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NOTES

DOES IMPLIED ASSUMPTION OF THE RISK EXIST IN CALIFORNIA'S COMPARATIVE FAULT SCHEME? THE [NOT SO] DEFINITIVE ANSWER OF *KNIGHT V. JEWETT* AND *FORD V. GOUIN*

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.¹

Justice Frankfurter's often quoted remark is particularly appropriate as California and many other comparative fault jurisdictions struggle to determine what place, if any, the affirmative defense of assumption of risk should have in a comparative fault scheme. The California Supreme Court, in the companion cases of *Knight v. Jewett*² and *Ford v. Gouin*,³ attempted to clarify whether any form of implied assumption of risk survived the adoption of comparative fault in California.

In 1975, the California Supreme Court adopted comparative fault as the law of the state in *Li v. Yellow Cab Company*⁴. The *Li* decision briefly addressed the effect comparative fault principles would have on the affirmative defense of assumption of the risk. However, the differing interpretations of *Li*'s language in subsequent court of appeal decisions emphasizes that the court's explanation was far from clear. After *Li*, according to some courts of appeal assumption of the risk remained an affirmative defense in a state where comparative fault principles otherwise governed.⁵ Commentators differed as to whether assumption of the risk as

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

2. 834 P.2d 696 (Cal. 1992).

3. 834 P.2d 724 (Cal. 1992).

4. 532 P.2d 1226 (Cal. 1975).

5. See, e.g., *Donohue v. San Francisco Housing Auth.*, 281 Cal. Rptr. 446 (Ct. App. 1991), review granted 282 Cal. Rptr. 510 (1991), transferred 13 Cal. Rptr. 2d 849 (1992) (fire fighter assumed the risk of slipping on a stairway during a fire safety inspection); *Hacker v. City of Glendale*, 279 Cal. Rptr. 371 (Ct. App. 1991), review granted 282 Cal. Rptr. 840 (1991), transferred 13 Cal. Rptr. 2d 732 (1992) (experienced tree trimmer assumed the risk of electrocution by trimming trees with power lines running through them); *Krol v. Sampson*, 278 Cal. Rptr. 164 (Ct. App. 1991), review granted 282 Cal. Rptr. 124 (1991), transferred 13 Cal. Rptr. 2d 733 (1992) (experienced recreational softball player assumed the risk of being struck by a ball during the course of a game); *Nunez v. R'Bibo*, 260 Cal. Rptr. 1 (Ct. App. 1989) (gardener using "wobbly" ladder of homeowner assumed the risk of accident caused while trimming trees); *King v. Magnolia Homeowners Ass'n*, 253 Cal. Rptr. 140 (Ct. App. 1988) (independent contractor assumed the risk of a fall when he climbed up an unsafe ladder a second

a bar to liability was inconsistent with comparative fault principles.⁶ California was not the only state to struggle with the question of assumption of the risk in a comparative fault regime.⁷ The issue was addressed either statutorily⁸ or judicially⁹ in many states that adopted comparative fault principles.

Seventeen years after *Li*, the California Supreme Court decided *Knight* and *Ford* in an attempt to define the status of assumption of the risk in California's pure comparative fault regime. More specifically, the court attempted to resolve the question of whether implied assumption of the risk is a viable defense within California's comparative fault system.

This Note will address the *Knight* and *Ford* decisions. First, the Note will give a brief introduction to the different variations of assumption of the risk. Following the introduction, California law subsequent to *Li* and prior to *Knight* and *Ford* will be summarized to illustrate the conflict among the courts of appeal. The Note will then discuss the plurality, concurring, and dissenting opinions in *Knight* and *Ford*. The discussion section will examine

time); *Ordway v. Superior Court*, 243 Cal. Rptr. 543 (Ct. App. 1988) (jockey assumed the risk of injury from being thrown off her horse due to another rider's misconduct); *Neinstein v. Los Angeles Dodgers, Inc.*, 229 Cal. Rptr. 612 (Ct. App. 1986) (spectator at professional baseball game assumed the risk of being struck by a batted ball); *Nelson v. Hall*, 211 Cal. Rptr. 668 (Ct. App. 1985) (veterinary assistant assumed the risk of being bitten by a dog while assisting in its treatment).

6. Compare Stephanie Wildman & John Barker, *Time to Abolish Reasonable Implied Assumption of a Reasonable Risk in California*, 25 U.S.F. L. REV. 647 (1991) (implied assumption of risk should not be a separate defense in a comparative fault system); John Diamond, *Assumption of Risk After Comparative Negligence: Integrating Contract Theory into Tort Doctrine*, 52 OHIO ST. L.J. 717 (1991) (implied assumption of risk should be merged with comparative negligence while express assumption of risk should be examined under principles of contract law); 4 FOWLER HARPER, ET AL., *THE LAW OF TORTS*, sec. 21.0 (2d ed. 1986) (disapproving of assumption of risk as a separate defense); and Fleming James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968) (disapproving of assumption of risk as a separate defense) with Robert Spell, *Stemming the Tide of Expanded Liability: The Coexistence of Comparative Negligence and Assumption of Risk*, 8 MISS. C. L. REV. 159 (1988) (implied assumption of risk should bar recovery because the plaintiff should accept the consequences of an informed choice); Paul Rosenlund & Paul 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) (assumption of risk should exist as a separate defense because assumption of risk is based on consent while comparative negligence apportions liability according to percentage of fault); John Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5 (1961) (assumption of risk should remain an affirmative defense because its advantages outweigh its disadvantages and it gives appellate courts more freedom of action).

7. Comparative negligence in its pure form apportions liability according to fault even if the plaintiff is equally at fault or more at fault than the defendant. *Li*, 532 P.2d at 1229.

8. VICTOR SCHWARTZ, *COMPARATIVE NEGLIGENCE*, Section 9.4(A) at 167 (2d ed. 1986) (citing ARIZ. REV. STAT. ANN. § 12-2505(A) (1991, Pocket Part) (implied assumption of risk merged into comparative fault system)); CONN. GEN. STAT. ANN. § 52-572h(c) (West 1991) (same); MASS. GEN. LAWS ANN., ch. 231 § 85 (West 1985) (same); N.Y. CIV. PRAC. L. & R. 1411 (McKinney 1976) (same).

