

1977

Torts - Assumption of the Risk - Comparative Negligence

Edward L. Korwek

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Law Commons](#)

Recommended Citation

Edward L. Korwek, *Torts - Assumption of the Risk - Comparative Negligence*, 16 Duq. L. Rev. 417 (1977).
Available at: <https://dsc.duq.edu/dlr/vol16/iss3/9>

This Recent Decision is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

TORTS—ASSUMPTION OF THE RISK—COMPARATIVE NEGLIGENCE—The Supreme Court of Florida has unanimously held that with the adoption of comparative negligence, the defense of assumption of risk is supplanted by the concept of contributory negligence.

Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977).

Kevin Blackburn, Jr., a passenger in a dune buggy operated by David Dorta, was injured when the vehicle overturned. Kevin, a minor, and his father, filed suit in the Circuit Court for Dade County, Florida, against David Dorta, also a minor, and his father. The complaint alleged that the defendant had operated the dune buggy negligently, thereby causing the vehicle to overturn and injure the plaintiff.¹ The defendants' answer raised the defenses of contributory negligence and assumption of the risk. At the trial, defendants' motion for a directed verdict on the ground that the evidence demonstrated the minor plaintiff had assumed the risk of harm was denied, and the defense counsel then requested that the judge instruct the jury on the doctrine of assumption of the risk. The trial judge refused, holding that since Florida had recently adopted a rule of comparative negligence² the defense of assumption of the risk had "merged into comparative negligence."³ The trial court instructed the jury that the minor defendant was negligent as a matter of law and gave the jurors instructions on the law of comparative negligence. The jury returned a verdict in favor of the plaintiffs and the defendants appealed.⁴

In argument before the district court of appeal,⁵ the issue was whether assumption of the risk was still viable as an absolute bar to recovery subsequent to the adoption of comparative negligence. The court held that it was still a valid defense and therefore ruled the trial judge's refusal to give the jury instruction on assumption

1. The complaint against the minor defendant's father also alleged negligent entrustment and failure to supervise. *Dorta v. Blackburn*, 302 So. 2d 450, 451 (Fla. Dist. Ct. App. 1974), *rev'd*, 348 So. 2d 287 (Fla. 1977).

2. A pure form of comparative negligence was judicially adopted. *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973). Only two other states have judicially adopted comparative negligence: California, in *Nga Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); and Alaska, in *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975).

3. 302 So. 2d at 451.

4. *Id.*

5. *Id.* at 450.

of the risk was in error;⁶ accordingly, the judgment of the trial court was reversed and the cause remanded for a new trial.

In separate cases involving injuries allegedly sustained from the negligent operation of a vehicle⁷ and from the negligent construction of a driveway,⁸ two other state district courts of appeal reached a contrary conclusion on the same issue of law; they held that the defense of assumption of the risk had merged with contributory negligence. As a result of these conflicting decisions, certiorari was granted by the Florida Supreme Court under conflict certiorari jurisdiction,⁹ and, since the facts of the individual cases were not of importance to the court, the cases were consolidated for review.¹⁰

6. The district court stated that it had examined *Hoffman* and had determined that the Florida Supreme Court impliedly recognized the continued existence of assumption of the risk despite the adoption of comparative negligence. The district court concluded this because the court in *Hoffman* had specifically declined to consider the continued vitality of assumption of the risk as a defense subsequent to the adoption of comparative negligence. See *Hoffman v. Jones*, 280 So. 2d at 439. Therefore, since assumption of the risk had been recognized as a defense apart from contributory negligence prior to the adoption of comparative negligence, the court concluded that the defense still existed. See *Dorta v. Blackburn*, 302 So. 2d at 451. Also, the court noted that other jurisdictions with comparative negligence still retained assumption of the risk as a defense and cited cases in support of its position. *Id.*

7. *Parker v. Maule Indus., Inc.*, 321 So. 2d 106 (Fla. Dist. Ct. App. 1975), *aff'd*, 348 So. 2d 287 (Fla. 1977). At the trial court, the plaintiffs' complaint alleged that the defendant negligently operated a truck causing the plaintiff Parker to fall from it and suffer injuries. The defendant's answer denied the negligence and affirmatively pleaded that Parker was contributorily negligent and had assumed the risk. The jury found for the defendant and the plaintiffs appealed on the basis that the court erred in charging the jury that assumption of the risk was a complete bar to plaintiffs' recovery. The Court of Appeal for the First District agreed with the plaintiffs' argument and reversed and remanded the case for a new trial. The basis for the court's decision seemed to rest entirely on the conclusion that since assumption of the risk is a special form of contributory negligence, it should be merged into the definition of contributory negligence. See *id.* at 107.

