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A PROPOSAL FOR COMPARATIVE RESPONSIBILITY ANALYSIS IN COMPARATIVE NEGLIGENCE JURISDICTIONS

JOEL LESLIE TERWILLIGER
University of Georgia School of Law

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by

JOEL LESLIE TERWILLIGER

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JOEL LESLIE TERWILLIGER

Approved:

Thomas A. Eaton 5/4/2000
Major Professor Date

5/5/2000
Chairman, Reading Committee Date

Approved:

Gordhan L. Patel
Graduate Dean

May 5, 2000
Date

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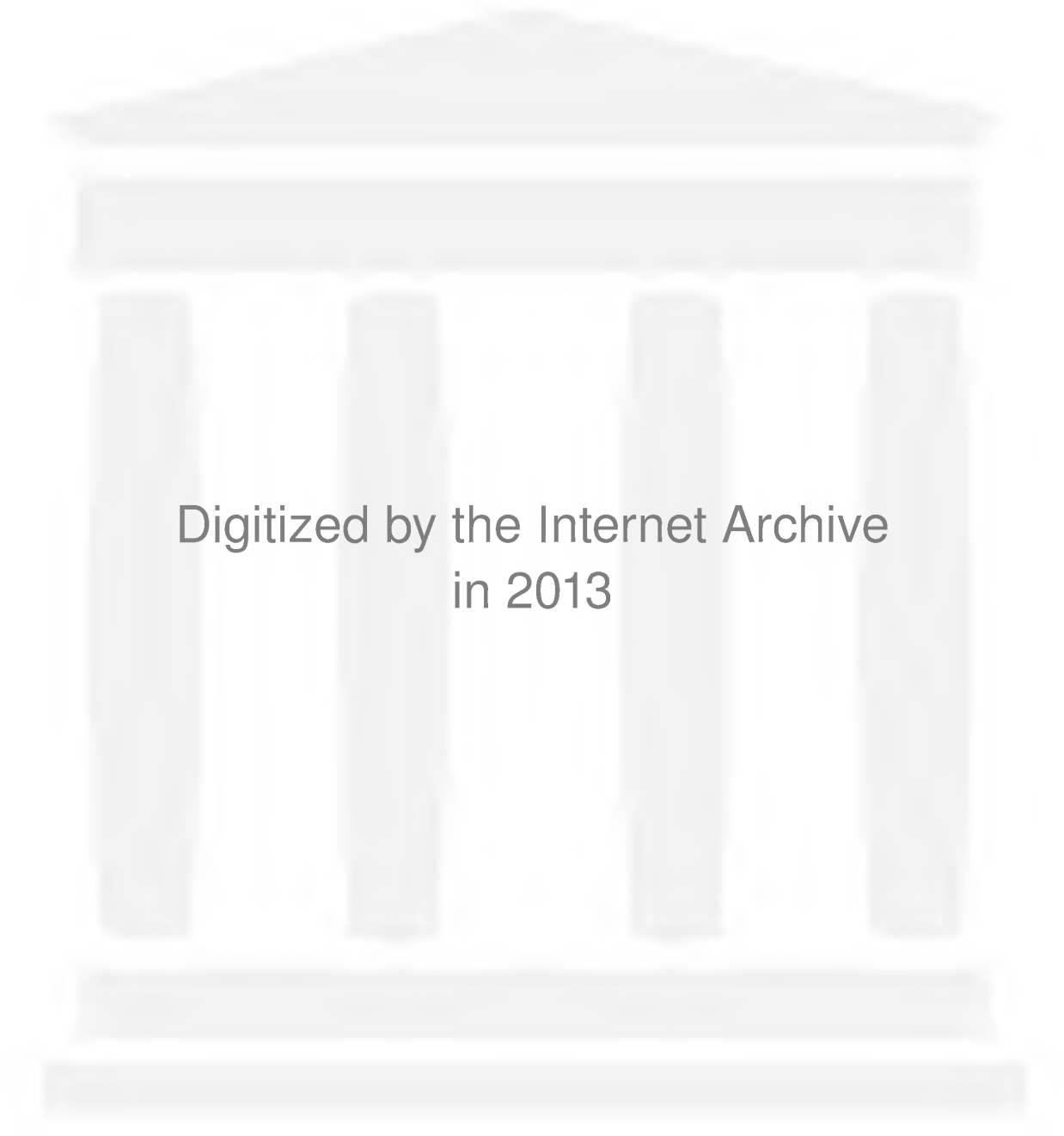

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PART I Introduction

Common law historically recognized two defenses that served as total bars to recovery in negligence suits: Contributory negligence and assumption of risk. Contributory negligence is based on the principle of unreasonable conduct by the plaintiff and assumption of the risk is based on a voluntary and knowing encounter with a risk created by the defendant. In claiming such a bar to recovery, the defendant could alternatively point out conduct by the plaintiff that the court could construe as either unreasonable or as evincing an agreement to accept the risk of injury.

Before the advent of comparative fault principles, distinguishing the plaintiff's behavior as either unreasonable or evincing agreement was not crucial to the outcome of the case at bar as either served as a total bar to recovery.[1] However, with the acceptance of comparative fault, the unreasonable conduct of the plaintiff no longer serves as a complete bar to recovery, instead reducing recovery (in many jurisdictions eliminating recovery if the plaintiff acted in a more culpable manner than the defendant). Assumption of risk, a corollary doctrine of contributory negligence, presently remains a total bar to recovery even in those states that have adopted comparative fault.

With the advent of comparative fault, the distinction between plaintiff's fault and plaintiff's agreement to encounter a risk has become crucial because it now means that

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[1] It was not necessary to distinguish among the different forms of assumption of risk before comparative negligence came about because the outcome was always the same. Today it is a problem. PROSSER ET AL., TORTS §68 at 441 (5th ed. 1984).

the plaintiff either recovers (minus any fault attributable to the plaintiff) or doesn't recover at all. Critical questions remain today: What should the courts do when plaintiff's conduct could be characterized as both unreasonable and as an agreement to accept a known danger? How do the courts determine whether the conduct was unreasonable? How do the courts determine whether plaintiffs have knowingly and voluntarily accepted a risk?

Attempts to address these questions have resulted in further distinction of assumption of risk into two categories: Express and implied.[2] Express assumption of risk exists when there is an agreement between the plaintiff and defendant as in the form of contract.[3] In this category, there is no question of the proper application of the doctrine to bar recovery to the plaintiff.

On the contrary, implied assumption of risk is based on agreement implied from the plaintiff's behavior. It bars recovery for injuries sustained when there is a voluntary encounter with a defendant whose negligent behavior harms the plaintiff. Unlike the first category where there is an express agreement to encounter a known risk, the acquiescence in the second category on the plaintiff's part to assume such a risk comes from the plaintiff's behavior when he encounters the known risk, not any express agreement between plaintiff and defendant. Additionally, plaintiff's acquiescence under

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[2] See, for example, Spell, *Stemming the Tide of Expanding Liability: The Coexistence of Comparative Negligence and Assumption of Risk,* 8 Miss. L. Rev. 159, 162 (1988).

[3] Common examples include written waivers of liability between participants in sporting events and the sponsor(s) of that event. Whalen v. BMW of North America, Inc., 864 F.Supp. 131 (S.D. Cal. 1994) highlights a common example of participants' releasing sponsors from harm during a sporting event.

this category of assumption of risk occurs despite plaintiff being aware of defendant's negligent conduct. Implied assumption of risk is based on a form of agreement from behavior by the plaintiff.[4]

Courts have had much difficulty under comparative fault principles with the application of implied assumption of risk in negligence cases.[5] The similarity of this doctrine to the now outmoded theory of contributory negligence bears a closer examination. If contributory negligence is no longer in use in 46 states[6], why does the principle remain in certain negligence claims, where implied assumption of risk may be a complete defense to the plaintiff's claim? This article examines the problems that this

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[4] The problem with these different types of assumptions of risk comes from examining the underlying terms of "consent" and "acquiescence" which are synonyms for the word "agreement." They carry with them diametrically opposed types of behavior in terms of the plaintiff's conduct when encountering the defendant's negligently created situation.

Consent "is an act of reason, accompanied with deliberation, the mind weighing as in a balance the good or evil on each side. It means voluntary agreement by a person in the possession and exercise of *sufficient mental capacity* to make an intelligent choice to do something proposed by another." BLACK'S LAW DICTIONARY 305 (6th ed. 1991).

Acquiescence lies in the middle ground between consent and opposition. It is "passive compliance or satisfaction; distinguished from avowed consent" and "differs from 'confirmation,' which implies a deliberate act." Id, at 24.

[5] 57B Am. Jur. 2D *Negligence* §§ 1201-1206 (1989). Scholars, practitioners and jurists generally agree that assumption of risk is inconsistent with the fault apportioning system of comparative negligence. See also Annotation, *Effect of Adoption of Comparative Negligence Rules on Assumption of Risk,* 16 A.L.R. 4th 700, 703 (1982) (1999 supplement).

[6] 57B Am.Jur. 2d NEGLIGENCE §§ 1300 and 1751 (1989).

category of assumption of risk presents in jurisdictions applying comparative fault principles.

Consider the following cases.

A. The case of the thwarted verdict

Frank Harris was an experienced ironworks contractor working in Arkansas who was injured when the boom crane he was working near came into contact with an uninsulated power line. He took his employer to court[7], claiming that the power line should have been de-energized to ensure safe working conditions. As a result of the trial to recover for his injuries, the jury found that Mr. Harris was 15 percent at fault and the defendant was 85 percent at fault. Accordingly, they apportioned damages of $90,000 among the parties in their respective manners of fault.[8]

Unfortunately for Mr. Harris, the jury also found that he had assumed the risk of his injuries. This assumption was the basis for a 15 percent reduction in Harris' damages. Based on this particular finding, the District Court of Arkansas granted defendant's motion to have the case dismissed notwithstanding the verdict.[9]

In dismissing the case, the Court stated,

> In candor…the jury probably did not know, or intend, that their finding on the assumption of risk defense would constitute a complete bar to the plaintiff's action. For the purposes of this opinion it is assumed that, if a

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[7] In a jurisdiction following comparative fault principles.

[8] Harris v. Hercules Incorporated, 328 F.Supp. 360 (Ark. 1971). Hence, the jury found that Mr. Harris should recover $76,500 ($90,000 minus 15 percent attributable to his fault).

[9] Id.., at 363.

> hearing were permitted on this issue, it would result in the conclusion that the jury believed, and intended, that their verdict would result in a judgment in favor of the plaintiff for $90,000.00 reduced by 15% as in the ordinary comparative negligence case.
>
> * * *
>
> The Court is impressed with plaintiff's argument and agrees that the doctrine of assumption of risk as a complete bar is inconsistent with the philosophy behind comparative negligence statutes [and the jury's findings]. However, this Court is bound in this instance to apply the law of the state of Arkansas.[10]
>
> The decision was affirmed by the Court of Appeals.[11]

B. The case of the sentient eight year old

Scott Harvard was an eight-year old boy who often played at his neighbor and mother's fiancé's house with Louis Sidre, a 10 year old boy. About two weeks after Christmas they played together alone in Louis' house and decided to play with matches, seeing who could hold the match longer. The game progressed into the living room near a dried out Christmas tree. The tree caught on fire accidentally; Louis was able to crawl on his belly toward an open window and escape. Scott's body was later found under a bed in an adjacent room.

In directing the trial court to enter summary judgment for the defendant-parents of Louis on various counts including negligence, the Court of Appeals of Georgia found that the 8 year old boy had assumed the risk of his injuries and thus was responsible for his

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[10] Id., at 363-364.

[11] 455 F.2d 267 (8th Cir. 1972).

own death.[12] The court's reliance on the elements of assumption of risk was based on the presumption that a child of age eight has sufficient capacity to appreciate the chain of events that could cause this type of danger.[13] The issue was precluded from reaching a jury.[14]

C. The case of the thwarted verdict, II

Sammie Jones was operating a snow blower outside his home when the blower jammed. He picked up a tree branch and shoved it into the blower to clear the snow out.

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[12] Stewart v. Harvard, et al., 239 Ga. App. 388, 520 S.E.2d 752 (1999).

[13] Yet, no mention was made of actual recognition of harm related to the risks undertaken. In its discussion, the court relied on Vaughn v. Pleasant, 266 Ga. 862, 471 S.E.2d 866 (1996), where the elements of assumption of risk are: Actual knowledge of the danger; understanding and appreciating the risks associated with such danger, and; voluntary exposure to the those risks.

Here, the surviving 10 year old's testimony illustrates that the only risk the boys appreciated was the match producing heat on their fingers, leading them to blow the matches out. Id., at 756. The court, in its ruling, implies that the boys were able to make a causal connection between a match head, a Christmas tree that should have been taken down some time earlier, and death from smoke inhalation.

[14] Thus, a jury never heard the issue of whether the boy had sufficient faculty to appreciate such a risk leading to his death.

Consider James Mansfield, *Informed Choice in the Law of Torts*, 22 La.L.Rev. 17 (1961), wherein he states, "Risk imparts a point of view, an estimate of the likelihood of a future result or class of results. One may have knowledge of a present fact and yet fail to attach any significance to it in terms of the likelihood of a future result." Id., at 24.

Two girls walked by and, as Mr. Jones admired them with his hand in the machine, he stuck his right hand too far into the blower, severely injuring two fingers on his hand.[15]

He readily admitted that he never read the brochure (at trial Mr. Jones conceded that he did not read the operating manual "completely and thoroughly all the way through") and knew that if he intentionally put his hand in the chute that he might hurt his hand.[16] The jury, in splitting damages equally between the plaintiff and the defendant, found that the plaintiff had voluntarily assumed the risk of harm to himself.

On defendant's motion to alter or amend judgment, the District Court in Pennsylvania held that since conduct of plaintiff in pushing snow down emission chute of snow thrower with twig from tree branch could only be characterized as negligence and did not rise to level of waiver or consent, no charge on assumption of risk was warranted as to negligence cause of action against manufacturer. The decision was affirmed by the Court of Appeals.[17]

D. The case of the well-chosen rule of law

Mr. Decker, a resident of Pennsylvania, bought some farm equipment in Pennsylvania that was manufactured by the defendant in Wisconsin. Sustaining injuries at his residence as a result of the use of the equipment, he sued in a diversity action in

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[15] Jones v. M.T.D. Products, Inc., 507 F.Supp. 8 (Penn. 1980).

[16] Id., at 9.

[17] 649 F.2d 859 (3d Cir. 1981).