9. SCHWARTZ, *supra* note 8, at 170 § 9.4(B) (citing *Springrose v. Willmore*, 192 N.W.2d 826 (Minn. 1971) (merging implied assumption of risk into comparative fault)); *Wentz v. Deseth*, 221 N.W.2d 101 (N.D. 1974); accord *Wilson v. Gordon*, 354 A.2d 398 (Me. 1976); *Farley v. M M Cattle Co.*, 529 S.W.2d 751 (Tex. 1975); *Brittain v. Booth*, 601 P.2d 532 (Wyo. 1979); *Murray v. Ramada Inns, Inc.*, 521 So.2d 1123 (La. 1988).

whether the plurality's holding clarifies the question before the court. The discussion section will then analyze the contentions in the concurring and dissenting opinions in an attempt to determine whether the California Supreme Court did in fact resolve the conflict among the courts of appeal. Before concluding the discussion, an alternative method of resolving the conflict will be suggested in anticipation of continuing uncertainty on the part of the California courts of appeal.

I. WHAT IS "ASSUMPTION OF RISK?"

Before discussing *Knight* and *Ford*, it is important to distinguish the various definitions and distinctions inherent within the term "assumption of risk." The broad assumption of risk definition in California is as follows:

[The defense of assumption of the risk] is available when there has been a voluntary acceptance of a risk and such acceptance, whether express or implied, has been made with knowledge and appreciation of the risk.¹⁰

Within that broad definition, different theoretical approaches are applied to evaluate the conduct of the plaintiff and the defendant when examining a particular fact situation. Because these approaches differ a great deal, a brief summary of the distinctions is necessary to understand assumption of the risk in general and more importantly assumption of the risk as it relates to the comparative fault system in California.

The first traditional approach is to distinguish between express and implied assumption of risk. Express assumption of the risk refers to an acceptance of risk evidenced by written or spoken words.¹¹ Express assumption of the risk remains a complete defense in California's comparative fault scheme and is not discussed in this Note.¹² By contrast, implied assumption of the risk refers to acceptance of risk by conduct.¹³ Some

10. *Prescott v. Ralphs Grocery Co.*, 265 P.2d 904, 906 (Cal. 1954); *accord*, RESTATEMENT (SECOND) OF TORTS §§ 496A-496G (1965).

11. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 68 at 482-84 (5th ed. 1984).

12. *Knight*, 834 P.2d at 703 n.4. *See also* *Madison v. Superior Court (Sulejmanagic)*, 250 Cal. Rptr. 299 (Ct. App. 1988). In *Madison*, the plaintiff parents brought suit on their deceased son's behalf. The decedent had drowned while participating in a scuba diving course. *Id.* at 301. He had signed a release expressly releasing defendant "from any liability for their NEGLIGENCE." *Id.* at 304 (emphasis in original). The court used contract analysis in determining the validity of the waiver. It emphasized the written release was "clear, unambiguous, and explicit in expressing the intent of the parties." *Id.* (citation omitted). The court found the waiver not to be void as against public policy. *Id.* at 304-05.

As *Madison* illustrates, express assumption of the risk involves *contractually* relieving defendant of possible liability. Thus, the analysis is one of contract rather than tort. *See also* *Kurashige v. Indian Dunes, Inc.*, 246 Cal. Rptr. 310 (Ct. App. 1988) (upholding validity of release signed by motorcycle riders relieving defendant of liability for negligence); and *Coates v. Newhall Land & Farming, Inc.*, 236 Cal. Rptr. 181 (Ct. App. 1987) (upholding validity of release signed by motocross racers relieving defendant of liability for negligence).

13. KEETON ET AL., *supra* note 11, at 481.

commentators equate conduct with consent,¹⁴ while others do not regard conduct of the plaintiff in engaging in an activity as consent to assume the risk of that activity.¹⁵ The cases analyzed in this Note and the issue that has divided courts and commentators involves the status of implied assumption of the risk in a comparative fault jurisdiction.

Another approach is to divide assumption of risk into primary and secondary assumption of risk. Under this approach, primary assumption of the risk is defined as "the counterpart of the defendant's lack of duty to protect the plaintiff from [the] risk."¹⁶ Secondary assumption of the risk describes the plaintiff assuming "a risk created by defendant's breach of duty toward him, when the former deliberately chooses to encounter that risk."¹⁷ This approach is based on the premise that assumption of risk does not exist as a separate defense apart from contributory negligence. As referred to in this Note, the primary/secondary assumption of risk distinction pertains only to implied assumption of risk.

A third approach divides implied assumption of risk into two categories—reasonable and unreasonable implied assumption of the risk. This distinction, derived in California cases from the language in *Li*, looks to the reasonableness of a plaintiff in assuming a certain risk to determine whether the plaintiff's recovery is barred. Prior to *Knight* and *Ford*, if the plaintiff's conduct was unreasonable, then plaintiff's fault in assuming an unreasonable risk was apportioned under the principles of comparative negligence.¹⁸ However, if the plaintiff reasonably assumed a risk, courts differed on whether reasonable conduct was a complete bar to recovery,¹⁹ or irrelevant and not to be factored in when apportioning fault.²⁰

Thus, a large part of the California Supreme Court's analysis of whether implied assumption of the risk was a viable affirmative defense in California's comparative fault scheme depended on the court's approach to assumption of the risk.²¹ The approach applied by the court would

14. *Id.*; see also John Fleming, *Forward: Comparative Negligence at Last—By Judicial Choice*, 64 CAL. L. REV. 239 (1976); and Rosenlund & Killion, *supra* note 6, at 287.

15. Fleming James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185, 190; HARPER, ET AL., *supra* note 6, at 259.

16. HARPER, *supra* note 6, at 188-89.

17. *Id.*

18. See, e.g., *Ordway v. Superior Court*, 243 Cal. Rptr. 536 (Ct. App. 1988); *Segoviano v. Housing Authority*, 191 Cal. Rptr. 578 (Ct. App. 1983).

19. *Ordway*, 243 Cal. Rptr. at 536.

20. *Segoviano*, 191 Cal. Rptr. at 578.

21. Furthermore, while this Note has attempted to set forth a brief framework of the different approaches, one commentator perceives express assumption of the risk as analogous to primary assumption of the risk and implied assumption of the risk as similar to secondary assumption of the risk. See HENRY WOODS, *COMPARATIVE FAULT*, sec. 6.1 at 135 (2d ed. 1987). However, it appears from the language of the California Supreme Court that these approaches seem to overlap in some cases but are not analogous. For instance, express assumption of the risk refers to spoken or written words that relieve a defendant of liability. See note 11, *supra*, and accompanying text. However, as this Note will demonstrate, the

determine the status of assumption of risk as a defense in California's comparative fault regime. However, before examining the California Supreme Court's decisions in *Knight* and *Ford*, it is necessary to briefly summarize the differing approaches of the California courts of appeal that brought this issue to the high court of California.