8. *Rea v. Leadership Hous., Inc.*, 312 So. 2d 818 (Fla. Dist. Ct. App. 1975), *aff'd*, 348 So. 2d 287 (Fla. 1977). At the trial court, the plaintiffs filed a complaint for damages against the defendant for injuries suffered by the plaintiff when she fell into a hole in the driveway leading to her home. The complaint contained multiple counts, one of which sought recovery based upon defendant's allegedly negligent installation of the driveway. The defendant filed an answer denying every allegation, and raised the defenses of assumption of the risk and contributory negligence. Subsequently, the defendant filed a motion for summary judgment which the court granted and the plaintiffs appealed. The Court of Appeal for the Fourth District, apart from determining the impropriety of the trial court's summary judgment, reversed and remanded with the explicit instruction that assumption of the risk was not a complete bar to recovery since it had merged with and had become a phase of contributory negligence. The court reasoned that though there was a theoretical distinction between assumption of the risk and contributory negligence, pragmatically the distinction lost vitality as a result of the adoption of comparative negligence. *Id.*

9. See FLA. CONST. art. V, § 3(b)(3).

10. 348 So. 2d at 288.

The sole issue before the supreme court was whether assumption of the risk should be abandoned as a complete defense to an action for negligence in a comparative negligence jurisdiction. The court unanimously agreed that any purpose to be served by the defense of assumption of the risk was subsumed in the principles of negligence or contributory negligence and, therefore, the rule of comparative negligence enunciated in *Hoffman v. Jones*¹¹ would apply to all cases where assumption of the risk was raised as a defense.¹² Accordingly, the decision of the district court in *Blackburn v. Dorta* was reversed and remanded, and the two other district court decisions disallowing the defense were affirmed.

In reaching this decision, the *Blackburn* court acknowledged the drift toward eliminating the defense of assumption of the risk,¹³ discernible in the abrogation of the defense in many jurisdictions with comparative negligence statutes.¹⁴ Moreover, it recognized the confusion that had been generated by the use of the term assumption of the risk to describe a number of very different legal concepts.¹⁵ The court then proceeded to analyze and enunciate the distinctions between the different types of assumption of the risk, and to determine whether the defense had a distinct purpose apart from that of negligence and contributory negligence.

The *Blackburn* analysis of the different types of assumption of the risk relied heavily on the New Jersey Supreme Court's reasoning in *Meistrich v. Casino Arena Attractions, Inc.*,¹⁶ where the continued use of assumption of the risk as a separate and distinct defense apart from the plaintiff's contributory negligence or the defendant's

11. 280 So. 2d 431 (Fla. 1973).

12. 348 So. 2d at 293.

13. *Id.* at 289.

14. The court cited fifteen comparative negligence jurisdictions that had merged the defense of assumption of the risk with contributory negligence. 348 So. 2d at 289 n.3.

15. The court stated:

At the commencement of any analysis of the doctrine of assumption of risk, we must recognize that we deal with a potpourri of labels, concepts, definitions, thoughts, and doctrines. The confusion of labels does not end with the indiscriminate . . . use of the terms "contributory negligence" and "assumption of the risk." In the case law and among text writers, there have developed categories of assumption of risk. Distinctions exist between *express* and *implied*; between *primary* and *secondary*; and between *reasonable* and *unreasonable*. . . .

Id. at 290 (footnotes omitted).

16. 31 N.J. 44, 155 A.2d 90 (1959). This case was decided before New Jersey adopted comparative negligence by statute in 1973.

negligence was disapproved.¹⁷ The Florida court, as well as the New Jersey court, prefaced its discussion of assumption of the risk by specifically excluding from consideration express assumption of the risk, which would include express contracts not to sue for injury or loss as a result of the covenantee's negligence, and situations in which actual consent exists, as where an individual voluntarily participates in a contact sport.¹⁸ The court then directed its attention to the implied forms and first, to primary-implied assumption of the risk, which is not truly an affirmative defense.¹⁹ The *Blackburn* court reasoned, as did the court in *Meistrich*, that the issue involved in determining whether the defendant was negligent or whether the plaintiff had assumed the risk in the primary sense was the same: did the defendant owe a duty to the plaintiff, and, if he did, was that duty breached?²⁰ Consequently, the *Blackburn* court decided that primary-implied assumption of the risk was but an alternate expression for the proposition that the defendant was not negligent and therefore this form was subsumed in the principle of negligence itself; to hold otherwise would only lead to confusion of the jury.²¹

17. *Id.* at 54-55, 155 A.2d at 96. In *McGrath v. American Cyanamid Co.*, 41 N.J. 272, 274, 196 A.2d 238, 240 (1963), the court reaffirmed *Meistrich*, saying that there were but two issues in a negligence case—negligence and contributory negligence—and it was erroneous to tell the jury that assumption of the risk constituted still another.

18. *Blackburn v. Dorta*, 348 So. 2d at 290; *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. at 48, 155 A.2d at 93.

