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**King v. Kayak Manufacturing Corporation: Comparative Assumption of Risk in West Virginina**

Daniel W. Greear  
*West Virginia University College of Law*

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In *King v. Kayak Mfg. Corp.*¹, the Supreme Court of Appeals of West Virginia addressed the issue of the relationship of assumption of risk to the comparative negligence system used in West Virginia.² Many jurisdictions have never recognized assumption of risk as a distinct defense to a tort claim, but rather treat the doctrine as a subset of contributory negligence.³ Many more jurisdictions eliminated assumption of risk as a separate defense when they moved

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¹ 387 S.E.2d 511 (W. Va. 1989).
³ E.g., Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977); Parker v. Redden, 421 S.W.2d 586 (Ky. 1967); Murray v. Ramada Inns, 521 So. 2d 1123 (La. 1988); Mizushima v. Sunset Ranch, Inc., 103 Nev. 259, 737 P.2d 1158 (1987); Wentz v. Deseth, 221 N.W.2d 101 (N.D. 1974).
to a comparative theory of negligence from the more traditional contributory view.  

Historically, West Virginia has recognized assumption of risk and contributory negligence as two separate and distinct defenses to a tort claim. Assumption of risk acts to bar a plaintiff from recovery if it is proven "that, with appreciation and knowledge of an obvious danger, he purposely elects to abandon a position of relative safety and chooses to reposition himself in the place of obvious danger and by reason of that repositioning is injured." The doctrine of contributory negligence acts to bar a plaintiff from recovery if it is shown that his own negligence, no matter how slight, works to contribute towards his own injury. The doctrine of comparative negligence lessens the harshness of contributory negligence by allowing the plaintiff to recover despite his own negligence. The plaintiff's recovery under a comparative system is lessened by his percentage of fault.

Until King, the effect a comparative negligence system would have on the doctrine of assumption of risk in West Virginia was unclear. With its decision in King, the West Virginia Supreme Court of Appeals made clear that assumption of risk was still to be viewed as a viable and distinct defense to a tort claim. However, while maintaining the doctrine as a separate defense, the court eliminated any practical differences between assumption of risk and comparative negligence by stating that assumption of risk was no longer a bar to recovery, but was to be administered on a comparative system identical to the one set up for contributory negligence in Bradley v. Appalachian Power Co.

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6. 57A AM. JUR. 2D Negligence § 74 (1964).
9. Id.
10. King, 387 S.E.2d at 517.
In coming to this conclusion, the West Virginia Supreme Court of Appeals has created a meaningless distinction which can only create problems for juries, lawyers, and parties alike. A better solution would be to follow the lead of California and other jurisdictions in establishing a system which allows flexibility in the application of assumption of risk. Under this system, when assumption of risk is no more than a variant of contributory or comparative negligence it is merged into the jurisdiction’s comparative negligence system. However, when the plaintiff’s conduct amounts to an express release of the defendant’s obligation of reasonable conduct, assumption of risk remains an absolute bar to recovery. Such a system seems to better recognize the true differences between the doctrines of assumption of risk and contributory negligence, and treats them accordingly.

II. BACKGROUND: PRIOR LAW IN WEST VIRGINIA

A. Traditional Assumption of Risk in West Virginia

The West Virginia Supreme Court of Appeals first clearly defined assumption of risk and compared it to contributory negligence in *Hunn v. Windsor Hotel Co.* The court marked the distinction between the two doctrines by remarking that “[t]he essence of contributory negligence is carelessness; of assumption of risk, venturesousness.” The court went on to state that assumption of risk rested on two premises: “first, that the nature and extent of the risk are fully appreciated; and second, that it is voluntarily incurred.” In *Hunn*, the plaintiff was injured by walking down steps which she knew to be dangerous. The court ruled that this constituted an act of venturesousness as opposed to carelessness, and thus