II. CALIFORNIA LAW PRIOR TO *KNIGHT* AND *FORD*

The California Supreme Court's adoption of comparative fault principles in *Li v. Yellow Cab*²² did not clearly resolve the question of the continued viability of assumption of the risk in a comparative fault regime. The court said in speaking of assumption of the risk:

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 within the doctrine of assumption of risk are those, for example, where plaintiff is held to agree 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. We think it clear that the adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence.²³

Based on the above language from *Li*, the courts of appeal struggled to determine whether reasonable implied assumption of the risk remained a viable defense under California law. *Ordway v. Superior Court*²⁴ and *Segoviano v. Housing Authority*²⁵ were two often cited cases that attempted to determine whether the assumption of risk defense remained viable.

Segoviano stood as the only court of appeal decision to hold reasonable implied assumption of the risk had been eliminated as a complete bar to recovery by the adoption of comparative fault principles in California.²⁶ In *Segoviano*, the plaintiff separated his shoulder in a flag football game sponsored by the defendant housing authority.²⁷ The court held that a reasonable plaintiff may not have his recovery reduced by comparative fault

primary assumption of risk approach does not require the risk be expressly assumed. Thus, the express/implied and primary/secondary distinctions are not analogous.

22. 532 P.2d 1226 (Cal. 1975).

23. *Id.* at 1240-41 (citations omitted).

24. 243 Cal. Rptr. 536 (Ct. App. 1988).

25. 191 Cal. Rptr. 578 (Ct. App. 1983).

26. *Id.* at 579.

27. *Id.* at 580.

principles.²⁸ The court further held that a plaintiff's recovery could only be reduced by comparative fault principles if plaintiff's assumption of the risk was unreasonable.²⁹ Thus, since the plaintiff's choice to play flag football was reasonable, there was no evidence of comparative fault justifying an apportionment of damages.³⁰

Ordway, on the other hand, held that a plaintiff's cause of action could be completely barred by the defense of reasonable implied assumption of the risk.³¹ In *Ordway*, the plaintiff, a jockey, was injured when she was thrown from her horse due to another rider's misconduct.³² The court also held that unreasonable assumption of the risk was not a complete bar to recovery; rather, a plaintiff's unreasonable assumption of the risk is merged in comparative fault principles.³³ Thus, as stated by the court:

Concededly, it does sound strange to decree that unreasonable plaintiffs may recover and reasonable ones may not; but the problem is not of law but of semantics. If the "reasonable-unreasonable" labels were simply changed to "knowing and intelligent" versus "negligent or careless," the concepts would be more easily understood.³⁴

In addition to *Segoviano* and *Ordway*, one other Court of Appeal case, not involving sports or recreation type activity, is worth mentioning. *Nelson v. Hall*³⁵ involved a plaintiff veterinary assistant who was bitten by defendant's dog as she was assisting in the dog's treatment. The *Nelson* court held that "[i]n certain circumstances the defense of assumption of the risk has survived the establishment of comparative fault."³⁶ The court further held, much like the court in *Ordway*, that "where a plaintiff unreasonably encounters a known risk—the doctrine has been subsumed by comparative fault."³⁷ However, the court characterized the defense on the facts of *Nelson* as: "true" or "primary" assumption of the risk whereby the defendant is impliedly relieved of any duty of care by the plaintiff's acceptance of employment involving a known risk or danger.³⁸

Though the *Nelson* court's decision seemed limited to employment situations involving risk,³⁹ its use of the term "primary" assumption of the

28. *Id.* at 583.

29. *Id.* at 587.

30. *Id.* at 588.

31. 243 Cal. Rptr. at 541.

32. *Id.* at 537.

33. *Id.* at 539.

34. *Id.* at 540.

35. 211 Cal. Rptr. 668 (Ct. App. 1985).

36. *Id.* at 672.

37. *Id.*

38. *Id.*

39. For instance, the court in *Nelson*, compared the occupation of veterinary assistants to other risky occupations such as firefighters and police officers. 211 Cal. Rptr. at 672-73.

risk foreshadowed the development of the law in California.

Subsequent to *Segoviano*, *Ordway*, and *Nelson*, California courts of appeal were more frequently faced with the question of whether assumption of the risk remained a viable defense after *Li*.⁴⁰ Frequently, courts explicitly commented there was a lack of guidance from the California Supreme Court on the issue.⁴¹ *Knight* and *Ford* gave the California Supreme Court the opportunity to clarify whether the affirmative defense of assumption of the risk deserved a separate existence as a complete defense in an otherwise comparative fault regime.

III. *KNIGHT V. JEWETT* AND *FORD V. GOUIN*

A. *Knight v. Jewett*⁴²

The California Supreme Court used the familiar factual scenario of a friendly football game in *Knight* to first address the issue.⁴³ Several guests at a Super Bowl party "decided to play an informal game of touch football . . . using a 'peewee' football."⁴⁴ After about five or ten minutes of playing the game, plaintiff Kendra Knight told defendant Michael Jewett to stop playing so rough or she would stop playing the game.⁴⁵ On the next play, plaintiff sustained an injury that eventually resulted in the amputation of her little finger.⁴⁶

After three operations and the eventual amputation of her finger, plaintiff filed suit against defendant alleging negligence, assault, and battery.⁴⁷ Defendant moved for summary judgment, relying on the court of appeal decision in *Ordway v. Superior Court*, which held that "reasonable implied

40. See, e.g., *Hacker v. City of Glendale*, 279 Cal. Rptr. 371 (Ct. App. 1991); *Van Meter v. American Motor Sports Ass'n*, 278 Cal. Rptr. 288 (Ct. App. 1991), review granted 282 Cal. Rptr. 124 (1991), transferred 13 Cal. Rptr. 2d 732 (1992); *Krol v. Sampson*, 278 Cal. Rptr. 164 (Ct. App. 1991); *Nunez v. R'Bibo*, 260 Cal. Rptr. 1 (Ct. App. 1989); and *Von Beltz v. Stuntman, Inc.*, 255 Cal. Rptr. 755 (Ct. App. 1989).

41. See, e.g., *Hacker*, 279 Cal. Rptr. at 374; *Van Meter*, 278 Cal. Rptr. at 292; and *Donohue*, 281 Cal. Rptr. at 448.

42. 834 P.2d 696 (Ct. App. 1992).

43. This scenario is similar to that of *Segoviano*. See *supra* notes 26-30 and accompanying text.

44. 834 P.2d at 697.

45. *Id.*

46. The stories differed as to how the incident actually occurred. Plaintiff contended the injury occurred when defendant ran over the plaintiff as he was pursuing another person that had the ball. In the process of running the plaintiff over, defendant stepped on plaintiff's hand. *Id.* at 698.

Defendant recalled the incident differently. He remembered jumping up in an attempt to intercept a pass and collided with plaintiff when he came down. He then stepped backward onto plaintiff's hand. *Id.* at 697.