19. Under implied assumption of the risk, the plaintiff is treated as if he had agreed to relieve the defendant of any duty toward him. It represents a consequence that the law attaches to various voluntary relationships. For example, a passenger who voluntarily rides with a driver he knows to be intoxicated impliedly assumes the risk of harm occurring from the driver's negligence. Primary assumption of the risk focuses on the defendant's conduct. Rather than being an affirmative defense, it prevents the establishment of a prima facie case of negligence. It is a way of expressing the idea that where the defendant owes no duty or has not breached a duty owed to the plaintiff he cannot be negligent. In such a case, all risks that fall outside the scope of the defendant's duty are "assumed risks." Primary assumption of the risk usually arises where there is a limited duty owed to the plaintiff. For example, it has generally been held that a licensee assumes the risk of defective conditions unknown to the occupier of the premises. In such a situation, the occupier's only duty is to disclose dangers known to him; hence, when harm occurs from other dangers, the licensee impliedly assumes the risk of harm in the primary sense. See generally 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 21.1 (1956) [hereinafter cited as HARPER & JAMES]; V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 9.1 (1974) [hereinafter cited as SCHWARTZ]; James, *Assumption of Risk*, 61 *YALE L.J.* 141 (1952) [hereinafter cited as *Assumption*]; Note, *Contributory Negligence and Assumption of the Risk—The Case for Their Merger*, 56 *MINN. L. REV.* 47 (1971) [hereinafter cited as *Merger*].

20. *Blackburn v. Dorta*, 348 So. 2d at 291; *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. at 49, 155 A.2d at 93.

21. The court stated:

This branch . . . of assumption of risk is subsumed in the principle of negligence itself.

The *Blackburn* court then focused on the status of secondary-implied assumption of the risk, an affirmative defense, and abrogated the doctrine entirely—whether the plaintiff's assumption was reasonable or unreasonable.²² The Florida court simply noted that there was little to commend the defense of reasonable assumption of the risk, which bars recovery to a plaintiff who reasonably encounters a known risk, and that in no Florida cases had the defense been utilized.²³ Thus, the only remaining element of the defense was unreasonable secondary assumption of the risk. The court declared that the basic inquiry at this point was whether the plaintiff acted unreasonably, which was equivalent to asking whether the plaintiff was contributorily negligent.²⁴ Consequently, the court eliminated unreasonable secondary assumption of the risk by merging it with contributory negligence.²⁵ In support of its decision, the Florida court cited Justice Frankfurter's concurring opinion in *Tiller v. Atlantic Coast Line Railroad*,²⁶ where the Supreme Court had interpreted a 1939 amendment authorizing comparative negligence to be applied to the Federal Employers' Liability Act to have eliminated "every vestige of the doctrine of assumption of the risk."²⁷ The

Under our Florida jury instructions, the jury is directed first to determine whether the defendant has been negligent To sprinkle the term of assumption of risk into the equation can only lead to confusion of a jury.

348 So. 2d at 291.

22. Secondary assumption of the risk, unlike primary assumption of the risk, is a measure of the plaintiff's conduct and is an affirmative defense that is asserted by the defendant after his negligence has been established. The essential element of secondary assumption of the risk is that the plaintiff knowingly and voluntarily encountered a risk created by defendant's negligence. *Merger, supra* note 19, at 51. For example, a passenger in a car who goes along with the driver to participate in a drag race could be said to impliedly assume the risk of injury (in the secondary sense) from an accident that occurs as a result of the driver's negligence. Conduct of the plaintiff in knowingly and voluntarily encountering a risk can then be considered to be either reasonable or unreasonable. For other examples, see RESTATEMENT (SECOND) OF TORTS § 496C, Comment g (1965).

23. 348 So. 2d at 291.

24. *Id.* See also RESTATEMENT (SECOND) OF TORTS § 466 (1965) (when the plaintiff voluntarily consents to take an unreasonable chance, this type of secondary assumption of the risk is but a special form of contributory negligence since the basis of the contributory defense is the reasonableness of the plaintiff's conduct).

25. The *Blackburn* court did not explicitly cite *Meistrich* in support of its position for abandoning reasonable and unreasonable secondary assumption of the risk; however, the examples the court cited and the reasoning behind its decision were identical to those noted by the New Jersey court. Compare *Blackburn*, 348 So. 2d at 291, with *Meistrich*, 31 N.J. at 53, 155 A.2d at 95.

26. 318 U.S. 54 (1943).

27. *Id.* at 58.

Blackburn court believed this opinion conclusively demonstrated that the doctrine had caused a great deal of ambiguity in the law, and that secondary assumption of the risk represented a morally unacceptable social policy—one utilized to advance the industrial revolution regardless of the cost of human suffering.²⁸

A majority of states that have adopted a rule of comparative negligence of general application²⁹ have either judicially or statutorily rejected implied assumption of the risk for the same reasons espoused by the *Blackburn* court. Although several jurisdictions, some with and some without a rule of comparative negligence, still recognize the defense of assumption of the risk, *Blackburn* aligns itself with the majority which have determined that the doctrine of implied assumption of the risk is confusing and tautological and therefore should be supplanted by the principles of negligence and contributory negligence.³⁰

28. 348 So. 2d at 292. The *Blackburn* court quoted Justice Frankfurter's opinion in *Tiller*, where he noted that the ambiguity created by assumption of the risk "necessarily [did] harm to the desirability of clarity and coherence in any civilized system of law. But the greater mischief was that . . . 'assumption of risk' gave judicial expression to a social policy that entailed much human misery." 318 U.S. at 69.

