

ASSUMPTION OF RISK AND ABNORMALLY DANGEROUS ACTIVITIES: A PROPOSAL

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I. INTRODUCTION

Despite the widespread adoption of otherwise comprehensive comparative fault schemes,¹ the status of "assumption of risk" has remained insecure.² Courts have had difficulty deciding whether—and how—assumption of risk should apply, as illustrated

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1. V. SCHWARTZ, *COMPARATIVE NEGLIGENCE*, §§ 1.4, 1.5 app. A (2d ed. 1986) (state statutes and judicial rulings regarding the adoption of comparative systems); *UNIFORM COMPARATIVE FAULT ACT*, 12 U.L.A. 41 (Supp. 1989) [hereinafter UCFA].

2. As discussed more fully below, many jurisdictions have purported to abolish assumption of risk or "merge" it with other doctrines, but only for some purposes. *See infra* notes 106-12 and accompanying text.

by a recent case: Sixto Benitez, a high school football player, suffered a broken neck during a varsity football game, leaving him a quadriplegic.³ He sued the school board and the athletic league, alleging that his coach had been negligent.⁴ The school district interposed the defense of assumption of risk.⁵

Courts have treated assumption of risk inconsistently.⁶ Some courts treat the plaintiff's decision to engage in risky activities as a bar to any claim;⁷ others ignore it by "merging" assumption of risk with contributory negligence;⁸ still others look for a middle path.⁹ Even comprehensive schemes for comparative fault have virtually ignored assumption of risk as an independent doctrine.¹⁰ This arti-

3. Benitez v. New York City Bd. of Educ., 73 N.Y.2d 650, 541 N.E.2d 29 (1988).

4. Specifically, Benitez alleged that: (1) the coach had put him in the lineup at a stage in the game when the coach should have known he was fatigued, and, therefore, prone to injury; and (2) the opponent was an athletically superior team, and the decision to play the two teams against each other was unreasonably risky. *Id.* at 655-56, 541 N.E.2d at 31-32.

5. Benitez in turn claimed that his decision to play was involuntary because of an "implied compulsion" and the fear that he would lose scholarship opportunities. *Id.* The jury found that Benitez had assumed the risk of injury voluntarily, and assigned 30 percent of the fault to him and 70 percent to the defendants, and the jury thereby reduced his \$878,330 award accordingly. *Id.* Although the Appellate Division affirmed, the New York Court of Appeals dismissed the entire claim, holding that the "luckless accident" arose "from the vigorous voluntary participation in competitive interscholastic athletics." *Id.* at 659, 541 N.E.2d at 34.

6. Other recreational activities cases raise the same question: Rini v. Oaklawn Jockey Club, 861 F.2d 502 (8th Cir. 1988) (horse racing); Cassio v. Creighton Univ., 233 Neb. 160, 446 N.W.2d 704 (1989) (scuba diving); Blide v. Rainier Mountaineering, Inc., 30 Wash. App. 571, 636 P.2d 492 (1981) (mountain climbing); Conratt v. Four Star Promotions, 45 Wash. App. 847, 728 P.2d 617 (1986) (car racing); Brewer v. Ski-lift, Inc., 234 Mont. 109, 762 P.2d 226, (1988) (skiing); Kirk v. Washington State Univ., 109 Wash. 2d 448, 746 P.2d 285 (1987) (cheerleading); Hulsey v. Elsinore Parachute Center, 168 Cal. App. 3d 333, 214 Cal. Rptr. 194 (1985) (parachuting); Murphy v. Steeplechase Amusement Co., 250 N.Y. 479, 166 N.E. 173 (1929) (amusement park attraction, "the Flopper"); Dorry v. LaFleur, 399 So. 2d 559 (La. 1981) (ice skating).

7. Whipple v. Salvation Army, 261 Or. 453, 495 P.2d 739 (1972) (fifteen-year-old boy assumed the risk of playing football, and his claim based on negligent training and supervision was, therefore, barred).

8. Rosen v. LTV Recreational Dev., Inc., 569 F.2d 1117, 1121 (10th Cir. 1978) (skier sued ski resort for negligent placement of steel pole; trial court properly refused to give assumption of risk instruction, because "when comparative negligence determines percentages of negligence and of contributory negligence, it sufficiently considers the effect of assumption of risk and avoids the confusion which would result from giving both definitions to the jury."). On the concept of abolition generally, see *infra* text accompanying notes 106-12.

9. Kirk v. Washington State Univ., 109 Wash. 2d 448, 746 P.2d 285 (1987) (cheerleader's recovery based on university's negligence reduced by percentage of her injury attributable to assumption of risk inherent in cheerleading).

10. For example, the UCFA narrowly defines "fault" as "unreasonable assumption of risk," which, the Official Comment notes, is only another term for contributory negligence. The Official Comment notes other meanings of assumption of risk (valid contractual release; no breach of duty; and reasonable assumption of risk); but none are included in the definition of "fault." UCFA, *supra* note 1, § 1(b) and Official Comment. See also *infra* text ac-

cle proposes replacing the inconsistent treatment of assumption of risk with an approach based on Calabresi and Hirschoff's suggestion that assumption of risk "is, and always has been, a kind of plaintiff's strict liability—the other side of the coin of defendant's strict liability."¹¹ Under such a view, assumption of risk represents a plaintiff's decision to engage in conduct that poses such a high risk of injury that it is fair to make the risk-taker bear at least some of the risk of injury, even when the risk was a reasonable one. The logical extension of this position is to reduce, rather than bar, an otherwise valid claim.

II. ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE

A. *Contributory Negligence and Last Clear Chance*

The contributory negligence rule,¹² first articulated in the nineteenth century, operated as a bar to a plaintiff's recovery if the plaintiff had been negligent.¹³ The doctrine of last clear chance, originating in 1842 in the English case of *Davies v. Mann*,¹⁴ was an attempt to mitigate the harshness of the contributory negligence rule. It allowed a plaintiff full recovery, even if the plaintiff had been negligent, if the defendant had the "last clear chance," or final opportunity, to avoid an accident.¹⁵ Although last clear chance favored plaintiffs—permitting even a negligent plaintiff to recover *all* of her damages—it still arbitrarily allowed either a full recovery

companion notes 115-16.

11. Calabresi & Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1065 (1972).

12. The contributory negligence rule should be differentiated from the *fact* of contributory negligence. A plaintiff's negligence has traditionally been termed "contributory negligence." Although the modern rule is to reduce, rather than bar, a recovery by the percentage of contributory negligence, the term contributory negligence continues to be a useful term to identify negligent conduct by a plaintiff.

13. W. PROSSER, D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON TORTS, § 65, at 451 (5th ed. 1984) [hereinafter PROSSER & KEETON].

14. 152 Eng. Rep. 588 (1842). The plaintiff negligently left his jackass tied in the middle of the road, and the defendant ran over it. The court held that the plaintiff could nonetheless recover (in full), because the defendant had the "last clear opportunity" to avoid the accident if the defendant had used sufficient care. PROSSER & KEETON, *supra* note 13, § 66, at 463. Holding the doctrine in no great esteem, Prosser and Keeton noted that it became the "jackass doctrine," with whatever implication it may carry." *Id.* § 66, at 463 n.2.

Part of the rationale for employing last clear chance was an argument that, if the plaintiff's negligence is complete when the injury occurs (such as the pitiful jackass in the middle of the road), the defendant's actions then become the sole proximate cause of the injury. *Id.* § 66, at 463. The difficulty with this argument is that it is impossible to draw a meaningful distinction (consistent with contemporary notions of proximate cause) between cases in which the plaintiff's negligence has ceased and those in which it continues as a proximate cause of the injury.

15. *Id.* § 66, at 463.

or none at all. Last clear chance, always a doctrinal muddle, was sustained largely by the otherwise unacceptably harsh consequences of the contributory negligence rule.¹⁶ When comparative negligence eliminated the need for the doctrine, most jurisdictions cheerfully jettisoned it.¹⁷

B. Assumption of Risk

Although assumption of risk was identified early in the common law as a defense distinct from ordinary contributory negligence,¹⁸ both operated as a total bar to the plaintiff's claim for recovery.¹⁹ Although application of the assumption of risk doctrine did not require proof of negligence, it frequently coincided with the fact of negligence, because a plaintiff's voluntary encounter of a known risk would often be negligent.²⁰ However, the scope of the doctrine included non-negligent behavior as well; otherwise, the doctrine would have been superfluous, because any negligence on the part of the plaintiff would be a complete bar anyway. For example, suppose that the owner of an ice-skating rink negligently prepared the surface of the ice, making it unreasonably slippery.²¹ The plaintiff noticed that the ice was very slippery, but continued to skate anyway, until he fell and was injured. If the plaintiff sued the defendant, two affirmative defenses were available at common

16. *Id.* § 66, at 468.

17. *See, e.g.,* *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 824, 532 P.2d 1226, 1240, 119 Cal. Rptr. 858, 872 (1975). Some jurisdictions retain under the name of last clear chance a related doctrine, which treats willful or wanton conduct as more culpable than mere negligence. Thus, in the "jackass case" the defendant might be required to pay for the entire injury, despite the plaintiff's negligence, if the defendant's failure to avoid injury to the plaintiff was wanton, that is, a callous indifference to the plaintiff's plight. *See* PROSSER & KEETON, *supra* note 13, § 66, at 464.

18. *See* PROSSER & KEETON, *supra* note 13, § 68, at 482. A significant difference between contributory negligence and assumption of risk is that contributory negligence usually involves inadvertence; assumption of risk, on the other hand, has been based upon a conscious choice by the plaintiff to engage in conduct the plaintiff knows to be dangerous. Thus, contributory negligence is measured by an objective standard (the reasonably prudent person), whereas assumption of risk is measured by a subjective one (whether the plaintiff actually knew of the risk and then voluntarily chose to encounter it).

