Comment

Note

Assumption of Risk in a Comparative Negligence System—Doctrinal, Practical, and Policy Issues: *Kennedy v. Providence Hockey Club, Inc.*; *Blackburn v. Dorta*

There is always an easy solution to every problem—
neat, plausible, and wrong.[1]

The adoption of a new principle of law invariably impinges upon related legal concepts, raising issue that were not considered when the law was changed. The adoption of comparative negligence, a drastic departure from the long-held principle of contributory negligence, has forced courts to consider how the related concept of assumption of risk is affected by the change. Because there are different types of assumption of risk, and various doctrinal, practical, and policy issues, a proper determination of the role for assumption of risk in a comparative negligence system depends upon a thorough examination of many relevant considerations. Unfortunately, two 1977 state supreme court decisions dealt with the effect of comparative negligence upon the assumption of risk defense without the necessary sensitivity to the complex issues that were lurking beneath the surface. In *Kennedy v. Providence Hockey Club, Inc.*,[2] the Rhode Island Supreme Court held that the adoption of comparative negligence[3] had no effect on the defense of assumption of risk, which would remain a complete bar to recovery. The Florida Supreme Court has taken a diametrically opposite view; in *Blackburn v. Dorta*,[4] the court largely abolished assumption of risk as an independent defense in light of the advent of comparative negligence.[5]

This Comment will present a framework for analyzing the problem presented by the interaction of two legal concepts—assumption of risk and comparative negligence—and will demonstrate analytical weaknesses in the reasoning of the *Kennedy* and *Blackburn* courts The Comment will suggest that a productive resolution of the question can be made only by

1. Attributed to Henry L. Mencken (source unknown).

2. 376 A.2d 329 (R.I. 1977).

3. Rhode Island had adopted comparative negligence by statute. R.I. GEN. LAWS § 9-20-4 (Supp. 1977).

4. 348 So. 2d 287 (Fla. 1977).

5. The Florida Supreme Court had judicially adopted comparative negligence in Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

carefully distinguishing several types of assumption of risk, and by thoroughly examining issues of legal doctrine, practical implementation, and public policy, issues that often differ markedly depending upon the type of assumption of risk under consideration.

I. THE FACTS AND HOLDINGS OF THE CASES

A. *Kennedy v. Providence Hockey Club, Inc.*

Sylvia Kennedy was an avid hockey fan who had attended numerous games with her fiance at the Rhode Island Auditorium.[6] In the course of one such game, the hockey puck flew from the ice during a face-off and sailed toward Mrs. Kennedy's unprotected fourth row seat, striking her above the left eye.[7] Having been seriously injured and having suffered substantial damages, she brought suit against the Providence Hockey Club, Inc., alleging that the club negligently failed to apprise her of the danger and afford her a safe seat.[8] The trial court granted summary judgment to the defendant hockey club, and the Rhode Island Supreme Court affirmed, on the basis that Mrs. Kennedy had assumed the risk of being injured and was therefore barred from any recovery.[9] The court found that Rhode Island's adoption of comparative negligence had no effect on the complete defense of assumption of risk.[10]

B. *Blackburn v. Dorta*

In *Blackburn v. Dorta*, the Florida Supreme Court dealt with three separate cases consolidated for purposes of the court's certiorari review. In *Dorta v. Blackburn*,[11] a Florida intermediate court of appeals had recognized the continued validity of assumption of risk as a complete bar to recovery despite the adoption of comparative negligence. The case involved a minor plaintiff, injured while riding as a voluntary passenger in a dune buggy, who alleged that the defendant driver of the buggy, also a minor, had negligently operated the vehicle.[12] *Rea v. Leadership Housing, Inc.*[13] had reached a contrary result, with a different court of appeals holding that assumption of risk was now but a type of contributory negligence that would not operate as a complete bar, but that would instead be subject to comparison under the principles of comparative negligence. The plaintiff in *Rea* alleged that the defendant builder of the plaintiff's new residence had been negligent in leaving two large holes in

6. 376 A.2d at 331.

7. *Id.*

8. *Id.* Mrs. Kennedy's then-fiance and now-husband sought consequential damages as a co-plaintiff. The complaint also charged a breach of warranty relating to an allegedly defective seat. *Id.*

9. *Id.*

10. *Id.* at 332.

11. 302 So. 2d 450 (Fla. Dist. Ct. App. 1974).

12. *Id.* at 451.