29. In the first half of the twentieth century, a number of states enacted comparative negligence statutes of *limited* application that usually protected workmen in intrastate railroad accidents. See SCHWARTZ, *supra* note 19, at 387-94.

30. The current positions taken by those thirty-three states that have adopted a rule of comparative negligence may be categorized as follows:

(1) Five states have resolved the problem statutorily by abolishing the legal doctrine of assumption of the risk or by indicating that assumption of the risk should be considered the equivalent of contributory negligence: CONN. GEN. STAT. ANN. § 52-572(h) (West Supp. 1978); N.D. CENT. CODE § 9-10-06 (1973); OKLA. STAT. ANN. tit. 23, § 12 (West 1973) (exact status of the doctrine is unclear); OR. REV. STAT. § 18.470 (1971); UTAH CODE ANN. § 78-27-37 (1977).

(2) Seven states have merged implied-secondary assumption of the risk into contributory negligence by judicial decision with or after the adoption of comparative negligence: *Nga Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (judicially adopted comparative negligence and merged the defenses at the same time); *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977); *Wilson v. Gordon*, 354 A.2d 398 (Me. 1976); *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971); *Farley v. M.M. Cattle Co.*, 529 S.W.2d 751 (Tex. 1975); *McConville v. State Farm Mut. Auto. Ins. Co.*, 15 Wis. 2d 374, 113 N.W.2d 14 (1962); *Sanders v. Pitner*, 508 P.2d 602 (Wyo. 1973).

(3) Nine states had judicially eliminated the defense of assumption of the risk and contributory negligence before adoption of comparative negligence: *Leavitt v. Gillaspie*, 443 P.2d 61 (Alaska 1968); *Bulatao v. Kauai Motors, Ltd.*, 49 Hawaii 1, 406 P.2d 887 (1965); *Fawcett v. Irby*, 92 Idaho 48, 436 P.2d 714 (1968); *Smith v. Blakey*, 213 Kan. 91, 515 P.2d 1062 (1973); *Bolduc v. Crain*, 104 N.H. 163, 181 A.2d 641 (1962); *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90 (1959); *Williamson v. Smith*, 83 N.M. 336, 491 P.2d 1147 (1971); *Joyce v. Quinn*, 204 Pa. Super. Ct. 580, 205 A.2d 611 (1964); *Siragusa v. Swedish Hospital*, 60 Wash. 2d 310, 373 P.2d 767 (1962).

Having adopted comparative negligence, the Florida court reexamined the defense of assumption of the risk, concluding that the arguments for abrogating the doctrine outweighed *stare decisis*.³¹ But prior to *Blackburn*, a number of legal commentators³² and courts³³ had called for abandonment of assumption of the risk as a complete defense even without adoption of comparative negligence. The primary reasons traditionally espoused for abrogating the defense are that 1) the historical reason for the defense is no longer extant since the doctrine was originally developed between master and servant as a device to give maximum freedom to an expanding industry;³⁴ 2) assumption of the risk is not favored by the courts where use of the defense would produce a harsh result, and therefore courts have undermined the doctrine by narrowly defining the risk incurred;³⁵ 3) assumption of the risk serves no purpose that cannot be integrated into either the principles of negligence (duty) or contributory negligence;³⁶ and 4) since assumption of the risk describes a variety of legal concepts, its indiscriminate use has led to a great deal of ambiguity and confusion, a situation which can perhaps best

(4) Five states with comparative negligence recognize assumption of the risk as a separate and complete defense to an action based on negligence: *Spradlin v. Klump*, 244 Ark. 841, 427 S.W.2d 542 (1968); *Yankey v. Battle*, 122 Ga. App. 275, 176 S.E.2d 714 (1970); *Saxton v. Rose*, 201 Miss. 814, 29 So. 2d 646 (1947); *Munson v. Dishop Clarkson Memorial Hosp.*, 186 Neb. 778, 186 N.W.2d 492 (1971); *Bartlett v. Gregg*, 77 S.D. 406, 92 N.W.2d 654 (1958).

(5) Seven states apparently had not reclassified secondary assumption of the risk prior to their adoption of comparative negligence and therefore must yet determine whether the defense is to remain a complete bar to recovery or not: Colorado, Massachusetts, Montana, New York, Nevada, Rhode Island, and Vermont.

31. Prior to the adoption of comparative negligence in Florida, the state had recognized as distinct defenses assumption of the risk and contributory negligence. *See, e.g., Byers v. Gunn*, 81 So. 2d 723 (Fla. 1955).

