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ESSAY—ASSUMPTION OF RISK: CASUISTRY IN THE LAW OF NEGLIGENCE

CHRIST GAETANOS*

I

What follows are the author's fulminations regarding an encumbrance on the common law of negligence: the doctrine of assumption of risk. It is a confounding doctrine possessing "beguiling simplicity"¹ in its expression of a fundamental social mood but which nevertheless embraces several variants. This in turn has resulted in an indiscriminate use of the phrase "assumption of risk" to express quite different and sometimes conflicting ideas.² As a result, ambiguity has become the rule, and the structure of legal thought has suffered accordingly.

Justice Frankfurter once wrote of assumption of risk that it was "a hazardous legal tool . . . bound to create confusion . . . [i]t should therefore be discarded."³ I agree with his statement, for what has arisen from the confusion is a tangled analytical framework, exemplified today by the existence of a fundamental dispute over whether assumption of risk means that the defendant committed no breach of his duty, or whether, admitting the breach, liability is rejected upon some other basis.⁴ This author proposes to argue in favor of the former.

It is argued by some that accurately perceiving the definition makes no difference since the results reached are usually right regardless of the jurisprudence employed. The courts,

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¹ Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5 (1961).

² See *Tiller v. Atl. Coast Line R.R. Co.*, 318 U.S. 54 (1943).

³ *Id.* at 72 (Frankfurter, J., concurring).

⁴ The West Virginia Supreme Court of Appeals has also fallen prey to this confusion. Compare *Lowe v. Norfolk & Western Ry. Co.*, 119 W.Va. 647, 195 S.E. 593 (1938) with *Hollen v. Linger*, 151 W.Va. 255, 151 S.E.2d 330 (1966).

therefore, ought to be permitted to continue to apply the doctrine, ambiguity or not, since the effect of error is minimal.⁵

On this I would make two observations. First, the rationale is plainly absurd. Results merely sensed to be right are not good enough.⁶ Verdicts and judgments justified solely by the warmth they engender in one's heart are more likely than not to be *ad hoc*, nonanalytic determinations, reflecting an insensitivity to the scope of the doctrine and its policy underpinnings. This, in turn, helps to foster a fat and feeble common law, narrow in scope, and in direct contravention of the rule of *stare decisis*.⁷ You might feel justifiably indignant if, upon learning that you had been adjudged guilty of a crime, you were then told by the judge or jury foreman that, reasonable doubt aside, it just seemed like the right thing to do.

Secondly, the widespread acceptance of the comparative negligence doctrine has undermined this minor premise that any jurisprudential error committed in the application of assumption of risk under comparative negligence is inconsequential. The plaintiff's contributory negligence is now simply one element of a matrix from which is derived the defendant's liability. Assumption of risk is not automatically included in this matrix, and, therefore, is preserved as an absolute bar to recovery. As a result, it has now become critical to minimize the risk of jurisprudential error since in those jurisdictions which continue to countenance the co-existence of comparative negligence and assumption of risk,⁸ a mischaracterization of plaintiff's conduct

⁵ One commentator has somberly suggested that, notwithstanding its doctrinal imprecision, assumption of risk should still be applied because it would "appear to solve many problems." Note, *Assumption of Risk as an Intuitive Concept in Tennessee*, 33 TENN. L. REV. 361 (1966). Perhaps, with expediency as a justification, we should also repeal the Fourteenth Amendment!

⁶ Mansfield, *Informed Choice in the Law of Torts*, 22 LA. L. REV. 17 (1961). This article presents an excellent alternative analysis and is highly recommended.

⁷ Moreover, of even more concern to the practitioner is how to evaluate a case and advise a client when a critical factor is left to the judge's or jury's day-to-day mood.

⁸ It is uncertain whether or not West Virginia is one of these jurisdictions. No holding or dictum of *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W.Va. 1979) seems to have sapped the vitality of the doctrine in this State. On the other hand, the court in *Bradley* felt it necessary to expressly cite the retention of the other common law contributory negligence defense of last clear chance. Thus, it

will result either in liability where there should be none, or, worse, an absolute bar to recovery by a plaintiff justly entitled to compensatory relief.