13. 312 So. 2d 818 (Fla. Dist. Ct. App. 1975).

the plaintiff's driveway. Even though the plaintiff was fully aware of the existence of the holes and even though there was enough room in the driveway to avoid them, the plaintiff had put her foot into one of the holes, falling and breaking her hip.[14] In the third case, *Parker v. Maule Industries, Inc.*,[15] still another court of appeals had dealt with the issue, finding itself in agreement with *Rea*. In *Parker*, the plaintiff passenger alleged that a truck driver with whom he had been riding negligently caused the plaintiff to suffer injuries in a fall from the truck.[16] The Florida Supreme Court sided with the intermediate appellate decisions in *Rea* and *Parker*, holding that the assumption of risk defense was generally abrogated as an independent entity and was merged with contributory negligence, being thus made subject to comparative negligence principles.[17] The court excepted from this abrogation and merger "express assumption of risk which is a contractual concept";[18] the court expressed no opinion on the continued validity and effect of this aspect of assumption of risk.[19]

II. THE BASIC LEGAL CONCEPTS PRESENTED

A. *Assumption of Risk*

Assumption of risk as a defense in negligence actions has traditionally been kept separate from the defense of contributory negligence. Contributory negligence has typically been described as negligent conduct on the part of the plaintiff that contributes to an injury also caused in part by the defendant's negligence.[20] A contributorily negligent plaintiff is one who, by objective, "reasonable man" standards, is found to have acted unreasonably under the circumstances,[21] thereby becoming the partial author of his own wrong. On the other hand, assumption of risk has traditionally been determined by a subjective test, the reasonableness of the plaintiff's conduct being immaterial.[22] Although the term "assumption of risk" has been used indiscriminately, it is most meaningfully used to describe the conduct of a plaintiff who voluntarily and consciously encounters a known risk of harm, which risk was created by the defendant's conduct, and thereby incurs an injury.[23] There is an

14. *Id.* at 819.

15. 321 So. 2d 106 (Fla. Dist. Ct. App. 1975).

16. *Id.* at 107.

17. Blackburn v. Dorta, 348 So. 2d 287, 293 (Fla. 1977).

18. *Id.* at 290. For a definition of express assumption of risk, see text accompanying note 27 *infra*.

19. 348 So. 2d at 290.

20. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 65, at 416-17 (4th ed. 1971).

21. *Id.* at 418-19.

22. *Id.* § 68, at 447-48.

23. *See id.* at 447. "The essence of contributory negligence is carelessness; of assumption of risk, venturousness." Hunn v. Windsor Hotel Co., 119 W. Va. 215, 217, 193 S.E. 57, 58 (1937).

overlap between contributory negligence and assumption of risk when the plaintiff acts both knowingly and unreasonably.[24] Under traditional rules, however, whether a defense is labeled "contributory negligence" or "assumption of risk" is of academic interest only, because either defense completely bars the plaintiff from recovery.[25]

Assumption of risk has been classified into as many as six different types.[26] To determine the effect of comparative negligence on the assumption of risk defense, three categories will suffice: (1) express assumption of risk, (2) reasonable implied assumption of risk, and (3) unreasonable implied assumption of risk. Express assumption of risk is present when the plaintiff expressly agrees to assume a risk of harm from the defendant's negligent conduct.[27] A typical example is an exculpatory clause in a contract. The term also encompasses express statements by the plaintiff that are not part of a contract. For example, if the plaintiff makes to the defendant an oral or written statement, not supported by consideration, that he agrees to accept consequences that might result from negligence by the defendant, the plaintiff has expressly assumed the risk of any such consequences. Implied assumption of risk exists when no express statement has been made, but the plaintiff, fully understanding a risk of harm that could result from the defendant's negligence, nonetheless voluntarily determines to encounter the risk confronting him.[28] Depending upon the propriety of the plaintiff's decision to encounter the risk, the implied assumption of risk is either reasonable or unreasonable. A clear example of reasonable implied assumption of risk is presented by the facts in *Kennedy*. Because Mrs. Kennedy had attended numerous hockey games and had witnessed pucks lofted from the ice, sometimes into the spectator seats,[29] she was found to have knowingly and voluntarily assumed the risk of being hit by a lofted puck.[30] However, given the slight chance of being hit by a puck and the recreational utility of attending the game, her conduct was obviously quite reasonable. On the other hand, if

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24. W. PROSSER, *supra* note 20, § 68, at 440-41. When the overlap is present, the defendant generally can assert either defense or both. *Id.* at 441.

25. *See* RESTATEMENT (SECOND) OF TORTS §§ 467, 496A (1965).

26. Professor Robert E. Keeton has identified six categories of assumption of risk: (1) express assumption of risk, (2) subjectively consensual assumption of risk, (3) objectively consensual assumption of risk, (4) assumption of risk by consent to conduct or condition, (5) associational assumption of risk, and (6) imposed assumption of risk. Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 123-30 (1961). Different categories and distinctions have been suggested by other commentators. *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 21.1 (1956); W. PROSSER, *supra* note 20, § 68, at 440.