However, the actual manner in which the injury occurred was not critical to the outcome of the case because the court did not consider defendant's conduct to be "so reckless as to be totally outside the range of the ordinary activity involved in the sport." *Id.* at 712.

47. *Id.* at 698.

assumption of the risk" is still a complete defense in the era of comparative fault.⁴⁸ "[D]efendant asserted that '[b]y participating in [the touch football game that resulted in her injury], plaintiff . . . impliedly agreed to reduce the duty of care owed to her by defendant.'"⁴⁹

Plaintiff's opposition to the summary judgment motion relied on the court of appeal decision in *Segoviano v. Housing Authority*, which held that "reasonable implied assumption of the risk" had been eliminated as a complete defense by the adoption of comparative fault principles in California.⁵⁰ Plaintiff alternatively contended that, even if the court found *Ordway* persuasive, defendant could still be subject to liability because his actions were at least reckless.⁵¹ Furthermore, plaintiff did not agree with the characterization by defendant that she had impliedly agreed to reduce defendant's duty of care.⁵² Defendant's reply to plaintiff's opposition reiterated that the material facts demonstrated plaintiff was injured playing touch football.⁵³ Thus, she impliedly assumed the risk of injuries that occurred in that context.

The trial court granted defendant's motion for summary judgment.⁵⁴ The court of appeal affirmed.⁵⁵ While recognizing the split of authority among the courts of appeal, the Fourth District Court of Appeal concluded the holding of *Ordway v. Superior Court*, which maintained that "reasonable implied assumption of the risk" remained a complete defense, should be followed.⁵⁶

The Supreme Court of California, in a plurality decision, affirmed the decision of the court of appeal.⁵⁷ It found that plaintiff had assumed the risk under the doctrine of primary assumption of the risk and thus could not recover.⁵⁸ In so holding, the plurality said primary assumption of the risk remained a complete defense in a comparative fault system, while secondary assumption of the risk merged with comparative fault principles.⁵⁹

The plurality broadly framed the issue as deciding "the proper application of the assumption of the risk doctrine in light of the adoption of comparative fault principles in *Li*."⁶⁰ Before addressing the issue before the

48. *Id.*

49. *Id.* at 301.

50. *Id.* at 698.

51. *Id.*

52. *Id.* at 698-99.

53. *Id.* at 699.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 712.

58. *Id.*

59. *Id.* at 703.

60. *Id.* at 699 (citation omitted).

court, the plurality conducted a detailed review of the court's holding in *Li*.⁶¹ It then rejected the *Ordway* court's characterization of assumption of the risk as either reasonable or unreasonable as a method of determining liability.⁶² Rather, the proper distinction to which the *Li* court referred is whether plaintiff's actions constituted so-called primary assumption of the risk or secondary assumption of the risk.⁶³

The court then discussed the significance of the distinction between primary and secondary assumption of the risk by interpreting the language of the *Li* court. The court said:

[T]he distinction to which the *Li* court referred was between (1) those instances in which the assumption of risk doctrine embodies a legal conclusion that there is "no duty" on the part of the defendant to protect the plaintiff from a particular risk—the category of assumption of risk that the legal commentators generally refer to as "primary assumption of risk"—and (2) those instances in which the defendant does owe a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty—what most commentators have termed "secondary assumption of risk."⁶⁴

After setting forth the distinction between primary and secondary assumption of risk, the court held:

[T]he category of assumption of risk cases that is not merged into the comparative negligence system and in which the plaintiff's recovery continues to be completely barred involves those cases in which the defendant's conduct did not breach a legal duty of care to the plaintiff, i.e., "primary assumption of risk" cases, whereas cases involving "secondary assumption of risk" properly are merged into the comprehensive comparative fault system adopted in *Li*.⁶⁵

Thus, the court undertakes a duty analysis in deciding whether a plaintiff has assumed the risk. If no duty exists, plaintiff's recovery is barred under "primary assumption of risk."⁶⁶ If defendant does breach a duty of care, and plaintiff knowingly encounters the risk caused by the breach, assumption of risk remains viable only in terms of measuring comparative fault under "secondary assumption of risk."⁶⁷

Because the existence of assumption of risk depends on the duty owed by the defendant, the court recognized liability will be dependent "on the nature of the activity or sport in which the defendant is engaged and the

61. *Id.* at 700-01.

62. *Id.* at 702.

63. *Id.* at 703.

64. *Id.* (footnote omitted).

65. *Id.* (footnote omitted).

66. *Id.*

67. *Id.*

relationship of the defendant and the plaintiff to that activity or sport."⁶⁸ In the context of a particular activity or sport, the plaintiff's voluntary action may be a factor in apportioning liability.⁶⁹ However, voluntary action will not necessarily preclude some recovery by the plaintiff for a breach of duty by the defendant.⁷⁰

Finally, after criticizing the dissent's argument, the *Knight* plurality applied its rule to the facts of the case. The plurality reviewed past assumption of risk cases from California and other jurisdictions that involved sports related activity to determine whether a duty existed.⁷¹ It concluded the duty of a coparticipant in sports related activity was limited to refraining from intentional or reckless conduct "that is totally outside the range of the ordinary activity involved in the sport."⁷² The plurality thus determined that because no legal duty of care as to negligent conduct was owed to the plaintiff, the case fell within the primary assumption of risk doctrine, thus barring plaintiff's action.⁷³

Justice Mosk, in a concurring and dissenting opinion, agreed with the court's conclusion on the facts of the case. However, Justice Mosk stated he would go farther and "eliminate implied assumption of risk entirely" because "[t]he all-or-nothing aspect of assumption of risk is as anachronistic as the all-or-nothing aspect of contributory negligence."⁷⁴ Justice Mosk would "simply apply comparative fault principles to determine liability."⁷⁵

Justices Panelli and Kennard, in separate opinions, disagreed with the plurality's reasoning. While Panelli and Kennard disagreed with each other as to the outcome of the case, they agreed that implied assumption of risk should constitute a complete bar to recovery.⁷⁶ Justice Kennard's dissent was especially critical of the plurality's reasoning. Kennard accused the plurality of advocating "a radical transformation of tort law" by "transforming an affirmative defense into an element of the plaintiff's negligence action [thus] abolish[ing] the defense without acknowledging that it is doing so."⁷⁷ Kennard would hold that reasonable implied assumption of the risk remain a viable defense because "a person generally should be required to accept responsibility for the normal consequences of a freely chosen course of conduct."⁷⁸ Apportionment of liability under comparative fault principles would only occur when plaintiff carelessly assumed a risk, whereas a

68. *Id.* at 704.

69. *Id.* at 705.

70. *Id.*

71. *Id.* at 708-10.

72. *Id.* at 710 (citation omitted).

73. *Id.* at 711-12.

74. *Id.* at 712.

75. *Id.* at 713.