19. *Zahrte v. Sturm, Ruger & Co.*, 203 Mont. 90, 93, 661 P.2d 17, 18 (1983) (common law defense of assumption of risk defeats plaintiff's claim when he voluntarily exposed himself to a known danger, even if such exposure was reasonable).

20. If a plaintiff decides consciously to undergo a risk that is unreasonably dangerous (e.g., driving with brakes negligently repaired by the defendant), a jury may find both negligence (judged by an objective standard of what the reasonably prudent person would do) and assumption of risk (judged by the subjective standard of whether the plaintiff, despite actual knowledge of a risk, voluntarily proceeded to encounter it).

21. The facts of this example are based upon *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90 (1959), discussed *infra* note 108 and accompanying text.

law: first, that the plaintiff was *negligent, i.e.*, his conduct fell below the standard of reasonable care.²² Second, the defendant would assert that the plaintiff *assumed the risk* that he would be injured, irrespective of negligence. If a jury found either one of these two doctrines applied, the plaintiff's claim was completely barred. Clearly, in many instances both doctrines applied.²³

However, in other cases the two diverged. Assumption of risk also applied when the plaintiff was unaware of the defendant's negligence, but had agreed with the defendant to take a chance with some risky activity. Courts held that this consent waived any claim for negligence. The most frequent application of the doctrine of assumption of risk in this sense was in the employment context prior to workers' compensation reforms.²⁴ If the employee was aware of the employment-related danger, it did not matter that reasonable care was used in encountering that risk; the employee's claim against the employer was barred. So long as the employer provided a reasonably safe place of work, an injured employee who voluntarily encountered a known risk at work had no claim against the employer. Today, the defense is rarely applied to the master-servant relationship because of workers' compensation statutes.²⁵

The numerous commentators on assumption of risk have

22. This contributory negligence defense required the fact-finder to evaluate the plaintiff's behavior by the same standard of reasonable care used in a determination of negligence by the defendant. However, the effect was quite different. A finding of negligence on the part of the plaintiff would bar the plaintiff's claim, even if the defendant had been negligent, while a negligent defendant must compensate a blameless plaintiff for injury only when he alone was negligent.

23. *E.g.*, *Gonzalez v. Garcia*, 75 Cal. App. 3d 874, 881, 142 Cal. Rptr. 503, 507 (1977) (passenger assumed the risk of riding with a drunk); *Kroger Co. v. Haun*, 177 Ind. App. 403, 379 N.E.2d 1004, 1014 (1978) (defenses of contributory negligence and assumption of risk could overlap); *Blackburn v. Dorta*, 348 So. 2d 287, 291-92, on remand 350 So. 2d 25 (Fla. 1977) (merging defense of assumption of risk into the defense of contributory negligence).

24. The doctrine developed during the industrial revolution, reflecting the tendency of the courts 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." *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 58-59 (1943). These early roots of assumption of risk provided the rationale for a Montana court to hold that the application of assumption of risk outside the employer-employee relationship should be narrowly confined. *Shahrokhfar v. State Farm Mut. Auto. Ins. Co.*, ___ Mont. ___, 634 P.2d 653, 677 (1981).

25. Workers' compensation laws have virtually abolished this defense in work-related injuries. V. SCHWARTZ, *supra* note 1, § 9.1 (1986). Workers' compensation statutes generally hold the immediate employer strictly liable for all injuries to an employee arising out of and in the course of employment. In return for a guaranteed (but modest) recovery, the employee is prohibited from suing the immediate employer. *But see O'Reilly, Risks of Assumptions: Impacts of Regulatory Label Warnings Upon Industrial Products Liability*, 37 CATH. U.L. REV. 85 (1987) (federal involvement in dissemination of information will restore vitality to the assumption of risk defense in future toxic illness cases brought by employees).

noted the different meanings given to the phrase "assumption of risk."²⁶

1. "Primary" Assumption of Risk

In one kind of assumption of risk case the plaintiff has, in effect, instructed the defendant to use less care than would otherwise be required, because the plaintiff sees some advantage in a less rigorous devotion to safety.²⁷ These cases have been called "primary" assumption of risk, because the focus is upon redefining the defendant's duty of care, rather than upon whether the plaintiff should be denied recovery for an otherwise valid claim.²⁸ For example, in *Brown v. San Francisco Ball Club*,²⁹ the plaintiff was injured by an errant baseball while she sat in the stands. The court found that baseball patrons preferred to have at least some unscreened seats in order to see the game better, and, therefore, the stadium owner was not negligent in providing them.

Another place to apply the doctrine of primary assumption of risk is on the ski slope. The safest way for a skier to travel from the top of the mountain to the bottom is by a gradual slope. If skiing were simply a means of transportation, reasonable care would require that, insofar as economically practical, steep slopes be converted into bunny slopes. Yet in fact many skiers seek out steep slopes to heighten their enjoyment. In effect, just as baseball patrons in *Brown* were held to have told the stadium owners to leave seats unscreened, skiers tell ski operators not to eliminate steep slopes.³⁰ Thus, ski operators who provide a steep slope can

26. PROSSER & KEETON, *supra* note 13, § 68, at 480; V. SCHWARTZ, *COMPARATIVE NEGLIGENCE*, § 9.1, at 154 (2d ed. 1986); Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 124-30 (1961); Rosenlund and Killion, *Once A Wicked Sister: The Continuing Role of Assumption of Risk Under Comparative Fault in California*, 20 U.S.F. L. REV. 225 (1986); Smith, *The Last Days of Assumption of the Risk*, 5 GONZ. L. REV. 190 (1970); Gaetanos, *Essay—Assumption of Risk: Casuistry in the Law of Negligence*, 83 W. VA. L. REV. 471 (1981).

27. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 127-28 (2d ed. 1977).

28. PROSSER & KEETON, *supra* note 13, §68, at 496.

29. 99 Cal. App. 2d 484, 222 P.2d 19 (1950). *Accord* *Arnold v. City of Cedar Rapids*, 443 N.W.2d 332 (Iowa 1989) (owner of softball facility not liable for spectator injury under primary assumption of risk analysis).

30. At least five states adopted statutes barring a skier from recovering from ski operators for injuries sustained from risks inherent to skiing. MASS. ANN. LAWS ch. 143, § 71P (Law. Co-op. 1989); MONT. CODE ANN. §§ 23-2-731, 736 (1989); 42 PA. CONS. STAT. ANN. § 7102(c) (Purdon 1982); UTAH CODE ANN. § 78-27-53 (1987); VT. STAT. ANN. tit. 12, § 1037 (1989 Supp.).

Some statutes have been challenged on constitutional grounds. For example, the Montana "Skier's Responsibility" statute originally stated that a "skier assumes the risk and all legal responsibility for injury to himself or loss of property that results from participating in

properly say that they acted with reasonable care even if, following Learned Hand's calculus,³¹ the risk might have been cheaply avoided.³² But the proper treatment of cases involving unscreened baseball seats, steep ski slopes, and the like, is not to invoke a separate defense called "assumption of risk," but rather to formulate an instruction on the nature of reasonable care such as: "In determining the standard of reasonable care expected of the defendant, you should consider the preferences of the average [baseball patron] [skier]. If [baseball patrons] [skiers] actually prefer to face the risk that is complained of in this case, you may find the defendant to have exercised reasonable care."³³

2. "Secondary" Assumption of Risk

"Secondary" assumption of risk cases look quite different from "primary" assumption of risk cases.³⁴ In a "secondary" case the

the sport of skiing by virtue of his participation." MONT. CODE ANN. § 23-2-736(1)(1979) (amended 1989). In *Brewer v. Ski-lift, Inc.*, 234 Mont. 109, 762 P.2d 226 (1988), the court held that parts of the statute unconstitutionally deprived an injured skier of legal recourse against the intentional or negligent acts of the ski operator. The amended Montana Code Annotated § 23-2-736 (1989) deleted the assumption of risk language, listed the skier's affirmative duties, prohibited certain conduct and added subsection (4), stating, "A skier must accept all legal responsibility for injury or damage of any kind to the extent that the injury or damage results from risks inherent in the sport of skiing." The statute lists inherent risks in skiing, such as bare spots, variations in terrain, avalanches, and weather changes. MONT. CODE ANN. § 23-2-736(4)(a)-(g) (1989).

31. *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947) (liability depends on whether the burden of preventing injury is less than the probability of injury multiplied by the gravity of potential injury).

32. Learned Hand's calculus usually is thought to include only the burden upon the defendant to avoid the injury. If the calculus were broadened to include the costs imposed upon the plaintiff, or society as a whole, it would include (in the skiing case) the psychic cost to skiers of making the activity less dangerous. In any event, the point is that the standard of *reasonable* care sometimes permits the defendant to maintain a dangerous condition (because plaintiffs prefer it that way) even if it could have been made safe at nominal economic cost.

33. Such an instruction would eliminate recoveries based upon those aspects of the sport commonly thought to be inherent risks (icy slopes), but still provide recoveries in cases in which the danger is not unique to the activity (collapsing chair lift).