32. James, *Assumption of the Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968) [hereinafter cited as *Unhappy Reincarnation*]; *Symposium: Assumption of the Risk*, 22 LA. L. REV. 1 (1961); *Merger, supra* note 19.

33. *Frellick v. Homeopathic Hosp. Ass'n*, 51 Del. 568, 150 A.2d 17 (1959); *Parker v. Redden*, 421 S.W.2d 586 (Ky. 1967); *Baltimore County v. State*, 232 Md. 350, 193 A.2d 30 (1963); *Flegner v. Anderson*, 375 Mich. 23, 133 N.W.2d 136 (1965).

34. *See Tiller v. Atlantic Coast Line R.R.*, 348 U.S. 54, 69 (1943); Pound, *The Economic Interpretation and the Law of Torts*, 53 HARV. L. REV. 365, 373 (1940).

35. *See, e.g., Hildebrand v. Minyard*, 16 Ariz. App. 583, 494 P.2d 1328 (1972) (person who parks a vehicle partially blocking a passageway between two buildings does not assume the risk that the vehicle will be hit by another vehicle); *Hawthorne v. Gunn*, 123 Cal. App. 452, 11 P.2d 411 (1932) (lady sitting on man's lap in a moving car assumes certain risks, but a collision is not among them).

36. *See* notes 46-50 and accompanying text *infra*.

be resolved by eliminating the doctrine entirely.³⁷ Many courts have recognized that all these considerations militate against the continued viability of the defense of assumption of the risk. *Blackburn* represents but another step toward elimination of the defense by reclassification.³⁸

While the defense of assumption of the risk has spawned a great deal of confusion, there are theoretical justifications for its continued existence which the *Blackburn* court avoided or ignored. Secondary assumption of the risk is a separate and distinct defense apart from contributory negligence because it includes reasonable conduct by the plaintiff, whereas contributory negligence only involves unreasonable conduct.³⁹ Also, it has generally been recognized that contributory negligence is not a defense to an action based on wilful, wanton, or reckless conduct⁴⁰—but one can assume the risk of such conduct.⁴¹ Furthermore, a subjective standard is applied to assumption of the risk to determine whether the plaintiff

37. See HARPER & JAMES, *supra* note 19, § 21.8 at 1191-92; *Editorial, Assumption of the Risk—A False Issue*, 73 N.J.L.J. 346 (1950); *Assumption, supra* note 19, at 169.

38. It seems the underlying motivation behind the *Blackburn* decision to eliminate the defense was merely to dispel the semantic and conceptual confusion that had arisen between the different forms of assumption of the risk and contributory negligence. This conclusion is based upon the observation that the *Blackburn* court meticulously focused on the legal distinctions between the different forms of assumption of the risk in an attempt to clarify and then simplify the doctrine. Yet the court entirely ignored the fact that *any* argument against assumption of the risk is reinforced by the adoption of a rule of comparative negligence. Formerly, as a practical matter, whether the plaintiff was adjudged to have assumed the risk or to have been contributorily negligent did not matter; both defenses were a complete bar to recovery. But under a comparative negligence rule, if the plaintiff's conduct constitutes both contributory negligence and assumption of the risk (*i.e.*, the plaintiff acted unreasonably in voluntarily assuming a known risk), the defendant has two separate defenses for the same conduct. He could therefore circumvent the rule of comparative negligence by asserting the assumption of the risk defense in a jurisdiction where assumption of the risk remained separate from contributory negligence. This anomalous result can only be avoided by merging secondary assumption of the risk with contributory negligence. See *Merger, supra* note 19, at 64-65.

39. See RESTATEMENT (SECOND) OF TORTS § 496C, Comment g at 572-73 (1965).

40. See *Kasanovich v. George*, 348 Pa. 199, 34 A.2d 523 (1943); 57 AM. JUR. 2d, *Negligence* § 305 (1971).

41. *Evans v. Holsinger*, 242 Iowa 990, 48 N.W.2d 250 (1951) (if one voluntarily becomes a guest in an auto knowing that the driver is under the influence of liquor, he assumes the risk of accident); *Waltanen v. Wiitala*, 361 Mich. 504, 105 N.W.2d 400 (1960) (assumption of the risk is a defense to mere negligence or to willful and wanton conduct and hence passenger assumes the risk of driving with intoxicated driver); *Schubring v. Weggen*, 234 Wis. 517, 291 N.W. 788 (1940) (assumption of the risk is not a species of contributory negligence and hence administratrix could not recover for wrongful death of auto guest on theory intoxicated driver was guilty of gross negligence).

