle Racing, 51 VAL. U. L. REV. 251, 286–87 (2016) (advocating for a generic waiver that more fully explains the risks and potential injuries arising from obstacle races and providing examples of language that should be included in liability waivers to make them clearer).


238. See Kevin M. Harris, Lawrence L. Creswell, Tammy S. Haas, Taylor Thomas, Monica Tung, Erin Isaacson, Ross F. Garberich & Barry J. Maron, Death and Cardiac Arrest in U.S. Triathlon Participants, 1985
something for which most first-time participants are unable to adequately train. They take place in open water, and competitors are in close proximity to each other. This increases the likelihood of a stray kick or punch.

Additionally, most participants experience a surge of adrenaline at the start of the race that is difficult to replicate during training. Autopsy data has also demonstrated that an unusually high proportion of participants who died during the swim leg had undiagnosed cardiovascular disease, further suggesting risks of which participants are unaware. Latent cardiac disease is a common cause of many deaths during the swim leg of the triathlon. This risk is much higher in men, particularly those over sixty years of age. The majority of triathlon participants are also relatively inexperienced, which further demonstrates the need for organizers to provide adequate information regarding these risks.

Yet few event organizers disclose specific risks, such as those noted in this Part, to participants when they require them to sign these liability waivers. The Valentino liability waiver illustrates this deficiency well. It warns only of “physical and mental rigors” and vaguely disclaims that “running, bicycling, [and] swimming . . . are inherently dangerous and represent an extreme test of a person’s physical and mental limits.” Event organizers should therefore take further steps to ensure their participants are aware of these risks.

While the policy argument for upholding the wrongful death claimant’s right to pursue a separate claim is compelling, its application in the online recreational sports liability waiver context is problematic. The policy focus should instead be on what steps courts, legislatures, and private parties might take to avoid similar future deaths.

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240. See Pauline et al., supra note 2, at 112.


242. Id.

243. See Harris et al., supra note 238, at 529 (“Deaths and cardiac arrests during the triathlon are not rare; most have occurred in middle-aged and older men. Most sudden deaths in triathletes happened during the swim segment, and clinically silent cardiovascular disease was present in an unexpected proportion of decedents.”).

244. See Rapaport, supra note 241.

245. See LAUREN RIOS, USA TRIATHLON, 2016 USA TRIATHLON MEMBERSHIP SURVEY REPORT 5 (2016) (identifying that sixty percent of its membership has less than three years’ experience participating in the sport).

246. See Pauline et al., supra note 2, at 121 (noting that 97.6% of the releases sampled did not provide specific notice to the triathlon participant of the risks assumed).

C. More Effective Alternatives

There are better alternatives to the wrongful death action that would benefit participants and event organizers. First, Part V.C.1 considers the argument for voiding pre-injury recreational liability waivers entirely. It concludes that such a result was not a viable judicial option in *Valentino* and is not an advisable policy for the legislature to adopt either. Second, Part V.C.2 identifies an insurance-based method by which event organizers might avoid liability, and participants might obtain benefits not currently available to them under the Wrongful Death Act. Finally, Part V.C.3 argues that in light of the peculiar risks related to the swim leg of the triathlon event, organizers should implement an information-based solution by taking steps to ensure that their participants understand those risks.

1. Making Pre-Injury Recreational Liability Waivers Void as a Matter of Policy

The dissents in *Valentino* advocated for invalidating the liability waiver only with respect to wrongful death claims, based on the purpose underlying the Wrongful Death Act.248 The majority found such a position illogical because it permitted the decedent’s heirs to recover when the decedent himself could not have done so.249 To resolve this contradiction, the logical conclusion would be to invalidate these liability waivers entirely, as one scholar has advocated.250 Banning such liability waivers would also eliminate some of the enforceability issues that are likely to arise out of the dissents’ positions.251

The Supreme Court of Virginia has taken this position, as have the legislatures of Louisiana and, to a lesser extent, New York.252 Such a result, however, would directly conflict with Pennsylvania precedent.253 Following the lead of Virginia, Louisiana, and New York was therefore an unlikely option for the court in *Valentino*—invalidating such liability waivers wholesale based on public policy and absent supporting legal precedent or legislative intent would be a striking departure for the court.254 The court would therefore need to “be content to await legislative action.”255

Nevertheless, it is doubtful that taking such sweeping legislative action to ban pre-injury sports liability waivers entirely is warranted. Of course, the risk of death in triathlons for participants is higher than the risk of death is generally.256 But it is not so high that it demonstrates a public safety concern serious enough to warrant banning