27. RESTATEMENT (SECOND) OF TORTS § 496B (1965).

28. *Id.* § 496C (1965). This section of the Restatement covers both reasonable and unreasonable implied assumption of risk; unreasonable implied assumption of risk is also encompassed within the Restatement's definition of contributory negligence. *Id.* § 496C, comment g; *id.* § 496A, comment d (1965).

29. Kennedy v. Providence Hockey Club, Inc., 376 A.2d 329, 331 (R.I. 1977).

30. *Id.* at 333.

Mrs. Kennedy had been injured by a hockey player's "body check" after she had scaled a barrier and slid onto the ice to join her favorite team, her conduct would have evidenced an unreasonable implied assumption of risk.

The assumption of risk defense has been justified on two different theories. The common justification is that the plaintiff's assumption of risk relieves the defendant of the duty of ordinary care that he otherwise would owe to the plaintiff. Under this theory, a plaintiff recovers nothing from the defendant because the defendant, who had no duty to breach, was simply not negligent. The Rhode Island Supreme Court in *Kennedy* expressly followed this doctrinal approach.[31] The other justification is that the nature of the plaintiff's conduct should preclude recovery even though the defendant may well have breached his duty and been negligent; the plaintiff is thought an improper recipient of compensation because he in some sense consented to the wrong.[32]

B. *Comparative Negligence*

Because the traditional contributory negligence doctrine totally bars recovery by a contributorily negligent plaintiff, even if his negligence contributes only insignificantly to his injury, the doctrine has been criticized as harsh and unjust.[33] A significant majority of states have now abandoned the rule that contributory negligence completely bars recovery, and have substituted a rule of partial compensation for contributorily negligent plaintiffs.[34] The modern rule is known as comparative negligence.

Comparative negligence calls for the fact-finder to determine the percentage of the injury attributable to the negligence of each party respectively.[35] Comparative negligence jurisdictions separate into three groups. First, under a system of "pure" comparative negligence, a contributorily negligent plaintiff is simply allowed to recover for any portion of his damages attributable to the defendant's conduct, but to

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31. *Id.*: "Where one knowingly accepts a dangerous situation, he essentially absolves the defendant of creating the risk or, put another way, the duty the defendant owes the plaintiff is terminated."

32. *See, e.g.*, Fletcher v. Kemp, 327 S.W.2d 178, 183 (Mo. 1959): "The rationale of the doctrine is that one who voluntarily exposes himself to a known and appreciated danger due to the negligence of another may not recover for an injury resulting from such exposure. . . ." *Cf.* Eisenhower v. United States, 216 F. Supp. 803, 806 (E.D.N.Y. 1963):

> This doctrine may be invoked under two different sets of circumstances, (i) where defendant had no duty to plaintiff, in which case plaintiff's assumption of risk is simply a counterpart of the defendant's lack of duty, and (ii) where defendant has a duty to plaintiff but has breached this duty and plaintiff, with full knowledge thereof, voluntarily and deliberately assumes the risk of this breach.

33. W. PROSSER, *supra* note 20, § 67, at 433.

34. Annot., 78 A.L.R.3d 339, 354-62, 366-73 (1977).

35. *See* Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973); R.I. GEN. LAWS § 9-20-4 (Supp. 1977).

receive no recompense for the portion traceable to his own negligence.[36] The courts in both *Kennedy* and *Blackburn* were confronted with this version of the doctrine.[37] Second, under "modified" comparative negligence, a plaintiff can recover as under "pure" if and only if his contribution to the injury is found to be "less than" (in some jurisdictions) or "less than or equal to" (in other jurisdictions) the defendant's; if, on the other hand, the plaintiff's contribution is found to be more than the proportion specified, he is totally barred from recovery, as under traditional contributory negligence doctrine.[38] Third, under a more stringent variation of "modified" comparative negligence, a contributorily negligent plaintiff recovers as in a "pure" system only if his negligence is "slight" compared with the defendant's; otherwise, he is barred from any recovery.[39]

III. The Proper Role for Assumption of Risk in a Comparative Negligence System

The adoption of comparative negligence, which was designed to mitigate the harshness of the contributory negligence defense, has produced unanticipated repercussions among related tort doctrines. Courts in comparative negligence jurisdictions have split on the continuing vitality of the "last clear chance" and "wanton or willful misconduct" doctrines, which had themselves mitigated the harshness of contributory negligence prior to the advent of comparative negligence.[40] Determining the effect of comparative negligence on the defense of assumption of risk has proved to be particularly difficult for the courts.