By and large, the courts, even those which have curtailed or abolished the doctrine, or have interpreted statutes doing the same, have not provided us with especially weighty reasoning on assumption of risk. They prefer instead to clutter the doctrine with insubstantial generalities such as "the essence . . . of assumption of risk . . . [is] venturousness"⁹ which are of little help in defining the essential character of the doctrine.

The commentators have been more critical, on the whole favoring a drastic restriction of the doctrine.¹⁰ Yet, they too have contributed to the confusion by compiling fundamentally differing views on the number and types of conduct apprehended by the doctrine. Most courts have identified two types of assumption of risk: express and implied. Dean Wade has spotted the same two,¹¹ as did Dean Keeton.¹² But Professors Harper and James have identified three types,¹³ and Professor Salmond, a different three.¹⁴ Dean Prosser noted four types,¹⁵ and the Restatement (Second) proclaimed a similar four.¹⁶ Professor Keeton, not to be outdone, found six.¹⁷ Still others, like Professor Mansfield¹⁸ have eschewed the jargon and analysis of the

could be argued that if the court desired to continue recognizing assumption of risk it would have done so expressly.

For a list of how other jurisdictions have treated this issue, see C. R. HEFT and C. J. HEFT, *COMPARATIVE NEGLIGENCE MANUAL* (1978).

⁹ *Hunn v. Windsor Hotel Co.*, 119 W.Va. 215, 216, 193 S.E. 57, 58 (1937).

¹⁰ See 2 F. HARPER & F. JAMES, *THE LAWS OF TORTS* § 21.8 (4th ed. 1956); Symposium, *Assumption of Risk*, 22 LA. L. REV. 1 (1961); Note, *Contributory Negligence and Assumption of Risk—The Case For Their Merger*, 56 MINN. L. REV. 47 (1971). But see W. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, § 68 (4th ed. 1971); *RESTATEMENT (SECOND) OF TORTS* §§ 496 A-G (1971).

¹¹ Wade, *supra* note 1, at 7-9.

¹² P. Keeton, *Assumption of Risk and the Landowner*, 22 LA. L. REV. 108, 110-15 (1961).

¹³ F. HARPER, & F. JAMES, *supra* note 10, at 1191.

¹⁴ SALMOND, *TORTS* 43 (8th ed. 1934).

¹⁵ PROSSER, *supra* note 10, at 440.

¹⁶ *RESTATEMENT (SECOND) OF TORTS*, *supra* note 10, at § 496 A.

¹⁷ R. Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 124-29 (1961).

¹⁸ Mansfield, *supra* note 6, *passim*.

others, preferring instead to examine the doctrine in terms of the relationship between or among the parties involved.

Indeed, in light of the judiciary's abdication and the commentator's disaccord, is there any wonder that those who deal today with the doctrine are confused and uncertain about how to properly apply it? This seems to me an argument cutting distinctly in the favor of those who are urging its abolition. What point is there in applying a legal formula in which the variables are perhaps unknowable? Nevertheless, while I submit to you that the doctrine should quickly and quietly be put to rest, I am also quite supportive of one idea embraced by it. Let us turn now to address that idea.

II

It is axiomatic, if not always true, that the American heritage endows and enriches its citizenry with freedom to author its collective and individual destinies. This is very much a people-oriented society, emphasizing to a remarkable degree the matter of individual choice in the conduct of one's own affairs. It is this characteristic which is thought to be the philosophic foundation of assumption of risk. Professor Bohlen's cardinal work on the subject speaks to the point:

The maxim *volenti non fit injuria* is a terse expression of the individualistic tendency of the common law, which, proceeding from the people and asserting their liberties, naturally regards the freedom of individual action as the keystone of the whole structure. Each individual is left free to work out his own destinies; he must not be interfered with from without, but in the absence of such interference he is held competent to protect himself. While therefore protecting him from external violence, from imposition and from coercion, the common law does not assume to protect him from the effects of his own personality and from the consequences of his voluntary actions or of his careless misconduct.¹⁹

While Professor Bohlen's exposition is to be understood in light of the mores of a different day, it still reflects a deepseated intuition most of us possess and cherish—that individual choice is a fundamental political principle, and its preservation a mat-

¹⁹ Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 91 (1906).

ter of utmost importance. Implicit in this intuition, though, is the concomitant trade-off that one accorded the right of free choice must also accept the consequences of that choice.