14. *Hunn v. Windsor Hotel Co.*, 119 W. Va. 215, 193 S.E. 57 (1937). (the plaintiff sued for injuries received while walking down steps of hotel where she was staying).
15. *Id.* at 217, 193 S.E. at 58.
16. *Id.* at 217-18, 193 S.E. at 58.
the doctrine of assumption of risk, and not contributory negligence, precluded recovery.18

The West Virginia Supreme Court of Appeals further expounded on the doctrine of assumption of risk in *Hollen v. Linger.*19 The court held that "[t]he doctrine of assumption of risk is based upon the existence of a factual situation in which the act of the defendant alone creates the danger and causes the injury and the plaintiff voluntarily exposes himself to the danger with full knowledge and appreciation of its existence."20

West Virginia’s highest court further addressed the differences between assumption of risk and contributory negligence in *Spurlin v. Nardo.*21 The court noted that assumption of risk involves "a choice made more or less deliberately and negatives liability without reference to the fact that the plaintiff may have acted with due care, whereas the defense of contributory negligence implies the failure of the plaintiff to exercise due care."22 The court did admit that the distinction between the two doctrines "is sometimes a troublesome matter."23

The facts of *Spurlin* serve to demonstrate the distinction between assumption of risk and contributory negligence which was set up by the court. The plaintiff was a passenger riding in the defendant's car.24 At some point in their journey, both the plaintiff and the defendant became aware that the defendant had to apply his foot brake all the way to the floor before his vehicle would stop.25 However, when the defendant tried his brakes again, they seemed to function properly.26 The defendant reassured the plaintiff that the

18. Id. at 218-19, 193 S.E. at 58-59.
19. 151 W. Va. 255, 151 S.E.2d 330 (1966). In *Holland,* the plaintiff sued the owner of an automobile who allowed a 14-year old to drive the vehicle for injuries received by being struck by the vehicle.
20. Id. at 263, 151 S.E.2d 335.
22. Id. at 418, 114 S.E.2d at 920.
23. Id. at 417, 114 S.E.2d at 919.
24. Id. at 410, 114 S.E.2d at 915.
25. Id. at 411, 114 S.E.2d at 916.
26. Id.
brakes were in working order. Sometime after this, the brakes again malfunctioned and the plaintiff was injured.

The court ruled that since the plaintiff had been reassured by the defendant that the brakes were in proper working condition, the plaintiff had no way to anticipate that the brakes were indeed defective. Thus, the plaintiff could not make a conscious decision to assume the risk of riding in a car with defective brakes. Accordingly the court ruled that the defense of assumption of risk did not apply in this situation. However, the court also ruled that the act of continuing to ride in the defendant's car after the initial trouble with the brakes could be construed as an act of contributory negligence and remanded the case for a jury determination on that issue.

Although the early decision of the Supreme Court of Appeals of West Virginia noted some substantive differences between the doctrines of assumption of risk and contributory negligence, once the doctrines were proved, they had the same effect procedurally. A total bar against recovery by the plaintiff was the effect of either a finding of contributory negligence or assumption of risk.

B. West Virginia Adoption of Comparative Negligence: Bradley v. Appalachian Power Company

The most drastic change in West Virginia law concerning contributory negligence and assumption of risk came when the Supreme Court of Appeals of West Virginia adopted a comparative system of negligence in Bradley v. Appalachian Power Co. The essence of this decision was to establish a system whereby the plaintiff was

27. Id.
28. Id.
29. Id. at 419, 114 S.E.2d at 920.
30. Id.
31. Id.
not prohibited from recovery by contributory negligence so long as his fault does not equal or exceed the combined negligence of the other parties involved.\textsuperscript{35} The \textit{Bradley} decision made no mention of assumption of risk and the court did not hint in this case that assumption of risk would be treated in a similar manner.\textsuperscript{36}

\textbf{C. Post-Bradley Assumption of Risk Cases}

In two cases following \textit{Bradley}, but preceding \textit{King}, the Supreme Court of Appeals of West Virginia hinted that it may be willing to modify assumption of risk in light of the new comparative negligence system.

