

## ***The Limitations of Tort Law as a Public Health Tool: A Defense of the Assumption of Risk Doctrine***

Tort litigation is a valuable tool that has helped and will continue to help develop public health policy. But there are limits to the ends that tort litigation can or should be expected to achieve. Appreciating these limits will help funnel public health efforts through the appropriate legal channels.

Tort law is reserved for those situations in which the plaintiff has neither the information nor the ability to protect himself or herself. For example, if a food manufacturer represents that its product is low in sugar when it is, in fact, particularly high in sugar, then the harmed plaintiff can and should recover in tort. Or, if a restaurant serves coffee at temperatures dangerously higher than normal, then the harmed plaintiff should recover.

But when the plaintiff is aware of the risks of consuming a product, then he or she must be left to work out his or her own destiny. A plaintiff who has made a substantially voluntary choice to engage in risk-posing conduct, generally is not and should not be able to recover through the tort system for injuries caused by the very risks to which he or she consented.

The protection of individuals who substantially voluntarily engage in unhealthy behavior is a matter for the legislatures, not for the courts. Not only has the attitude of the courts generally not been one of paternalism, but also courts are institutionally ill-suited to act paternalistically, particularly in our autonomy-driven culture where paternalism is so controversial.