Wisconsin federal court.[18] Prior to the trial, the parties submitted briefs in support of which rule of law should apply: Pennsylvania's rule of contributory negligence[19] (thus barring the claim), or Wisconsin's rule of comparative negligence with no recognition of assumption of risk.

It was no surprise then that the defendants argued that Pennsylvania law applied with the plaintiff countermanding that the Wisconsin law applied. Wisconsin, which uses an approach based on Leflar's "choice influencing factors" in governing choice of law,[20] applied its own law, finding that "this forum's governmental interests would be damaged by the adoption of a rule under which no apportionment of fault is possible."[21] Basing its decision on the history of equitable results achieved with comparative fault rather than the Pennsylvania law of contributory negligence, the Court found that application of

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[18] Decker v. Fox River Tractor Co., 324 F.Supp. 1089 (Wis. 1971).

[19] In effect at the time the case was decided.

[20] Wisconsin use of Professor Leflar's approach uses a combination of five choice influencing factors: Predictability of results; maintenance of interstate and international order; simplification of the judicial task; advancement of the forum's governmental interests, and; application of the better rule of law. Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts,* 34 Mercer L. Rev. 521 (1983).

In applying its own law to the case at bar, the Court relied heavily on the last two factors to allow the plaintiff to proceed in his cause of action that might have otherwise been barred in Pennsylvania. 324 F.Supp. 1089, 1090-2.

A relevant criticism of this approach is that it is indefinite and uncertain since the five factors can be evaluated differently by different states. In practice, the forum usually selects as the better rule its own law. 34 Mercer L. Rev. 521.

[21] 324 F.Supp. 1089, 1091.

foreign state law would result in "den[ying] an injured person all compensation although his responsibility for the accident and for the resulting injuries may be minor."[22]

In the four cases above, a problem becomes immediately clear. In the first three cases, the court misapplied secondary assumption of risk because the doctrine retains contributory negligence principles and is confusing to apply (in the first case assumption of risk was used to deny the claim without regard to the findings of the jury). Such confusion on the courts' part thwarts juries attempts to dispense corrective justice.[23] In the fourth case dealing with an issue of conflict of laws, the court refused to permit assumption of risk principles to apply to the case before it went to trial. It claimed under its choice of law rules that Wisconsin law is superior to the inequitable results that might otherwise be achieved with the application of Pennsylvania law.

The difficulty in this application of secondary assumption of risk in courts following comparative fault is determining two threshold issues: Whether comparative fault or assumption of risk applies, and; whether the plaintiff knowingly and voluntarily encountered the defendant's negligently created risk so as to bar the claim. With regard to the first issue, if comparative fault is applied then the jury gets to decide who is more at fault. If the court decides to apply assumption of risk, the claim is barred altogether. In the latter situation, the court may overlook whether one, or both, of the elements of assumption of risk (knowing and voluntary) so as to prevent the case from going to the

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[22] Id., at 1092.

[23] Catharine Pierce Wells, *Tort Law As Corrective Justice: A Pragmatic Justification For Jury Adjudication*, 88 Mich. L. Rev. 2348 (1990). The article contains an excellent discussion of how rigid principles of law (such as assumption of risk) hinder juries' attempts at corrective justice.

jury. The example of the sentient eight-year old discussed above is an excellent example of those elements being imputed onto the boy to bar the claim.

The same pitfalls apply if the plaintiff is deemed to have acquiesced to encountering defendant's negligently created risk despite lack of an express agreement. The court again will bar the claim. This is a problem because in contributory negligence any fault by the plaintiff bars recovery, however slight that may be. In secondary assumption of risk, the plaintiff is at fault for agreeing to encounter the risk, yet no consideration is given to whether the plaintiff's acquiescence is lesser, equal to, or greater than, the defendant's fault (remember—the defendant negligently created the risk). It is assumed that plaintiff's behavior in agreement is *greater* than the defendant's fault.

So, courts following comparative fault rules will allow the jury to consider an action where both parties are at fault, yet summarily bar plaintiff's claim where plaintiff has, *through behavior alone*, waived any right of recovery.

Implied assumption of risk should be subsumed fully into comparative fault principles. Unless an express agreement is found between the plaintiff and the defendant and the agreement doesn't stem from negligent behavior on either part, the courts should not bar recovery where both parties act unreasonable and yet one is said to have assumed risks either not fully understood or with consequences greater than the assumption of risk in a negligent manner entails. Finding assumption of risk based on an implication from behavior is a factual determination; to have the court make this assessment as a matter of law results in confusing and difficult to reconcile outcomes. The maxim, "*volunti non fit*

injuria,"[24] should only apply to an express agreement of willingness, not on behavior alone.

Part II of this article discusses the common law background of assumption of risk and how it fits into the scheme of negligence principles as an affirmative defense. Part II also examines the background of assumption of risk and parallels its development (erosion?) with contributory negligence principles. Part III looks at how assumption of risk has been redefined and narrowed in its application as comparative fault principles gained favor. It includes an examination of statutory erosion and in modern judicial activism.

Next, Part IV examines how assumption of risk, particularly the secondary form, conflicts with comparative fault and its underlying policy reasons. This examination will include the tension between applying secondary assumption of risk and comparative fault principles to a negligence suit.

Part V comprises the bulk of this article. It details a proposal for eliminating secondary assumption of risk and proposes a comparative responsibility analysis to resolve suits where each party was deemed negligent and one assumed the risks of the other's act or omission. This proposal is based on risk-utility principles widely accepted in other areas of the common law. Finally, Part VI will examine some criticisms of this proposed analysis.

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[24] A commonly used Latin maxim meaning, "To the willing, no harm can be done." See, generally, 65A C.J.S. *Negligence* § 174(1) (1966).

PART II Background of Assumption of Risk

Assumption of the risk historically was used to balance the desire to protect defendants from shifting risks onto unwilling plaintiffs with the need to protect plaintiffs from forcing defendants to bear the costs of risks that were voluntarily assumed.[25] Developed as part of the common law of England[26] and carried over to the United States court system,[27] the doctrine of assumption of risk had particular vitality in jurisdictions

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[25] Dean Wade, *The Place of Assumption of the Risk in the Law of Negligence*, 22 La.L.Rev. 5 (1961).

[26] Priestly v. Fowler, 3 M & W 1, 150 Eng.Rep. 1030 (1837). A worker was injured by the negligence of a fellow worker when an overloaded vehicle fell upon him. In suing his employer, he was denied recovery. The court found that, by accepting employment, he had assumed the risk of his injuries related to the working conditions that he could discover for himself.

See also Cruden v. Fentham, 2 Esp. 685, 170 Eng. Rep. 496 (1799). A seminal case regarding the creation of the doctrine of contributory negligence which eventually led to the corollary principle of assumption of risk was Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926, 927 (K.B. 1809).

The English Law Reform Act of 1945 replaced the rule with that of apportionment. Law Reform (Contributory Negligence) Act of 1945, 8 & 9 Geo. VI, c. 28. British scholars argue for the application of a even narrower theory of assumption of risk whereby express consent is required in order to waive a tort claim. See G. Williams, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE 307-308 (1951). They also argue that the assumption of risk defense should be rarely invoked because it reflects consent to bearing the legal, in addition to the physical, risks. Id.

[27] See, for example, Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), where the Florida Supreme Court declared that the general English common and statutory law was in full force and effect in Florida except as it contradicted federal and state law. See also Johnson v. Hudson River R.R.Co., 75 Am.Dec. 375, 20 N.Y. 65 (1859).

that followed contributory negligence principles. Its use was favored in the prevention of master-servant liability suits. In *Tiller v. Atlantic Coast Line R. Co.*,[28] the Court discussed the reason for the widespread use of this doctrine as seen in the context of the Industrial Revolution[29]:

> [Assumption of risk] can best be seen against the background of one hundred years of master-servant tort doctrine. Assumption of risk is a judicially created rule which was developed in response to the general impulse of common law courts at the beginning of this period to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost-to someone-of the doing of industrialized business. The general purpose behind this development in the common law seems to have been to give maximum freedom to expanding industry. The assumption of risk doctrine for example was attributed by this Court to "a rule of public policy, inasmuch as an opposite doctrine would not only subject employers to considerable and often ruinous responsibilities, thereby embarrassing all branches of business[.]"[30]

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[28] 318 U.S. 54, 63 S.Ct. 444 (1943).

[29] During this time period England began to recognize that the doctrine was rooted in the notion of free transferability of employment that was more concept than reality and thus decided to no longer apply the doctrine. See, for example, Bohlen, *Voluntary Assumption of Risk*, 20 Harv. L. Rev. 14, at 14-15 (1907).

[30] 318 U.S. 54, 58-60.

Subsequently, the doctrine had been abolished by statutory amendment with regard to cases involving federal workers' compensation.[31] Ironically, assumption of risk continued its growth as part of the general body of tort law during the same time period that state and federal laws under worker's compensation statutes abrogated recognition of assumption of risk in the context of the master-servant relationship.[32]

Even prior to the Congressional amendment that abolished assumption of risk, the Supreme Court recognized that the distinction between assumption of risk and negligence was "hazy" and expressed concern that "the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name."[33]

A. Elements of assumption of risk

The elements of assumption of risk consist of the following: Actual knowledge of the danger; appreciation or understanding of the risk, and; voluntary exposure to that risk. Additionally, the harm associated with the outcome of the encounter must be within the scope of the risk assumed.[34]

Actual knowledge of the danger can range from encountering a risk that is obviously known to the plaintiff to a defendant warning of a risk, yet the plaintiff

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[31] Federal Employers' Liability Act, 53 Stat. 1404, 45 U.S.C. §54, 45 U.S.C.A. §54, as amended in 1939.

[32] 2 F. Harper & F. James, THE LAW OF TORTS §21.4 (1956).

[33] Schlemmer v. Buffalo, R., etc., R., Co., 205 U.S. 1, 12-13, 27 S.Ct. 407, 409 (1907).

[34] 471 S.E.2d 866. See supra note 13.

deciding to encounter it anyway.[35] When it comes to the question of whether the plaintiff encountered a danger that is so obvious such that she should be aware of it, it is mainly a determination for the jury to decide whether the "obviousness" was high enough to warrant that the plaintiff assumed a risk.

The element of appreciation of the risk, in its application, can either vitiate the defense or create such a high hurdle for plaintiffs to clear that it is tantamount to completely negating liability for the defendant. For example, requiring a precise level of appreciation of risk on the plaintiff's part may make proof of any appreciation almost impossible.[36] Conversely, finding that the plaintiff was aware that some (indeed, any) risk exists will almost completely diminish liability on the defendant's part.[37]

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[35] See, for example, Toley v. Kansas City Power & Light Company, 252 Kan. 205, 843 P.2d 248 (1992). Employees of the power company's coal generation plant sued for acid rain damage to their parked vehicles at the plant site. In affirming denial of recovery by the trial court, the court noted that the employer had posted a sign saying, in part, "parking your motor vehicles at or near the plant site is at your own risk [due to sulphurous emissions]." Id., at 216.

The court went on to note that plaintiffs should have known of the risks of acid rain damage (even without a posted sign) because of the 'obviousness' of the damage.

[36] See, for example, Olson v. A.W. Chesterton Company, 256 N.W.2d 530 (N.D. 1977). A conveyor belt maintenance operator received damages for his lost left arm. It was lost in some belt driven machinery when he climbed atop of the belt and stuck his arm in the high pulley.

The plaintiff acknowledged that there was some level of risk involved with sticking his arm into the machinery but did not think it was '*that*' dangerous. The plaintiff's expert witness testified that, while the plaintiff was aware of the potential risk of his actions, it was stored in his long-term memory. During the attempted repair, the expert testified, the plaintiff was in a state of relying on his short-term memory where such an appreciation of the risk may not have been stored. Id., at 538.

[37] James Mansfield, *Informed Choice in the Law of Torts*, 22 La.L.Rev. 17 (1961). The author notes that requiring knowledge of the exact level of risk would demand an "exact prevision of the future that

The third element, voluntary exposure to the risk relies on complete acquiescence on the plaintiff's part in deciding on proceeding with a certain course of action that may involve a risk. "The plaintiff is barred from recovery only if [her] choice [to incur the risk] is a free and voluntary one."[38] Coercion or duress negate this element.[39]

Finally, the harm must be within the scope of the risk assumed. This is a general principle that prevents a defendant from claiming that plaintiff's damages resulting from injury of type A are a result of encountering a risk that could have only produced an injury of type B. It can also be stated as the element that prevents a causal chain of events from becoming so long and twisted that the ultimate injury resulting from a risk assumed is tentatively, at best, related to the actual risk assumed.[40]

B. Forms of assumption of risk[41]

Assumption of risk comes in two major forms[42]: Express and implied. In the implied form there are two additional subsets of assumption of risk: Primary and

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would displace any notion of risk." Hence, requiring knowledge of any level of risk would result in assumption of risk cases being resolved in favor of the defendant who raises the defense.

[38] KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 68 at 490 (5th ed. 1984).

[39] See, for example, Marshall v. Ranne, 511 S.W.2d 255 (Tex. 1974). A farmer, facing the prospect of possible attack by a known vicious boar, could have remained in a farmhouse or gone outside to get in his car to return home. When he went to his car, he was bitten on the hand. The court held, "The latter alternative [choice] was forced upon him against his will[.]" Id., at 259.

[40] See supra note 13.

[41] Refer to the chart in Appendix A.

[42] See supra note 2.

secondary,[43] with secondary implied assumption of risk having two additional subsets, reasonable and unreasonable, depending on the plaintiff's behavior at the time an injury is incurred.

The express and primary implied categorizations are best considered as a form of contract.[44] In this theory, a prior agreement of release from liability for damages sustained during the agreed upon activity is entered into between the plaintiff and the defendant. The consequences of this agreement are such that the risk of negligence shifts

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[43] See, for example, Minnesota's adoption of the Uniform Comparative Fault Act. The statute says in relevant part:

> "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent or primary assumption of risk, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages, and the defense of complicity under section 340A.801. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault. The doctrine of last clear chance is abolished.
>
> M.S.A. § 604.01

In adopting the principle of comparative fault, Minnesota created a two-prong definition of assumption of risk: Primary and unreasonable, or secondary. See also, Springrose v. Wilmore, 292 Minn. 23, 192 N.W.2d 826 (1971).