\textit{Pack v. Van Meter}\textsuperscript{37} addressed the issue of whether the doctrine of assumption of risk could be applied where an employee safety statute had been violated by the employer which caused injury to the employee.\textsuperscript{38} The court ruled that the defense was generally not available when such a statute had been violated. The court reasoned that the purpose of employee safety statutes was to guard the plaintiff against his own inability to protect himself. To allow the plaintiff to turn around and assume the risk guarded against by these statutes would defeat the primary purpose of the statutes.\textsuperscript{39} However, the court did note that it may be willing to address the continued validity of assumption of risk in light of the comparative negligence system.\textsuperscript{40}

In \textit{Ventura v. Winegardner},\textsuperscript{41} the court again noted its willingness to address the continued validity of assumption of risk in a comparative negligence system.\textsuperscript{42} The court noted that various jurisdic-

\begin{itemize}
\item \textsuperscript{35} \textit{Bradley}, 163 W. Va. 332, 256 S.E.2d 879 (1979).
\item \textsuperscript{36} Id.
\item \textsuperscript{37} 354 S.E.2d 581 (W. Va. 1986) (the plaintiff was injured while walking down steps at the store where she was employed by the defendant).
\item \textsuperscript{38} Id.
\item \textsuperscript{39} Id. at 587-88. The court went on to comment that the bar on assumption of risk in such cases should not be absolute as “[t]here may be certain occasions when the risk assumed could be easily avoided by alternative conduct on the part of the employee.” Id. at 588.
\item \textsuperscript{40} Id. at 587, n.11.
\item \textsuperscript{41} 357 S.E.2d 764 (W. Va. 1987). In \textit{Ventura}, the plaintiff was injured when she fell over a steep bank after running from her room, beyond a walkway, and into an unlit area at the Holiday Inn where she was staying. Id. at 765.
\end{itemize}
tions had taken different approaches in determining the effect of a comparative negligence system on the doctrine of assumption of risk. The court re-emphasized that contributory negligence and assumption of risk had always been treated separately in West Virginia. Although the issue was not raised by the parties in this case, the court indicated a willingness to re-examine assumption of risk in light of the adoption of a comparative negligence system.

III. THE RELATIONSHIP BETWEEN COMPARATIVE NEGLIGENCE AND ASSUMPTION OF RISK: KING v. KAYAK MANUFACTURING CORPORATION

A. Statement of the Case

In King v. Kayak Mfg. Corp., the plaintiff sued the manufacturer of a swimming pool in the Circuit Court of Monongalia County under a products liability theory. The plaintiff dove into a pool manufactured by the defendant with a depth of about four feet. As a result of this dive, the plaintiff struck bottom and became a quadriplegic.

There was evidence introduced at the trial court which indicated that the plaintiff had used the pool on several occasions before this incident. The plaintiff admitted that he was aware of the depth of the pool, but he also claimed to have seen others, including his brother, dive into the pool without injury. The plaintiff maintained that he dove into the pool with his hands outstretched over his head, but the defendant contended that the plaintiff dove into the pool with his hands at his side.

43. "There is no general rule among the various jurisdictions on this matter, but instead it varies widely." Id. at 767, n.3.
44. Id.
46. Id. at 513.
47. Id.
48. Id.
49. Id.
50. Id. at 521.
51. Id.
52. Id.
53. Id.
The defendant’s primary defense to the action was that the plaintiff was aware of the depth of the pool and thus he was either contributorily negligent or else he assumed the risk of diving into the pool. These defenses met with little success at the trial court as Judge Starcher rejected both defenses as a matter of law and entered a directed verdict in favor of the plaintiff. Judge Starcher implied in his directed verdict that following West Virginia’s adoption of comparative negligence, the doctrine of assumption of risk had lost its vitality.