A court could take one of three positions regarding the role of assumption of risk in a comparative negligence system: (1) that assumption of risk is unaffected by the adoption of comparative negligence, and that it therefore remains a complete bar to recovery,[41] (2) that assumption of risk, though retaining an existence independent from contributory negligence, is no longer a bar to recovery but is instead to be entered into the calculus for determining the relative contributions of the plaintiff and defendant to the injury suffered,[42] or (3) that assumption of risk is abolished as a defense

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36. Annot., 78 A.L.R.3d 339, 354-55, 366-71 (1977).

37. *See* R.I. Gen. Laws § 9-20-4 (Supp. 1977); Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973).

38. Annot., 78 A.L.R.3d 339, 355-59 (1977).

39. *Id.* at 359-62.

40. *Id.* at 386-92. In the absence of comparative negligence, a plaintiff is typically allowed *full* recovery despite his contributory negligence if the defendant had the "last clear chance" to avoid the harm, *see* W. Prosser, *supra* note 20, § 66, or if the defendant's conduct was not just negligent but had reached the level of "wanton or willful misconduct." *See id.* § 65, at 426.

41. The Rhode Island Supreme Court in *Kennedy* took this position. 376 A.2d at 332.

42. *See, e.g.*, Braswell v. Economy Supply Co., 281 So. 2d 669, 677 (Miss. 1973) (holding that assumption of risk is subject to comparative negligence rules when it overlaps with contributory negligence).

separate from contributory negligence.[43] Because the three types of assumption of risk—express, reasonable implied, and unreasonable implied[44]—present very different doctrinal, practical, and policy issues, courts might properly take different positions concerning the role for each type in a comparative negligence system.

A. *Doctrinal Issues*

One goal of a legal system is to maintain logical consistency and doctrinal integrity among its rules of law. When purely doctrinal constraints conflict with strong practical and policy considerations, however, the doctrinal barriers must give way to the formulation of new rules of law, backed by new doctrinal underpinnings. In integrating assumption of risk into a comparative negligence system, the foremost doctrinal constraint derives from the proposition that a plaintiff who assumes the risk thereby relieves the defendant of the duty of care that he would otherwise owe to the plaintiff.[45]

A superficial analysis of the problem posed by the juxtaposition of assumption of risk and comparative negligence, relying upon logical extensions of the "no duty" proposition, leads to a determination that assumption of risk, unlike contributory negligence, cannot be subjected to the apportionment of liability called for by comparative negligence. The application of comparative negligence principles presupposes a defendant who is *negligent*, that is, who has breached his duty of care to the plaintiff, and is therefore at least partially liable for the plaintiff's damages. If the plaintiff has, however, by assuming the risk, relieved the defendant of his duty of care, the defendant has no duty to breach and thus cannot be negligent. If the defendant is not negligent, he is not even partially responsible for the plaintiff's damages. The apportionment question is never reached.[46]

Unfortunately, the Rhode Island Supreme Court in *Kennedy* allowed itself to be bound by the trammels of the "no duty" doctrine and its logical extension:

> Where one knowingly accepts a dangerous situation, he essentially absolves the defendant of creating the risk or, put another way, the duty the defendant owes the plaintiff is terminated. For example, where a plaintiff traditionally pleads negligence and a defendant responds with contributory

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43. The Florida Supreme Court took this position in *Blackburn* for implied assumption of risk, 348 So. 2d at 292, although it refused to offer an opinion on express assumption of risk. *Id.* at 290.

44. *See* text accompanying notes 26-30 *supra*.

45. *See* text accompanying notes 31-32 *supra*.

46. Dean Prosser has been criticized for taking the doctrinally inconsistent positions that (1) assumption of risk relieves the defendant of his duty of care to the plaintiff and (2) assumption of risk should not always be a complete bar to recovery, but should in certain cases be subject to comparative negligence principles. Comment, *Assumption of the Risk in Alaska After the Adoption of Comparative Negligence*, 6 U.C.L.A.-ALAS. L. REV. 244, 248-49 (1977).

> negligence, the plaintiff can still plead last clear chance because the defendant, despite the plaintiff's own negligence, still owes a duty to him. But where a plaintiff pleads negligence and a defendant pleads assumption of the risk, that is the end of the chain, because once the plaintiff accepts the risk, the defendant no longer owes a duty to him.[47]

Given this unflinching adherence to the "no duty" proposition, the *Kennedy* court's decision that assumption of risk remains a complete bar to recovery is not surprising.

The Florida Supreme Court in *Blackburn* did not find itself constrained by the "no duty" doctrine. Accordingly, the *Blackburn* court was able to make major changes in the law regarding assumption of risk, changes not possible for the *Kennedy* court, which felt obliged to follow the logical mandates of established legal doctrine.