[44] John L. Diamond, *Assumption of risk after comparative negligence: Integrating Contract Theory into Tort Doctrine*, 52 Ohio St. L. J. 717. This theory of construing primary assumption of risk as a contract theory is supported by Whalen v. BMW of North America, Inc., 864 F.Supp. 131 (S.D. Cal 1994), where the court held that assumption of risk, although not ordinarily available in admiralty cases, could be applied in this action because a contract to do so existed.

from the defendant to the plaintiff.[45] Defendant is deemed relieved of the duty or burden of use of reasonable care toward the plaintiff.

In implied secondary assumption of risk, although no express agreement exists, there exists a strong implication of prior assent because the plaintiff is fully cognizant of and voluntarily encounters a risk.[46] The consequences of this implication are similar to express assumption of risk, with plaintiff's actions having absolved defendant of any duty owed toward him. Thus, in seeking to prove that secondary assumption of risk has occurred by the plaintiff, the defendant must prove that the plaintiff encountered a known risk in a voluntary manner.[47]

These theories are defeated where public policy considerations outweigh these types of agreements, contrary to libertarians who would hold that agreements are in most circumstances enforceable.[48] Also, the express and primary implied agreements do not give the defendant leeway to act in a gross, wanton or reckless manner toward the plaintiff.

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[45] Prosser, HANDBOOK ON THE LAW OF TORTS 439-441 § 68 (4th ed. 1981) (hereinafter referred to as TORTS); 2 F. Harper & F. James, THE LAW OF TORTS 1162-1167 §21.1 (1956).

[46] ARTHUR BEST, COMPARATIVE NEGLIGENCE: LAW AND PRACTICE (1993).

[47] See, for example, Vaughn v. Pleasant, 266 Ga. 862, 471 S.E.2d 866 (1996). The elements of assumption of risk consist of the following: Actual knowledge of the danger; appreciation or understanding of the risk, and; voluntary exposure to that risk. Id., at 864.

[48] Kronman, *Contract Law and Distributive Justice,* 89 Yale L.J. 427 (1980). There is agreement among libertarian thinkers that assumption of risk, in its express form, should be never be abrogated and indeed could be expanded beyond formal written contract principles.

In contrast, implied secondary assumption of risk with its subsets of reasonable and unreasonable theories, is "a thorn in the judicial side."[49] As stated above, it occurs when a plaintiff knowingly and voluntarily meets a risk negligently created by the defendant and bars recovery by the plaintiff. Furthermore, the two subsets, reasonable and unreasonable secondary assumption of risk, attempt to categorize the plaintiff's conduct so as to either allow recovery or not, based on the plaintiff's reasonableness in encountering the danger.[50] In its application by courts, it is very similar to the principles of contributory negligence because fault on the plaintiff's part is factored into the court's consideration of whether to allow plaintiff to recover damages.[51] In contrast, no inquiry is made into the defendant's behavior regarding the creation of the occurrence.

In the reasonable subcategory, the plaintiff's conduct in encountering the negligently created risk by the defendant will not bar or reduce damages in comparative fault jurisdictions.[52] But, if the plaintiff acted unreasonably, this is determined to be

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[49] Blackburn v. Dorta, 348 So. 2d 287, 291 (Fla. 1977).

[50] E. Todd Presnell, *Torts—Perez v. McConkey: The Tennessee Supreme Court Abolishes Implied Assumption of Risk After the Adoption of Comparative Fault in McIntyre,* 25 U.Mem.L.Rev. 291 (1994).

[51] In fact, Prosser once pointed out that the difference between assumption of risk and contributory negligence is where "assumption of risk is a matter of knowledge of the danger and intelligent acquiescence in it, while contributory negligence is a matter of some fault or departure from the standard of reasonable conduct, however unwilling or protesting the plaintiff may be." Robert v. King, 253 N.C. 571, 117 S.E.2d 421 (1960). Apparently Prosser was discussing assumption of risk before the many subsets and variations came about as secondary assumption of risk carries with it the elements of fault on the plaintiff's part, much like the principles of contributory negligence.

unreasonable secondary assumption of risk and the plaintiff will have his damages either barred completely or reduced according to the jury's apportionment of fault attributed to the plaintiff.[53]

Some states, in adopting comparative fault principles, have abrogated the use of implied assumption of risk.[54]

C. Secondary assumption of risk retains viability despite disappearance of contributory negligence

Ever since the Mississippi legislature enacted a statute in 1910 eliminating the use of contributory negligence and giving comparative negligence principles its first foray into the courts of America,[55] more than forty five other states and the District of

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[52] Id.

[53] See, generally, Spell, Stemming the Tide of Expanding Liability: The Coexistence of Comparative Negligence and Assumption of Risk, 64 Miss.L.J. 753 (1988). In "pure" comparative fault jurisdictions, the plaintiff always recovers damages even if he is found to be more at fault than the defendant so long he is not100 percent at fault. The damages recovered are equal to the percentage of the defendant's fault.

In "modified" comparative fault jurisdictions, the plaintiff will recover damages only if his fault is not greater than 50 percent. Twenty jurisdictions have a "not greater than" modified comparative fault statute where a "50/50 split" of damages is possible. In both "modified" and "not greater than" jurisdictions, if plaintiff is permitted recovery, she is awarded damages in the percentage attributable to the defendant's fault.

[54] E. Todd Presnell, *Torts—Perez v. McConkey: The Tennessee Supreme Court Abolishes Implied Assumption of Risk After the Adoption of Comparative Fault in McIntyre*, 25 U. Mem. L. Rev. 291 (1994).

Columbia have enacted similar measures of their own.[56] Comparative fault principles have predominated over contributory negligence principles because the end result is viewed as more equitable,[57] the cost of litigation is spread over a broader group of persons (and thus subsuming individual costs), and a plaintiff avoids having his cause of action being completely barred from recovery however slight his own fault may be.

However, the theory of assumption of risk, whose own history neatly meshes with the principles of contributory negligence and reached popularity through now outmoded master-servant doctrines,[58] still lives on to this day. In its present form, assumption of risk has taken on different lives and meanings, much to the confusion of the courts and the juries that sit in them.[59]

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[55] Act of Apr. 16, 1910, ch. 135, 1910 Miss. Laws 125 (later amended as Miss. Code Ann. S 11-7-15 (1972). Some commentators have suggested that Mississippi did in fact do away with assumption of risk four years later when the legislature passed a law eliminating the defense in employer-employee relationships. Since this was only the type of tort that used this defense at the time, it is argued that the legislative intent was to completely abrogate assumption of risk, not just limit its application. See Wilder, *Assumption of Risk in Mississippi—Time for a Change?*, 44 Miss. L. J. 452 (1973).

[56] Jim Hasenfus, *The Role of Recklessness in American Systems of Comparative Fault*, 43 Ohio St.L.J. 399 (1982).

[57] In Louisville Nashville R. Co. v Fisher, 357 S.W.2d 683 (Ky. 1962), the court, in reversing an award for the plaintiff and ruling for the defendant railroad, held that the plaintiff's fault in not being able to see through overgrown weeds at a crossing barred recovery. The court admitted however that a more just result would have been achieved if it were able to apply comparative negligence rules.

[58] Tiller v. Atlantic Coast Line R.R. Co., 318 U.S. 54, 63 S.Ct. 444 (1943).

[59] Spell, *Stemming the Tide of Expanding Liability: The Coexistence of Comparative Negligence and Assumption of Risk,* 64 Miss.L.J. 753 (1988); Rosenlund & Killion, *Once a Wicked Sister: The*

Conceptual differences between assumption of risk and contributory negligence are three-fold: First, assumption of risk deals with knowledge of the danger and voluntary acquiescence in it, but contributory negligence is simply a departure from the standard of reasonable care (in an unknowing and unsuspecting manner); second, due to these different behaviors, assumption of risk is viewed as a subjective standard (what did the plaintiff actually know at the time of the injury) while contributory negligence is based on an objective "reasonable person" standard; third, assumption of risk relies on a presuming adventurousness on the plaintiff's part while contributory negligence relies upon reasonableness.[60]

Attempts have been made to distinguish these conceptual differences. For example, in Tennessee, assumption of risk is based on consent (whether expressed or

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Continuing Role of Assumption of Risk Under Comparative Fault in California, 20 U.S.F.L.Rev. 225 (1986).

Indeed, Justice Frankfurter once stated: "[T]he phrase 'assumption of risk' is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishing it as a legal formula, indiscriminately used to express different and sometimes contradictory ideas." 318 U.S. 54, 68 (1943). Frankfurter concurring opinion. See also generally, Note, *Symposium: Assumption of Risk,* 22 La. L. Rev. 1 (1961).

For an amusing analogy of assumption of risk with a mysterious element called "phlogiston," see Wex S. Malone, *Foreword—The Kid Who Got Left Out,* 22 La.L.Rev. 1 (1961). Phlogiston was an imaginary element believed to be responsible for fire; once it was discovered that it never existed, meaningful analysis of the causation of fire was undertaken.

[60] See Riley v. Davidson Construction Co., 381 Mass. 432, 409 N.E.2d 1279 (1980); Blum v. Brichacek, 191 Neb. 457, 215 N.W.2d 888 (1974).

implied) and the "keystone" to this consent is knowledge.[61] Contributory negligence is based on the issue of whether a reasonably prudent man would or should have discovered the danger and avoided it.[62] However, in attempting to delineate the differences, courts acknowledge that the same facts in a case may be relevant to both defenses.[63]

As contributory negligence waned,[64] the principal of secondary (implied) assumption of risk remained. This did not occur without tension from the courts and commentators. Many courts, while recognizing that assumption of the risk is a doctrine that evolved from contributory negligence, merged the doctrine with comparative fault by labeling wrongdoing on the plaintiff's part as contributory negligence in apportioning damages among the parties.[65] This merger however creates the confusion.

In *Li v. Yellow Cab Co.,*[66] the California court pronounced that comparative fault replaced contributory negligence; thus, all its subsidiary forms were also no longer

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[61] McIntyre v. Ballantine, 833 S.W. 2d 52 (Tenn. 1992).

[62] Supra, note 53. Tennessee defines assumption of risk with the same elements as many other states. See, for example, Vaughn v. Pleasant, supra notes 12 and 44.

[63] Supra note 56.

[64] As a complete defense, contributory negligence has disappeared in England, continental Europe, Canada, New Zealand, Western Australia and forty-six states of America. See Howard J. Alperin, Annotation, *Comment Note—The Doctrine of Comparative Negligence and its Relation to the Doctrine of Contributory Negligence*, 32 A.L.R.3d 463, 469 (1970) (1999 supplement).

[65] Matthew J. Toddy, *Assumption of Risk Merged with Contributory Negligence: Anderson v. Ceccardi,* 45 Ohio St. L. J. 1059 (1984).

recognized. As such, assumption of the risk could only be introduced at trial in attempt by the defense to ameliorate damages, not in an attempt to seek a total bar to the cause of action.[67] Unfortunately, this clear statement with regard to assumption of the risk has not been picked up on by other jurisdictions.

In *Knight v. Jewett,*[68] and in *Anderson v. Ceccardi,*[69] cases which attempted to resolve this conflict, the courts simply decided to have the knowledge element of assumption of the risk be the determinative factor in deciding whether a plaintiff encountering a known risk can recover.[70] *Anderson* reached a somewhat contradictory conclusion: Comparative fault had replaced contributory negligence yet the court had this to say about assumption of risk:

> [C]onduct previously considered assumption of the risk by the plaintiff shall be considered by the trier of fact under the phrase 'contributory negligence of the person bringing the action' [in the present suit].[71]

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[66] 13 Cal. 3d 804, 532 P.2d 1226 (1975).

[67] The Court stated: "The defense of assumption of the risk is also abolished to the extent that it is merely a variant of the former doctrine of contributory negligence; assumption of the risk is to be subsumed under the general process of assessing liability in proportion to negligence." Id.

[68] 3 Cal. 4th 296, 834 P.2d 696 (1992).

[69] 6 Ohio St. 3d 110, 451 N.E.2d 780 (1983).

[70] [T]here is no merit to the…general claim that simply because a person is aware an activity involves a risk of harm that may arise from another's negligence and voluntarily proceeds to participate in that activity despite such knowledge, that person should be barred from obtaining any recovery on the theory that he or she impliedly consented to the risk of harm. 3 Cal. 4th 296, 312, 834 P.2d 696, 706 (1992). Note that the defendant prevailed anyway on the theory of assumption of risk.

[71] 6 Ohio St. 3d 110, 451 N.E.2d 780 (1983).

In sum, in those courts that have not followed the clarity of *Yellow Cab,* the only *true* distinction separating assumption of risk from contributory negligence is merely the scrutiny of whether a subjective inquiry (of plaintiff's awareness or knowledge) should be used versus an objective inquiry (reasonable person standard).[72] Consequently, the subjective standard remains and is applied in a very subjective manner.

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[72] The significant difference is likely to be one between the risks in fact known to the plaintiff and those risks which he should have discovered through the exercise of ordinary care. Prosser, TORTS, 441 §68. Plainly, this is a subjective versus objective inquiry.

PART III The Rise of Comparative Fault and the Erosion of Assumption of Risk

A. The introduction of comparative fault

Comparative fault gained favor in recent decades because of its underlying notions of fairness and ease of application for the jury system (although it initially was favored in those civil code jurisdictions that do not use juries).[73] Too often, a plaintiff's slight fault on his own was plead as contributory negligence by the defendant and the plaintiff was barred from any recovery, however slight that fault may have been. This was viewed as injustice because, as it has been said, "the injured man is in all probability, for the very reason of his injury, the less able of the two to bear the financial burden of his loss[.]"[74]

To ameliorate this effect, especially in suits involving employees attempting some form of recompensation from the employer for an injury incurred while on the job, state legislators and the federal government began enacting statutes to implement comparative

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[73] For example, in Germany a Supreme Court decision overruled previous decisions that allowed an "all-or-nothing" approach where contributory negligence on the part of the plaintiff could be plead. The court favored a more flexible approach; in their decision they returned to the original intent of the statute that implemented comparative fault type of negligence suits. BGHZ 34, 355 (363) (Supreme Court of Germany).

> The relevant code section provides:
>
> If any fault of the injured party has contributed to causing the damage, the obligation to compensate the injured party and the extent of the compensation to be made depends upon the circumstances[.]
>
> § 254 BGB (F.R.G.) (German Civil Code).

[74] Prosser, TORTS, 433 §67.

fault principles. For example, the Federal Employer Liability Act (FELA),[75] while still using the language of "contributory negligence," is structured in such a way so as to have the statute have the effect of comparative fault.[76] Many states adopted workers' compensation statutes following implementation of FELA and Supreme Court decisions upholding their validity to reach this result in a similar manner.[77] An attempt to broaden

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[75] Federal Employers' Liability Act, 53 Stat. 1404, 45 U.S.C. §54, 45 U.S.C.A. §54, as amended in 1939.