76. *Id.* at 713-14.

77. *Id.* at 714.

78. *Id.* at 719 (citation omitted).

plaintiff's reasoned and deliberate choice would bar recovery.⁷⁹

Justice Kennard also disagreed with "the plurality's no-duty-for-sports rule."⁸⁰ Therefore, even applying the plurality's new assumption of risk scheme, Kennard would find some possible liability based on a limited duty of the defendant and reverse the grant of summary judgment upheld by the court of appeal.⁸¹ While agreeing that a limited duty rule may apply in an organized sports setting, Kennard did not agree that there is an ordinary range of activity in touch football which would justify the lack of a duty of care on the part of the participants.⁸²

In summary, a divided California Supreme Court held in a plurality opinion that primary assumption of risk remains a complete bar to plaintiff's recovery under comparative fault principles when defendant owes no duty to plaintiff. However, secondary assumption of risk is merged into the system of comparative fault because it involves the breach of a legal duty by the defendant *and* plaintiff's knowingly encountering the risk caused by the breach. Thus, liability should be apportioned according to fault. However, the sharply divided court finds Justice Mosk at one end of the spectrum advocating the total abolishment of implied assumption of risk, while Justices Kennard and Panelli are at the other end of the spectrum advocating the continued viability of implied assumption of the risk as a complete defense. The plurality's opinion is an attempt to find a middle ground based on an analysis of defendant's duty. Yet, *Knight's* facts only allowed the court to analyze assumption of risk in a competitive sports situation such as flag football. In *Ford*, the California Supreme Court extended its holding to include so-called cooperative sports such as water skiing.

B. Ford v. Gouin⁸³

In this companion case to *Knight*, the plaintiff, Larry C. Ford was injured while water skiing barefoot and backward.⁸⁴ Ford's injury occurred when his head struck a tree limb that extended over the channel where he was skiing.⁸⁵ Defendant Jack Gouin, a friend of the plaintiff, was driving the boat.⁸⁶ Plaintiff alleged defendant's negligence caused the accident because defendant drove the boat too close to the riverbank.⁸⁷

The trial court granted defendant's motion for summary judgment because plaintiff had selected the particular site to ski and therefore assumed

79. *Id.* at 720.

80. *Id.* at 722.

81. *Id.* at 723-24.

82. *Id.*

83. 834 P.2d 724 (Cal. 1992).

84. *Id.* at 726.

85. *Id.*

86. *Id.*

87. *Id.*

the risk.⁸⁸ The court of appeal affirmed, holding that "reasonable implied assumption of the risk" barred plaintiff's action.⁸⁹ Plaintiff sought review relying on the holding in *Segoviano* which had rejected the continuing viability of assumption of the risk in a comparative fault regime.⁹⁰

The California Supreme Court reiterated its analysis of *Knight*.⁹¹ It then addressed the question of whether a substantive difference existed between a competitive sport such as touch football and a cooperative sport such as water skiing.⁹² The court held:

[T]he general rule limiting the duty of care of a coparticipant in active sports to the avoidance of intentional and reckless misconduct, applies to participants engaged in noncompetitive but active sports activity, such as a ski boat driver towing a water skier.⁹³

The court thus imposed a bright line duty of care to apply to all recreational activity participants to merely avoid reckless or intentional misconduct.⁹⁴ Therefore, because defendant was not reckless in driving the boat, he did not breach a legal duty to plaintiff.⁹⁵ Consequently, plaintiff was barred from recovery by the doctrine of primary assumption of the risk.⁹⁶

IV. DID *KNIGHT V. JEWETT* AND *FORD V. GOUIN* RESOLVE THE ISSUE?

The *Knight* and *Ford* decisions are the first attempts by the California Supreme Court since its decision in *Li* to address the continued viability of implied assumption of risk in California's comparative fault regime. However, whether the court definitively resolved the issue is not at all clear.⁹⁷

First, the court's choice of *Knight* and *Ford* as the companion cases

88. *Id.* at 727.

89. *Id.*

90. *Id.*

91. *Id.* at 727-28.

92. *Id.* at 728.

93. *Id.*

94. *Id.*

95. *Id.*

96. The court also discussed defendant's possible duty of care under Harbors and Navigation Code section 658, subdivision (d). The concurring and dissenting opinions disagree as to the applicability of the statute to the fact situation. *Id.* at 728-31 and 741-45. However, because this Note addresses the broader issue of the companion cases as to the continuing viability of implied assumption of the risk, the Note will not address the issues of statutory construction which further divided the court in *Ford v. Gouin*.

97. One court of appeal recently noted that *Knight* and *Ford* "have served only to further stir up the already murky waters" of implied assumption of the risk. *Lucas v. Fresno Unified School District*, No. F015104, 1993 Cal. App. LEXIS 337, at *3 (March 29, 1993). The court thus analyzed its fact situation and found triable issues of fact under all three approaches posited in *Knight* and *Ford*, "the duty analysis, the consent-based analysis, [and] Justices Mosk's view." *Id.* at *12.

invites the question: Is the doctrine of assumption of risk limited to sports and recreational activity? The court comprehensively decided that both competitive and cooperative recreational activity are governed by its holdings in *Knight* and *Ford*. Thus, looking at the recent court of appeal decisions, the Supreme Court's analysis would definitely apply to participants in cases involving football,⁹⁸ horse racing,⁹⁹ and softball.¹⁰⁰ Of course, the assumption of risk defense may traditionally be raised in many other factual situations, often involving accidents that occur "on the job."¹⁰¹

A careful examination of the *Knight* and *Ford* opinions reveals an intent on the part of the California Supreme Court that its analysis of assumption of risk be uniformly applied in all cases where the issue is raised, not just those involving recreational activity. The *Knight* plurality said broadly that the issue before the court was "the effect of the adoption of comparative negligence on the assumption of risk doctrine."¹⁰² The court also specifically refers to the "firefighter's rule" line of cases as being another area where "assumption of risk comes into play."¹⁰³ Only after the court resolved the issue of the viability of assumption of risk in California¹⁰⁴ does the court address the limited duty of participants in sporting or recreational activity.¹⁰⁵ The limited duty analysis specifically addressing sports and recreational activity does not in any way affect the broad fundamental holding of the court regarding assumption of the risk.

For example, using the rationale of *Knight*, an embellished hypothetical clarifies the reach of the plurality's holding. An employee of a moving company certainly assumes the risk of moving heavy objects. Under the doctrine of primary assumption of risk, the person packing boxes probably has no duty to guard against packing a box with heavy objects. Thus, if the mover injures his or her back because of the weight of a box, primary assumption of risk would conceivably bar recovery. If, on the other hand, the heavy objects are explosives, and the mover knows the boxes are packed with explosives, the owner of the explosives has a duty to pack the explosives with due care. Any liability for an injury caused by an explosion because of negligent packing would probably be apportioned under

98. *Segoviano v. Housing Auth.*, 191 Cal. Rptr. 536 (Ct. App. 1983).