The defendant manufacturer appealed the directed verdict issued in favor of the plaintiff. In deciding this case, the court did not limit itself to a discussion of whether the plaintiff was entitled as a matter of law to a directed verdict. Instead, the court used this case as an opportunity to discuss the status of assumption of risk following the adoption of comparative negligence.

B. Opinion of the Court

The opinion, written by Justice Miller, began its discussion of the effect of Bradley and comparative negligence on assumption of risk by reviewing the similarities and differences in the doctrines. The court pointed out that the “distinction is sometimes a troublesome matter.” The court did emphasize that a distinction between the two doctrines had always been recognized regardless of their similarities.

The opinion noted the almost universal trend among jurisdictions in the United States towards a comparative negligence system and away from the more strict contributory system. The court observed that the majority of jurisdictions which have adopted comparative negligence have also adopted a comparative form of assumption of risk.
risk which parallels that jurisdiction's comparative negligence doctrine.\textsuperscript{61}

The court justified decisions which have treated assumption of risk in the same manner as contributory negligence in a comparative system by reciting the similarities between the doctrines.\textsuperscript{62} Both doctrines had their origins in common law and dealt with the fault of the plaintiff.\textsuperscript{63} And according to the court at least, "both doctrines . . . were unduly harsh because if the plaintiff's fault contributed in any degree to the injuries, there could be no recovery."\textsuperscript{64}

The court acknowledged that many jurisdictions which adopted comparative negligence had done away with assumption of risk as a separate defense altogether and had merged it into a form of comparative negligence.\textsuperscript{65} The court noted that the argument for the elimination of assumption of risk as a separate defense was based on its similarities to the doctrine of contributory negligence.\textsuperscript{66} However, the court quickly rejected this argument by concluding without much discussion that "such similarities do not exist in this jurisdiction."\textsuperscript{67}

Finally, the court announced the retention of assumption of risk,\textsuperscript{68} but modified the doctrine so that a plaintiff is not barred from recovery by the doctrine unless his fault under assumption of risk is equal to or greater than the combined fault of the other parties involved.\textsuperscript{69} Thus, while refusing to merge the doctrines of assumption of risk and comparative negligence, the court mandated that the doctrines be treated exactly the same.\textsuperscript{70} Indeed, the court in-

\textsuperscript{61} Id. This directly contradicts an earlier statement by the court in Ventura. The court, discussing the effect of comparative negligence on assumption of risk, stated that "there is no general rule among the various jurisdictions on this matter, but instead it varies widely." Ventura v. Windgardner, 357 S.E.2d 764, 767 n.3 (W. Va. 1987).
\textsuperscript{62} King, 387 S.E.2d at 516.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Id. at 517.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
cluded in its opinion a proposed jury instruction which could be used for both assumption of risk and comparative negligence.\footnote{71. \textit{Id.} at 517-18 n.17: Under our law, the plaintiff can be guilty of assumption of risk and still be entitled to recover damages from the defendant(s) so long as the plaintiff's fault from assumption of risk does not equal or exceed the combined negligence of the other parties whose negligence contributed to the accident.

If, after considering all the evidence, you find from a preponderance of the evidence that the defendant(s) was (were) guilty of negligence that proximately contribute to the plaintiff's injury and that the plaintiff was not guilty of any fault which caused his or her injury, then your verdict should be for the plaintiff and you should assess damages.

In the event you should find the plaintiff guilty of fault which proximately contributed to his or her injuries, you should compare the plaintiff's fault to the combined negligence of the other parties to the accident and determine the degree of the plaintiff's fault expressed as a percentage of 100%.