The common law has labeled this trade-off "assumption of risk." The phrase and the doctrine, however, are only intuitive aids, helpful at times to remind us that the underlying policy must be sustained. I do not quarrel with the policy. It is the doctrine itself which bedevils and confounds, and to that I direct my criticism.

One purpose of the law of negligence is the control of individual conduct. Another is the distribution of losses in accordance with rather broadly conceived public policies. In evaluating the law of negligence we must necessarily begin with the effect on the defendant, for it is the quality of his conduct which has been questioned. If his conduct is to be substandard, he will usually be made to bear, at least in part, the loss sustained by the plaintiff.

Law should, therefore, be to a considerable degree predictable.²⁰ Since it reflects, at least theoretically, the wisdom of common experience, it would not be altogether inapposite to expect from it a few workable rules of conduct. This is what the defendant needs, particularly so in the area of negligence. Unfortunately, assumption of risk is far too amorphous a doctrine to serve this purpose.

III

Presently acceptable assumption of risk theory generally holds that the doctrine assumes one of two shapes. The first is denominated "express assumption of risk," and means simply that a plaintiff has given his express consent that the defendant be relieved of his otherwise extant responsibility to act with reasonable care. The other is termed "implied assumption of risk," referring to situations where no express consent has been given, but where the courts nevertheless impute the same to the

²⁰ This is not to suggest that law should be static. Law is a process properly influenced by subtle inclinations derived from common experience. Nevertheless, change must come slowly, else it will outstrip the social conventions of the day, and come to be viewed more as tyranny than as law.

plaintiff, again effectively relieving the defendant from his reasonable care obligation.

The former is not a complicated principle. It is often discussed in contractual terms, the plaintiff's consent being regarded as the *quo* given in lawful exchange for defendant's *quid*.²¹ Technically, no actual contractual relationship is necessary for express assumption of risk to exist. But, where one doesn't exist, the courts generally regard the plaintiff's conduct in question as amounting to implied assumption of risk. In any event, absent some compelling public policy, where the plaintiff expressly undertakes to look out for himself he will be held to his commitment.²²

Implied assumption of risk, on the other hand, is hopelessly imprecise. It rests upon an absurd legal fiction that the plaintiff implicitly understands that he has accepted certain risks and tacitly agrees to relieve the defendant of liability for these risks. The absurdity lies in the imputation to the plaintiff of this understanding. It would be rare indeed to encounter a plaintiff who would maintain that he has agreed to hold a defendant harmless for conduct resulting in the plaintiff's injury. In actuality, the law simply regards him as having done so.

Thus, in order to be barred from recovery, there must be on the plaintiff's part an informed willingness to encounter certain risks. The finder of fact is directed to ascertain the plaintiff's subjective awareness of the pertinent risks. This of course is not a doable thing. No one is capable of peering into another's brain to learn of his actual thoughts, yet we ask the finder of fact to do just that. Practically speaking, what we get is an objective evaluation of such manifestations as there may be of the plaintiff's mental condition at the time of the injury. I submit that the law could do better than to have such an important doctrine turn upon empty phraseology.

Yet a further and more hazardous difficulty is the bifurcation of implied assumptions of risk into those reasonable and

²¹ See *Gonzales v. Baltimore & Ohio R.R. Co.*, 318 F.2d 294 (4th Cir. 1963); *Ciofalo v. Vic Tanney Gyms, Inc.*, 10 N.Y.2d 294, 177 N.E.2d 925 (1961).

²² Examples of relevant policies which would serve to void such commitments may be found in PROSSER, *supra* note 10, at § 668. See also RESTATEMENT (SECOND) OF TORTS § 496 B, Comment *passim* (1971).

those unreasonable. As to the first, why does our judicial system undertake to punish a plaintiff's reasonable conduct by absolutely barring recovery with nary an inquiry into the quality of defendant's conduct? Indeed, a defendant whose conduct falls to the level of willfulness or recklessness might still be shielded from having to account for such behavior.²³

As to the second, it should be apparent that a plaintiff who acts unreasonably is acting negligently since negligence is understood to be *unreasonable* misbehavior. Thus, unreasonable assumption of risk is sometimes overlapped by the more familiar doctrine of contributory negligence and, accordingly, the need for the former terminology disappears completely.