knows, understands, and appreciates the risk, but an objective standard is applied to contributory negligence: the plaintiff is required to have the knowledge, understanding, and judgment of a reasonable man.⁴² Also, assumption of the risk concerns knowledge of a danger and acceptance of it, whereas contributory negligence is a departure from a standard of reasonable conduct. Thus, assumption of the risk is a mental condition of willingness or consent,⁴³ whereas contributory negligence is more a matter of conduct. In theory then, assumption of the risk is not based on the fault of the plaintiff but on the plaintiff's implied agreement to take the risk of the harm that was incurred.⁴⁴ From this perspective, the defense is analogous to consent, and that has been suggested as its basis.⁴⁵ Consequently, if the defense of assumption of the risk is not based on fault but upon consent, a rule of comparative negligence apportioning damages on the basis of fault should not apply.⁴⁶

Despite these arguments for maintaining the doctrinal integrity of assumption of the risk, arguments apparently rejected by the *Blackburn* court, some courts and legal commentators have argued that most of these distinctions between secondary assumption of the risk and contributory negligence are more conceptual than real and lead to anomalous results. For example, the notion that secondary assumption of the risk is unique from contributory negligence because the former includes reasonable conduct whereas the latter does not has been argued to be invalid because a reasonable decision to encounter a known risk (labeled reasonable secondary assumption of the risk) is often involuntary; therefore, it seems there can be no secondary assumption of the risk that is both reasonable and voluntary.⁴⁷ Moreover, to deny recovery to a plaintiff who reasona-

42. *Rea v. Leadership Hous., Inc.*, 312 So. 2d 818, 822 (Fla. Dist. Ct. App. 1975), *aff'd* 348 So. 2d 287 (Fla. 1977); RESTATEMENT (SECOND) OF TORTS § 496A, Comment d at 562-64 (1965).

43. See *Landrum v. Roddy*, 143 Neb. 934, 12 N.W.2d 82 (1943) (passenger who voluntarily rides with intoxicated driver assumes the risk of harm and is precluded from recovery because of his voluntary assent to driver's condition which caused the injury); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 68, at 445-47 (4th ed. 1971) [hereinafter cited as PROSSER].

44. See Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 164-65 (1961).

45. See PROSSER, *supra* note 43, § 68 at 446; see also *Dunion v. Kaiser*, 124 F. Supp. 41, 44 (E.D. Pa. 1954) (assumption of the risk means plaintiff has consented to relieve defendant of an obligation toward him).

46. See SCHWARTZ, *supra* note 19, at 162-63.

47. *Merger*, *supra* note 19, at 55 (a plaintiff's conduct is *not* voluntary when defendant's tortious conduct has left the plaintiff no reasonable alternative in attempting to avoid harm

bly encounters a known risk is inconsistent with the fault system of loss distribution because it denies recovery to a plaintiff who was without fault.⁴⁸ The notion that contributory negligence cannot be a defense to an action based on reckless conduct, whereas assumption of the risk can be, has been rejected by some courts; hence, some cases decided under comparative negligence have held that when a defendant is guilty of reckless conduct or gross negligence he is not precluded from apportionment of damages as between him and a contributorily negligent plaintiff.⁴⁹ The argument that secondary assumption of the risk requires a subjective test while contributory negligence requires an objective one has been challenged as being largely theoretical since the jury in the usual case cannot distinguish between subjective and objective knowledge, unless the plaintiff admits he knew and appreciated the risk.⁵⁰ The final argument for not abrogating the defense, that assumption of the risk is based more on consent than fault, evades the issue that even consensual conduct can be reasonable or unreasonable. Moreover, any consent implied from the plaintiff's conduct is usually fictional because the injured person has not truly manifested his consent to exculpate the defendant's negligence; instead, the law treats him as having done so.⁵¹ Thus, in view of all these considerations, it seems there are no convincing practical or theoretical reasons why secondary-implied assumption of the risk should be treated as a defense distinct from that of contributory negligence, even without adoption of comparative negligence.⁵² Moreover, since the defense

to himself; in this situation the plaintiff's decision to encounter the risk is likely to be reasonable, but not voluntary, because all the alternatives are unreasonable). See, e.g., *Donald v. Moses*, 254 Minn. 186, 94 N.W.2d 255 (1959) (court held that if a pedestrian, with knowledge of the dangerous condition of an icy sidewalk, voluntarily attempts to walk on it, pedestrian is not deemed to assume the risk of injury unless the city proves the reasonable availability of a safer route of travel).

48. *Merger*, *supra* note 19, at 57.

49. *Billingsley v. Westrac Co.*, 365 F.2d 619 (8th Cir. 1966) (auto accident caused by defendant's alleged willful and wanton negligence will not preclude apportionment of damages under Arkansas comparative negligence statute); *Nga Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (suggests there will be apportionment of damages in all cases involving misconduct falling short of intentional); *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962) (doctrine of gross negligence is abolished; conduct characterized as gross negligence will be treated as ordinary negligence for purpose of comparison with a plaintiff's conduct under comparative negligence).

50. See Comment, *Distinction Between Assumption of the Risk and Contributory Negligence in Wisconsin*, 1960 Wis. L. Rev. 460, 466.