[76] In 1939 Congress specifically amended the Act to eliminate the use of assumption of risk. See, supra note 71.

[77] Alperin, "Doctrine of Contributory Negligence...," 32 A.L.R. 3d 463 (1970).

See also Philip D. Oliver, *Once is Enough: A Proposed Bar of the Injured Employee's Cause of Action Against A Third Party,* 58 Fordham L. Rev. 117 (1989). In his discussion of the historical background of workers' compensation statutes, he notes:

> In 1904, Massachusetts established a commission on employer liability in response to increasing industrial injuries and restrictive tort remedies, the publication of a full account of the German system of strict liability for employers, and the enactment of the first British Compensation Act in 1897. Other states followed Massachusetts' lead.
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> In 1910, representatives of commissions from Congress and nine states drafted a Uniform Workmen's Compensation Law. Some early statutes were held unconstitutional. In the most important of these decisions, the New York Court of Appeals held that a provision for damages in the absence of fault constituted deprivation of property without due process of law, in violation of the state and federal constitutions. See Ives v. South Buffalo Ry., 201 N.Y. 271, 94 N.E. 431 (1911). Any problem posed by the New York Constitution was met by a 1913 amendment. See 4 N.Y. Laws app., at 2492 (1913) (amending New York state constitution by adding art. I, § 19 (now § 18)). Shortly thereafter, a series of decisions by the United States Supreme Court resolved the federal constitutional

the effect of comparative fault by the American Law Institute to weakening the application of secondary assumption of the risk was similarly undertaken.[78] All of these developments have occurred rather rapidly in the span of the past few decades, building on the federal legislative activity at the turn of the century.[79]

Also, courts attempted to use the doctrine of last clear chance to keep defendants from avoiding the costs of the injuries resulting from their actions.[80] This caused even more confusion however as the courts had difficulty in applying this concept. As a result, the doctrine has been declining in favor while still being restated in a variety of different ways and constructions.[81] This result is most likely because assumption of risk was viewed as a concept separate from comparative fault and thus not readily replaced by

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issue by upholding workers' compensation statutes. See, e.g., Mountain Timber Co. v. Washington, 243 U.S. 219, 37 S.Ct. 260 (1917); Hawkins v. Bleakly, 243 U.S. 210, 37 S.Ct. 255 (1917); New York R.R. v. White, 243 U.S. 188, 37 S.Ct. 247 (1917).

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By 1920, all but eight states had compensation acts. Hawaii became the fiftieth state to adopt the system in 1963.

Id., at 118 and footnote 24.

[78] See the Model Comparative Fault Statute, infra note 152.

[79] See, supra note 31.

[80] MacIntyre, *The Rationale of Last Clear Chance,* 53 Harv. L. Rev. 1225 (1940). See also Ackerman v. James, 200 N.W.2d 818 (Iowa 1972), which has a discussion of different cases that use this doctrine.

[81] James, *Last Clear Chance: A Transitional Doctrine,* 47 Yale L.J. 704 (1938).

those statutes implementing comparative fault. Even with some courts subsuming assumption of risk into comparative fault confusion still exists.[82]

During this period of mitigating the harsh results of contributory negligence and narrowing the aspects of its corollary contributions, assumption of risk began its decline. As discussed above, this erosion occurred in several different areas: the adoption of worker's compensation and other state and federal employment statutes, the use of last clear chance, an inquiry into whether the elements of assumption of risk were ever present during the cause of action in question[83] and, most significantly, with the increasing adoption of comparative fault.

Comparative fault has its roots in the theory of apportionment of damages. Many critics of contributory negligence and its correlating doctrines (last clear chance, assumption of risk, et al.) looked to the examples in use by civil code jurisdictions as a way of replacing what they saw as a complicated and unfair doctrine. The suggestion: Implement apportionment of damages, the so-called comparative fault system.

Critics of this system wasted little time in responding.[84] A principle criticism stems from the philosophy that underscored the idea behind contributory negligence: Comparative fault reduces the promotion of caution by the plaintiff who should be

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[82] *Li v. Yellow Cab Co.,* 13 Cal. 3d 804, 532 P.2d 1226 (1975).

[83] See, supra note 64.

[84] *Comparative Negligence Symposium*, 23 Mem. St. U.L.Rev. (1992).

responsible for his own safety.[85] Another criticism of comparative negligence is distrust of juries,[86] who are viewed by some as willing to award damages for every cause of action they sit in on. Furthermore, such deliberations, as viewed by these same critics, come under fire as the jury is viewed as ill-equipped to make the right decisions.[87]

B. Rethinking the corollary contributions of contributory negligence

With the adoption of comparative fault courts have re-examined two corollaries of contributory negligence: assumption of risk and the "last clear chance."[88] With the last clear chance doctrine (wherein a plaintiff may still recover despite his negligence if the defendant had a final opportunity to avoid occurrence of the injury) the courts have ceased to recognize its application.[89] This is mainly due to the fact that the doctrine was

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[85] One study suggests that this may not be true. See Mole and Wilson, *A Study of Comparative Negligence*, 17 Corn. L. Q. 333, 344 (1933).

[86] David W. Robertson, *Ruminations on Comparative Fault, Duty-Risk Analysis, Affirmative Defenses, and Affirmative Doctrines in Negligence and Strict Liability in Louisiana*, 44 La. L. Rev. 1341 (1982).

[87] Id., at 1395. Mistrust of juries is also discussed in Wex S. Malone, *Comparative Negligence—Louisiana's Forgotten Heritage*, 6 La. L. Rev. 125, 144 (1945). Yet compare this perception against the jury's findings in Harris v. Hercules Incorporated and the court's subsequent action on the verdict, supra note 7.

[88] Although some courts have applied the new comparative fault standards without addressing the issues of assumption of risk, res ipsa loquitor and last clear chance. See, generally, Dominick Vetri, *Communicating Between the Planets: Law Reform for the Twenty-First Century*, 34 Willamette L. Rev. 169 (1998).

[89] Bokhoven v. Klinker, 474 N.W.2d 553 (Iowa 1991).

seen as a possible method of ameliorating the harsh "all or nothing" rule of contributory negligence. With the decline of contributory negligence so too goes last clear chance.[90]

Not so with secondary assumption of risk; it has remained and courts have been struggling to merge this doctrine into comparative fault. That this problem exists today is remarkable in light of the fact that the Uniform Comparative Fault Act called for the abolishment, at least in part, of assumption of risk.[91] Part of the problem stems from the fact that secondary assumption of risk and contributory negligence, despite some differences, overlap. Both doctrines look to the plaintiff's behavior to determine whether it played a role in causing his own injury.[92] The significant difference is likely to be one between the risks in fact known to the plaintiff and those risks which he should have discovered through the exercise of ordinary care.[93] This is contrary to last clear chance where the final analysis was centered on defendant's behavior before plaintiff was

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[90] Of course, there are always exceptions. See Southern Railway v. Brunswick Pulp & Paper Co., 376 F.Supp. 96 (S.D. Ga. 1974), where the Georgia courts still adhere to the last clear chance doctrine as an affirmative defense.

[91] A model statute, the Uniform Comparative Fault Act §1(b) (1977), states that certain defenses used to preclude recovery, including "unreasonable assumption of risk not constituting an enforceable express consent," would only reduce damages in the amount apportioned to plaintiff's fault. See, infra note 152.

[92] [In a case where the plaintiff is deemed to have acted in a negligent manner] his conduct is a form of contributory negligence, in which the negligence consists in making the wrong choice and voluntarily encountering a known unreasonable risk. In such cases it is clear that the defenses of assumption of risk and contributory negligence overlap, and are as intersecting circles…[.]" Prosser, TORTS 441 §68.

[93] Id., at 440-442.

injured. As stated earlier, both plaintiff and defendant share some degree of fault but if the plaintiff is determined to be at fault in a manner deemed permissive[94] on his part, then his suit is barred from recovery.

Thus it makes sense that some courts have narrowed the application of assumption of risk into primary and express variations only. With these two theories, plaintiff is expressly or implicitly agreeing to relieve defendant of his duty of care without acting in a negligent manner in doing so (refer to chart at end of article). Some courts have gone even further and abolished assumption of risk completely as a defense, holding that the similarities between assumption of risk and the outmoded contributory negligence principles are so intertwined that statutory elimination of contributory negligence does away with assumption of risk as well.[95]

Statutorily, this abrogation or narrowing of assumption of risk has occurred on the federal and state level. For example, the Federal Employer Liability Act (FELA)[96] modifies the doctrine of contributory negligence[97] to effectively function as comparative

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[94] Again, refer to the different types of permissive behavior possible by plaintiff, supra note 1.

[95] Curties v. Hill Top Developers, Inc., 14 Cal.App.4th 1651, 18 Cal.Rptr. 2d 445 (1993); Hanke v. Wacker, 217 Ill.App. 3d 151, 576 N.E.2d 1113 (1991); Swagger v. Crystal, 379 N.W.2d 183 (Minn. 1985). See, generally, Annotation, *Effect of Adoption of Comparative Negligence Rules on Assumption of Risk*, 16 A.L.R. 4th 700, 703 §2 (1982).

[96] 45 U.S.C. §51 et seq.

[97] 45 U.S.C. §53 is as follows:

Contributory negligence; diminution of damages

negligence while eliminating assumption of risk.[98] Other federal statutes include the Merchant Marine Act and the Jones Act.[99] Putting these statutes together means that insofar as the employer-employee relationship in the railroad industry goes comparative fault has replaced contributory negligence while secondary assumption of risk has been completely abrogated. Congress has delineated a clear set of tracks in terms of what

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> In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act [45 USC §§51 et seq.] to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, *the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee*: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee (emphasis added).

In Seabord A.L.Railway v. Horton, 239 U.S. 595, 36 S.Ct. 180 (1916), the Supreme Court made it clear that contributory negligence and assumption of risk are separate theories because assumption of risk remained as a complete defense while contributory negligence did not. Congress amended this act in 1939 to eliminate assumption of risk.

[98] 45 U.S.C. §54. The relevant portion of this section states:

> [S]uch employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence [of the railroad].
>
> This section abrogates assumption of risk in terms of the employment relationship in railroads. Congress added this section to avoid any confusion over whether plaintiff acted in a manner to be considered secondary assumption of risk since the court in Horton, supra, indicated that expressed assumption of risk still is a viable defense.

[99] 45 U.S.C. § 688.

defenses are, and aren't, available. This statute has no application outside the railroad industry and does not apply to the several states.[100]

In federal maritime law, the advent of comparative fault has also resulted in the narrowing of assumption of risk principles. Courts have refused to consider the defense except in circumstances where an express contract so exists.[101] As the court stated in *Whalen v. BMW of North American, Inc.*[102] assumption of risk is ordinarily not available in federal maritime law under principles of comparative fault but because a contractual clause to the effect existed, it will be applied to bar plaintiff's claim.[103] Primary assumption of risk (as an express contract) still has application then in this arena but secondary assumption of risk is subsumed into comparative fault.

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[100] Toleda, St.L.&W.R.Co. v. Slavin, 236 U.S. 454, 35 S. Ct. 306 (1915); see also Sadowski v. Long I.R.Co., 292 N.Y. 448, 50 NYS 2d 171 (1944).

[101] Barber v. Marina Sailing, Inc., 36 Cal. App. 4th 558, 42 Cal. Rptr.2d 697 (1995). The court relied on 28 U.S.C. §1333(1).

Interestingly, this is a result of following English common law in admiralty cases. Following this common law approach gave American courts contributory negligence in all other genre of cases. See generally, Anne M. Payne, Annotation, *Historical Development*, 2 Am.Jur. 2d, *Admiralty* §2 (1994).

[102] 864 F.Supp. 131 (S.D. Cal. 1994).

[103] Id. The clause was part of a form signed by the plaintiff John Whalen prior to his injury in a yacht racing contest. The clause, in pertinent part, states, "I assume any risks of injury arising out of: my participation in the race, failure or breakage of my yacht, or any of its equipment, or weather conditions." Id., at 132.

As for the narrowing or erosion of assumption of risk in the states, different results have been achieved mostly through a combination of state legislation and judicial activism. Eight states have abolished the assumption of risk defense in the absence of an express agreement[104], twenty-seven states have retained the defense as a factor in determining respective fault[105], and fifteen states and the District of Columbia keep assumption of risk as a defense regardless of whether primary or secondary is established by the defense.[106] Of these latter fifteen, three states and DC still adhere to the principles of contributory negligence (and thus have some valid relationship between the overlap of secondary assumption of risk and contributory negligence).[107]

Further compounding this issue, some of those states that have abolished contributory negligence in favor of comparative fault still maintain that secondary

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[104] 57B Am. Jur. 2D *Negligence* § 1300-1751 (1989). Those states are Connecticut, Illinois, Kansas, Kentucky, Massachusetts, Mississippi, North Dakota and Oregon.

[105] Id. Those states are Alaska, Arizona, Arkansas, California, Colorado, Florida, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Texas, Utah, Vermont, Washington, Wisconsin and Wyoming.

[106] Id. Those states are Alabama, Delaware, Georgia, Maryland, Mississippi, Nebraska, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, Pennsylvania, DC. Furthermore, of these states, Alabama, Maryland, North Carolina and DC still retain the use of contributory negligence.

[107] Gail D. Hollister, *Using Comparative Fault to Replace the All Or Nothing Lottery Imposed in Intentional Tort Suits in Which Both the Plaintiff and Defendant Are At Fault,* 46 Vand. L. Rev. 121, 123 n.2 (1993).

assumption of risk, in both its forms, is still a complete bar to recovery.[108] The argument principally relied upon in these courts for denying recovery completely without apportioning fault is consent by the plaintiff.[109]

C. Assumption of risk's elements of confusion

In those states still applying secondary assumption of risk it is done in an inconsistent manner. The elements of assumption of risk (i.e., knowing and voluntary) may be defined, or ignored, so as to justify the outcome desired or the doctrine may be overlooked altogether. Or, as demonstrated in the *Decker* case,[110] the court (following the plaintiff's lead in choosing it as the forum) may get lucky and be able to choose the law that it finds appropriate to the case at hand and skirt the issue altogether. Courts have hesitated to find any assumption of risk as a matter of law in situations where the outcome would have a harsh outcome (or alternatively apply the doctrine regardless of its harsh outcome) by overlooking the voluntary and knowing elements necessary for such a defense. Also, courts have allowed the doctrine to upset or contravene a jury's finding; such a result may come from a jury's confusion as to the implications behind the principles it bases its findings on. At the very least, courts are aware of the possibility of inequity through application of assumption of risk.[111]

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[108] Riley v. Davidson Construction Co., 381 Mass. 432, 409 N.E.2d 1279 (1980); *Blum v. Brichacek,* 191 Neb. 457, 215 N.W.2d 888 (1974); Kennedy v. Providence Hockey Club, Inc., 119 R.I. 70, 376 A.2d 329 (1977).