If the plaintiff's degree of fault is less than 50 percent, you will determine the total damages that the plaintiff is entitled to recover. The court will then reduce the total damages by the percentage of the plaintiff's fault. If you find that the plaintiff's fault is 50 percent or greater, the plaintiff is not entitled to recover any damages and your verdict shall be for the defendant(s). A verdict form will be given to you on which to make your findings.}

After announcing its decision, the court discussed whether it should be applied retroactively. The factors which the court considered included: whether the area of law was changing or settled, whether the change was substantive or procedural, whether a common law rule was being considered, whether the area involved a substantial public policy, how radical the departure was from prior law, and finally, analogous decisions of other jurisdictions.\footnote{72. \textit{Id.} at 520.} After considering these factors and noting that \textit{Bradley} was given full retroactivity, the court also made \textit{King} fully retroactive.\footnote{73. \textit{Id.}}

After reaching these conclusions, the court stated that in the case at issue there was enough evidence for the jury to have found that the plaintiff's conduct was either comparative negligence or assumption of risk.\footnote{74. \textit{Id.} at 521.} Therefore, the court concluded that Judge Starcher was incorrect in issuing a directed verdict in favor of the plaintiff.\footnote{75. \textit{Id.}}

\section*{C. Analysis}

By deciding to treat assumption of risk in the same manner as contributory negligence in a comparative system, while maintaining...
a distinction between the two doctrines, the Supreme Court of Appeals of West Virginia created a distinction without a difference. In their present form, keeping these doctrines as two distinct defenses serves only to confuse the jury by adding another factor for their consideration.

The court in *King* also seems to be inconsistent in stating the similarities and differences between contributory negligence and assumption of risk. While arguing that assumption of risk should be treated like contributory negligence under a comparative system, the court stated the many similarities in the doctrines. Yet when the court stated that many jurisdictions had supported uniting contributory negligence and assumption of risk into one defense because of those similarities, the court stated that such similarities did not exist in West Virginia. Additionally the West Virginia court failed to clarify the similarities relied on by these jurisdictions. Furthermore, the court provided no basis for its conclusion that these similarities did not exist in West Virginia. Nowhere in the opinion does the court attempt to explain or justify how or why the similarities in assumption of risk and comparative negligence in West Virginia justify identical treatment yet do not justify merger of the doctrines into one defense.

The court also offers no guidance to juries on how to determine what percentage of fault to assign a plaintiff under the comparative assumption of risk doctrine. As defined by the Supreme Court of Appeals of West Virginia, "[t]he doctrine of [assumption of risk] is based upon the existence of a factual situation in which the act of the defendant alone creates the danger and causes the injury and the plaintiff voluntarily exposes himself to the danger with full knowledge and appreciation of its existence." It is hard to imagine a logical method to determine assessment of fault in a situation where the defendant is solely responsible for the danger, and yet the plaintiff voluntarily exposes himself to that danger.

76. *Id.* at 516.
77. *Id.* at 517.
IV. COMPARISON WITH OTHER JURISDICTIONS

Other jurisdictions which have dealt with the effect of assumption of risk defense in the context of a comparative system of negligence have come to a variety of conclusions. These decisions generally fall into one of three categories.

The first category of cases generally hold that the enactment of comparative negligence did not vitiate the common law defense of assumption of risk as an absolute bar to a person's claim for recovery.\(^{79}\) It is important to note, however, that every jurisdiction following this scheme analyzed the problem by trying to decide whether the legislature intended to include assumption of risk in a comparative negligence statute.\(^{80}\) Thus, these cases are not extremely helpful, as they turn on legislative intent rather than the benefits or disadvantages of treating assumption of risk like contributory negligence under a comparative system.

The second category of cases addressing the issue state that assumption of risk is to be only a damage reducing factor under a comparative negligence system, instead of operating as a total bar to recovery.\(^{81}\) West Virginia, with the decision in *King*, could be placed in this category. However, unlike the Supreme Court of Appeals of West Virginia, none of the other jurisdictions which fall in this category have maintained that assumption of risk was still to be regarded as a separate defense.\(^{82}\)

The final category of cases involves jurisdictions which recognize that assumption of risk is made up of at least two distinct defenses; the first being merely a form of contributory negligence, the second being more of a contractual relationship in which the plaintiff agrees to lessen the defendant's burden of care. When it


\(^{82}\) *King*, 387 S.E.2d at 571.
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is a form of contributory negligence, the plaintiff's recovery is reduced accordingly under the comparative system. These jurisdictions generally allow assumption of risk to act as a total bar to recovery when a plaintiff has contractually agreed to assume the risk.