34. Unfortunately, many commentators have used the term "primary" assumption of risk to describe cases in which the defendant was negligent, but plaintiff's conduct made a recovery inequitable. For example, in *Parker v. Maule Indus., Inc.*, 321 So. 2d 106, 107-08 (Fla. Dist. Ct. App. 1975), a dissenting judge posed the following hypothetical: suppose a driver has poor vision, impaired reflexes, and defective brakes on his car. Nonetheless, fully aware of these limitations, a passenger asks for a ride home. If the driver has an accident on the way home, the passenger should be barred from recovery, because it is inconceivable how "under any system of *justice* [the passenger] should be allowed to recover." *Id.* at 108 (Boyer, J., dissenting) (emphasis in original). In this hypothetical, it is hard to deny that the driver had been negligent. Such a case should not fall within the doctrine of *primary* assumption of risk, analogous to the unscreened baseball seat or the steep ski slope, because one cannot say that, under the circumstances, the driver exercised reasonable care. How-

plaintiff's claim may be barred even when the defendant's conduct is negligent, because the plaintiff consciously chose to engage in the activity.³⁵ It is important to emphasize that unless the defendant is negligent,³⁶ liability will not be imposed anyway, and no separate defense is needed or relevant. However, if the defendant would ordinarily be required to compensate the plaintiff, under what circumstances and to what extent will the law relieve the defendant of that duty because the plaintiff chose to engage in the activity that caused the injury?

Generations of courts and commentators have complained about the confusion surrounding the multiple meanings of "assumption of risk," particularly in this "secondary" sense.³⁷ The decision to bar or reduce the plaintiff's recovery has been variously related to whether the plaintiff *voluntarily* encountered the risk presented by the activity;³⁸ whether the plaintiff *knew* about the defendant's negligence or other breach of duty;³⁹ whether the plaintiff had *alternatives* to the risky activity;⁴⁰ and whether the plaintiff's conduct was *reasonable* or not.⁴¹

Numerous commentators have heroically attempted to cata-

ever, the *plaintiff's* recovery could be barred by the application of equitable estoppel.

35. In *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90 (1959), the court explained that "secondary" assumption of risk "is an affirmative defense to an established breach of duty." *Id.* at 49, 155 A.2d at 93.

36. Of course, strict liability exists under some circumstances, but for present purposes the point is that plaintiff must demonstrate that, in the absence of contributory fault, there is an entitlement to shift the injury to the defendant.

37. *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 68, (1943) (Frankfurter, J., concurring):

The 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 establishes it as a legal formula, indiscriminately used to express different and sometimes contradictory ideas.

See also *Rini v. Oaklawn Jockey Club*, 861 F.2d 502, 504 (8th Cir. 1988) (confusion caused by phrase "assumption of risk"). *See also supra* note 13.

38. *Kennedy v. Providence Hockey Club, Inc.*, 119 R.I. 70, 76-77, 376 A.2d 329, 333 (1985) (plaintiff injured by errant hockey puck; assumption of risk requires proof of "the exercise of one's free will in encountering the risk").

39. *Nganga v. College of Wooster*, No. 2414, slip op. (Ohio Ct. App. Mar. 29, 1989) (soccer player's knowledge of rough play barred his claim); *Murray v. Ramada Inns, Inc.*, 521 So. 2d 1123 (La. 1988) (swimmer's knowledge of diving into shallow area reduced damages); *Smith v. Seven Springs Farm, Inc.*, 716 F.2d 1002, 1009 (3d Cir. 1983) (assumption of risk barred claim when skier's testimony indicated knowledge of risk).

40. *Brown v. San Francisco Ball Club*, 99 Cal. App. 2d 484, 222 P.2d 19 (1950) (screened seats available to baseball patron).

41. *Turcotte v. Fell*, 123 Misc. 2d 877, —, 474 N.Y.S.2d 893, 896 (1984) (jockey reasonably assumed risk of injury in exchange for substantial reward); *Segoviano v. Housing Auth.*, 143 Cal. App. 3d 162, 164, 191 Cal. Rptr. 578, 579 (1983) (decision to play flag football was not unreasonable).

logue each of the different variations of assumption of risk.⁴² Although some terminological clarity is essential, yet another catalogue of the various kinds of assumption of risk—and whether they have or have not survived the adoption of comparative fault—would not be fruitful. Instead, this article will demonstrate that assumption of risk, if treated as a form of plaintiff's strict liability, results in a doctrinally satisfying and practically enforceable system of comparative fault.

III. ASSUMPTION OF RISK AND THE ADOPTION OF COMPARATIVE FAULT

The contributory negligence rule received criticism on two grounds: first, it was inequitable, because it "place[d] upon one party the entire burden of a loss for which two are, by hypothesis, responsible."⁴³ Second, it was arbitrary; it forced juries to make an all-or-nothing choice between assigning to the plaintiff either the entire loss or none.⁴⁴ The adoption of comparative fault struck at both of these features: first, by permitting apportionment of fault it avoided the injustice of punishing the plaintiff more severely than the defendant; and second, it avoided the arbitrariness of making an all-or-nothing determination of fault.

Comparative fault appeared to eliminate many of the complex doctrines surrounding contributory negligence, relying instead upon the flexibility of the jury's allocation of fault to produce an appropriate result. However, courts were undecided on whether to extend such thinking to assumption of risk.⁴⁵ The California Supreme Court's opinion in *Li v. Yellow Cab Co.*⁴⁶ is typical. In discussing the problems associated with implementing a comparative fault system, the court raised the issue of assumption of risk. Fol-

42. Keeton, *Assumption of Risk and the Landowner*, 22 LA. L. REV. 108, 109 (1961) (two categories, express and implied); Keeton, *Assumption of Risk in Product Liability Cases*, 22 LA. L. REV. 122, 149-54 (1961) (six categories: "express," "subjectively consensual," "objectively consensual," "consent to conduct," "associational," and "imposed"); Green, *Assumed Risk as a Defense*, 22 LA. L. REV. 77 (1961) (assumption of risk cases fall into categories of intended harms, traffic, manufacturers and suppliers, landowners, master-servant, slip and fall, and contractors); F. HARPER & F. JAMES, *THE LAW OF TORTS* §§ 21.1, 21.6 (1956 & Supp. 1968) (three categories of assumption of risk defined in terms of conceptual overlap with duty, contributory negligence, and contract law).

43. PROSSER & KEETON, *supra* note 13, § 67, at 468-69.

44. *Abernathy v. Eline Oil Field Servs., Inc.*, 200 Mont. 205, 208-09, 650 P.2d 772, 774-75 (1982) (citing *Wilson v. Gordon*, 354 A.2d 398, 402 (Me. 1976)); *Kopischke v. First Continental Corp.*, 187 Mont. 471, 504-05, 610 P.2d 668, 686 (1980).

45. Nonetheless, some states statutorily abolished the assumption of risk defense. *E.g.*, OR. REV. STAT. § 18.475 (1987); CONN. GEN. STAT. ANN. § 52-572h (West 1989).

46. 13 Cal. 3d 804, 824, 532 P.2d 1226, 1240, 119 Cal. Rptr. 858, 872 (1975).

lowing many commentators on the issue, the court distinguished two different concepts covered by the term:

To simplify greatly, it has been observed . . . that in one kind of situation, to wit, where a plaintiff *unreasonably* undertakes to encounter a specific known risk imposed by a defendant's negligence, plaintiff's conduct, although he may encounter that risk in a prudent manner, is in reality a form of contributory negligence . . . Other kinds of situations arise within the doctrine of assumption of risk are those, for example, where plaintiff is held to relieve defendant of an obligation of reasonable conduct toward him. Such a situation would not involve contributory negligence, but rather a reduction of defendant's duty of care.⁴⁷

The court went on to rule that assumption of risk could simply be merged with contributory negligence⁴⁸ in those cases in which "the form of assumption of risk involved is no more than a variant of contributory negligence."⁴⁹ But if assumption of risk appeared, like last clear chance, to be another relic of the contributory negligence rule, such thinking ignored the fact that assumption of risk had never been solely a creature of the contributory negligence rule and required independent treatment.

One alternative would be to continue to treat assumption of risk as a bar, rather than a damage-reducing factor. Some courts and commentators continue to justify assumption of risk as a complete bar because they view assumption of risk as somehow more culpable than mere contributory negligence. For example, in *Kennedy v. Providence Hockey Club, Inc.*⁵⁰ an errant hockey puck struck a spectator. The court held that her voluntary subjection to a known risk constituted "consent" to the possibility of harm and that such conduct is "worlds apart from one who unwittingly and unsuspectingly falls prey to another's negligence."⁵¹ In this respect, assumption of risk resembles the mirror image of last clear chance, in which a plaintiff's contributory negligence is superseded because of the defendant's "clear"—that is, conscious—chance to avoid the injury.⁵² But to the extent that a comparative system has replaced

47. *Id.* at 824-25, 532 P.2d at 1240-41, 119 Cal. Rptr. at 872-73 (quoting *Grey v. Fibreboard Paper Prods. Co.*, 65 Cal. 2d 240, 245-46, 418 P.2d 153, 156, 53 Cal. Rptr. 545, 548 (1966)).

48. To say that assumption of risk will be "merged" with contributory negligence is to say, in effect, that it will be eliminated, because it will no longer have any independent contribution to the defendant's case.

49. *Li*, 13 Cal. 3d at 825, 532 P.2d at 1241, 119 Cal. Rptr. at 873.

50. 119 R.I. 70, 73, 376 A.2d 329, 331 (1977).

51. *Id.* at 77, 376 A.2d at 333. See also Comment, *infra* note 118.