[109] 381 Mass. 432 at 437 (1980).

[110] See supra note 17.

[111] 357 S.W.2d 683, supra note 55.

An examination of the consent portion of the assumption of risk equation can reveal some incongruous results. In *Conroy v. Briley*,[112] a tenant was injured while using the stairs. In allowing her recovery, the court reasoned that the plaintiff, by using the stairs, could have consented to the possibility of harm to herself. However, the court went on to discuss a crucial fact: The stairs were the only means of ingress/egress for the plaintiff. Because of this lack of choice on her part, it was found that the plaintiff therefore did not consent to assuming the risk of harm from using the only available means of entry into her apartment.[113]

Consider also whether a shipper of cabbages was held to have not assumed the risk of a defective car supplied by a carrier where the alternative was to leave the cabbages rotting in the field, thus destroying any possibility of utility on the shipper's part to realize profit from their sale.[114]

The following two cases are also illustrative. In the widely discussed *Eckert v. Long Island R.R.*[115] case, the plaintiff's deceased was killed when rescuing a child on a railroad track as a train bore down on the child. At trial, the court refused to allow the defendant's motion to insert a jury instruction with regard to whether a plaintiff

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[112] 191 So.2d 601 (Fla.App.1966).

[113] The court stated, in part, "[T]he tenant, without any choice of a method of egress, did not assume the risk of the danger created by the landlord." Id., at 603.

[114] Missouri, K&T R. Co. of Texas v. McLean, 55 Tex.Civ.App. 130, 118 S.W. 161 (1909).

[115] 43 N.Y. 502 (1871).

voluntarily placed himself in harm's way when rescuing a child.[116] The Court of Appeals affirmed, ignoring the issue of assumption of risk and hailing the actions of the plaintiff's deceased.[117] The dissent was correct when it pointed out that the plaintiff's deceased had voluntarily and knowingly encountered a risk, therefore precluding recovery by his estate.[118] To avoid such an inequitable result, the majority avoided the voluntary aspect of assumption of risk altogether.

This case was distinguished by *Wilson v. New York*[119] where a brakemen, seeing some young children running next to a moving train, attempted to get them away. He was hit from behind by a fence post as he leaned off the rail car and killed. Although his motives were the same as in *Eckert*, the court denied a possibility of recovery by his estate, stating that the context of his heroism was not the same and that he knowingly and voluntarily assumed the risk of harm when he attempted to keep the children away from the moving train.[120] In neither case can the argument be made that there was a duty to rescue as both of the deceased did not place the children in harm's way through their own action (or inaction). For both, rescue was voluntary only.

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[116] This particular outcome gave rise to the doctrine that "danger invites rescue."

[117] Id., Allen, J. dissenting.

[118] Id.

[119] 29 R.I. 146, 69 A. 364 (1908).

[120] Id., at 368.

In *Eckert,* the court refused to apply assumption of risk as a corollary to the defendant's assertion that the plaintiff's deceased acted in a contributory negligent manner. In affirming, the Court of Appeals overlooked the issue and decided the merits according to what they felt was the equitable outcome to the man's heroic actions. In *Wilson,* the court imputed the elements of assumption of risk onto the deceased's actions, claiming that his death is directly the result of voluntarily placing himself in harm's way.

The Court of Appeals attempted to distinguish the two rescue attempts by the contact the rescuer had with the children: In the former case, the rescuer was able to physically carry the child away; in the latter, the rescuer could only rely on his powers of persuasion to get the children out of harm's way. Apparently, Wilson got broad-sided by more than just a fence post.

This selective application of the elements of assumption of risk has expanded into other decisions. Certainly, many courts have ignored the voluntary element of assumption of risk in order to find that the defense did not exist to bar the plaintiff's recovery.[121] For example, the plaintiff may have encountered a forced choice when encountering the risk and thus there is no voluntary action on his part. In choosing the course of action that resulted in his injury, the choice was necessary because it would result in a meritorious outcome, such as saving a child's life in *Eckert.*[122] What is really happening here is that the courts are negating the "voluntary" aspect of assumption of

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[121] PROSSER, TORTS 311-13 (5th ed. 1955).

[122] Id.

risk so as to allow the plaintiff to recover.[123] This results in assumption of the risk being applied across the board to all plaintiffs; taking a course of action with a lack of true alternatives doesn't necessarily mean consent.

This selective application of this tort doctrine not a uniquely American event. In continental European legal systems which use the broader term of "fault of the injured party" rather than contributory negligence,[124] courts have been found to be very flexible in determining whether a plaintiff has assumed any risk or been at any fault in suits where the defendant is more at fault. One commentator notes in general with regard to civil law jurisdictions in Europe:

> [I]t is difficult to say how far the courts lean over backwards in order not to "discover" contributory fault [or its corollary doctrines] and thus give the victim his full compensation. It could be argued that they appear to be more eager to discover fault in defendants—especially where insurance is obligatory or prevalent—than they are to find it in plaintiffs. If this "impressionistic" reaction is correct, and there is some authority in England to support this...it would certainly be in tune with the more modern trend to disregard the victim's own fault unless it is particularly flagrant or obnoxious, and to let him recover full compensation. This

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[123] Contrast the results in Eckert and Wilson; the different outcomes turn on the courts' interpretations of the voluntary encounter of a risk by the plaintiff. The minority in Eckert pointed out that plaintiff acted voluntarily, stating: "...the company is not liable to whose who, of their own choice and with full notice, place themselves in the path of the train and are injured." Id, at 507-08. The majority never discussed this point.

[124] "Fault of the injured party" as used in civil law jurisdictions is broader than contributory negligence in that it includes intentional behavior on the plaintiff's part. B.S. MARKESINIS, THE GERMAN LAW OF TORTS 90 (2d ed. 1990).

> view has been officially adopted by the 1964 Soviet Civil Code and sanctioned by the French Cour de Cassation[.][125]

Thus, courts around the world appreciate the inequity resulting from the application of contributory negligence and all its concomitant doctrines.

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[125] Id., at 90-91.

PART IV How Assumption of Risk Conflicts with Comparative Fault

A. The subjective versus objective inquiry in application

A principle conflict with secondary assumption of risk lies in its application under the auspices of comparative fault in its focus on the subjective knowledge plaintiff has in encountering a known risk created by the defendant. This type of knowledge (different from that of contributory negligence which is an objective inquiry into any departure from a reasonable person standard) conflicts with comparative fault for the simple notion that both parties are deemed negligent to a degree with the degree of fault on each part tipping the scale one way or the other. The inquiry doesn't focus on subjective knowledge but objective departure. Additionally, no inquiry is made into how defendant's negligence was created, whether subjectively or objectively.[126]

The problem arises because the plaintiff's behavior could be construed either subjectively or objectively wrong, depending on how the facts are pleaded and whether the defense affirmatively pleads secondary assumption of risk. The key here is that both

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[126] 22 La.L.Rev. 17 (1961), supra note 13. Mansfield states in part that:

> [T]he energetic attack on assumption of risk as an independent liability-limiting doctrine has been directed mainly at those cases in which the defendant acted negligently and then, subsequently, the plaintiff, with knowledge of the risk created by the defendant's conduct, chose to encounter it.
>
> * * *
>
> Here are stripped away all the complications arising out of the need to adjust the relations between the parties and to provide the defendant with a practical guide to conduct."
>
> Id, at 22.

doctrines look to the plaintiff's behavior; one focuses on subjective and the other focuses on objective. The distinction among the two inquires is often blurred and has caused courts to apply the wrong principles in deciding cases, most notably at summary judgment and in jury instructions.[127] In Minnesota, for example, although the state Supreme Court in *Springrose v. Wilmore*[128] has merged secondary assumption of the risk into contributory negligence and abolished both due to the state's adoption of comparative fault, there is no clear authority as to whether jury instructions on secondary assumption of risk should be given. Cases subsequent to the *Springrose* decision have been upheld even though the trial court used secondary assumption of the risk language in the jury instructions.[129]

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[127] An excellent discussion of this jury instruction confusion potential is found in Timothy Bettenga, Note, *Instructing the Jury On Comparative Fault Issues: A Current Guide To Understanding the Nature of Comparison In Comparative Fault*, 14 Wm. Mitchell L. Rev. 807 (1988). The discussion points out:

> There is no reason to unduly emphasize one part of the plaintiff's conduct in instructing on secondary assumption of the risk. Such an instruction would result in prejudice to the plaintiff, just as instructing on specific acts of the defendant's negligence would be prejudicial to the defendant.
>
> * * *
>
> As secondary assumption of the risk is nothing more than a form of comparative negligence, the courts must start treating it as such by eliminating any distinguishable instructions to the jury. In doing so, complex comparative fault issues will be simplified.
>
> Id., at 822-23.

[128] 292 Minn. 23, 192 N.W. 2d 826 (1971).

[129] See, generally, 14 Wm. Mitchell L. Rev. 807, 820, for a recitation of cases using this form of jury instruction.

In *Hunn v. Windsor Hotel Co.*,[130] a plaintiff walked down obviously defective steps when other steps in better condition were available at no great inconvenience to the plaintiff. Although plaintiff (correctly) did not recover in the negligence suit, the court labeled the plaintiff's contributory negligence as careless behavior and his implied secondary assumption of the risk as "venturousness" in order to deny recovery to plaintiff. Yet the court did not examine or distinguish the defendant's conduct. No inquiry was made into the utility of the defendant's actions or the reasons why the steps were defective, and for how long. Critics of this distinction argue that this is not a distinction at all but an opportunity for two defenses to be plead.[131]

Consider the plaintiff who gets into a car with a drunk driver. If the defense is able to show that the plaintiff knew beforehand that the driver was drunk then secondary assumption of risk applies—plaintiff was subjectively aware of the danger and proceeded in the face of it. If the defense can not show that the plaintiff knew, the principles of objective departure still apply if facts can be shown that tend to prove that the plaintiff should have known (a form of "willful blindness") of the danger. This objective departure from reasonable care can be pleaded as the affirmative defense of secondary assumption of risk.

In the example shown above with the drunk driver, two types of conduct could be inferred based on the plaintiff's behavior. First, the plaintiff could be seen as unreasonably accepting a ride (i.e., a date with the drunk driver) or secondly, as

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[130] 119 W.Va. 215, 193 S.E. 57 (1937).

[131] Prosser, TORTS §68.

reasonable given the circumstances (i.e., needing a ride due to an emergency). In either case, a subjective inquiry would lead to two different results: The plaintiff on the date should not have gone on the ride, or; the plaintiff had no choice but to accept that ride given the emergency (and even worse consequences for not accepting the ride). An objective inquiry would also lead to two different results: In the first example the plaintiff should have known (he was on a date with the drunk driver and observed her heavy drinking), or; in the second example, the objective result could be that the plaintiff should not have placed herself in a situation where a getting a ride with a drunk driver was necessary or that she had no other reasonable alternative.

B. Subjective versus objective inquiry confusion creates two defenses

Because the plaintiff is held to either an objective or subjective inquiry, the defendant has two defenses arising from a single occurrence. The first, subjective, could be plead affirmatively at summary judgment to deny recovery. The second, objective, could be shown inferentially through circumstantial evidence that the plaintiff acted in a manner inconsistent with that of an ordinary reasonable person under similar circumstances. This type of evidence would necessitate jury instructions that would deny recovery to the plaintiff if the jury feels there is sufficient inferential proof to show that plaintiff acted in a manner inconsistent with an ordinary, reasonable person such that he assumed the risk (albeit impliedly). In comparative negligence, a balance of the evidence is weighed by the fact finder.

This conflicts with comparative fault principles that came about because of the perceived inequities between plaintiffs and defendants during the all or nothing approach

of contributory negligence. With secondary assumption of risk (which courts acknowledge has the characteristics of contributory negligence[132]) still being applied today, comparative negligence truly has not been fully implemented.

In order to make comparative fault work properly, we must trust the trier of fact to be able to properly balance fault of the respective parties after vigorous argument on both sides is heard.[133]

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[132] 22 La.L.Rev. 17 (1961).

[133] The Model Rules of Professional Conduct states: "As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." MODEL RULES OF PROFESSIONAL CONDUCT Preamble, paragraph [2] (1983).

PART V The Proposal for a Comparative Responsibility Analysis

A. Introduction to the analysis

The principle contention of confusion outlined in this article is whether the court should analyze the plaintiff's behavior in an objective (contributory negligence) standard or a subjective (assumption of the risk) standard. In either case, the plaintiff's behavior is examined and the defendant's conduct leading to the event is assumed to be negligent. As discussed in the previous section, this has led to confusing outcomes and lengthy litigation when a simple adjudication of the facts would lead to better results. A shift in the analysis is required: It is time to weigh the balance of behaviors by each party in determining the outcome of the suit. No longer should just the behavior by the plaintiff be the determining factor of whether recovery should be allowed or denied.

Secondary assumption of risk as a complete defense to negligence suits needs to be cast into a more judicially applicable manner so as to be more conducive for proper analysis by a jury. Instead of taking what is an issue of fact away from the jury, courts should have them decide the varying degrees of asserted negligence on each party's part (can it ever be said that both parties are exactly equal in fault?) and a host of external factors vital to properly allocating fault to the respective parties. Secondary assumption of risk, whether reasonable or unreasonable, should be analyzed under a comparative responsibility analysis model. This model is inspired by a modified risk-utility analysis

promulgated for use in product defect cases.[134] The proposed model of analysis, as modified herein, could be used in comparative fault jurisdictions, replacing secondary assumption of risk analysis. In those jurisdictions still following contributory negligence, the model would have no application.