B. *Practical Issues*

A legal system should seek out rules of law that are susceptible to fair and consistent implementation by courts and juries. As to the role of assumption of risk in a comparative negligence system, no practical problems of implementation result if a court decides either to retain assumption of risk as a complete bar to recovery or to abolish assumption of risk as a concept independent of contributory negligence. Because the *Kennedy* court took the former position, and the *Blackburn* court the latter, neither decision presents practical difficulties.

Practical problems do present themselves if a determination is made that assumption of risk, retaining independent significance separate from contributory negligence, is to be subject to comparative negligence principles, *i.e.*, a plaintiff's assumption of risk is to be compared with the defendant's negligence for the purpose of apportioning liability. The problems of implementing a comparative approach differ depending upon the type of assumption of risk involved.

Asking a jury to compare a plaintiff's *express* assumption of risk with a defendant's negligent conduct is like asking it whether an elephant is grayer than a fish is wet.[48] Even if not backed by consideration, an express statement by the plaintiff to the defendant that he assumes a risk of harm from the defendant's negligence in some sense "sounds" in contract.[49] Contractual promises are either enforceable or unenforceable;[50] they cannot realistically be said to have, say, a 37% effect on legal responsibility.

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47. 376 A.2d at 333.

48. The elephant/fish analogy is taken from Professor Robert J. Nordstrom, who used it to pedagogical advantage teaching contracts at the Ohio State University College of Law.

49. As to statements unsupported by consideration, *cf.* RESTATEMENT OF CONTRACTS § 90 (1932) (reliance can be substitute for ordinary consideration).

50. *See* L. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS 6-7 (1965). RESTATEMENT (SECOND) OF TORTS § 496B (1965) recognizes that certain statements of express assumption of risk are invalid as against public policy.

It would be foolish and unjust to request a fact-finder to decide how much of the plaintiff's injury should be attributed to the defendant's negligence, and how much should be attributed to the express promise of the plaintiff to hold the defendant harmless. The results under such a system would be meaningless and arbitrary.

The elephant and fish problem is not so pronounced with *implied* assumption of risk of either the reasonable or unreasonable variety. When this type of assumption of risk defense is presented, the jury is charged with evaluating the conduct of each of two parties in relation to a certain risk of harm, and determining the degree to which each should be held liable for damages ensuing when that risk of harm has resulted in actual injuries. If it is "folly" to attempt an apportionment of liability in these circumstances,[51] it is folly differing only in degree, and not in kind, from the apportionment of liability in the typical comparative negligence case of a negligent defendant and a contributorily negligent plaintiff.

In the typical comparative negligence case, the jury is asked to decide, on a percentage basis, the degree to which the negligence of the defendant and plaintiff respectively contributed to the plaintiff's damages. Suppose that a negligent defendant homeowner has failed to remove a dead tree limb that hangs over the city street in front of his house, and the limb falls and hits the car of a contributorily negligent plaintiff whose inadvertence had kept him from stopping the car short of where the limb fell. The jury goes out, and returns with a verdict: "Defendant—65% responsible. Plaintiff—35% responsible." It would indeed be folly to view these percentages as any more than gross estimates of the degree to which each party's conduct contributed to the injury. But the law tolerates this inexactitude in order to achieve some semblance of fairness between two parties who were each "wrong" in their conduct.[52] This semblance of fairness is believed superior to the traditional contributory negligence system, wherein one of the "wrong" parties, the plaintiff, must sustain the entire loss, while the other party, the defendant, is held unaccountable.

Allowing the fact-finder to assess a plaintiff's implied assumption of risk does not pose appreciably greater practical difficulties in the apportionment process than allowing it to consider a plaintiff's contributory negligence. To vary slightly the example suggested above, suppose that the plaintiff driver had often driven by and viewed the dead limb, subjectively recognized that the limb appeared ready to fall at any time, and nonetheless decided to drive under it rather than take an equally

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51. Comment, *Comparative Negligence Legislation: Continuing Controversy over the Doctrine of Assumption of the Risk in Oregon*, 53 ORE. L. REV. 79, 92 (1973).

52. "The law consistently seeks to elevate justice and equity above the exact contours of a mathematical equation." Daly v. General Motors Corp., 20 Cal. 3d 725, 742, 575 P.2d 1162, 1172, 144 Cal. Rptr. 380, 390 (1978) (holding comparative negligence apportionment principles applicable in products liability cases).

convenient route. Suppose that the jury found that his conduct was unreasonable and that he had disregarded a subjectively known risk of harm. This unreasonable implied assumption of risk might result in percentage findings of responsibility somewhat less in the plaintiff's favor than in the example first put, in which the unreasonable, contributorily negligent plaintiff had not subjectively appraised the risk. Perhaps the defendant would be found only 55% responsible, and the plaintiff 45%. On the other hand, suppose that from the road the limb did not look like it would fall, and the plaintiff, having subjectively perceived the risk that it *might* fall, reasonably decided that his chances of being hit by the limb were slight; he decided to continue to take his customary route under the limb. This non-negligent plaintiff, who reasonably assumed the risk of the falling tree limb, might receive a verdict holding the defendant, say, 85% responsible for the injuries that resulted when the limb did in fact fall, and the plaintiff would bear 15% of the loss himself. If the non-negligent plaintiff had never before driven by the tree, and thus had not knowingly encountered the risk of harm, he would recover 100%, because he had neither assumed the risk nor been contributorily negligent.