52. The last clear chance doctrine also emphasized the fact that the defendant's con-

the all-or-nothing doctrine of last clear chance, it makes sense to judge the plaintiff's last clear chance—if that is what assumption of risk resembles—by a comparative rather than all-or-nothing standard.⁵³

IV. PROPOSAL: THE CONCEPT OF "FAULT" SHOULD INCLUDE (EVEN REASONABLE) ASSUMPTION OF RISK

As noted above, the supporters of comparative fault hoped to eliminate not only the injustice of treating the plaintiff's negligence as more culpable than the defendant's, but also arbitrary distinctions between different categories of behavior. The goal was a system in which different kinds of conduct can each be ascribed a percentage of responsibility for causing the plaintiff's harm.⁵⁴ Modern comparative fault statutes, such as the Uniform Comparative Fault Act,⁵⁵ use the term "fault" to include much more than "negligence":

"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

duct came "last," that is, after the plaintiff's negligence was known to the defendant. But because the timing of the respective parties' negligence has no bearing on the policy questions underlying the decision of who should bear the loss, a search for the "last" act of negligence is futile.

53. Some commentators suggested that when a defendant's negligence forces a plaintiff into a situation in which the plaintiff must reasonably choose to undergo the risk, the defendant should be held liable and the damages should not be reduced. PROSSER & KEETON, *supra* note 13, § 68. This view is similar to that of another commentator, who described this situation in terms of full or limited preferences of the plaintiff. When reasonable assumption of risk is based on full preference, it should operate as a bar; but if based on limited preference, it coincides either with contributory negligence or no negligence at all. This author suggests dropping the term "assumption of risk" altogether. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U.L. REV. 213 (1987).

54. *E.g.*, statutes providing comparative "responsibility" rather than comparative negligence: ARK. STAT. ANN. § 16-64-122 (1988); IOWA CODE ANN. § 668.1 (West 1988); MINN. STAT. § 604.01 Subd. 1a (1988); WASH. REV. CODE § 4.22.015 (1988). *See, e.g.*, Note, *Howard v. Allstate Insurance Co. (520 So. 2d 715 (La.))—Louisiana's Attempt at Comparative Causation*, 49 LA. L. REV. 1163, 1171 n.36 (1989) (listing states that have adopted "comparative causation"). In addition, some jurisdictions have judicially interpreted their general comparative statutes to include strict liability. *E.g.*, *Kaneko v. Hilo Coast Processing*, 65 Haw. 447, 654 P.2d 343 (1982); *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 (1980). *See infra* note 61 and accompanying text.

55. UCFA, *supra* note 1, §1(b).

requirements of causal relation apply both to fault as the basis for liability and to contributory fault.⁵⁶

Strangely, however, courts and commentators balked at integrating assumption of risk into comparative fault schemes because it is not necessarily based on negligence.⁵⁷ For example, when the California Supreme Court in *Li v. Yellow Cab Co.*⁵⁸ proposed as a general principle of tort law that liability should be assigned in proportion to fault, courts responded with widespread approbation.⁵⁹ But when it came to considering assumption of risk, the court could not distinguish it from contributory negligence.⁶⁰ In contrast, the same court in a later case had no difficulty in finding that a *defendant's* strict liability for a defective product could be compared to a *plaintiff's* ordinary negligence.⁶¹ Over the dissent of justices who complained that the court was mixing apples and oranges,⁶² the majority held that sharing the loss was preferable to an arbitrary assignment to one party.⁶³ Other jurisdictions⁶⁴ and the Uni-

56. *Id.*

57. *See supra* text accompanying notes 20-24.

58. 13 Cal. 3d at 810, 532 P.2d at 1230-31, 119 Cal. Rptr. at 862-63.

59. *See, e.g.*, *Salinas v. Vierstra*, 107 Idaho 984, 988-89 n.12, 695 P.2d 369, 373-74 n.12 (1985); *Hilen v. Hays*, 673 S.W.2d 713, 717-18 (Ky. 1984); *Abernathy v. Eline Oil Field Servs., Inc.*, 200 Mont. 205, 209, 650 P.2d 772, 775 (1982); *Kirby v. Larson*, 400 Mich. 585, 621, 256 N.W.2d 400, 417 (1977).

60. *See supra* text accompanying notes 46-49.

61. *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

62. *Id.* at 751, 575 P.2d at 1178, 114 Cal. Rptr. at 396 (Jefferson, J., dissenting): The majority's assumption that a jury is capable of making a fair apportionment between a plaintiff's negligent conduct and a defendant's defective product is no more logical or convincing than if a jury were to be instructed that it should add a quart of milk (representing plaintiff's negligence) and a metal bar three feet in length (representing defendant's strict liability for a defective product), and that the two added together equal 100 percent[—] the total fault for plaintiff's injuries

See also Recent Cases, *Negligence—Defenses—Applying Comparative Negligence to Strict Products Liability*, 4 W. ST. U. L. REV. 283, 284 (1977).

63. Justice Mosk, dissenting, disagreed. He disputed the majority's characterization of the merger of assumption of risk and contributory negligence as "felicitous":

If a consumer elects to use a product patently defective when other alternatives are available, or to use a product in a manner clearly not intended or foreseeable, he assumes the risks inherent in his improper utilization and should not be heard to complain about the condition of the object. One who employs a power saw to trim his fingernails—and thereafter finds the number of his fingers reduced—should not prevail to any extent whatever against the manufacturer even if the saw had a defective blade. I would retain assumption of risk as a total defense to products liability, as it always has been.

Daly, at 763-64, 575 P.2d at 1185-86, 144 Cal. Rptr. at 403-04 (Mosk, J., dissenting).

64. Steagall, *Illinois Adopts Comparative Assumption of Risk and Misuse in Strict Products Liabilities Cases*, 72 ILL. B.J. 476 (1984); Note, *Assumption of Risk and Strict Products Liability*, 95 HARV. L. REV. 872 (1982); Note, *Setting the Standards for the Suffi-*

form Comparative Fault Act, proposed in 1977,⁶⁵ did likewise.⁶⁶

When it came to assumption of risk, however, the confusion over its different meanings and the preoccupation with negligence as the essence of fault prevented a similar evolution toward equitable apportionment. Another hindrance may have been the treatment of strict liability for defendants in the Restatement (Second) of Torts. The Restatement authors had prescribed an all-or-nothing, not comparative, approach where the defendant's abnormally dangerous activities combined with a plaintiff's fault: a plaintiff should be barred from recovery when she assumed the risk of the abnormally dangerous activity, but contributory negligence should not be a defense at all.⁶⁷ (Ironically, this placed the negligent user of dynamite in a better position than the non-negligent user who was held strictly liable: the negligent—and presumably more cul-

ciency of an Assumption of Risk Defense in Oklahoma Manufacturers' Products Liability Actions: Bingham v. Hollingsworth, 8 OKLA. CITY U.L. REV. 45 (1983).

65. Professor Wade, a drafter of the UCFA, commented that the Act was intended to address peripheral problems that had been largely ignored by comparative fault statutes, some of which had been hastily and inarticulately drafted in the wake of the no-fault insurance movement. Conflicting pressure groups struck compromises that found their way into the statutes lacking doctrinal coherence. The UCFA was an attempt to provide a more workable model. Wade, *A Uniform Comparative Fault Act—What Should It Provide?*, 10 J. L. REFORM 220, 221 (1977). One of the peripheral issues was reasonable assumption of risk, which was dismissed by the UCFA in a brief comment. See *infra* note 115 and accompanying text. See also Note, *The Reemergence of Implied Assumption of Risk in Florida*, 10 Nova L.J. 1343 (1986) (haphazard expansion of assumption of risk doctrine resulted in assumption of risk operating as a complete defense).

66. See *supra* text accompanying note 55. The comment to this section justifies the inclusion of strict liability on philosophical and practical grounds: strict liability for products and abnormally dangerous activities is similar to negligence per se; and a jury is capable of weighing the fault involved in selling a dangerous product or engaging in an abnormally dangerous activity. UCFA, *supra* note 2, § 1 Comment.

67. RESTATEMENT (SECOND) OF TORTS § 524 (1977):

(1) Except as stated in Subsection (2), the contributory negligence of the plaintiff is not a defense to the strict liability of one who carries on an abnormally dangerous activity.

(2) The plaintiff's contributory negligence in knowingly and unreasonably subjecting himself to the risk of harm from the activity is a defense to the strict liability.

At the time of the Second Restatement's formulation, the doctrine of contributory negligence operated as a complete bar in many jurisdictions. The drafters of the Restatement preserved this bar to remain consistent with the purpose of the strict liability doctrine, which was to impose total responsibility on the defendant engaging in abnormally dangerous activities. *Id.* § 524 comment a (1965). The comment also indicates the drafters' difficulty with the logic of permitting a defense based on the plaintiff's negligence when strict liability was not based on the defendant's negligent behavior. *Id.*

The justification of assumption of risk as a defense to strict liability is clouded by describing this defense as including behavior that was either a voluntary encounter of a known risk or a voluntary *unreasonable* encounter of a known risk. *Id.* § 524 comment b. As Prosser observes, the latter involves fault and assumption of risk is not usually thought of as a fault defense. PROSSER & KEETON, *supra* note 13, § 79.

pable—defendant could reduce liability by the percentage of plaintiff's negligence, whereas the strictly liable defendant could not.⁶⁸) More recent attempts to consider the impact of contributory fault on strict liability theories have leaned toward comparing the two on a percentage basis,⁶⁹ as the California court did in *Daly* and as the Uniform Law Commissioners did in the Uniform Comparative Fault Act.⁷⁰ Unfortunately, few courts have extended this principle to *plaintiff's* strict liability.

Despite the belief of many courts and commentators that the "apple" of negligence cannot be compared with the "orange" of no-fault approaches, an all-or-nothing approach to assumption of risk should be rejected for two reasons: first, for reasons of doctrine, because of the symmetry between plaintiff's strict liability and defendant's strict liability. This can best be explained through the Calabresian theory of entitlements. The second argument is less elegant, but perhaps more persuasive: unless a middle position is found between the extremes of full recovery and no recovery, assumption of risk will create the same dangers as the contributory negligence rule: unjust and arbitrary application by fact-finders.