The leading case in this third category of defenses is *Li v. Yellow Cab. Co.*, a California decision. In this case, the plaintiff brought an action against a taxi company and driver for injuries sustained by the plaintiff when his vehicle collided with the taxi. The California Supreme Court adopted a pure comparative negligence system in this case. The court also discussed assumption of risk. It observed that a situation "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."

However, where the assumption of risk is more a contractual relation and doesn’t involve carelessness, the court recognized that *Li* did not act to prevent assumption of risk from being a total bar to recovery.

Two subsequent lower court decisions in California help to illustrate the differences between these two categories of assumption of risk. In *Paula v. Gagnon*, the court held that assumption of risk did not preclude recovery in a wrongful death action brought against three taverns by the wife and children of the decedent, even though the decedent clearly assumed the risk of driving while intoxicated. The court concluded that this action was unreasonable and therefore fell squarely within the area that *Li* merged into a system of comparative negligence. On the other hand, *Lipson v.*

84. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).
85. Id.
86. Id.
87. Id. at 832, 858 P.2d at 1240, 119 Cal. Rptr. at 580.
89. Id.
Superior Court\textsuperscript{91} demonstrates a situation in which assumption of risk remains an absolute bar to recovery. In Lipson the court noted that even after Li, assumption of risk acted as a total bar to firemen seeking to recover for injuries suffered in the line of duty. The court stated that firemen assumed all risks known or that could be reasonably anticipated at the site of a fire. Since this assumption of risk was contracted for and was not a form of carelessness, the court recognized that it should remain a total bar to recovery in such circumstances.\textsuperscript{92}

The category of cases represented by Li offer two main benefits over the solution proposed by West Virginia in King. First, the Li decision offers a means of determining the fault of the various parties. Under Li, when assumption of risk falls under contributory negligence, it is viewed as carelessness — like any other contributory negligence it can be evaluated within the comparative negligence framework. The jury can factor in the carelessness related to assumption of risk along with other careless actions of the plaintiff leading to the injury. This facilitates the jury determination of the plaintiff’s comparative fault an easy determination of the plaintiff’s percentage of fault. As noted earlier, King offers no guidance in how to go about ascertaining fault under assumption of risk. The West Virginia jury is merely instructed to determine the percentage of fault entailed in the plaintiff’s assumption of risk without being given a standard by which to come to such a conclusion.

Secondly, the Li decision evaluates the similarities and differences of assumption of risk and contributory negligence. When assumption of risk is no more than a form of contributory negligence, it is merged with that defense in a comparative system. When, however, the assumption of risk is more of a contractual release of the defendant’s duty of care, assumption of risk remains an absolute bar to recovery. By contrast, King holds that the doctrines have some similarities and thus must be treated the same.\textsuperscript{93}

\textsuperscript{91} Lipson v. Superior Court, 31 Cal. 3d 362, 182 Cal. Rptr. 629, 644 P.2d 822 (1978).
\textsuperscript{92} Id.
\textsuperscript{93} King, 387 S.E.2d at 516.
but they also have differences and thus should still be treated as separate doctrines.\textsuperscript{94}

V. CONCLUSION

In King, the Supreme Court of Appeals of West Virginia attempted to modernize the doctrine of assumption of risk by addressing it under a comparative system. However, this approach, which lumps all assumption of risk under a comparative system, ignores the fact that in many situations, assumption of risk is more of a contractual relation than a form of plaintiff's fault. West Virginia should follow the lead of California in the \textit{Li} case and recognize that assumption of risk should be administered under a comparative fault system when it is merely a form of carelessness, but when it is more of a contractual relationship, it should remain an absolute bar to recover.

\textit{Daniel W. Greear}