C. *Policy Issues*

The paramount goal of a legal system is to develop rules of law that reflect a sensitive balancing of all relevant considerations of public policy. Assuming that a court is not content to perpetuate existing rules of law in the name of doctrinal consistency,[53] and having determined that practical constraints preclude apportionment only in the case of express assumption of risk,[54] the question remains: What—in terms of appropriate public policy—*should* be the role for assumption of risk in a comparative negligence system? Each type of assumption of risk presents different policy concerns.

1. *Express Assumption of Risk*

Because practical considerations preclude its apportionment under comparative negligence principles, express assumption of risk must either be abrogated as a defense, allowing a plaintiff full recovery despite his express statement that he would assume the risk of harm from the defendant's negligent conduct, or remain a complete bar to recovery. On policy grounds, express assumption of risk must surely remain viable as a bar to recovery, irrespective of the adoption of comparative negligence. Simply put, a party can waive his rights, and others must be protected in their reliance on such a waiver.

A dissenting judge in one of the Florida court of appeals cases that

53. *See* text accompanying notes 45-47 *supra*.

54. *See* text accompanying notes 48-52 *supra*.

was consolidated for review in *Blackburn*, apparently believing that the majority of his court was abolishing the express assumption of risk defense, suggested a hypothetical case to show the equities involved when such a defense is presented.[55] In the hypothetical example, Mr. Goodhearted grudgingly agreed to drive Mr. Persistent home from a party, on the express condition that Persistent was assuming the risks involved in riding with Goodhearted, including Goodhearted's poor vision, impaired reflexes, and the defective brakes on his car.[56] A collision occurred on the ride home, and Persistent sued Goodhearted for injuries suffered.[57] The dissenting judge could not "conceive under any system of *justice* how Persistent could be permitted to recover."[58]

Because the Rhode Island Supreme Court in *Kennedy* retained *implied* assumption of risk as a complete bar to recovery,[59] the court would, a fortiori, recognize *express* assumption of risk as a bar. On the other hand, the Florida Supreme Court in *Blackburn* specifically refused to venture an opinion on the effect of express assumption of risk after the state's adoption of comparative negligence.[60] If confronted with the issue directly, however, the Florida court would presumably follow the Rhode Island approach, retaining the express assumption of risk defense as a complete bar to recovery.

2. *Reasonable Implied Assumption of Risk*

The proper role for implied assumption of risk of the reasonable variety is debatable even in the absence of comparative negligence, because competing policy considerations are present. On the one hand, the plaintiff has voluntarily encountered a known risk, and one might argue that public policy "refuses to permit one who manifests willingness that another shall continue in a course of conduct to complain of it later if he is hurt as a result of it."[61] On the other hand, the plaintiff has, by definition, acted as a reasonable man would act when confronted with the same situation.

In a state that has adopted comparative negligence, a court—depending on the importance it places on each of the competing policy

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55. Parker v. Maule Indust., Inc., 321 So. 2d 106, 107-08 (Fla. Dist. Ct. App. 1975) (Boyer, C.J., dissenting).

56. *Id.* at 107.

57. *Id.* at 107-08.

58. *Id.* at 108 (emphasis in original).

59. 376 A.2d at 332.

60. 348 So. 2d at 290. The court's definition of express assumption of risk, which was excepted from its general abrogation of the assumption of risk defense, was expansive. According to the court, express assumption of risk is present in "situations in which actual consent exists such as where one voluntarily participates in a contact sport." *Id.* Florida attorneys representing defendants will undoubtedly attempt to distinguish *Blackburn* by arguing that "actual consent," in this broad sense, was present in their cases.

61. RESTATEMENT (SECOND) OF TORTS § 496C, comment b (1965)

concerns—could take one of three positions vis-a-vis reasonable implied assumption of risk: (1) that the defense remains a complete bar to recovery, (2) that the defense is a partial one only, calling for apportionment of responsibility under comparative negligence principles, or (3) that the defense is abolished, allowing the plaintiff full recovery despite his reasonable implied assumption of risk. The starkest contrast between the Rhode Island Supreme Court decision in *Kennedy* and the decision of the Florida Supreme Court in *Blackburn* arises from each court's treatment of this aspect of assumption of risk. The Rhode Island court retained the defense as a complete bar.[62] The Florida court, on the other hand, expressly stated that—to the extent that such a defense had existed in Florida prior to the adoption of comparative negligence—the defense was now abolished, and would in no way limit a plaintiff's recovery.[63] An examination of the flaws in each court's reasoning will demonstrate that neither of these extreme positions is justified, and that reasonable implied assumption of risk ought instead to be subjected to the apportionment principles of comparative negligence.