A. *Assumption of Risk and the Calabresian Theory of Entitlements*

Tort liability is based upon a scheme of legal entitlements that either creates tort liability or protects a person against the imposition of tort liability.⁷¹ When a loss or injury occurs, society must decide whether to let the loss lie where it falls,⁷² or to shift the loss

68. It is quite likely that the Restatement's position on abnormally dangerous activities was a creature of the contributory negligence rule: if the plaintiff would ordinarily be barred from recovery if contributory negligence were recognized as a defense, the Restatement authors may have believed that on balance the "all" position was better than the "nothing" position. One can only speculate what the Restatement drafters' position would have been had the option of a comparative solution been available for contributory negligence in general.

69. In a strict liability case based on a defective product, courts have used "assumption of risk" as a damage-reducing factor, defining it in such a way that it resembles contributory negligence. *Zahrte v. Sturm, Ruger, & Co.*, 203 Mont. 90, 661 P.2d 17 (1983) (assumption of risk defined as a voluntary and *unreasonable* encounter of a known risk).

70. See *supra* note 50 and accompanying text.

71. Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090 (1972).

72. As Calabresi and Melamed explained in *Property Rules, and Inalienability: One View of the Cathedral*:

When a loss is left where it falls in an auto accident, it is not because God so ordained it. Rather it is because the state has granted the injurer an entitlement to be free of liability and will intervene to prevent the victim's friends, if they are stronger, from taking compensation from the injurer. The loss is shifted in other

to some other party. The loss is shifted to a defendant on a variety of theories: negligence, strict liability, or contract. Similarly, society may decide that the plaintiff should properly bear the loss, even when it would otherwise shift to the defendant, because of the plaintiff's own negligence, a contractual agreement not to sue, or some no-fault theory. Tort law has recognized both comparative negligence⁷³ and contractual defenses,⁷⁴ but to date it has had difficulty recognizing a distinct "no-fault" theory. Assumption of risk provides the missing element in this periodic table. It can be used to analyze a plaintiff's conduct in exactly the same way that the theory of abnormally dangerous activities is used to analyze a defendant's conduct.

Two cases illustrate the application of strict liability theory to abnormally dangerous activities by a defendant. In *Spano v. Perini Corp.*,⁷⁵ a garage owner sustained damages to his property caused by the defendants' use of explosives in a nearby municipal-tunnel project. The court held the defendants strictly liable for all damages caused by the blasting, although the decision to blast and the manner of use were reasonable. The court recognized that explosives were necessary to construct the tunnel and society benefitted from the construction. However, the blasting still invaded the plaintiff's entitlement to undisturbed possession and enjoyment of his property. Although the defendant had been given the freedom to blast, the question "was not *whether* it was lawful to engage in blasting but *who* should bear the cost of any resulting damage."⁷⁶ After weighing the respective entitlements, the court held that the defendants, and not the innocent plaintiff, should bear the cost of accidental harm caused by blasting.⁷⁷ Similarly, toxic-waste dispo-

cases because the state has granted an entitlement to compensation and will intervene to prevent the stronger injurer from rebuffing the victim's requests for compensation.

Id. at 1091.

73. *Buck v. State*, 222 Mont. 423, 430-31, 723 P.2d 210, 215 (1986); *Abernathy v. Eline Field Servs., Inc.*, 200 Mont. 205, 208-09, 650 P.2d 772, 774 (1982).

74. *E.g.*, *Kuehner v. Green*, 406 So. 2d 1160, 1161 (Fla. 1983) (karate student's express assumption of risk); *O'Connell v. Walt Disney World Co.*, 413 So. 2d 444, 447-48 (Fla. 1982) (plaintiff injured in amusement park horse stampede did not expressly assume the risk of defendant's negligence); *Van Tuyn v. Zurich Am. Ins. Co.*, 447 So. 2d 318, 321 (Fla. 1984) (express assumption of risk of riding a mechanical bull).

75. 25 N.Y.2d 11, 302 N.Y.S.2d 527 (1969).

76. *Id.* at 17, 302 N.Y.S.2d at 532.

77. *Id.* A similar approach was used in allocating liability when a car and its driver were burned by the spillage of gasoline from a tanker truck. *Siegler v. Kuhlman*, 81 Wash. 2d 448, 502 P.2d 1181 (1973). The court held that the negligence of the defendant was irrelevant for two reasons: first, all proof had disappeared in the explosion and, second, the defendant was strictly liable for any injuries caused by his transportation of gasoline. The

sal frequently triggers the application of the abnormally dangerous activity doctrine. For example, in *Kenney v. Scientific, Inc.*,⁷⁸ residents in the vicinity of two landfills sued the state, municipality and private operators for damages caused by the escape of toxic wastes. The court held that the disposal of toxic wastes, past and present, was an abnormally dangerous activity. Relying on the Restatement (Second) of Torts, the court held that despite the social benefit from disposing of the toxic wastes, "the unavoidable risk of harm that is inherent in it requires that it be carried on at [defendant's] peril, rather than at the expense of the innocent person who suffers harm as a result of it."⁷⁹ In addition, the court emphasized that "the creators of abnormally dangerous substances are far better able than the victims to sustain the costs of the injuries."⁸⁰

As these two cases illustrate, defendants who engage in abnormally dangerous activities are required to shoulder the cost of resulting damages, even if they exercise reasonable care. As noted earlier, Professors Calabresi and Hirschoff suggested that assumption of risk should be viewed as a form of plaintiff's strict liability;⁸¹ although the decision to engage in a risky activity may have been reasonable, society may justifiably expect the plaintiff to bear the risk of loss, rather than forcing the defendant (even if negligent) to do so. Perhaps the reason that this concept did not achieve greater acceptance is that Calabresi and Hirschoff included this suggestion as part of the Calabresian theory of the "cheapest cost avoider,"⁸² in which fault and comparative negligence receive secondary emphasis. Although Calabresi in a later article recognized that the comparative negligence rule may provide superior incentives for reducing accident costs,⁸³ he preferred avoiding the

court stressed that imposition of liability on the defendant was grounded not on the idea of deterrence or punishment (the defendant may have acted non-negligently), but on a policy judgment of which one of two innocent parties should bear the cost of loss. In reaching its decision the court drew upon the criteria set forth in the RESTATEMENT (SECOND) OF TORTS. *Siegler*, 81 Wash. 2d at 458, 502 P.2d at 1186-87 (citing with approval RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (Tent. Draft No. 10, 1964)).

78. 204 N.J. Super. 228, 497 A.2d 1310 (1985).

79. *Id.* at 247, 497 A.2d at 1320 (citing RESTATEMENT (SECOND) TORTS § 520 comment h (1977)).

80. *Id.* at 248, 497 A.2d at 1321.

81. Calabresi & Hirschoff, *supra* note 11 at 1065.

82. Calabresi's theory of tort law as a search for the cheapest cost avoider is set forth in G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970), and in Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L.J. 656 (1975). For recent commentary on Calabresi's theory, see Atanasio, *The Principle of Aggregate Autonomy and the Calabresian Approach to Products Liability*, 74 VA. L. REV. 677 (1988); Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CAL. L. REV. 677 (1985).

83. Calabresi, *supra* note 82, at 663.

determination of "fault" altogether. Instead, Calabresi would assign liability to whichever party was in the best position to *decide correctly* whether the accident should be avoided.⁸⁴

Perhaps because of Calabresi's doctrinal emphasis on the search for the cheapest cost avoider, regardless of "fault," the theory of assumption of risk as a form of plaintiff's strict liability did not find its way into such reformulations of comparative fault as the Uniform Comparative Fault Act.⁸⁵ The UCFA does, however, treat the problem of what to do when a plaintiff's negligence concurs with a defendant's abnormally dangerous activity to produce an injury. Unlike the Restatement (Second) of Torts, which does not recognize contributory negligence as a defense to strict liability,⁸⁶ the UCFA proposes an inclusive definition of "fault," with an assignment of shares of fault to any party whose actions create liability for an injury, regardless of whether liability is based on negligence or strict liability. Thus, if a gasoline tank truck spills gasoline and the plaintiff negligently drives into the spill, the tank truck owner will be strictly liable for the injury but the plaintiff's negligence would be a damage-reducing factor.⁸⁷

Thus, if a plaintiff's decision to engage in an abnormally dangerous activity like high school football is the mirror image of a defendant's decision to engage in an abnormally dangerous activity such as blasting, the mirror-image approach should be taken. For example, take the *Benitez* case cited at the beginning of this article: the student's decision to play high school football concurred with the defendant's negligence to produce injury. Under the proposed approach, the jury would then be asked to assign a percentage of fault to the defendant's negligence, and a percentage of fault to the plaintiff's decision to engage in the abnormally dangerous activity of playing football.⁸⁸

B. *The Practical Arguments*

In addition to the doctrinal symmetry that results from treating assumption of risk as a form of plaintiff's strict liability, impor-

84. *Id.* at 666. Under the Calabresian theory, not all accidents are worth avoiding. Just as Learned Hand's calculus (*supra* note 31) requires safety measures only if they are cheaper than the cost of an accident discounted by its probability, so Calabresi is interested in locating the person best situated to decide whether additional safety measures are worthwhile.