248. See supra notes 153–76 and accompanying text.
249. See supra notes 149–50 and accompanying text.
250. See Leslie, supra note 226, at 360 (advocating for “invalidation of these nasty negligence waivers”).
251. See supra Parts V.B.1 and V.B.2 for a discussion of these issues.
252. See supra notes 51–53 and accompanying text.
253. See supra notes 54–58 and accompanying text for an explanation of the general enforceability of such releases in Pennsylvania, subject to specified conditions.
255. Id. (quoting Eichelman, 711 A.2d at 1008).
256. See supra notes 237–45 and accompanying text.
liability waivers for all sports activities.\textsuperscript{257} Event organizers would also likely argue that invalidating these liability waivers entirely will result in substantially higher prices for participants\textsuperscript{258} and might cause some of them to go out of business in a competitive market.\textsuperscript{259} Such an outcome could discourage public participation in triathlons and other similar sports,\textsuperscript{260} which would be bad public policy given the larger national obesity crisis.\textsuperscript{261}

These arguments are particularly compelling for local nonprofit or small business event organizers, who often make positive contributions to their communities.\textsuperscript{262} Smaller entities might not have a sufficiently large customer base to absorb the insurance premium increases that would likely arise out of an outright ban on pre-injury recreational liability waivers.\textsuperscript{263} Thus, at least with respect to local nonprofit or small business event organizers, there is no compelling reason for the legislature to invalidate pre-injury recreational liability waivers entirely.

Many of the most popular triathlon events are not organized by such entities, however.\textsuperscript{264} In fact, the owner of the World Triathlon Corporation, which promotes and organizes the well-known Ironman triathlon events,\textsuperscript{265} is a business unit of a publicly

\textsuperscript{257} See Rapaport, supra note 241 (identifying that out of nine million triathlon participants over a thirty-year time period, 135 died during the event).


\textsuperscript{260} See supra note 258 and accompanying text for a consideration of the effect such releases might have on event pricing.

\textsuperscript{261} See Ludwig & Rogoff, supra note 227.


\textsuperscript{263} This is a significant concern for triathlon organizers in light of declining participation in the sport and concerns among younger participants about high costs. See, e.g., Danielle Allentuck, Triathlons Fight Decline and Seek Ways To Attract the Young, N.Y. TIMES (July 28, 2019), http://www.nytimes.com/2019/07/28/sports/triathlon-members.html [https://perma.cc/CLZ8-6LLT].


267 See id. (stating that athlete entry fees account for $140 million worth of revenues, whereas sponsorship and host city fee revenues account for $78.3 million and $28.8 million respectively).

268 See id.

269 Ali, supra note 239.

270 Id.

271 See Bonnie D. Ford, Trouble Beneath the Surface, ESPN (Oct. 18, 2013), http://www.espn.com/espnfeature/story/_/id/9838319/trouble-surface [https://perma.cc/PLK2-XG4Q] (discussing several deaths that occurred during the swim leg of triathlons and identifying steps the Philadelphia Triathlon implemented following Valentino’s death to mitigate risks).

272 Organizers should consider the precautions implemented by the Philadelphia Triathlon following Valentino’s death. It replaced the traditional wave starts—consisting of large groups of participants—with time-trial starts comprised of small groups released in short intervals, and placed a “recovery dock” one hundred meters from the start line for participants experiencing distress. Id.

273 Cf. Bobo v. Tenn. Valley Auth., 855 F.3d 1294, 1306 (11th Cir. 2017) (“[I]mposing liability to deter acting, or failing to act, in a way that causes foreseeable harm is one of the functions of tort law.”).

274 See supra note 51 and accompanying text for a description of New York’s law invalidating releases with respect to for-profit event organizers.

275 See supra notes 134–35 and accompanying text for an explanation of the effect of evenly divided appellate decisions in Pennsylvania.