What we have here, in essence, is a series of rules which lead us up, down and all around but never directly toward what should be a major objective of the law of negligence—the development of workable rules of individual conduct. What, for example, is a defendant to think if he knows that unreasonableness in conduct will not be discouraged if a plaintiff reasonably encounters a risk arising out of such conduct? Will we not, by following such a rule, encourage a defendant's unreasonableness, and discourage a plaintiff's reasonableness? Certainly, we will. And what impact will these rules have upon a jury? What will it believe, and how will it react to a system which instructs, on the one hand, that plaintiff's unreasonable conduct will go to reduce, but not automatically bar, his recovery, and then further instructs that this same unreasonableness may indeed bar recovery if it can be said to fall under the rubric of assumption of risk?

Such rubric is simply a "confusing way of stating certain no-duty rules or . . . [a] kind of contributory negligence."²⁴ It is not irrational to say, nor to instruct, that a plaintiff owes himself a duty to take care of himself. But to do so in the language described above is to express artificially and nearly incoherently the rule that liability should be based on breach of duty.

A plaintiff who assumes certain risks is, and rightly should be, accorded a lesser measure of legal protection than one who

²³ RESTATEMENT (SECOND) OF TORTS § 496 A, Illustration Z (1971).

²⁴ F. James, Jr., *Assumption of Risk: Unhappy Re-Incarnation*, 78 YALE L. J. 185, 188 (1968).

does not. However, it is error to refer indiscriminately to this allocation of liability in terms of assumption of risk. The problem here is one of misplaced emphasis. A plaintiff, by asserting in the face of danger his choice to encounter it, has interjected in his relationship with any given defendant a new and critical element. Since the defendant's duty to another is to act reasonably under all the circumstances which attend his relationship with the other, it would be quite in keeping with this relatively uncomplicated expression to make the plaintiff's choice another circumstance to be considered in fixing the parameters of that duty. It is that concept which occupies the greater part of the rest of this essay.

IV

As Prosser noted, the whole theory of negligence presupposes some uniform standard of behavior²⁵ personified in law by the so-called reasonable man, whose conduct always adheres to the social ideal of apt behavior. The reasonable man is bound to observe an objectively determined standard of conduct which covers a variety of human affairs, making allowances for his capacity to act prudently under the circumstances. Furthermore, he is required to know that which is common to the community, *even to the point of anticipating either the conduct of others,*²⁶ *or when the responsibility for the protection of others, with respect to whom he might otherwise be charged with a duty to exercise due care, may reasonably be shifted to another.*²⁷

We have, therefore, theoretically instilled in all persons the principle that they must act reasonably in their affairs with others. What is proposed here is simply that assumption of risk should be subsumed into the reasonable man formula, a proposal which should relieve the bench, bar and lay jury of the task of shifting cognitive gears to comprehend and apply a doctrine which differs markedly in tone from standard negligence theory. The point is to return exclusively to a concept which, by and large, has served us well.

Negligence theory emphasises the relationship existing between any given plaintiff and any given defendant. Included in

²⁵ PROSSER, *supra* note 10, at § 32.

²⁶ PROSSER, *supra* note 10, at § 33 (emphasis added).

²⁷ *Id.* at § 33 (emphasis added).

the theory are considerations respecting the quality of conduct of each of the parties, the knowledge each possesses and the expectations each has. Rules are devised to encourage such behavior as might afford a plaintiff a maximization of freedom and a defendant a minimization of culpable conduct. Thus, the goal is not only to discourage harmful conduct but also to encourage one party to respond affirmatively to the desires of the other. Obviously, the two are correlative and a balance must be struck between them.

The parties need to know the approximate limits upon their freedom. Generalities must suffice because the infinite variety of human conduct makes impractical the development of precise rules of behavior. Accordingly, neither should be required to reflect, in particularly great depth, as to what the mental processes of the other might be.²⁸ Moreover, since both the plaintiff and the defendant are affected by these rules of social behavior, we must take care not to focus solely on the plaintiff's point of view of the risks inherent in social interaction. Indeed, since in any lawsuit it is the defendant who finds himself accused of misbehavior we are safer to err by emphasizing his standpoint. Properly though, we should look to both views.