85. See *infra* text accompanying note 115.

86. RESTATEMENT (SECOND) OF TORTS § 524 (1977).

87. See *supra* note 64 and accompanying text.

88. This, of course, is what the jury did in *Benitez*, but the New York Court of Appeals rejected it by applying an all-or-nothing approach to assumption of risk.

tant practical advantages suggest a percentage rather than an all-or-nothing approach. As noted earlier, a major criticism of the contributory negligence rule was that it forced juries to make an all-or-nothing decision about where a loss should fall, even when both plaintiff and defendant appeared to share responsibility. Those familiar with the actual administration of jury trials acknowledged that juries frequently arrived at a compromise verdict despite legal instructions to the contrary.⁸⁹

A similar problem is likely to occur if juries are forced to award all or nothing to a plaintiff who has assumed the risk of injury but is also injured by defendant's negligence. The current approach to assumption of risk in most jurisdictions creates two Procrustean beds that do not accommodate cases like the high school football player's injury. On the one hand, the court (or jury) can (1) impose assumption of risk as an independent defense that bars, rather than reduces, the plaintiff's recovery; or (2) abolish assumption of risk as an independent defense (except for express assumption of risk) and rely solely upon contributory negligence to perform any damage-reducing function. Neither is satisfactory.

1. *Retaining the Bar: Express and Implied Assumption of Risk*

Some courts have held that, because assumption of risk is not a form of negligence, it is *not* affected by the adoption of comparative negligence. In particular, many commentators and courts have argued that *express* assumption of risk is a defense independent of comparative fault.⁹⁰ Unfortunately, confusion over terminology has engendered uncertainty as to whether the emphasis is upon the *primary* assumption of risk—in which the plaintiff has in effect told the defendant not to make the activity safer—or upon the *express* (i.e., contractual) aspect of the relationship. Express assumption of risk is theoretically based upon a *contractual* agreement between the plaintiff and the defendant that relieves the defendant of the duty to use reasonable care.⁹¹

89. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 811, 532 P.2d 1226, 1231, 119 Cal. Rptr. 858, 863 (1975).

90. PROSSER & KEETON, *supra* note 13, § 68, at 496; V. SCHWARTZ, *supra* note 1, § 9.2, at 152; *Rutter v. Northeastern Beaver County*, 496 Pa. 590, 610, 437 A.2d 1198, 1209 (1981).

91. PROSSER & KEETON, *supra* note 13, § 68, at 481. Such analysis must be carefully distinguished from those cases in which the standard of ordinary care is modified because of the plaintiff's preferences. If a plaintiff goes to a ski slope and wants a thrilling run, the standard of reasonable care does not mean giving her a bunny slope; reasonable care permits the defendant to give her a very dangerous vertical slope. *See supra* text accompanying notes 27-30.

This theory has limited utility in the case of the high school football player. First, it is unlikely that the defendant can successfully argue that the plaintiff has in effect asked for the particular danger of which he is now complaining, such as negligent coaching. Unlike the unscreened baseball seat, the high school player would not prefer a negligent coach to an adequately trained one. However, one might still argue that the high school player's *express* agreement to forego a right to sue the school district would be a complete defense.

Are such releases effective? The hornbook answer to this question is: "There is in the ordinary case no public policy which prevents the parties from contracting as they see fit, as to whether the plaintiff will undertake the responsibility of looking out for himself."⁹² Such agreements, however, are not binding "where one party is at such obvious disadvantage in bargaining power that the effect of the contract is to put him at the mercy of the other's negligence."⁹³ How do these principles apply to the ordinary football player? In Washington, two school districts required their student athletes to sign a standardized form releasing the school district from liability created by participation in school-sponsored extracurricular activities. Several students refused to sign and were prohibited by their schools from participating in extracurricular activities. The Washington Supreme Court held that these releases were unconscionable contracts of adhesion and, thus, invalid.⁹⁴ If express agreements are found to be not unconscionable, they will insulate the school district and its employees from liability regardless of their negligence. But if they are found unconscionable, and no other provision is made for factoring in the plaintiff's decision to engage in a risky activity, the plaintiff's share of responsibility will be ignored.

92. PROSSER AND KEETON, *supra* note 13, § 68, at 482.

93. *Id.* See also *Miller v. Fallon County*, 222 Mont. 214, 721 P.2d 342 (1986). The appellant had accompanied her husband, an independent truck driver, on a business trip. An accident occurred, rendering the appellant a paraplegic. *Id.* at 216, 721 P.2d at 344. The Montana Supreme Court reversed a summary judgment for defendant based on appellant's having signed the following "Application to travel with my husband":

Furthermore, in the event of an accident or other manner wherein I may lose my life, be injured, or in any way contribute to the injury or loss of life to another, I hereby waive any rights whatsoever against Pre-Fab Transit Co. for what otherwise might be its liability and agree that Pre-Fab Transit Co., its agents, employees and contractors are to be held harmless in all respects by virtue of my being a passenger in said vehicle.

Id. at 216-17, 721 P.2d at 344. The court held that "an entity cannot contractually exculpate itself from liability for willful or negligent violations of legal duties, whether they be noted in statutes or case law." *Id.* at 221, 721 P.2d at 347.

94. *Wagenblast v. Odessa School Dist.*, 110 Wash. 2d 845, 758 P.2d 968 (1988).

Similar problems have occurred when courts have attempted to apply the doctrine of *implied* assumption of risk. The analysis of *express* assumption of risk should not be significantly different from the analysis of *implied* assumption of risk, because both are based upon the claim that the plaintiff has agreed to release the defendant from the duty to use reasonable care.⁹⁵ Courts have divided on the issue of when an implied assumption of risk bars the plaintiff's claim. For example, in *Whipple v. Salvation Army*,⁹⁶ a 15-year-old boy was injured in a game of tackle football sponsored by the defendant's youth program. The plaintiff alleged that his injury was caused by the defendant's negligent training and supervision. The appellate court sustained the trial court's directed verdict in the defendant's favor:

[A]s a matter of law . . . a 15-year-old boy, without evidence of mental deficiency or untoward seclusion from life's experiences common to boys of that age, sufficiently appreciates the dangers inherent in the game of football so that he assumes the risk thereof when he plays. In the present case, defendant created a hazard, that of playing football, and plaintiff voluntarily exposed himself to that hazard.⁹⁷

On the other hand, consider *Rutter v. Northeastern Beaver County School District*.⁹⁸ The plaintiff suffered a detached retina during a game of "jungle football." He sued, alleging that the school district had failed to follow appropriate safety standards. In response to the claim that assumption of risk should apply, the court noted the different varieties of assumption of risk, and their effect upon the issue of "voluntariness":

It is apparent that when the risk is defined more narrowly, . . . the analysis of voluntariness changes. . . . Appellant was familiar with varsity football and he voluntarily participated in it, but it does not follow that he voluntarily participated in jungle football if such participation was required to make the varsity team. . . . Another way to put this is that the voluntariness of appellant's act must be proximately related to the danger (or the risk) which caused the injury. Otherwise, the question of voluntariness, which is said to be at "the basis" of assumption of risk, Restatement §

95. After all, the only difference between *express* and *implied* assumption of risk is the degree of certainty one has about the nature of the bargain between the plaintiff and the defendant. A signed agreement simply prevents controversy over whether an agreement was in fact reached, and what its content was. The issue remains whether its *enforcement* is consistent with public policy.

96. 261 Or. 453, 495 P.2d 739 (1972).

97. *Id.* at 462, 495 P.2d at 743.

98. 496 Pa. 590, 437 A.2d 1198 (1981).

496 E, comment a, would be avoided, for the only relevant voluntariness is voluntariness related to the risk.⁹⁹

In such cases the court agonizes over whether the plaintiff's encounter with the risk was truly voluntary.¹⁰⁰ As the court noted in *Rutter*, this analysis in turn depends on whether the risks are defined broadly or narrowly. When the risk is defined broadly ("those who play football are likely to get hurt"), the average high school player voluntarily assumes it. On the other hand, when the risk is defined narrowly ("those who play football for a coach with less than the recommended twelve hours of training in injury prevention") then the average player will almost never be aware of the risk and, thus, will not be said to have assumed it. As a consequence, whether one focuses on express or implied assumption of risk, courts are ill-equipped to ferret out whether the plaintiff's purported waiver of any right to recover was truly voluntary. This is not surprising, because such factual determinations are heavily freighted with the larger policy question of whether it is more unfair to permit defendants to escape the consequences of their negligence, or to let plaintiffs escape the consequences of their voluntary decision to encounter a danger.

Another blind alley is a false dichotomy between the "inherent" risks of the activity and the risks imposed by the defendant's

99. *Id.* at 613, 437 A.2d at 1208.

100. In a recent article, Professor Simons states the problem in terms of whether the plaintiff *fully preferred* the choice of participating in the activity (to not participating), or whether in fact the plaintiff would have preferred some third alternative that the defendant tortiously refused to offer the plaintiff. Simons, *supra* note 53, at 221. The difficulty with this formulation is that it makes the plaintiff responsible for a risk only when the plaintiff has been completely informed of all available choices and then has consciously selected the injury-causing activity. In reality, almost all injuries are surrounded by varying degrees of ignorance on the part of all participants. Neither the coach nor the player fully knows the extent of their respective limitations in training, conditioning, equipment, or other similar factors. If only a fully informed, fully preferred choice constitutes a defense, then it will have almost no application. Professor Simons offers the illustration of a hang-glider pilot who consciously decides not to fly surrounded by an iron cage, although the iron cage would be safer. While the defendant would be exonerated from any liability in this scenario, it is hardly any comfort to the manufacturer of hang-gliders, because no one would be likely to make such an argument. However, the more realistic scenario is that the hang-glider frame has an inadequate weld on one of the metal joints. The hang-glider collapses in mid-air and the pilot is seriously injured. Because the plaintiff would have preferred a non-negligently welded frame, assumption of risk would not apply under Professor Simons' model, unless the defendant could show that the plaintiff knew all about the limitations of welded frames and "fully preferred" that no further care be taken. That will rarely be true. Similarly, the high school football player will never know all of the alternative ways that the game might be played. Thus, assumption of risk would almost never apply. Yet it is precisely the case that assumption of risk might plausibly be invoked.

negligence.¹⁰¹ For example, in *Thompson v. Ruidoso-Sunland, Inc.*,¹⁰² both the jockey and racetrack owner were aware of the danger posed by an exposed metal bar anchoring the inside rail. The jockey fell from his horse onto the bar and sued the race track owner for his injuries. The court held that both the plaintiff and the defendant were negligent and that the exposed metal bar was not a danger inherent in horse racing.¹⁰³ The court stated that if the jockey had fallen from his horse to the ground, the claim might have been barred based on an implied consent to normal risks inherent in the sport.