99. *Ordway v. Superior Court*, 243 Cal. Rptr. 543 (Ct. App. 1988).

100. *Krol v. Sampson*, 278 Cal. Rptr. 164 (Ct. App. 1991).

101. *See, e.g.*, *O'Donnell v. Feldsher*, 4 Cal. Rptr. 2d 732 (Ct. App. 1992) (gas company employee); *Novicke v. Vons Grocery Co.*, 260 Cal. Rptr. 694 (Ct. App. 1989) (security guard); *Von Beltz v. Stuntman, Inc.*, 255 Cal. Rptr. 755 Ct. App. 1989) (stunt woman); *Donohue v. San Francisco Housing Auth.*, 281 Cal. Rptr. 446 (Ct. App. 1991) (firefighter); *Hacker v. City of Glendale*, 279 Cal. Rptr. 371 (Ct. App. 1991) (tree trimmer); *Nunez v. R'Bibo*, 260 Cal. Rptr. 1 (Ct. App. 1989) (gardener); and *King v. Magnolia Homeowner's Ass'n*, 253 Cal. Rptr. 140 (Ct. App. 1988) (independent contractor).

102. *Knight*, 834 P.2d at 701.

103. *Id.* at 704 n.5.

104. *Id.* at 699-708.

105. *Id.* at 708-12.

comparative fault principles using secondary assumption of risk.¹⁰⁶

In a more realistic example, a property owner is required "to use due care to eliminate dangerous conditions on his or her property."¹⁰⁷ Thus, if the ground is obviously covered with ice due to a winter storm, under the doctrine of primary assumption of risk, the property owner probably has no duty to guard against someone slipping on the icy walkway. However, if the property owner negligently leaves broken glass on the walkway and someone slips and lands on the glass, the property owner would probably have a duty to protect against the additional injuries caused by the broken glass. Liability would be apportioned based on percentage of fault under the principle of secondary assumption of risk. In summary, the above hypotheticals illustrate the rationale of *Knight* and *Ford* is applicable in fact situations that do not involve sports or recreational activity.

The more fundamental question that must be asked is whether the court resolved the issue of "the proper application of the assumption of risk doctrine in light of the adoption of comparative fault principles?"¹⁰⁸ According to the California Supreme Court in *Knight* and *Ford*, primary assumption of the risk is a complete bar to recovery;¹⁰⁹ secondary assumption of the risk is merged into comparative fault.¹¹⁰ Thus, at least in California, assumption of the risk appears to survive as a complete defense in some circumstances. Or does it?

The court says cases in which a plaintiff's action continues to be barred under primary assumption of the risk are those where the "defendant's conduct did not breach a legal duty of care to the plaintiff."¹¹¹ No breach occurs because no duty existed. Under the court's approach, using the term "primary assumption of the risk" is surplusage. If defendant has no duty, plaintiff cannot establish a prima facie cause of action for negligence.

At first glance, this argument seems to be one largely of semantics. However, the primary/secondary assumption of the risk approach was developed by Professors Fowler Harper and Fleming James Jr.¹¹² Their view of assumption of the risk was clear-cut: the doctrine "deserves no separate existence" apart from comparative negligence.¹¹³ For instance, rather than pleading the elements of the defense in California (the voluntary acceptance of a known and appreciated risk),¹¹⁴ the defendant need only answer a cause of action by "concentrating instead on the nature of

106. Of course, the inherently dangerous nature of explosives may involve other tort doctrines such as strict liability. This example is for illustration purposes only.

107. *Knight*, 834 P.2d at 708 (citing *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968)).

108. *Id.* at 699.

109. 834 P.2d at 703, 732.

110. *Id.* at 703.

111. *Id.*

112. HARPER, ET AL., *supra* note 6.

113. *Id.* at 190

114. *Prescott v. Ralphs Grocery Co.*, 265 P.2d 904, 906 (Cal. 1954).

defendant's duty, its limitations if any, and the reasons for any such limitations."¹¹⁵ No reference to assumption of risk is necessary. As one article commented about adopting the primary/secondary assumption of the risk approach of Harper and James, "To adopt their terminology thus necessitates adopting their conclusion . . . assumption of risk does not function as a defense independent of the existing concepts of duty and contributory negligence."¹¹⁶ The language of the California Supreme Court's opinion does not clarify whether the court is adopting the conclusion of Harper and James when it adopts their terminology.

The court holds that defendant's lack of duty be viewed under the rubric of primary assumption of the risk without actually eliminating assumption of risk as Harper and James propose. Conversely, the merger of secondary assumption of risk into the apportionment of comparative fault is consistent with Harper and James' conclusion that assumption of risk "deserves no separate existence"¹¹⁷ as an affirmative defense. The court's approach to primary assumption of the risk preserves the burdensome and unnecessary step of pleading an affirmative defense when a sufficient answer would merely refute the existence of a duty. Maintaining the language of assumption of risk within California's comparative fault scheme causes more confusion than merely merging any voluntary risk on the part of the plaintiff into allocation of comparative fault after a duty has been established.

The first case to be decided by the court of appeal after *Knight* and *Ford* illustrates the confusion of the Plurality opinion. In *Davis v. Gaschler*,¹¹⁸ the plaintiff, "an experienced breeder and handler of dogs for over ten years,"¹¹⁹ was bitten on the hand by defendant's dog as she was assisting the injured animal.¹²⁰ Plaintiff brought causes of action for negligence and negligent infliction of emotional distress.¹²¹ The trial court granted a motion for summary judgment on "the ground that plaintiff's reasonable implied assumption of the risk barred recovery."¹²² The court of appeal reversed because "triable issues of material fact" still existed.¹²³ While the result in *Davis* may be consistent with the principles of comparative fault, the court's reliance on *Knight's* language exemplifies the problem with the California Supreme Court's approach. The *Davis* court said:

115. HARPER, ET AL., *supra*, note 6, at 225.

116. Rosenlund & Killion, *supra* note 6, at 234.

117. See notes 15 and 16, *supra*, and accompanying text.

118. 14 Cal. Rptr. 2d 679 (Ct. App. 1992)

119. *Id.* at 681.

120. Plaintiff, despite her experience with dogs, was merely giving assistance as a "Good Samaritan." She was not under a legal duty to assist nor was she acting in the course of any employment. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 685.

Under *Knight*, . . . [the defendant] had the burden to show this is a case of primary assumption of risk—where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendants owe no legal duty to the plaintiff . . .