Further support for this type of comparative responsibility analysis can be seen in Dean Wade's article (in which he calls for abrogation of the term assumption of the risk).[135] In his article, he points out that in various cases where the courts wrestled with this concept, the possibility exists for either the plaintiff's conduct or his implied consent to be unduly extended beyond the scope of the risk purportedly assumed. He stated, in part, that "[t]his is the test of negligence again—balancing of magnitude versus utility of risk—and the test is much better perceived and evaluated by the use of the negligence terminology [rather than assumption of risk]."[136]

1. Modifying risk-utility analysis into a comparative responsibility analysis

Risk-utility in the context of product liability suits was proposed as a method to address what was perceived to be weaknesses with the consumer expectancy test as applied to design flaws.[137] Risk-utility analysis derived from the same school of thought

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[134] See, e.g. 1 Am.L.Prod.Liab, § 1:49; Preliminary Draft No. 1 (April 20, 1993) Restatement (Third) of Torts; Products Liability § 101, Reporter's Notes; O'Reilly and Cody, The Products Liability Resource Manual (General Practice Section of the American Bar Association 1993).

[135] See supra note 24.

[136] Id, at 13.

[137] See supra note 129.

that called for the abolition of contributory negligence and was first proposed in product defect cases for the purpose of obviating the open and obvious hazard doctrine, which was viewed as an unjust and harsh rule to bar plaintiff's from recovery.[138] This doctrine was a corollary of assumption of the risk as any equipment with a dangerous condition that is obvious to a casual user of the equipment necessarily would carry with it the admonition that the user accepted such a risk by using the equipment anyway. Many courts, by adopting risk-utility analysis in product defect cases, dropped the use of the open and obvious hazard rule (which correlates to implied assumption of the risk) as a defense.[139]

In its application, risk-utility in products liability centers primarily around the concept of "reasonableness" and relative responsibility.[140] To utilize this concept in the courtroom, the manufacturer's conduct in choosing a particular product design, especially in view of that product's risk to its users, is balanced against the utility (or usefulness) of the product in that condition.[141] Of particular importance is the ability of the manufacturer to eliminate the risk without diminishing the utility of that product (which

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[138] Id.

[139] Ogletree v. Navistar International Transport., 194 Ga.App. 41, 390 S.E.2d 61 (1989); Banks v. ICI Americas, Inc., 264 Ga. 732, 450 S.E.2d 671 (reconsid. den.) (1994). The court held that public policy dictate that the open and obvious rule should be done away with.

[140] See, for example, Suter v. San Angelo Foundry & Machine Co., 81 N.J. 150, 406 A.2d 140, 145 (1979); Milwaukee Electric Tool Corp. v. Superior Court, etc., 15 Cal.App.4th 547, 19 Cal. Reptr.2d 24, 36 (1993).

[141] Restatement (Third) of the Law of Torts, Products Liability § 2.

includes the price).[142] The fact finder is given the role in these cases of considering evidence of a reasonable design alternative at the time of the manufacture of the product to determine whether to hold the manufacturer, seller or distributor liable for the plaintiff's injuries resulting from the use of the product.[143] In most situations, is the plaintiff's burden to produce such evidence of a reasonable, alternative design.[144]

The Restatement (Third) of Products Liability's language with regard to "reasonable alternative design" can be of guidance in understanding how the fact finder's role would work in considering the utility of plaintiff and defendant's conduct. The Restatement categorizes one form of product defect as such:

> [A product] is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design...and the omission of the alternative design renders the product not reasonably safe.[145]

Building on this same form of analysis, I propose a modified form of risk-utility analysis, couched in terms of "comparative responsibility." Much as implied assumption of risk (as applied through the open and obvious hazard rule) was replaced with the risk-utility analysis in product design cases, comparative responsibility would give proper analysis to each party's role in the transaction that gave rise to the cause of action.

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[142] Id.

[143] Id, comment (c).

[144] Id.

[145] Id, § 2.

Comparative responsibility analysis places more emphasis on allowing juries to weigh comparative levels of responsibility each party has to the other, given the factors of utility of conduct and the alternatives available to each party. The overly generic and judicially compliant term of implied assumption of the risk would no longer be used.

Some parallels between the Restatement (Third) regarding "reasonable alternative design" and comparative responsibility can be drawn. For example, in product defects, the fact finder determines, based on evidence introduced by the plaintiff, whether a reasonable alternative design was available at the time the product was manufactured or distributed.[146] Under comparative responsibility, the fact finder's role would be similar in that their determination of liability depends on the weighing of the utility of each party's conduct given the circumstances and alternatives available at the time the injury occurred. For both risk-utility analysis and comparative responsibility, the fact finder is asked to perform role of determining responsibility from a fairness and appropriateness of responsibility perspective.[147]

2. Comparative responsibility's elements of analysis

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[146] Id, comment (b). "For the liability system to be fair and efficient, most courts agree that the balancing of risks and benefits in judging product design and marketing must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution."

[147] Id, comment (a). "Society benefits most when the right, or optimal, amount of product safety is achieved. From a fairness perspective, requiring individual users and consumers to bear appropriate responsibility for proper product use prevents careless users and consumers from being subsidized by more careful users and consumers, when the former are paid damages out of funds to which the latter are forced to contribute through higher product prices."

The proposal outlined herein consists of examining the utility, or value, of each party's conduct leading up to the injury at issue. Additionally, the alternatives available to each party at the time of the occurrence should also be examined to ascertain whether it diminishes or increases the utility of each party's conduct. Stated in formulaic manner, it would resemble something like this:

$$\frac{(\textit{Utility of P's Conduct}) * (\textit{Alternatives Available at Time of Occurrence})(-1)}{(\textit{Utility of D's Conduct}) * (\textit{Alternatives Available at Time of Occurrence})(-1)}$$

An example of this formula in determining fault for each party would be as follows (where the plaintiff would be denied recovery): Defendant is driving on the street to work within the speed limit when plaintiff's hat blows into the street. Plaintiff wants to retrieve the hat and defendant is on his way to work. Both have utility for their actions. However, plaintiff has alternatives available (because these alternatives may be numerous X will denote the number). Two possible alternatives are to either buy a new hat or wait for the wind to blow his hat to the other side of the street where he can cross and retrieve it then. Illustrated by the formula, it would look something like this:

(P's Conduct = 100) * (X Alternatives Available)(-1)	(D's Conduct = 100) * (0 Alternatives Available)(-1)
(100) * (-X)	(100) * (0)
-100x	0

As outlined above, the plaintiff's measure of fault is (-100x) where the defendant's measure of fault is (0). In this case, because plaintiff and defendant both had

utility of conduct that was equal but plaintiff was presented with alternatives to the course of action chosen, plaintiff is denied recovery.

Even if one alternative were presented to the defendant, braking the vehicle to avoid hitting the plaintiff-pedestrian in the middle of the street, his measure of fault would be measure as much lesser than the plaintiff due to the plaintiff's numerous alternatives available as denoted by X above.

A. Examining the utility of each party's conduct

A an argument for examining the utility of the party's conduct in assessing fault lies in the analogy presented by Prosser:

> It is not every deliberate encountering of a known danger which is reasonably to be interpreted as evidence of such consent [to assumption of risk]. The jaywalker who dashes into the street in the middle of the block, in the path of a stream of cars driven in excess of the speed limit, certainly does not manifest consent that they shall use no care and run him down. On the contrary, he is insisting that they shall take immediate precautions for his safety; and while this is certainly contributory negligence, it is not assumption of risk."[148]

The jaywalker may possess a subjective state of mind that cars seeing him will slow down to avoid harming him, but the utility of his conduct is very weak considering the alternatives objectively available to him (and every other reasonable person). Thus, the utility of rushing in to save a stranded child on the roadway will not preclude recovery due to the utility of rescuing the child and the lack of alternatives. Rushing in to the roadway chasing after a windswept hat has utility but there are alternatives to this

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[148] PROSSER, TORTS 450 §68.

course of action and therefore will preclude recovery. A discussion of how utility is to be measured follows in part C.

B. Examining the alternatives available to each party

Can it ever be said that consent is given where there are no alternatives? Recall the discussion in Part III where the elements of assumption of risk are stretched, ignored or twisted to suit the framework that the court feels is warranted by the facts of the particular case. For example, in the *Conroy* case, where a landlord's negligence in maintaining his tenant's only exit to the street did not impart consent on the tenant when he was forced to use the exit for lack of other alternatives.[149]

It is important then to note whether feasible alternatives are available to the plaintiff at the time of his consent to the defendant's negligently created occurrence. Assumption of risk differs greatly in this context of alternatives because, unlike contributory negligence, it is (or may be) assumed that the plaintiff's behavior is always voluntary when in fact there may not be alternatives.[150] It is in this regard whether true

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[149] Conroy v. Briley, 191 So.2d 601 (Fla.App.1966).

[150] PROSSER, Torts 457 §68. "The term [assumption of risk] does serve to focus attention upon the element of voluntary acceptance of the defendant's negligence, which is sometimes, but not always, involved in contributory negligence." Thus, where there are no alternatives available to the plaintiff at the time he encounters the negligently created event by the defendant, is his behavioral consent really being deemed a form of contributory negligence? The problem with this, of course, is that this concept is being applied in jurisdictions that no longer recognize contributory negligence because of its acrimonious effects.

consent given viable alternatives at the time of the injury to the plaintiff has truly occurred.[151]

C. Applying the utility of conduct with the alternatives available

As utilized in negligence suits, comparative responsibility analysis could be presented in a statutory form similar to the following:

> Plaintiff's conduct in encountering (or assuming) the impliedly known risk created by the defendant is to be balanced by the utility of the plaintiff's conduct against the utility of the defendant's conduct. Factors in the analysis of whether there is culpable negligence on each parties' side should include: utility (usefulness) of plaintiff's conduct, utility (usefulness) of defendant's conduct, the gravity (severity) of the danger known to plaintiff of defendant's conduct, plaintiff's ability to avoid defendant's conduct and the alternatives presented to plaintiff and defendant at time of the occurrence.
>
> If plaintiff's conduct is equal or greater in terms of negligence than with the defendant's conduct weighing all the above factors, then plaintiff is barred from recovery. If plaintiff's conduct is not as negligent as defendant's with all the above factors properly considered, then plaintiff's recovery should be reduced by the percentage of fault attributable to plaintiff.

A comparison with the above sample statute implementing comparative responsibility to a model comparative fault statute (below) does not reveal great differences in effect except for the crucial elements of utility of each party's conduct and the alternatives available at the time of the occurrence.

The Uniform Comparative Fault Act states:

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[151] "This is undoubtedly the most frequent error of attorneys, and even of the courts, in dealing with the defense[s of contributory negligence and assumption of the risk]." Id., at 450.

§ 1. [Effect of Contributory Fault].

(a) In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

(b) "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, *unreasonable assumption of risk not constituting an enforceable express consent*, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault (emphasis added).[152]

The major difference between these two provisions is that the latter Uniform Comparative Fault Act assigns implied assumption of risk into a category of fault that does not necessarily terminate the plaintiff's cause of action but only diminishes her recovery. The former provision does not attempt to categorize the different labels of fault (formerly defenses) but assigns a general comparative responsibility scheme.

Application of the utility of conduct on each party's part is left to the jury. In much the same manner that the jury examines the attributable fault to each person as

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[152] Unif. Comparative Fault Act § 1 (1977). The model statute was written by The National Conference of Commissioners on Uniform State Laws.

outlined in the Comparative Fault model above, the jury utilizing the comparative responsibility analysis assigns utility towards each person's conduct. The analysis is the same as if the jury were comparing fault; comparative responsibility asks the juror not to allocate percentages of fault but percentages of utility. Thus, no great shift in presenting evidence or pleading one's case to the jury occurs. Instead of attempting to convince a jury that their opponent was wholly (or mostly) at fault the advocate makes her case that her client's conduct has more utility than the other party's, given the alternatives available.

This theory of comparative responsibility analysis modified from product defects' risk-utility analysis to apply in secondary assumption of risk situations in negligence carries more weight when economic analysis factors are considered. In economic analysis of the law, the costs of certain conduct and the costs of those consequences (or avoiding those consequences) are examined to determine how it fits within the current scheme of laws. More importantly, it forms a basis for suggesting better ways to implement or even change those laws. Indeed, a strong economic criticism of contributory negligence that hastened its demise were the inequitable results achieved when the party least able to bear the misfortunes of its injuries was asked to do so.

Posner's premise that risk preferrers would be willing to "trade on their taste"[153] by willingly waiving cost-justified precautions on the defendant's part does not mean that plaintiffs could still have prevented injury by their own cost-justified precautions. In other words, plaintiffs may encounter risks others do not because they may or may not

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[153] POSNER, ECONOMIC ANALYSIS OF THE LAW.

have cost-justifiable alternatives available at the time of acquiescence due to the fact that no other alternatives are available.[154] But, let's not confuse this with assuming the risk.[155]

Meshing the philosophy of economic analysis with comparative responsibility, a clear picture of how to illustrate the interaction of plaintiff's and defendant's behavior presents itself. In this regard, plaintiff's conduct and the utility of such conduct can be weighed against defendant's conduct and utility of such (comparative fault principles here) with the added factors of the utility of plaintiff's implicit agreement to assume defendant's created risk, plaintiff's ability to avoid defendant's conduct and other alternatives presented at the time of the behaviorally-created assumption of risk. This is important because it enables the jury to play a role in allocating blame rather than having the court summarily bar the plaintiff's suit.

The factors enumerated above, particularly the utility of each person's conduct and the possibility of alternatives, better illustrate the "complete picture" of the circumstances leading to the risks a plaintiff may have assumed and perhaps more importantly, why. This complete picture is what should be relied upon by the jury in allocating fault on either party and whether an award of damages is merited in the cause of action.

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[154] [O]ther factors, which remain to be considered, may affect the 'voluntary choice'; and the fact that the risk *may* be assumed is by no means conclusive as to whether it has been assumed." PROSSER, TORTS 447 §68 (emphasis in original).

[155] See supra note 1.

This balance of factors can be derived from present case law that utilize the risk-utility analysis originates in product defect cases. Those factors incorporated the concept of "reasonableness,"[156] which underlies the comparative responsibility analysis herein.

B. Some hypothetical examples of comparative responsibility

A plaintiff may be fully aware of one risk (and acquiescent in it) but not necessarily fully aware of another risk which is the proximate cause of his injuries. For example, he may be aware that a car is speeding, but not that the driver is not watching where he is going.[157]

Comparative responsibility analysis eliminates the need to ascertain whether the defense of assumption of risk or contributory negligence should be plead and also the need to have the jury consider whether the plaintiff departed from a subjective standard (assumption of risk) or an objective standard (contributory negligence). Instead, the utility of each party's conduct is balanced against the alternatives available to each at the time of the injury.[158]

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[156] 264 Ga. 732, 734-736. See also supra notes 135 and 136.

[157] Jewell v. Schmidt, 1 Wis.2d 241, 83 N.W.2d 487 (1957); Cassidy v. Quisenberry, 346 S.W.2d 304 (Ky.1961).