When a plaintiff is injured solely by a risk "inherent" in a particular activity, however, then the defendant has no need of the assumption of risk defense, because the plaintiff will be unable to show that the defendant's negligence caused the injury. But if the plaintiff argues that the inherent risk was exacerbated by the defendant's failure to use reasonable care (for example, to provide proper instruction to the high school football player), then many courts would find that the doctrine of assumption of risk is unavailable.¹⁰⁴

A similar analysis, with an opposite result, was used in *Conradt v. Four Star Promotions, Inc.*¹⁰⁵ Before entering a demolition derby sponsored by the defendant racetrack, the plaintiff, an experienced driver, signed the defendant's standardized form releasing the racetrack from liability for the obvious and inherent risks of racing, including the defendant's negligence. Thereafter the defendant reversed the direction of the race, and the plaintiff was

101. For example, the inherent risks involved in skiing (e.g., trees, steep, or icy slopes, etc.) should be distinguished from the risks created by a defendant's negligent grooming of the slopes. These are not, however, mutually exclusive sources of injury, as is sometimes thought. Instead, negligence and inherent risk frequently combine to produce a single injury, in which case it is improper to insist upon a decision of what "caused" the skier's fall, just as it is improper to insist that the jury decide whether the defendant's speeding cab or the plaintiff's illegal left turn "really caused" the collision. The correct solution in both cases is to ask the jury to allocate the loss between the respective risks.

102. 105 N.M. 487, 734 P.2d 267 (1987).

103. *Id.* at 491, 734 P.2d at 271.

104. In fact, the treatment of inherent risk and the exacerbation of the risk should not be treated as mutually exclusive causes. Consider the mirror image of the defendant's strict liability: a truck full of gasoline has an inherent risk of fire that makes the operation of the truck subject to strict liability as an abnormally dangerous activity; a negligent plaintiff, however, may encounter that risk unnecessarily. Under comparative fault principles the two causes of injury would be compared by the jury on a percentage basis. Similarly, instead of forcing the trier of fact to decide whether a football player's injury occurred because of the inherent risks of the sport or because the defendant negligently increased the risk of injury, the court should permit a determination that *both* causes contributed to the accident, with an assignment of responsibility accordingly.

105. 45 Wash. App. 847, 728 P.2d 617 (1986).

subsequently injured. The plaintiff sued the racetrack alleging that the negligent change in direction caused his injuries. The court held that the plaintiff had expressly assumed the risks inherent in demolition racing, and that the change in direction was within that general category of risks. The court's decision may have been influenced by the fact that the plaintiff signed a form expressly relieving the race track of its obligation to use reasonable care, but the court relied upon a finding that the actions of the defendant were within the inherent risks of the activity.

These cases illustrate the flexibility of the concept of *voluntary* assumption of risk, and the futility of searching for a bright—and dispositive—line between the risks covered by the assumption of risk defense and those which were negligently created by the defendant. Regardless of whether one focuses on the plaintiff's *voluntary* decision to engage in the activity—risks and all—or on whether the defendant's negligent conduct was known to the plaintiff or not, courts cannot meaningfully distinguish between those cases in which the plaintiff should recover all and those cases in which she should recover nothing.

2. *Abolishing Assumption of Risk: "Merging" It with Contributory Negligence*

Another approach to assumption of risk has been to "merge" it with contributory negligence, which in effect abolishes it, at least in its secondary sense.¹⁰⁶ Even before the general adoption of com-

106. Many states have purported to abolish the assumption of risk defense, at least in its secondary sense, by statute. *See e.g.*, *Rutter v. Northeastern Beaver County*, 496 Pa. 590, 613 n.5, 437 A.2d 1198, 1209 n.5 (list of twenty jurisdictions that have either "seriously modified or abolished" the doctrine of assumption of risk).

Montana also abolished the doctrine of implied assumption of risk as an affirmative defense in negligence actions in *Abernathy v. Eline Oil Field Servs., Inc.*, 200 Mont. 205, 211 650 P.2d 772, 775-76 (1982). A combination of assumption of risk and contributory negligence remains, however, a defense in strict liability actions. *See Zahrte v. Sturm, Ruger & Co.*, 203 Mont. 90, 661 P.2d 17 (1983). In *Zahrte*, the Montana Supreme Court explained two reasons for retaining the defense in strict liability actions:

First, the defense of assumption of risk in a strict liability action is different from common law assumption of risk as applied to negligence actions. Secondly, we felt that a defense should be retained for strict liability actions and that assumption of risk may be the appropriate defense.

Id. at 93, 661 P.2d at 18. Of course, as noted previously, *supra* note 61 and accompanying text, contributory negligence ought to be recognized as a defense even to strict liability actions. To invoke the defense of assumption of risk in a Montana products liability case, the defendant must prove the plaintiff had "a subjective knowledge of the danger and then voluntarily and unreasonably expose[d] himself to that danger." *Zahrte*, 203 Mont. at 93-94, 661 P.2d at 19. If so, the jury will reduce the recovery by a percentage share similar to the comparison employed under the comparative negligence statute. *Id.* at 94, 661 P.2d at 18-19. *Accord Krueger v. General Motors Corp.*, ___ Mont. ___, 783 P.2d 1340 (1989).

parative fault, some commentators and courts argued for abandoning the term "assumption of risk" except to describe the situation in which a person expressly assumes a known risk.¹⁰⁷ And when the New Jersey Supreme Court considered the issue in *Meistrich v. Casino Arena Attractions, Inc.*,¹⁰⁸ it held that the "secondary" sense of assumption of risk was synonymous with contributory negligence.¹⁰⁹ Thus, many courts and commentators seemed to believe that assumption of risk could simply be relegated to the same dustbin as last clear chance. However, such approaches simply shift the battleground to the dispute over what constitutes "primary" assumption of risk. In the case of the school district and the injured football player, it seems absurd to suggest that the plaintiff would agree to relieve the defendant of the duty to use reasonable care. In fact, as we have seen, many courts will prevent enforcement of such agreements.¹¹⁰ It may be that the defendant met the standard of reasonable care, using the analysis applied earlier to ski resorts and baseball stadiums. However, when the jury is convinced that the defendant was negligent, a complete release of the defendant appears unjust.

Of course, it is possible to divide the damages on a percentage basis if the plaintiff is found negligent. Some cases will certainly permit such a result; for example, when a player is aware of a negligently created danger but proceeds to encounter it anyway. In other cases, however, only a tortured application of the contributory negligence principle will achieve that result. Juries have found that reasonable people *do* play football, hockey, and other danger-

107. H. WOODS, *COMPARATIVE FAULT*, § 6.1, at 131 (2d ed. 1987) (citing 2 HARPER & JAMES, *THE LAW OF TORTS*, 1191 (1956)). More recently, in *Abernathy v. Eline Oil Field Servs., Inc.*, 200 Mont. 205, 650 P.2d 772 (1982), the father of the deceased plaintiff decided to drive his son to school in a heavy snowstorm and became stuck in a snowdrift, perpendicular to the traffic in the right lane. A 16,000 pound truck hit the car, killing the son. The Montana Supreme Court ruled that jury instructions on assumption of risk were prohibited in all negligence cases and only the issues of negligence and contributory negligence could be considered. *Id.* at 211, 650 P.2d at 776. The court reasoned that assumption of risk and contributory negligence instructions were contradictory because the former was governed by a subjective standard and the latter by an objective one. *Id.* at 207-11, 650 P.2d at 774-76.

108. 31 N.J. 44, 155 A.2d 90 (1959).

109. Many other commentators have called for the abolition of assumption of risk as an independent doctrine. Paraphrasing an earlier commentator, Professor James suggested:

A plaintiff's *reasonable* assumption of risk would not bar him unless the risk was one which defendant had a legal right to put up to plaintiff; and in such a case defendant breached no relevant duty. A plaintiff's *unreasonable* assumption of risk would constitute contributory negligence on his part; and this would be a defense without the need to invoke any separate doctrine.

James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185, 185 (1968) (footnotes omitted, emphasis in original).

110. See *supra* note 94 and accompanying text.

ous sports.¹¹¹ On the other hand, according to the abolitionist position, the only other option for the court is to find that the defendant owed no duty to the plaintiff.¹¹² As noted above, no bright line separates injuries caused by negligence from injuries caused by the inherent risks of the game. In fact, both frequently concur to cause an injury. But without a comparative doctrine, in some cases the player will be left with no recovery, despite the obvious negligence of the defendant; in others the player will receive a 100% recovery, despite his having consciously engaged in what he knew was a dangerous sport. Neither option is satisfactory.