Here, defendants have *not shown the absence* of a legal duty to plaintiff.¹²⁴

The court then goes on to analyze in detail why the defendants owe plaintiff a duty of care. The court imposes a duty on defendant for three reasons. First, Civil Code section 3342, a dog bite statute,¹²⁵ establishes a duty of care while not "render[ing] inapplicable such defenses as assumption of the risk. . ."¹²⁶ Second, defendant had a duty to vaccinate the dog against rabies.¹²⁷ Finally, the court found the "veterinarian's rule"¹²⁸ did not apply because plaintiff was not engaged in activity for compensation when she was injured.¹²⁹ Thus, the court's reasoning appears consistent with established comparative fault principles in deciding whether summary judgment is warranted in this particular case. Yet, the language of the conclusion puts the burden of proving the "absence of a duty of care" on the defendant by referring to the lack of a duty as the affirmative defense of primary assumption of the risk. This shifts the burden of proving the presence of a duty from the plaintiff's prima facie case to the defendant's establishment of an affirmative defense.¹³⁰ Thus, *Davis v. Gaschler* plainly illustrates the confusion caused by the Plurality's holding that absence of a duty is now an affirmative defense.

Justice Kennard's dissenting opinion accused the plurality of using *Knight v. Jewett* "as a forum to advocate a radical transformation of tort law."¹³¹ While Justice Kennard is certainly correct in that the decision

124. *Id.* at 683 (emphasis added).

125. Civil Code section 3342, subdivision (a) provides in pertinent part: "The owner of any dog is liable for the damages suffered by any person who is bitten by the dog while in a public place or lawfully in a private place, including the property of the owner of the dog . . ."

126. *Davis*, 14 Cal. Rptr. 2d at 683-84 (citation omitted).

127. *Id.* at 684. This duty derived from plaintiff's cause of action for negligent infliction of emotional distress caused by having to undergo a series of inoculations for rabies after the initial test on the dog for rabies was "equivocal." *Id.* at 681.

128. *See Nelson v. Hall*, 211 Cal. Rptr. 668 (Ct. App. 1985).

129. *Davis*, 14 Cal. Rptr. 2d at 684-85.

130. At first glance, requiring plaintiff to prove the existence of a duty of care may seem contrary to the rules governing summary judgment. To warrant summary judgment, a defendant must establish as a matter of law that none of plaintiff's asserted causes of action can prevail. *Molko v. Holy Spirit Ass'n*, 762 P.2d 46 (Cal. 1988). However, plaintiff must still prove a prima facie case to survive the motion for summary judgment. While it may be mere semantics, plaintiff is responsible for establishing the existence of a duty as an element of a prima facie case. There is no need to talk about the presence or the absence of a duty of care under the rubric of primary assumption of the risk. It is simply a question of whether plaintiff can establish a duty of care or defendant can negate the duty element of the prima facie case of negligence.

131. 834 P.2d at 714.

affects the manner in which assumption of the risk may be plead, Kennard also appears to believe assumption of risk is an established affirmative defense for negligence. This is the "traditional" view shared by many scholars, including Prosser and Keeton.¹³² However, the view that assumption of risk is a well-established affirmative defense for negligence is not without question. In fact, the preparation of the Restatement (Second) of Torts found the advisors of the American Law Institute to be sharply divided over whether an "Assumption of Risk" chapter should be included.¹³³ Scholars including Prosser and [Robert] Keeton prevailed over a group that included Deans [Page] Keeton, Wade, and Professor James.¹³⁴ Thus, the question of whether assumption of the risk is more than "an excellent illustration of the extent to which uncritical use of words bedevils the law"¹³⁵ is not a new debate.

As Justice Kennard's opinion illustrates, the supporters of the defense of assumption of the risk opine that the defense is "based on consent."¹³⁶ This so-called consent "will negative liability."¹³⁷ However, this consent-based view is usually based on a legal fiction.¹³⁸ "The injured party has not truly manifested his consent to hold the defendant blameless; rather, the law treats him as if he had done so."¹³⁹ In short, the notion that implied assumption of risk is based on consent is simply a policy decision to limit liability based on knowledge of a possible risk—not consent to be injured. Under comparative negligence principles, a jury may certainly weigh plaintiff's knowledge of a risk in apportioning fault. However, to totally bar a plaintiff from recovery relieves defendant from any limited duty of care.

Justice Mosk's opinion in *Knight* recognizes that "[a]ssumption of risk now stands for so many different legal concepts that its utility has diminished."¹⁴⁰ Rather than maintain the language of the plurality that primary assumption of the risk remains a complete bar to recovery, Mosk would eliminate the "anachronistic"¹⁴¹ doctrine "and simply apply comparative fault principles to determine liability."¹⁴² Mosk's approach, referred to throughout this note as the approach of Professors Harper and James, is consistent with the rationale of comparative fault. The rationale of comparative negligence seeks to avoid absolute bars to recovery. Liability is apportioned according to fault.

132. KEETON ET AL., *supra* note 11, at 484.

133. See *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368, 378 n.3 (Tex. 1963).

134. *Id.*

135. See note 1, *supra*.

136. 834 P.2d at 715 (citations omitted).

137. *Id.* (quoting *Prescott v. Ralphs Grocery Co.*, 265 P.2d at 906.)

138. SCHWARTZ, *supra* note 8, at 154.

139. *Id.*

140. 834 P.2d at 712.

141. *Id.*

142. *Id.*

In sum, if there is no duty on the part of the defendant, there can be no breach and thus no fault, as the first element of the prima facie case for negligence has not been established. Pleading the affirmative defense of primary assumption of risk is therefore superfluous.

V. THE OPPORTUNITY FOR CALIFORNIA TO BE A TRUE COMPARATIVE NEGLIGENCE JURISDICTION SHOULD NOT BE WASTED

The companion cases of *Knight* and *Ford* were an opportunity for the California Supreme Court to clarify whether implied assumption of the risk deserved a separate existence under comparative negligence. The court wasted the opportunity. Rather than formulating a bright line rule that makes sense to possible litigants, a plurality of the strongly divided court succeeded in adding confusion to an already divisive area of the law.

The court adopted the language of Professors Harper and James while only partially accepting the theory underlying the approach. The court accepted Harper and James' theory that secondary assumption of risk was subsumed under comparative fault principles. However, the court held the language of primary assumption of risk survives as a complete bar when defendant has "no duty . . . to protect the plaintiff from a particular risk."¹⁴³

Why use the language of assumption of risk? It only leads to confusion as to whether primary assumption of risk remains an affirmative defense. By not agreeing with Justice Mosk that implied assumption of the risk should be eliminated altogether, the Plurality maintains it as an affirmative defense. If primary assumption of risk derives from a lack of duty on the part of the defendant, an affirmative defense is unnecessary; the plaintiff is unable to establish a prima facie case of negligence.