51. See SCHWARTZ, *supra* note 19, at 155.

52. Before a state adopts comparative negligence, the disposition of assumption of the risk

has been misinterpreted, restricted, and revised, it has lost most of its utility as a distinct doctrine and therefore should be abrogated.

In the future, other states reconsidering the status of assumption of the risk after adoption of comparative negligence will have to address issues the Florida court was either not confronted with or avoided. States that have adopted comparative negligence by statute will initially have to decide the status of assumption of the risk when the statute is silent or when there is no indication of legislative intent to abolish the doctrine. Such is the case in Pennsylvania, where comparative negligence was adopted by statute in 1976.⁵³ While some courts may defer to the wisdom of the legislators and let them decide the disposition of assumption of the risk after adoption of comparative negligence, consideration of its continued vitality seems appropriate for judicial determination since assumption of the risk is a judicially created doctrine.⁵⁴

In Pennsylvania, unlike Florida, there was substantial authority prior to the adoption of comparative negligence that unreasonable secondary assumption of the risk was synonymous with, or merely a form of, contributory negligence;⁵⁵ indeed, some Pennsylvania courts seem to treat the two defenses as equivalent and thus use the doctrines interchangeably to describe the same conduct.⁵⁶ Consequently, the main issue before the *Blackburn* court—whether to merge unreasonable assumption of the risk and contributory negligence—should be readily resolved in Pennsylvania.

For Pennsylvania and any state that merged unreasonable secondary assumption of the risk into contributory negligence before adoption of comparative negligence, one salient residuary issue will

and contributory negligence is relatively unimportant since no contradictions arise from the use of the two defenses. However, after adoption of comparative negligence, various anomalies arise from the availability of the two defenses. See note 37 *supra*, and notes 62 & 64 and accompanying text *infra*.

53. PA. STAT. ANN. tit. 17, §§ 2101, 2102 (Purdon Supp. 1977-1978).

54. See *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971) (court ruled that the judicially created doctrine of assumption of the risk would be considered a phase of contributory negligence).

55. See, e.g., *Stephenson v. College Misericordia*, 376 F. Supp. 1324 (M.D. Pa. 1974); see also *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479 (3d Cir. 1965); *Ovja v. City of Scranton*, 65 Lack. Jur. 9, 55 Mun. 220 (Pa. C.P. 1962); *Knepper v. East Taylor Township*, 21 Cambria 63 (Pa. C.P. 1958).

56. See, e.g., *Kuchinic v. McCrory*, 439 Pa. 314, 266 A.2d 723 (1970); *Hill v. Richards*, 406 Pa. 452, 178 A.2d 705 (1962); *Rauch v. Pennsylvania Sports & Enterprises, Inc.*, 367 Pa. 632, 81 A.2d 548 (1951).

be the determination of the status of express assumption of the risk. But there should be no reason to find that the adoption of Pennsylvania's comparative negligence statute has altered the status of this form of assumption of the risk. Assuming there is no general legal prohibition against an express agreement to assume risks,⁵⁷ a plaintiff should still be permitted to expressly agree to assume a risk of harm from the defendant's negligent conduct. Several courts,⁵⁸ including the court in *Blackburn*,⁵⁹ have clearly indicated that express assumption of the risk remains untouched as a complete defense after the adoption of comparative negligence. Nevertheless, any analysis of the status of express assumption of the risk should involve a weighing of the desirability of freedom to contract against public policy considerations⁶⁰ in allowing a plaintiff to expressly agree to assume a risk of harm from the defendant's conduct.

Probably the more important issue before Pennsylvania courts and before courts in other jurisdictions that have already merged unreasonable assumption of the risk into contributory negligence will be the status of reasonable secondary assumption of the risk. Whatever effect it is now to have must be reconciled with the adoption of comparative negligence. Comparative negligence statutes apportion damages on the basis of fault, but a plaintiff who acts reasonably in encountering a known risk cannot be regarded as "at fault." The *Blackburn* court avoided this issue by simply stating there were no cases in its jurisdiction where a person who acted reasonably in encountering a known risk had been barred from recovery.⁶¹ A similar statement cannot be made in Pennsylvania since the supreme court has determined that spectators who reasonably

57. See, e.g., *Shafer v. Reo Motors*, 205 F.2d 685 (3d Cir. 1953) (where buyer signed sales contract which contained seller's warranty excluding liability for negligence, buyer was bound thereby); *Graves v. Davis*, 235 N.Y. 315, 139 N.E. 280 (1923) (owners of a tug may restrict their liability by special agreement); see also Annot., 175 A.L.R. 8 (1948) (exhaustive collection of cases on this subject).

58. *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971); *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90 (1959); *Lyons v. Redding Constr. Co.*, 83 Wash. 2d 86, 515 P.2d 821 (1973).

59. 348 So. 2d at 290.

60. On occasion, courts will specifically decline to enforce express contracts to assume a risk, as being against public policy. See, e.g., *Tunkl v. Regents of Univ. of Cal.*, 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963) (invalidating a hospital patient's express agreement to assume risks of medical negligence); *McCutcheon v. United Homes Corp.*, 79 Wash. 2d 443, 486 P.2d 1093 (1971) (lease provision exculpating the landlord from liability for injury to lessee or anyone entering the building held void).