3. *A Solution: The Percentage Approach*

A few courts and commentators have suggested extending a percentage approach to include *reasonable* assumption of risk. For example, in *Kirk v. Washington State University*,¹¹³ a college cheerleader was injured when she practiced a pyramid stunt on astroturf, rather than the softer indoor mats on which she was accustomed to practicing. She sued the university for failing to provide adequate coaching, and the university asserted assumption of risk as a defense. The Washington Supreme Court ultimately approved a jury instruction that allowed the jury to reduce the plaintiff's damages to the extent she "[v]oluntarily participat[ed] in an activity which she knew to be dangerous."¹¹⁴

As obvious as this solution is, many commentators have objected to any reduction of the plaintiff's recovery if the plaintiff acted reasonably, that is, non-negligently. As noted, the Uniform Comparative Fault Act included only *unreasonable* assumption of risk in its definition of "fault," reasoning that reasonable assumption of risk "is not fault and should not have the effect of barring recovery."¹¹⁵ This, of course, ignores the possibility of using reasonable assumption of risk to *reduce* the recovery. After all, although assumption of risk is not based on negligence, the same is true of the UCFA's assignment of "fault" based on strict liabil-

111. See, e.g., *Segoviano v. Housing Auth.*, 143 Cal. App. 3d 162, 175, 191 Cal. Rptr. 578, 588 (1983).

112. Or the abolitionist might suggest that the standard of care be reduced in light of the plaintiff's preferences, as discussed earlier in connection with the skiing cases. However, when it is clear that the plaintiff would not have preferred the particular danger that the defendant negligently created, it is difficult to see how the defendant's duty could either be reduced or eliminated altogether.

113. 109 Wash. 2d 448, 746 P.2d 285 (1987).

114. *Id.* at 452, 746 P.2d at 288.

115. UCFA, *supra* note 1, § 1, Commissioner's Comment.

ity.¹¹⁶ Prosser and Keeton's discussion of assumption of risk contains the same fallacy: reasonable assumption of risk should not act as a bar to recovery. "Nor logically should it even factor in to reduce the plaintiff's damages, since his conduct has by definition been free from blame."¹¹⁷

Other commentators, however, have been more flexible. Noting the equally unacceptable alternatives of full recovery and no recovery, one commentator has suggested that apportionment of liability would be appropriate when reasonable assumption of risk applies. "This approach is not precluded by practical constraints, and would allow a jury to consider the particular equities in a given case. . . . The law ought not seek out black or white solutions when a compromise of gray comes closer to achieving fairness."¹¹⁸

Some statutes have also attempted to find a middle position. Arkansas' comparative-fault statute defines fault to include "any act, omission, conduct, risk assumed, breach of warranty, or breach of any legal duty which is a proximate cause of any damages sustained by any party."¹¹⁹ Similarly, Professor Schwartz has suggested that unless courts recognize reasonable implied assumption of risk as a damage-reducing factor, the very purpose of the comparative system would be undermined: "The true meaning of comparative fault is comparative responsibility. When a plaintiff engages in classic assumption of risk conduct, he is *in part* responsible for his injury."¹²⁰

V. APPLICATION OF THE PROPOSED ASSUMPTION OF RISK PRINCIPLE

If courts accept assumption of risk as a defense separate from contributory negligence and treat it as an analogue to a defendant's abnormally dangerous activity, how should they instruct ju-

116. *Id.* § 1(b).

117. PROSSER & KEETON, *supra* note 13, § 68, at 497-498. This language was quoted with approval in *Rini v. Oaklawn Jockey Club*, 861 F.2d 502, 509 (8th Cir. 1988) (jockey sued riding club for negligent operation of the racetrack; jury's finding of assumption of risk reversed). *Accord Segoviano v. Housing Auth.*, 143 Cal. App. 3d 162, 174, 191 Cal. Rptr. 578, 587 (1983) ("If we assume a plaintiff has acted reasonably in regard to his own safety in deciding to confront the risk, then his act of confronting the risk may not be considered as 'fault' justifying an apportionment of damages.").

118. Comment, *Assumption of Risk in a Comparative Negligence System—Doctrinal, Practical, and Policy Issues: Kennedy v. Providence Hockey Club, Inc.; Blackburn v. Dorta*, 39 OHIO ST. L.J. 364, 374-75 (1978).

119. ARK. CODE ANN. § 16-64-122(c) (1987). However, as noted above, *supra* note 117, in interpreting this statute, the Eighth Circuit Court of Appeals rejected the suggestion that reasonable assumption of risk should serve as a damage-reducing factor, following the reasoning just criticized. *Rini v. Oaklawn Jockey Club*, 861 F.2d 502, 509 (8th Cir. 1988).

120. V. SCHWARTZ, *supra* note 1, § 9.5, at 180 (emphasis in original).

ries to recognize assumption of risk and apply it? If defendants and plaintiffs are to be treated analogously, plaintiff's strict liability, that is, assumption of risk, should only apply when the plaintiff has engaged in an *abnormally* dangerous activity. Just as a defendant is not held strictly liable simply because his activity poses some danger to others, so a plaintiff should not be held to assume a risk simply because her activity poses some danger to herself.

The doctrinal basis of strict liability for defendants' abnormally dangerous activities remains unsettled. The Restatement offers six "factors" to be considered—with no particular weighting—in making the determination.¹²¹ In an influential article Professor Fletcher suggested that courts have imposed strict liability on defendants when their conduct posed an unexcused, "non-reciprocal risk" to the plaintiff. Non-reciprocal risks "represent a threat of harm in excess of the level of risk to which all members of a community contribute in roughly equal shares."¹²² A similar analysis could be used in determining whether a plaintiff's conduct qualifies as "assumption of risk." When a plaintiff engages in a risky behavior common to many members of the community, the defendant should have no expectation that a plaintiff will be made responsible for her injuries. On the other hand, when a plaintiff engages in unusually risky behavior that is common to only a few members of her community, such as hang-gliding, she should expect to bear some of the risk of injury—even when someone else's negligence also caused the injury.

In addition, in some cases a plaintiff's behavior, though not especially risky, is risky enough to multiply the defendant's cost of offering the activity. For example, many high schools are considering abolishing or reducing sports programs because of liability risks.¹²³ In such cases a plaintiff's willingness to assume at least part of the risk of injury—again, even when he is not at fault—may make it possible for the defendant to provide the facilities for the activity at a reasonable cost. A plaintiff's contractual agreement to assume the inherent risks of an activity may estab-

121. The factors include: (1) the likelihood of injury; (2) the magnitude of harm; (3) the extent to which reasonable care would suffice to prevent an injury; (4) whether the activity is a matter of common usage; (5) whether it is appropriate to the place where it is carried on; and (6) its value to the community. RESTATEMENT (SECOND) OF TORTS § 520 (1977).

122. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 547 (1972). Fletcher attempts to justify the application of strict liability on the basis of "just deserts." Calabresi and Hirschoff criticized Fletcher's approach for its failure to account for the way in which notions of efficiency or distributive justice affect the determination of "just deserts." Calabresi & Hirschoff, *supra* note 11, at 1078-80.

123. Gutis, *Schools Watch Court on Liability Issue*, N.Y. Times, June 6, 1989, at 3, col. 4.

lish an assumption of risk defense as a matter of law. Similarly, some statutes require that the participant in a dangerous activity, such as skiing, bear the responsibility for the inherent risks of injury.¹²⁴ In such cases the jury would not need to determine *whether* the activity was abnormally dangerous, but only what part of the plaintiff's injury resulted from the defendant's negligence and what part resulted from the inherent risks of the activity. Assumption of risk frequently arises in situations in which the plaintiff and the defendant have the opportunity to bargain beforehand (hang-glider pilot and manufacturer, school district and football player, Outward Bound instructor and camper, for example). Therefore, an assumption of risk clause—used not as a bar, but as a damage-limiting factor—should be judicially recognized.

The following is offered as a draft for the composition of a suitable jury instruction:¹²⁵

In this case the defendant contends that the plaintiff's injury arose in whole or part from engaging in [skiing] [scuba diving] [etc.] which defendant contends is an inherently dangerous activity.

An inherently dangerous activity is one that

(1) is dangerous to an extent beyond that which the ordinary person would expect to encounter in [his] [her] daily activities;

(2) was freely chosen by the plaintiff, knowing of its inherent danger; and

(3) is one that may result in injury even when all reasonable care has been exercised.

If you find that the activity in which the plaintiff was engaged was inherently dangerous, you should assign the percentage of responsibility for the injury attributable to its inherently dangerous character. If you do not find that the plaintiff's activity was inherently dangerous, you should not assign a percentage of responsibility to the plaintiff's conduct unless you find that the plaintiff was negligent, as will be covered elsewhere in these instructions.

Further refinement of this instruction would of course be possible, but it illustrates the ease with which the concept of abnormally dangerous activities could be translated into a form that lay juries could readily grasp and apply. Particularly in those cases

124. See *supra* note 30.

125. Another suggestion for application of the reduced duty principle can be found in Dobson, *Medical Malpractice in the Birthplace: Resolving the Physician-Patient Conflict Through Informed Consent, Standard of Care, and Assumption of Risk*, 65 NEB. L. REV. 655, 679 (1986) (obstetrical patients would have more options in controlling therapy if assumption of risk doctrine were available to protect physicians by redefining his obligations to the patient).

where the status of the activity as abnormally dangerous has already been determined, juries should have no difficulty assigning percentage shares, as they have done in cases previously cited in this article.

VI. CONCLUSION

Assumption of risk ought to be an easy, rather than difficult, branch of tort law. It corresponds closely to a defendant's abnormally dangerous activity and ought to be given analogous treatment. By allowing juries to assign proportionate shares of liability based upon relative "fault"—as that term has been broadly defined in the Uniform Comparative Fault Act—tort law can strike a better balance between the expectations of defendants and plaintiffs.