[158] Support for this contention can be found in the dictum of the concurring opinion in Entrevia v. Hood, 427 So.2d 1146 (La.1983), where a person entered a dilapidated building and injured himself. The court, in denying recovery by the plaintiff, found that he had assumed the risk based on his subjective knowledge at the time he entered the building. The concurring opinion, while agreeing with the outcome, was troubled by the notion that the majority found that the building posed a reasonable risk of harm to trespassers.

Consider this hypothetical: The guest who accepts a ride with the intoxicated driver.[159] Assume the guest had knowledge of the driver's intoxication. After getting in the car, the driver proceeds to have an accident proximately related to his state of inebriation. At this point, should the driver be able to claim assumption of risk on the part of the guest?

Using comparative responsibility analysis, the first issue to analyze is the utility of plaintiff's conduct compared to the defendant's conduct. Here, we may have a situation where the guest was simply looking for a ride to the local bus station. The defendant may be driving home after consuming too many drinks at a local bar. Both have justifiable utility for their actions, but to complete this picture we need to examine the alternatives available to each.

In view of these alternatives, plaintiff had other opportunities for that free ride; when presented with the choice of grabbing a ride with the drunk driver, he should have relied on the alternative of waiting for a ride with a sober driver. The alternative available to the intoxicated driver are plenty; a taxi ride home or a ride with a sober

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Justice Watson wrote, "Clearly, the building was a ruin. As such, it had little utility and it was likely that children, tramps or others straying on the premises might be injured. [However], if a small child were the 'trespasser,' would not an unreasonable risk of harm be found [by the court so that the child could recover]?" Id., at 1151.

In a subsequent decision the court expounded on this by declaring that such an analysis of whether something posed a reasonable risk of harm by examining its utility should be based on many factors including social, economic and moral. Oster v. Dept. of Transportation & Development, 582 So.2d 1285, 1289 (La. 1991) (Justice Kimball dissenting opinion).

[159] Admittedly, most states have abrogated the use of assumption of risk in this area but the hypothetical still has good use.

in an accident proximately caused by the intoxicated driver. Plaintiff sues driver; the jury examines the evidence using comparative responsibility analysis.

Each party has utility (or usefulness) behind their actions. Plaintiff needed to go to the hospital to save his life; defendant needed to get home (or, in the alternative, was trying to save plaintiff's life). A survey of the alternatives available presents a more complete picture of the negligence of each party. Plaintiff had no other feasible, realistic alternatives. Defendant had alternatives (recalling those from the preceding scenario). Weighing these factors in the appropriate manner, plaintiff should then be awarded damages. The utility of plaintiff's conduct with the added analysis of the alternatives is greater than defendant's utility of conduct and his numerously available alternatives.

(P's Conduct = 100) * (0 Alternatives)(-1)	(D's Conduct = 100) * (X Alternatives)(-1)
(100) * (0)	(100) * (-x)
0	-100x

In the previous examples the alternatives available to each party were examined. In the following example the *utility* of each person's conduct is discussed. This example will be the ballpark scenario.[160] The current state of affairs is to preclude a plaintiff from receiving an award of damages based on his implied assent to the possibility of being struck by an errant baseball bat or hockey puck.

[160] Although, arguably, this scenario is moot for purposes beyond academic discussion as most professional sports have (or should have) assumption of risk waivers on the tickets. This would create an express contract of assumption of risk between the stadium owner(s) and the spectator.

Each party derives utility from their actions. Plaintiff is going to go to a game for entertainment while defendant profits from having the game performed (in this regard their utilities are intertwined and dependant on each other). Each party has an alternative to preventing injury. Plaintiff could stay at home and watch the game[161] or defendant could construct costly wire mesh to completely prevent the possibility of harm to the spectators. However, this alternative diminishes the utility of both plaintiff's and defendant's actions.

In our example plaintiff is struck by a puck. In his suit for damages, the complete picture of the utility of each party's actions is weighed with the alternatives available to each. Since plaintiff derived utility from viewing the game live and defendant derived utility from the profit of hosting the game, the alternatives available may tip the balance toward who wins. If defendant's alternative of completely enclosing the arena with wire meshing is viewed as having better utility than the plaintiff staying at home and watching the game, then plaintiff wins and the defendant would be required to construct the wire meshing. If plaintiff's utility of staying at home is viewed as less than having the defendant enclose the arena (because the value of going to the game is diminished), then the defendant wins.

The key to analyzing this fact pattern then is to balance the utility of each party's actions against the alternatives available. As illustrated above, utilizing an alternative on one person's part reduces the overall utility toward the other person. In this example, a compromise of sorts has already been reached because of their interdependent nature.

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[161] *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 166 N.E. 173 (1929). Justice Cardozo in his opinion wrote, "The timorous may stay at home."

Baseball fields and hockey arenas have partial enclosures to protect those fans very close to the action, but do not extend out to those areas where fans are further from the action. This compromise has an economic premise: The value of watching the game behind a screen is not outweighed by being struck by a 95 fastball but is outweighed by the possibility of catching a foul ball.

For example, plaintiff's conduct prior to encountering defendant's negligently-created risk may have an economic utility of $100 while defendant's conduct has an economic utility of $50. In apportioning utility of conduct, it can be said that plaintiff's behavior was twice as useful as defendant's (or 200 percent greater) and thus plaintiff should be entitled to recover. Determination of this is left to the jury and is not based on a hard and fast rule but rather an examination of the facts surrounding the injury. As Prosser stated, implied assumption of the risk [in its present form] is hard to apply due to the myriad facts in every conceivable situation that can occur.[162]

C. Simplifying the problem of multiple defendants

Suppose Plaintiff sues three defendants: A, B, and C for damages in the amount of $100.00. Each party has some degree of fault attributable to their actions. In jurisdictions which apply comparative fault principles, the possibility of having to instruct the jury on different defense principles exists in the following example. This simple illustration of combining four defendants (one with no defense theory, two with a theory of common negligence on the plaintiff's part and one with a defense of assumption of risk). Where different percentages of fault are attributable to each party under comparative responsibility but not traditional comparative fault (due to the Def. A's

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[162] See supra note 1.

assertion of assumption of risk), with the possibility of damages apportionment is as follows:

	Percentage of fault	Type of defense available
Plaintiff	20%	Comparative fault
Def. A	30%	Assumption of risk (secondary)
Def. B	30%	Common negligence
Def. C	20%	Common negligence

If assumption of risk is a bar to recovery from A, then the complicated issue of whether plaintiff recovers from the other parties arises, in addition to the problem of properly instructing the jury. And, if the plaintiff does recover, there is the possibility that the measure of damages awarded may not be the proper amount. Under comparative responsibility analysis, each party is allocated a percentage of fault based on the utility of each party's conduct weighed against the alternatives available to each.

1. B and C "piggyback" on A's defense

In this hypothetical, plaintiff is now 50 percent at fault (plaintiff's 20 percent plus A's 30 percent attributed to plaintiff through his secondary assumption of risk). In modified comparative negligence jurisdictions, B and C walk away from the cause of action as their level of fault together would not surpass the 50 percent threshold plaintiff needs to overcome in order to recover.[163]

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[163] In most jurisdictions. Some jurisdictions would allow for recovery if plaintiff is not more negligent than defendant(s). Here, it is assumed that plaintiff recovers nothing since his damages, reduced in the amount of 50 percent of the total, are equivalent to plaintiff's own proportion of damages incurred without compensation.

The conclusive effect of B and C acting in a negligent manner without providing compensation for the injury caused is similar to contributory negligence. Recall that plaintiff never recovers if there is any fault, however slight that may be, on his part. This defeats the policy reasons for the demise of contributory negligence, as discussed in Part III. With the principles of contributory negligence still prevalent in secondary assumption of risk analysis, it is very possible that B and C could "piggyback" on A's defense to completely deny recovery on the plaintiff's part.

2. Jury confusion potential

Even if plaintiff is able to recover at law against B and C they still may not have to pay their share of damages either due to possible confusion on the part of the trier of fact during deliberations. Here, A has an affirmative defense while B and C must plead that the evidence shows their conduct has not risen to a level of negligence. The fact finder in this situation is asked to consider the plaintiff's behavior in two different contexts: First, the subjective standard of whether he acted in a reasonable manner when he encountered defendant A's negligently created event and second, the objective reasonable person standard of ordinary negligence.

It is very possible that the fact finder may "carry over" the analysis of the plaintiff's behavior into the analysis of whether B and C were negligent. If, for example, the trier of fact considers that the plaintiff acted in an unreasonable manner when encountering the negligently created event of A, it is entirely possible that this behavior will be imparted against the plaintiff in considering the negligence of B and C even though the affirmative defense no longer applies. In some jurisdictions courts refuse to submit separate

instructions for assumption of risk and comparative negligence finding the potential for confusion too great.[164]

3. The proper measure of damages may not be awarded

Finally, consider whether plaintiff will receive the proper measure of damages. Ideally, given that plaintiff is 20 percent at fault and A, B, and C are assumed to be jointly and severally liable for the remaining 80 percent of damages, the most plaintiff should receive is $80.00. Also, plaintiff may only recover $50.00 if the trier of fact finds, using comparative responsibility analysis, that A's conduct had more utility than plaintiff's given the alternatives available at the time of the event. In either case, the minimum award would be $50.00.

However, if the trier of fact relies on the secondary assumption of risk analysis now used in comparative fault courts, plaintiff faces the prospect of recovering either $50.00 or nothing at all. The return of no award could be due to either the results achieved in scenarios 1 and 2, discussed above. In either situation, the policy principles behind comparative fault would be defeated.

Looking to comparative responsibility analysis, plaintiff's utility of conduct is weighed against A, B, and C. For B and C, the utility of conduct on plaintiff's part outweighs B and C's utility since their behavior violated common negligence principles.

As for A, the analysis would be the same, where each party's utility of conduct is weighed against the other with added weight given to the alternatives available to plaintiff and A at the time the event occurred. This analysis then would have two

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[164] Annotation, *Effect of Adoption of Comparative Negligence Rules on Assumption of Risk,* 16 A.L.R. 4th 700, 703 §2 (1982).

outeomes: Either plaintiff reeovers against A or he doesn't. In either case, the measure of damages allocated to plaintiff from all three parties would be the proper amount ($80.00 if A liable to plaintiff; $50.00 if A is not liable to plaintiff). Refer to the chart below (total amount of damages being equal to $100.00):

	Percentage of fault	Type of defense available	A liable	A not liable
Plaintiff	20%	Comparative respons. analysis	-$20.00	-$20.00
A	30%	Comparative respons. analysis	+30.00	-$30.00
B	30%	Common negligence	+$30.00	+$30.00
C	20%	Common negligence	+$20.00	+$20.00

D. Revisiting the four introductory cases

This article began with four cases highlighting problems in the area of applying secondary assumption of risk. This subseetion re-examines the outeomes of those cases using eomparative responsibility.

1. The case of the thwarted verdict, revisited[165]

Mr. Harris recovered damages of $90,000 in this case but was denied recovery even though he was found only 15 percent at fault beeause the jury eonstrued his pereentage as secondary assumption of the risk. The trial court, despite its obvious reluctance to do so and the jury's intention. upheld eomplete denial of damages on the defense's motion.

[165] Harris v. Hercules Incorporated, 328 F.Supp. 360 (Ark. 1971).

Using comparative responsibility analysis, the critical element of analysis lies with the alternatives available to the parties. Mr. Harris, as an employee of the defendant Hercules Incorporated, had no alternatives available because he was hired to do the work and he was led to believe that the line he was working near was de-energized. The alternative of not working on the line is irrelevant because it would cause Mr. Harris to lose his job, something he would not reasonably wish to do given the fact that he thought the power line was safe to be near. Hercules, on the other hand, had the alternative of de-energizing the power line or not sending its employees near unsafe lines. In using comparative responsibility, Hercules would be at fault for 100 percent of the damages due to the fact that it failed to use an available alternative to avoid creating a situation of risk to the plaintiff.[166]

Using the proposal herein, the jury would not have to assign percentage values of fault that were probably arrived at in a somewhat arbitrary manner. As a factual matter, the jury would simply weigh the alternatives available along with the utility of conduct (as discussed above) to reach the conclusion that Hercules was responsible for the injuries. Clearly, in the actual findings the jury's desire to award Mr. Harris a majority percentage of damages was contravened by the confusing jury instructions that utilized the phrase, "assumption of risk." This confusion served as the death knell for any recovery by Mr. Harris at all.

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[166] To reach this outcome, it is assumed that each party has sufficient utility for their actions. Harris was a paid employee assigned to complete a task and Hercules gained profit from its employees performing certain services. This assessment of utility within this proposal, as always, is a factual issue decided by the jurors.

2. The case of the sentient eight-year old, revisited[167]

Utilizing a far-fetched notion of secondary assumption of risk, the court denied recovery by the Harvards against the Stewarts when they left an eight-year old boy alone in their house because they found that he had assumed the risk of his death when he played with matches in an empty house, save for another boy, aged ten. They held the deceased boy has significant appreciation for the causal chain of events that could lead to his death.

Under comparative responsibility, the issue would have gone to the jury. The factors of utility of conduct and alternatives available would be tried. In this case, there is arguably no utility of conduct in playing with matches and certainly some utility for the actions of the persons who were away from their house at the time (shopping, working, et cetera).

Alternatives again are crucial however. The Stewarts had the alternative of sending Scott Harvard home before they left the house. They could have informed his parents that they were leaving him there alone with their ten-year old son, giving them the opportunity to bring him home. One could have stayed with the two boys while the other left to do what needed done outside the house. As for the boys alone in the house, they had the alternative of not playing with matches. But, is this a realistic alternative, given the fact that boys at this age need parental supervision because they lack full capacity for their actions?

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[167] *Stewart v. Harvard, et al.*, 239 Ga.App. 388, 520 S.E. 2d 752 (1999).

In this case, the alternatives tip against the Stewarts. By not utilizing their choice of alternatives, they effectively failed under comparative responsibility analysis to keep Scott from dying in the resulting fire.

3. The case of the thwarted verdict, part II, revisited[168]

Sammie Jones became seriously injured when he stuck his arm in a running snow blower while his attention was diverted to two young girls walking by. He recovered damages against the manufacturer and no assumption of the risk charge was ever read into the jury instructions.