276 See supra notes 84–89 and accompanying text for a discussion of Dealey.

277 See, e.g., AIG ACCIDENT & HEALTH, POLICY FORM SER. NO. C11695DBG, SPECIAL RISK/PARTICIPANT ACCIDENT INSURANCE SOLUTIONS (2016).
triathlon already includes medical expense coverage as part of its registration fees. It
does not seem overly burdensome for organizers to include life insurance as one of the
benefits offered to the participant during the registration, which would function much
like the wrongful death cause of action does.279

Like the families in Deley,280 a wrongful death beneficiary’s acceptance of such
insurance would substantially address the concerns in Valentino regarding the societal
burden or practical disinheriance that pre-injury sports liability waivers imply.281
Because such insurance would likely increase the cost of registration fees, event
organizers might instead opt to offer it to participants at a higher cost in exchange for the
participant signing the liability waiver. Doing so would further indicate that the liability
waiver was part of a freely bargained-for exchange, satisfying one of the essential
policy-related factors in determining a liability waiver’s enforceability.282

Rather than risking the increased liability arising out of potential future judicial or
legislative action discussed above,283 event organizers would do well to consider this
insurance-based solution. Participants with dependents or other loved ones who do not
qualify for compensation under the Wrongful Death Act would further benefit, because
they could simply designate them as beneficiaries under the insurance policy obtained
through the liability waiver.284

3. Information-Based Solutions

As discussed, event organizers should be as specific as possible about the risks they
are requiring participants to assume in connection with pre-injury recreational liability
waivers.285 But participants bear some responsibility here as well. It is especially
important for middle-aged or older men to consult their physicians and undergo health
screenings prior to participating in the event.286 Providing participants with sufficient
information about the risks specific to the swim leg would likely decrease the incidence

278. See Medical Coverage, ESCAPE TO MIAMI TRIATHLON, http://www.escapetomiamitriathlon.com/
resources/medical-coverage/ [https://perma.cc/H4NN-PWUW] (last visited Feb. 1, 2021) (providing
a maximum medical expense benefit of $25,000 with a $250 deductible but life insurance is not included).

-planning/what-is-life-insurance [https://perma.cc/56C4-SZB7] (last visited Feb. 1, 2021) (stating that life
insurance “provides a lump-sum payment, known as a death benefit, to beneficiaries upon the insured’s death”); with Hatwood v. Hosp. of the Univ. of Pa., 55 A.3d 1229, 1235 (Pa. Super. Ct. 2012) (“Damages for wrongful
death are the value of the decedent’s life to the family, as well as expenses caused to the family by reason of the

280. See supra notes 84–89 and accompanying text.

281. See supra notes 155–76 and accompanying text for further explanation of these concerns in the
dissenting opinions.

282. See supra notes 47, 58, and accompanying text for the Tunkl court’s and Pennsylvania courts’
inclusion of this element as a relevant factor.

283. See supra Parts V.A and V.C.1 for a discussion of the ways in which courts or the legislature might
impose such liability.

284. See supra note 219 and accompanying test for the limited classes of beneficiaries eligible to recover
under the Wrongful Death Act.

285. See supra Part V.B.2 for a discussion of issues of informed consent in the online release context.

286. See Ali, supra note 239 (recommending that triathlons implement mandatory health screenings for
high-risk participants, particularly those over fifty years old).
of fatalities during triathlons. Similarly, it would reduce the likelihood of wrongful death claims like that in *Valentino*.

From the event organizer’s vantage point, specifying the risks inherent to the swim leg and requiring mandatory health screenings could help to shield it from potential liability.287 Once properly informed of these inherent dangers, event organizers could defend on the grounds that they owe no further duty to participants who have voluntarily proceeded in the face of a “known or obvious” risk.288 At that point, it would be up to participants to “protect them[elves] from the consequences of their own behavior.”289

**VI. CONCLUSION**

In holding that a liability waiver signed by a decedent triathlete served as a complete defense to his wife’s wrongful death claim, the *Valentino* court failed to give adequate weight to the policy underlying the Wrongful Death Act. The *Valentino* dissents, however, failed to consider the possible effects of upholding the liability waiver in the limited context of the wrongful death action. Requiring each wrongful death beneficiary to sign a separate liability waiver would substantially frustrate the desire of event organizers and participants alike to organize and participate in events such as triathlons.

Considering that the decision in *Valentino* was evenly divided and therefore is not binding precedent, the state of the law in this area remains unsettled. If a similar issue were to come before the Pennsylvania Supreme Court again, the result could easily go the other way. By taking steps such as offering their participants insurance and providing more specific information regarding the risks, event organizers can eliminate the need for further judicial review of this issue. “One value in law . . . is to find the cheapest ways to solve problems, and then to give people incentives to use them.”290 If event organizers elect not to take such steps on their own, the legislature should provide further incentive by invaliding these liability waivers.

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287. See supra notes 126–32 for an explanation of the importance of inherent risk in the *Hughes* court’s holding.