The division of California's Supreme Court requires a legislative response. The plurality decisions in *Knight v. Jewett*¹⁴⁴ and *Ford v. Gouin*¹⁴⁵ emphasize the divergence of opinions among the members of the court. Many cases were still pending in front of the supreme court on the issue of assumption of risk within California's comparative fault scheme after *Knight* and *Ford* were decided. However, approximately three months after its decision, on November 30, 1992, the court transferred the pending cases back to the court of appeal for reconsideration in light of *Knight*.¹⁴⁶ Thus,

143. *Id.* at 703.

144. 834 P.2d 696 (Cal. 1992).

145. 834 P.2d 724 (Cal. 1992).

146. See 92 Bartclays CSCS (Cal. Sup. Ct. Serv.) 463-64 (Dec. 7, 1992), listing O'Donnell v. Feldsher, 4 Cal. Rptr. 2d 732 (Ct. App. 1992) (transferred to the Second Appellate District, Div. 7); Donohue v. San Francisco Housing Auth., 281 Cal. Rptr. 446 (Ct. App. 1991) (transferred to the First Appellate District, Division Two); Hacker v. City of Glendale, 279 Cal. Rptr. 371 (Ct. App. 1991) (transferred to the Third Appellate District); Krol v. Sampson, 6 Cal. App. 4th 310 (1991) (transferred to the First Appellate District, Division Four); Van Meter v. American Sports Ass'n, 278 Cal. Rptr. 288 (Ct. App. 1991) (transferred to the Fifth Appellate District).

possibly based on both the conflicting opinions by members of the court in *Knight* and *Ford*, and the inability to compromise, the court will not address the issue again soon.¹⁴⁷

Therefore, the California Legislature needs to address the inconsistency caused by the California Supreme Court's opinion. A clearly written statute should be drafted that clarifies implied assumption of risk no longer exists in California.¹⁴⁸ Justice Kennard's dissent was correct when it stated, "[T]he plurality would abolish the defense without acknowledging that it is doing so."¹⁴⁹ The Legislature could eliminate the confusion by specifying implied assumption of risk is abolished as a separate defense under California's comparative fault scheme.

The statute should specify that consistent with comparative fault principles established in *Li*,¹⁵⁰ implied assumption of risk is no longer an affirmative defense. Rather, any conduct on the part of the plaintiff previously referred to as "implied primary assumption of risk" merely refers to the absence of a duty on the part of the defendant and can be pleaded as part of establishing the prima facie case of negligence. This approach is preferable to a statute that lists situations where no duty exists. A statute listing possible circumstances where no duty existed could be endless¹⁵¹ and is best addressed by established case law.

If a duty is established by the pleadings, any knowledge or appreciation of the risk on the part of the plaintiff may serve to limit defendant's liability under contributory negligence principles, consistent with "implied secondary assumption of risk." Thus, an implied assumption of risk defense need not exist apart from the establishment of a limited duty and then apportioning liability by percentage according to fault.

Abolishing assumption of risk as an affirmative defense does not affect

147. In what might have been a significant action, the court granted review one week *after* the present opinions were issued to a case questioning whether implied assumption of the risk remained a viable defense in California. (*Stimson v. Carlson*, No. S027893, 1992 Cal. Lexis 4482, review granted September 3, 1992.) However, this case was also transferred back to the court of appeal (First District, Division Four) on November 30, 1992 (1992 Cal. Lexis 5959).

148. Many other states have drafted statutes merging assumption of risk into contributory negligence including Arizona (ARIZ. REV. STAT. ANN. § 12-2506(F)(2) (1991 Supp.)), Massachusetts (MASS. GEN. LAWS ANN., ch. 231, § 85 (West 1985)), New York (N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976)), and Washington (WASH. REV. CODE ANN. § 4.22.015 (West 1988)).

However, these statutes have not specifically addressed primary assumption of risk. Instead, many state statutes have established "no duty" rules in certain circumstances. For instance, Utah establishes no duty for ski resort operators in some situations (UTAH CODE ANN. §§ 78-27-51 to 78-27-54 (Michie 1992)).

149. *Knight*, 834 P.2d at 714.

150. 532 P.2d 1226 (Cal. 1975).

151. Furthermore, California case law already specifies no duty in some situations. For instance, the "Fireman's Rule" (*Lipson v. Superior Court*, 644 P.2d 822 (Cal. 1982)), the "Veterinarian's Rule" (*Nelson v. Hall*, 211 Cal. Rptr. 668 (Ct. App. 1985)), and the "No-Duty-For-Sports Rule" (*Knight v. Jewett*, 834 P.2d 696 and *Ford v. Gouin*, 834 P.2d 724) are all examples of situations where defendant has no duty as per negligent conduct.

the burden of proof.¹⁵² A plaintiff must prove duty as part of the prima facie case of negligence regardless of any affirmative defenses. However, rather than then pleading the affirmative defense of assumption of risk, the defendant need only negate the duty element of plaintiff's cause of action (primary assumption of risk). Or, if the duty is established, any "assumption of risk" on the part of the plaintiff is merely a form of contributory negligence (secondary assumption of risk). Such a statute would abolish implied assumption of risk as an affirmative defense and avoid "the all or nothing aspect" of the rule.¹⁵³

CONCLUSION

By a plurality decision, the California Supreme Court in the companion cases of *Knight v. Jewett*¹⁵⁴ and *Ford v. Gouin*¹⁵⁵ held primary assumption of risk remained a complete defense to negligence while secondary assumption of risk was merely a variant of contributory negligence to be apportioned under the principles of comparative fault. The court did not take the opportunity to abolish the defense altogether—a conclusion that would have been consistent with the principles of comparative fault.

The Legislature should recognize the inability of the court to fashion a majority rule and draft a statute consistent with the rationale of the plurality of the court. The statute should abolish implied assumption of risk as an affirmative defense. Primary assumption of risk should be asserted in pleadings as an answer to whether defendant had a duty as part of the prima facie cause of action for negligence. Secondary assumption of risk should then be a factor in allocating fault under comparative negligence principles.

Corey Y. Hoffmann*

152. Commentators Wildman and Barker also conclude the abolition of the affirmative defense of implied assumption of risk will not affect the burden of proof as long as "duty standards are sufficiently broad and inclusive" to be "fair" to plaintiffs and "fair enough to defendants . . . they will not miss the opportunity to litigate issues that would have been raised by an implied assumption of risk defense." Wildman & Barker, *supra* note 6, at 679.

153. *Knight v. Jewett*, 834 P.2d 696, 712 (Cal. 1992).

154. *Id.*

155. 834 P.2d 724 (Cal. 1992).

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