The Rhode Island court in *Kennedy*, in upholding reasonable implied assumption of risk as a complete bar, emphasized that a plaintiff who voluntarily encounters a known risk has "consented to the possibility of harm,"[64] and as such is more culpable than and "worlds apart from one who unwittingly and unsuspectingly falls prey to another's negligence."[65] In distinguishing assumption of risk from the defense of contributory negligence, the court said, "When one acts knowingly, it is immaterial whether he acts reasonably."[66]

Even though reasonableness is immaterial in determining whether some form of implied assumption of risk is present, reasonableness is crucial in properly affixing legal responsibility. The *Kennedy* decision leads to an anomaly in Rhode Island: an *unreasonable* plaintiff, *i.e.*, one who is contributorily negligent, might receive partial compensation under comparative negligence principles, while a *reasonable* plaintiff receives no compensation if he has impliedly assumed the risk.

The Florida opinion in *Blackburn* exemplifies opposite but equally inappropriate reasoning. Emphasizing that a reasonable plaintiff should not be penalized in his recovery, the court inaccurately labeled an extreme hypothetical example as reasonable implied assumption of risk, and concluded that—in light of the state's adoption of comparative negligence—"there is no reason supported by law or justice in this state to give credence to such a principle of law."[67]

62. 376 A.2d at 332.
63. 348 So. 2d at 291.
64. 376 A.2d at 333.
65. *Id.*
66. *Id.*
67. 348 So. 2d at 291.

In the *Blackburn* court's hypothetical case, a plaintiff tenant was injured while rushing into his apartment to save his infant child from a raging fire caused by the defendant landlord's negligence. The court concluded that the hypothetical plaintiff had voluntarily encountered a known risk, and that, were the court to recognize the reasonable implied assumption of risk defense, it would apply in this type of situation.[68] The court's rather obvious error was to conclude that the hypothetical plaintiff's conduct was in any sense "voluntary" within the meaning of the assumption of risk doctrine. It is black letter law that the "plaintiff's acceptance of a risk is not voluntary if the defendant's tortious conduct has left him no reasonable alternative course of conduct in order to . . . avert harm to himself or another. . . ."[69] The court's analysis was fatally flawed by its reliance on this straw man hypothetical.

The Florida court might better have considered a set of facts actually within the reasonable implied assumption of risk defense, such as the facts of Rhode Island's *Kennedy* case. In *Kennedy*, it was found as a matter of fact that Mrs. Kennedy—because she had witnessed the possible consequences of pucks lofting from the ice—had subjectively turned her attention to the risk of being hit by a puck.[70] She was found, in effect, to have said to herself, "I might get hit by a hockey puck. I realize and understand that. But I like to watch hockey, and I'll take my chances."[71] Even though her decision was perfectly reasonable in light of the slim chance that she would actually be hit, it would seem just and fair for the law to recompense her more grudgingly than a first-time hockey spectator who had no idea that he might get hit by a puck.

Because competing and equally weighty policy considerations exist when a plaintiff has acted reasonably but knowingly, the proper approach to the reasonable implied assumption of risk defense in a comparative negligence system is a compromise between the extreme positions taken in *Kennedy* and *Blackburn*. The fact-finder should be allowed to apportion liability under comparative negligence principles when this defense is applicable. The fact-finder should consider the reasonableness of the plaintiff's conduct, but should also consider the fact that the plaintiff had in some sense "taken his chances" concerning the possibility of injury. This approach is not precluded by practical constraints,[72] and would allow a jury to consider the particular equities in a given case. The approach would also further the comparative negligence policy of apportioning liability in accordance with comparative fault or culpability, rather than holding either the defendant or the plaintiff exclusively responsible. The

68. *Id.*

69. RESTATEMENT (SECOND) OF TORTS § 496E(2)(a) (1965).

70. 376 A.2d at 333.

71. "Assumption of risk rests on plaintiff's voluntary consent to take his chances. . . ." Meulners v. Hawkes, 299 Minn. 76, 80, 216 N.W.2d 633, 635 (1974).

72. *See* text accompanying notes 51-52 *supra.*

law ought not seek out black or white solutions when a compromise of gray comes closer to achieving fairness.