Under comparative responsibility, Mr. Jones would not have recovered. Although he had some utility for his conduct by attempt to dislodge whatever was jamming the snow-blower with a stick he picked up nearby, he had easily available alternatives to him. First, he could have turned off the machine. Second, he could have paid more attention to what he was doing as he stuck the tree branch inside the blower. Third, he could have called a qualified repairman.

Defendant, on the other hand, utilized its alternatives readily available. It warned users of its product that sticking body parts inside the machinery while it was operating was potential harmful. Other warnings made it clear that great risk came to those who did not operate the machine in a safe manner. Mr. Jones himself acknowledged that these alternatives did in fact occur.[169]

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[168] *Jones v. M.T.D. Products, Inc.*, 507 F.Supp. 8 (Penn. 1980).

[169] He admitted he never read the operating manual but did acknowledge that there was danger in his actions. 507 F.Supp. 8, 10 (Penn. 1980).

4. The case of the well-chosen rule of law, revisited[170]

This was a diversity suit brought in Wisconsin by a Pennsylvania resident for an injury that occurred at him using a machine he bought in Pennsylvania. The federal court used a tenuous connection at best to justify applying Wisconsin's rule of law (comparative fault) over Pennsylvania law (contributory negligence). They accomplished this through the use of a conflict of laws rule that has been criticized for being to manipulative at best.[171] The motivating factor behind the court's decision was to avoid unjust and harsh results from the application of an unjust rule.

The problem with this was the willingness to give the plaintiff a chance to proceed under a negligence cause of action without much regard to the merits of his claim. For, despite those merits, had the court chosen Pennsylvania law, plaintiff would have been completely barred had the defendant shown any fault on the plaintiff's part at all. Those focus, rather than being on the suit itself, was on the avoidance of premature dismissal of the suit altogether.

Comparative responsibility avoids this result as there are no all or nothing rules of contributory negligence to apply, even the underlying defense of implied secondary assumption of risk. Without having to focus on inequitable results that could attain, the

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[170] *Decker v. Fox River Tractor Co.,* 324 F.Supp. 1089 (Wis. 1971).

[171] Professor Leflar's five choice influencing factors, as used by the court in Wisconsin, are often criticized as indefinite and uncertain since the five factors can be evaluated differently by different states. See Cavers, THE CHOICE OF LAW: SELECTED ESSAYS, 207 (1985); Kay, *Theory into Practice: Choice of Law in the Courts,* 34 Mercer L. Rev. 521 (1983).

court instead could focus more on the merits of the claim itself, instead of trying to seek the rule with the least harsh possible outcome.

Part VI. Criticisms of the Comparative Responsibility Analysis

A principle criticism of this approach advocated in this Article is that "cooperative negligence" of the parties should not allow the plaintiff to recover. When plaintiff is injured by the concurrent negligent acts of himself and the defendant, he should not be able to recover.[172] To this criticism, the proper response is to consider the principles that led to the decline of contributory negligence itself and the balance proposed herein. In an instance where cooperative negligence has occurred (where each party has either 100 percent or 0 utility, concurrently), the alternatives to the negligent behavior are also examined to arrive at the proper allocation of fault on each part. Also, this logic may assume that each party is equally at fault; again, an examination of alternatives available to each party would properly allocate fault on either side.

Another criticism is that plaintiffs may be rewarded for their bad behavior. Proponents of contributory negligence emphasize their belief that plaintiff's who receive any measure of damages would not be vigilant in their own safety. The response is two-fold: First, it would be an assumption that goes against the grain of human nature to think that a person would not look after his own personal safety simply because, if they hurt themselves, they can recover 20 cents on the dollar for their pain and suffering. Second, with regard to the proposal outlined in this article, the utility of plaintiff's behavior, compared to defendant's, with the proper analysis of alternatives available to

[172] Menger v. Lauer, 55 N.J.L. 205, 26 A. 180 (1893); Herrell v. St. Louis-San Francisco R. Co., 324 Mo. 38, 23 S.W.2d 102 (1929).

each, would still give us the correct determination of fault on each side. For example, the plaintiff who rushes into the street to save a child has acted badly, but the alternatives (serious injury to the child) outweigh this fault. Conversely, rushing into the street to save a hat has some utility, but this is greatly outweighed by the alternatives available (buying a new hat versus potentially paying thousands of dollars in medical expenses).

A compelling criticism may be that judicial activism would be required to implement these principles since state legislatures have been silent on this issue.[173] Admittedly, a major issue in resolving the problems that secondary assumption of risk presents in the courtroom is, short of statutory implementation, that it will require judicial activism to have the analysis imparted in the process.

Critics of this cringe at the thought of the bench creating new laws and abrogating those already in place. But, consider this notion: Contributory negligence is a judicially created doctrine.[174] In their attempts to modernize or ameliorate the harsh effects of contributory negligence, the courts fashioned many exceptions to the rule. This practice became known as the Erosion Principle.[175] Over time, confusing rules and ever more confusion in the application of these rules were created.

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[173] Dean Wade, *Comments on* Maki v. Frelk—*Comparative vs. Contributory Negligence: Should the Court or the Legislature Decide?,* 21 Vanderbilt L. Rev. 889 (1968). The article suggests that the common-law adversary system where one party should win and the other should lose rewards use of contributory negligence because apportioning damages is "unworthy of the common law and suitable only for the untutored lay mind or perhaps occasionally in equity." However, the author overlooks the fact that contributory negligence itself is a judicially created doctrine.

[174] Keeton, *Creative Continuity in the Law of Torts*, 75 Harv. L. Rev. 463 (1962).

[175] PROSSER, ET AL., TORTS 569-572 (9th Ed. 1994).

By contrast, most of the forty-six states that have adopted comparative negligence schemes have done so through legislation. As for those states that did adopt comparative fault through judicial activism, the state legislatures followed with statutes.[176] It seems that the courts, absent legislative action, were unable to leave contributory negligence behind unless compelled to do so by either their state legislators or the overwhelming force of jurisdictional pull.[177] In one compelling example of hesitation in absence of legislation, Tennessee recognized that contributory negligence could operate to thwart justice yet waited nearly 16 years to find the proper opportunity to change to comparative fault.[178]

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[176] Id., at 578.

[177] Alabama probably bests exemplifies this reluctance to act without legislative authorization. In a recent opinion, the court, despite overwhelming reasons to do so and support from academicians and other jurisdictions, stated:

> We have heard hours of oral argument; we have read numerous briefs; we have studied cases from other jurisdictions and law review articles; and in numerous conferences we have discussed at depth this issue and all of the ramifications surrounding such a change. After this exhaustive study and these lengthy deliberations, the majority of the Court, for various reasons, has decided that we should not abandon the doctrine of contributory negligence, which has been the law in Alabama for approximately 162 years.

Williams v. Delta International Machine Corp., 619 So.2d 1330 (Ala.1993).

[178] McIntyre v. Ballantine, 833 S.W.2d 52 (Tenn. 1992). The Supreme Court of Tennessee, making reference to an earlier decision, announced when it finally adopted comparative negligence that "[s]uch a case is before us."

The earlier decision was Street v. Calvert, 541 S.W.2d 576 (Tenn. 1976). The court had this to say when asked to adopt comparative negligence:

It should not be overlooked as well that a form of judicial "non-activism" has occurred in this arena. For years, courts have acknowledged that plaintiffs have received favorable jury verdicts despite evidence to the contrary (such evidence showing contributory negligence). These so-called "compromise verdicts" are a fact of the court system that has been acknowledged for some time.[179]

The problem with these compromise verdicts is that the jury is doing what the court is unwilling to do: Awarding damages in a case that the evidence shows should not be done due to some form of contributory negligence on the plaintiff's party that should prevent an award otherwise. If the courts were to acknowledge that comparative fault should completely abrogate all forms of assumption of risk (except primary) and take steps to do so, then these types of verdicts would not be necessary. Choose your lesser evil: Compromise verdicts or judicial activism.

An interesting example of judicial activism occurred in the civil law jurisdiction of Germany. After the enactment of a statute to allow for apportionment of damages[180],

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> We do not deem it appropriate to consider making such a change unless and until a case reaches us wherein the pleadings and proof present an issue of contributory negligence accompanied by advocacy that the ends of justice will be served by adopting the rule of comparative negligence.
> Id., at 586.

[179] Karcesky v. Laria, 382 Pa. 227, 114 A.2d 150 (1955) provides an excellent example of this in its dictum.

[180] § 254 BGB (F.R.G.) (German Civil Code). This code section provides:

> If any fault of the injured party has contributed to causing the damage, the obligation to compensate the injured party and the extent of the compensation to be made depends upon the circumstances[.]

the Supreme Court of Germany swung away from application of the statute and began considering cases of contributory negligence to bar claims under a statute that governed *unlawful* tortious acts[181]. In effect, the Court began to find that plaintiffs who assumed the risk of their injuries were acting in an unlawful manner.

The Supreme Court changed this approach because of its harsh results and once again began applying the statute intended to cover situations where assumption of the risk occurs, § 254.[182] This code section is viewed as more flexible because it allows an allocation of the damages between the parties.

Consider also the bold move of the courts in the state of Georgia. They took the bold step of expanding a statute once applicable only to railroads into a rule of law applicable in all negligence cases.[183]

Finally, critics may point out that litigation would become increasingly complex with regard the comparative responsibility analysis proposed. However, a counterpoint to this criticism is that it may encourage settlement by the parties. Instead of going

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This is a very flexible approach.

[181] § 823(1) BGB (F.R.G.) (German Civil Code). This code section provides:

> [1] A person who, willfully or negligently, unlawfully injures [another] is bound to compensate hime for any damage arising therefrom.

[182] BGHZ 34, 355 (363). The Supreme Court no longer considered assumption of the risk to be unlawful behavior but rather as behavior that could reduce damages under § 254. See also, 2 JULIUS VON STAUZINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH—RECHT DER SCHULDVERHÄLTNISSE (A COMMENTARY ON THE GERMAN CIVIL CODE—LAW OF OBLIGATIONS), 5 Teil, 2871 (11th ed. 1975).

forward on an all or nothing suit, the parties would be encouraged to reach a compromise and settle. This would have the net effect of reducing personal injury cases in the court system and creating a more streamlined approach to litigation. The trend toward mediation and other forms of alternate dispute resolution underscore that this approach would work well.

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[183] Goodrich, *Origin of the Georgia Rule of Comparative Negligence and Apportionment of Damages,* Ga. Bar. A. J. 174 (1940).

PART VII Conclusion

Comparative fault jurisdictions presently face confusion in applying implied assumption of the risk to negligence suits. The confusion centers around the courts' attempt to find some acknowledgement or agreement for the plaintiff to assume risk based on her behavior alone. The traditional elements of assumption of risk, knowingly, voluntarily and full appreciation of the risk involved, are often overlooked or created at summary judgment level in barring a claim or allowing it to continue to trial. As the cases in the Introduction illustrate, there is inconsistency as to whether a case will proceed to trial or whether the plaintiff will recover damages even though already awarded. Some plaintiffs have even used this confusion to their advantage in determining which jurisdiction to file suit in.

Where an express agreement is lacking, comparative responsibility attempts to eliminate this confusion. Based on a modified form of risk-utility analysis promulgated in products liability cases, comparative responsibility is applicable in situations where there is an absence of a clear agreement (such as a waiver of liability) to assume the risks of a given activity. The model presents an analysis of the utility of each party's conduct against the alternatives available to each at the time of the activity to determine the scope of fault attributable to each. Such a determination is to be made by a jury. The model also eliminates the presumption that, where both parties acted unreasonably, the plaintiff acted in a more unreasonable manner than the defendant and thus assumed the risk.

Under this model, secondary implied assumption of risk would be fully subsumed into the principles of comparative fault already being applied in the vast majority of the

United States and civil law jurisdictions throughout the world. A comparative fault jurisdiction that utilizes the analysis presented herein would find that the maxim "volunti non fit injuria" would apply only to express agreements of willingness, and not to the subjective analysis of behavior alone.

APPENDIX A

Chart of Different Forms of Assumption of Risk

Express

What it is: A prior agreement of release from liability for damages sustained during the agreed upon activity

Consequences: Risk of negligence shifts from the D to the P. D relieved of burden of use of reasonable care.

Defeated by: Public policy considerations; D may *not* use gross, wanton or reckless behavior.

Examples: Participation in certain sporting events, waiver of release (i.e. contract).

Adoption of comparative fault has no effect on availability of this theory to bar P's recovery from D.

Implied, 2 types

Primary

What it is: According to ARTHUR BEST, COMPARATIVE NEGLIGENCE: LAW AND PRACTICE (1993), when a plaintiff is fully cognizant of and voluntarily encounters a risk without expressly consenting to it, nonetheless an implication of assent still occurs.

Consequences: There can be no cause of action for negligence as the P's actions absolved D of any duty owed. Cts. Also construe this to mean that D owed no duty because of P's knowledge when encountering the known risk.

Defeated by: Public policy considerations or if D acts in a gross, wanton or reckless manner.

Examples: Being struck by an accidentally flung bat at a baseball game; inherent dangers ("the danger of falling trees lurks in all wooded…areas," *Walls v. Lueking,* 332 S.W.2d 692 (Tenn.Ct.App. 1959), *cert. Denied.* Some cts. also use this for participants in contact sports.

Adoption of comparative fault has led AK, GA, NE, RI, SD to abolish this theory as a defense [Best, §4.20[2][b][i]].

Secondary, 2 types (reasonable & unreasonable)

What it is: "A thorn in the judicial side," *Blackburn v. Dorta*, 348 So.2d 287, 291 (Fla.1977). Occurs when a P voluntarily and knowingly meets a risk negligently created by the D. Very similar to contributory negligence (which is no longer used by the cts.).

Consequences: Bars recovery by the P.

Defeated by: Public policy considerations; whether D's negligence was sufficiently greater that P's so as to allow recovery by P (comparative negligence principles).

Examples: Construction worker stepping outside of clearly marked site to urinate and struck by drunk driver speeding on highway.

Adoption of comparative fault has led many jurisdictions to clamor for abolishing this theory.

Reasonable	*Unreasonable*
Occurs when P's conduct in assuming the risk was reasonable.	Occurs when the P's conduct in assuming the risk deemed as unreasonable.

APPENDIX B

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28 U.S.C. § 1333(1)

45 U.S.C. § 51

45 U.S.C. § 53

45 U.S.C. § 54

45 U.S.C. § 688

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M.S.A. § 604.01 (Minnesota Statutes Annotated)

Model Comparative Fault Statute

O.C.G.A. § 51-1-11

Uniform Comparative Fault Act § 1

Uniform Comparative Fault Act § 1(b)

APPENDIX C

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