61. 348 So. 2d at 291.

encounter known risks at most sporting events *should* be barred from recovery for harm incurred from such risks.⁶² Consequently, Pennsylvania's adoption of comparative negligence requires some new thinking about the disposition of reasonable secondary assumption of the risk.⁶³ The Pennsylvania statute does not technically apply to reasonable assumption of the risk, because there is no negligence on the part of a plaintiff who acts reasonably;⁶⁴ thus it could be argued that the defense still remains as a complete bar to recovery. But the retention of reasonable assumption of the risk as a complete defense in a comparative negligence jurisdiction produces an anomalous result. When the plaintiff is at fault (because he acted unreasonably), his damages will be reduced in proportion to his fault, but when he is without fault (because he acted reasonably) in encountering a known risk, he is completely barred from any recovery. Thus, the recovery of the plaintiff who acted unreasonably is theoretically unlimited while that of the plaintiff who acted reasonably is nil! To avoid some of these problems, commentators have suggested reclassifying reasonable secondary assumption of the risk as a duty question.⁶⁵ The practical effect of this reclassification is to change the inquiry from one of evaluating the plaintiff's conduct to one of evaluating the defendant's conduct. It also shifts the burden of proof from the defendant (when assumption of the risk is a defense) to the plaintiff (when assumption of the risk is reduced to a duty question),⁶⁶ and changes the question from one for the jury to one for the court.⁶⁷ Moreover, if reasonable secondary assumption

62. See *Amon v. Shemaka*, 419 Pa. 314, 214 A.2d 238 (1965).

63. Several courts and commentators have called for the abolition of reasonable secondary assumption of the risk even without adoption of comparative negligence. *Fawcett v. Irby*, 92 Idaho 48, 436 P.2d 714 (1968); *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90 (1959); *Ritter v. Beals*, 225 Or. 504, 358 P.2d 1080 (1961); *Unhappy Reincarnation*, *supra* note 32; *Merger*, *supra* note 19.

64. The Pennsylvania comparative negligence statute applies only to a *negligent* plaintiff:

In all actions brought to recover damages for negligence . . . the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery . . . where such negligence was not greater than the causal negligence of the defendant . . . but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

PA. STAT. ANN. tit. 17, § 2101 (Purdon Supp. 1977-1978).

65. See HARPER & JAMES, *supra* note 19, § 21.7 at 1191; *Unhappy Reincarnation*, *supra* note 32; Sherman, *An Analysis of Pennsylvania's Comparative Negligence Statute*, 38 U. PITT. L. REV. 51, 74 (1974).

66. PROSSER, *supra* note 43, § 68 at 455.

67. *Id.*

of the risk is instead to be considered in terms of a duty/no-duty analysis, the scope of the duty should be clearly evaluated in each case since in some situations the defendant's duty has traditionally been a limited one.⁶⁸

Assuming *arguendo* that Pennsylvania courts interpreted the comparative negligence statute to be applicable to reasonable assumption of the risk, such a ruling would create serious conceptual difficulties for the trier of fact. It would be difficult for a jury to compare reasonable conduct with culpable conduct and make an apportionment of damages on that basis; it is difficult enough to compare fault with fault, but to compare innocence with fault would be impossible.⁶⁹ Of the five states that still permit assumption of the risk to be a complete defense after adoption of comparative negligence,⁷⁰ only one still permits reasonable assumption of the risk to be a complete bar to recovery;⁷¹ the rest seem to apply assumption of the risk as complete defense only when the plaintiff's conduct has been unreasonable.

The cumulative effect of the *Blackburn* decision and of decisions of other jurisdictions both with and without a rule of comparative negligence is essentially to abrogate the doctrine of assumption of the risk, with the exception of the express form. Nonetheless, any consideration of eliminating assumption of the risk after adoption of comparative negligence should involve a weighing and balancing of all the factors that have traditionally distinguished assumption of the risk from negligence and contributory negligence principles. The objective of comparative negligence, to apportion damages on the basis of fault, should not be overlooked when using it as a vehicle for eliminating the doctrine of assumption of the risk. The policy justifications for any abrogation or emasculation of the doctrine should be clearly adumbrated before any court pronounces the demise of the defense.

Edward L. Korwek

68. See HARPER & JAMES, *supra* note 19, § 21.7 at 119i; *Unhappy Reincarnation*, *supra* note 32, at 191. See also note 19 *supra* (a traditional example of a limited duty situation).

69. SCHWARTZ, *supra* note 19, § 9.4 at 153.

70. See note 30 *supra* (listing states that still recognize assumption of the risk to be a complete defense after adoption of comparative negligence).

71. *Yankey v. Battle*, 122 Ga. App. 275, 176 S.E.2d 714 (1970).