3. *Unreasonable Implied Assumption of Risk*

Unreasonable implied assumption of risk presents the case of a plaintiff who has subjectively recognized a risk of harm, and who has then proceeded to encounter the risk even though it was unreasonable to do so. Surely the law should treat this plaintiff with less favor than either the plaintiff who encounters a risk unreasonably but unknowingly or the one who knowingly encounters a risk but is reasonable in his decision to do so. That is, unreasonable implied assumption of risk is more "wrongful" than either purely objective contributory negligence[73] or reasonable implied assumption of risk.

Because of the plaintiff's heightened culpability when he has proceeded knowingly as well as unreasonably, the Rhode Island Supreme Court's decision in *Kennedy*, retaining assumption of risk as a complete bar even though purely objective contributory negligence is but a partial defense, can be defended as it relates to unreasonable implied assumption of risk. Dean Prosser, however, has suggested that such a decision is not defensible:

> It can scarcely be supposed in reason that the legislature has intended to allow a partial recovery to the plaintiff who has been so negligent as not to discover his peril at all, and deny it to one who has at least exercised proper care in that respect, but has made a mistake of judgment in proceeding to encounter the danger after it is known.[74]

Prosser's view is apparently this: One who acts unreasonably (*i.e.*, who "has made a mistake of judgment") in deciding to encounter a risk of harm that he has discovered has at least as much desert as one who has been unreasonable (*i.e.*, who "has been . . . negligent") in failing to discover the risk in the first instance. Despite the superficial appeal of his argument, Prosser's policy position is dubious at best. It suggests that, as between two unreasonable plaintiffs, one whose unreasonable conduct was premised on a conscious appreciation of what he was doing should be treated as kindly as one whose unreasonableness was founded on inadvertence alone. Prosser's position withers further in the face of its application to concrete factual circumstances. Under Prosser's approach, for example, the law would treat an absent-minded plaintiff pedestrian, who failed to notice that an oncoming car was out of control, no more generously than a pedestrian who saw the car, but said, "Oh, what the heck! I'll take my chances and hope that he misses me."

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73. Unreasonable implied assumption of risk can be thought of as contributory negligence with an added subjective component. As noted above, assumption of risk overlaps with contributory negligence when the assumption of risk is unreasonable. *See* text accompanying note 24 *supra*.

74. W. PROSSER, *supra* note 20, § 68, at 457.

Even though the Rhode Island "complete bar" approach to unreasonable implied assumption of risk reflects the sound policy of treating plaintiffs who are more culpable with less favor than those who are less culpable, it is an unnecessarily harsh doctrine. In a comparative negligence system, the goal is a fair apportionment of liability between the plaintiff and defendant when both are wrongdoers. It is inconsistent and unjust to place the entire loss upon one of those wrongdoers, *i.e.*, the plaintiff, simply because his wrongful conduct includes the element of subjective knowledge.

The Florida Supreme Court in *Blackburn* took the view that unreasonable implied assumption of risk was nothing more than contributory negligence, and should have no independent significance.[75] The unreasonableness of the plaintiff would be considered in comparative negligence apportionment,[76] but the fact that he knowingly and voluntarily encountered the risk would be irrelevant.

The *Blackburn* court apparently felt that the knowing, "what the heck" plaintiff should be treated on par with one who "unwittingly and unsuspectingly falls prey to another's negligence."[77] To the contrary, the law should properly view unreasonable implied assumption of risk, with its subjective fault component, with less favor than mere contributory negligence, which is based on objective fault alone.

The most appropriate resolution of the issue would once again be a compromise. The plaintiff's unreasonable implied assumption of risk should not bar his recovery altogether, nor should his subjective appraisal of the risk of harm be disregarded as irrelevant. Instead, the fact-finder should be permitted to consider the plaintiff's subjective knowledge of the risk, as well as his unreasonableness, in applying comparative negligence apportionment principles. This approach is not precluded by practical concerns,[78] and allows the jury to consider all relevant evidence concerning fault, not just part of it.

IV. CONCLUSION

The *Kennedy* and *Blackburn* cases are examples of unsound decisions concerning the assumption of risk defense in a comparative negligence system, decisions based on incomplete analysis and deficient reasoning. This writer's appraisal of doctrinal, practical, and policy issues suggests that (1) express assumption of risk should remain a complete bar to recovery, and (2) implied assumption of risk of both the reasonable and unreasonable varieties should be subjected to comparative negligence

75. 348 So. 2d at 291-92.

76. *Id.* at 293.

77. Kennedy v. Providence Hockey Club, Inc., 376 A.2d 329, 333 (R.I. 1977).

78. *See* text accompanying notes 51-52 *supra.*

apportionment principles, under which the fact-finder would consider the plaintiff's subjective appreciation of the risk of harm that he decided to encounter. The result would be a more just allocation of legal liability for losses resulting from tortious conduct.

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