Refer back momentarily to the previous discussion regarding the importance in this society of individual freedom and the concomitant trade-off of the right to absolute legal protection. If we accept the premise, as we must, that persons are free to act pretty much as they wish, then it follows *a fortiori* that they may also affect to their detriment the circumstances on which the reasonable man depends for guidance. In other words, the defendant is charged with exercising due care under the circumstances. This is his burden, but when a plaintiff chooses to gamble that he might safely confront the defendant's conduct this burden should be eased solely by virtue of the plaintiff's gamble, regardless of whether or not the defendant was aware of the gamble.²⁹ All that should be demanded of a given defendant whose deportment would do even the reasonable man proud is a

²⁸ This of course is a failing of assumption of risk. Human affairs pass much too quickly and are much too varied to allow for serious reflection on subjective judgment. The reasonable man will just have to do.

²⁹ This does not concern those instances in which the defendant is required to act, but only those where the defendant's conduct is essentially unrestrained by affirmative duty.

reasonable belief that any given plaintiff, acting prudently, would appreciate a risk and nevertheless choose to encounter it.

Such a standard coincides with the various policies favored by the law of negligence. Firstly, unreasonable behavior is, as before, not tolerated.³⁰ Conceptually, it is treated as negligence. If both parties conduct themselves unreasonably, applicable tort principles take over. If the plaintiff alone acts without due care, he is contributorily negligent and would be barred absolutely from recovery.³¹ If the defendant is the sole negligent party, he must bear the burden of recompense no matter how reasonable the plaintiff was in encountering the risk.³²

Here, assumption of risk would probably bar plaintiff's recovery upon the rationale that manifested, voluntary willingness cures all. This is not satisfactory. The upshot of such a rule permits a reasonable plaintiff to suffer for his prudence and an unreasonable one to be relieved of liability. Harper and James have articulated well an objection to this circumstance and, while they wrote in the context of products liability, their thoughts apply quite nicely to assumptions of risk of this third type:

Such a result, it is submitted, is unfortunate. The maker has, by hypothesis, put out a produce which is unreasonably dangerous even to one who knows the defect. Whether he is to be held strictly or only for negligence in doing so, why should he be

³⁰ "The great majority of cases involving assumption of risk are of this kind." RESTATEMENT (SECOND) OF TORTS, *supra* note 10, at § 496A(d).

³¹ This absolute bar holds true always: no one may recover in negligence against one who, in acting reasonably, has breached no duty.

³² Rescue cases are typically thought to fall within this category. Sometimes, courts have refused to instruct as to assumption of risk since the defendant's act of placing a third party in danger is thought to constrain the plaintiff to engage in a rescue attempt, thus making plaintiff's conduct involuntary.

This is however, incongruous and does violence to our language and common sense. I am not my brother's keeper and, absent some pre-existing duty, am not obligated to rescue another from impending doom. Nonetheless, if I do choose to attempt a rescue I most certainly assume the risk of personal injury, but in no way do I act involuntarily.

If assumption of risk will in this situation bar me from recovery, and relieve the defendant from liability for his negligence, I would have to say that this is grossly unfair. And, if the bench and bar need to justify imposing liability with cute semantical distinctions, I would then submit that the doctrine of assumption of risk bears serious retooling.

freed of liability merely because the plaintiff knew of the defect but used the thing carefully? If the individualism embodied in assumption of risk is to be justified by the unwillingness to inhibit the maker's activities in such a way as to diminish to defeat the flow of advantages to plaintiff's class (customers and users), then surely it is unrealistic to think that in the case put the withholding of liability will materially promote that objective. [Citation omitted.] The maker, negligent by hypothesis, will in any event be subject to liability to plaintiff's ignorance of the risk, and if the fear of this liability does not keep him from producing the product, it is unlikely indeed that he will go out of production to avoid the prospect of additional liability to the occasional informed victim. Except where products are extremely dangerous, both liabilities are more likely to induce care in manufacture than cessation of production.³³

Of this there is nothing more to say except that Harper and James have identified that which is inherently fair. This fairness should also prevail in our jurisprudence.³⁴

Where both parties have acted reasonably, the defendant must prevail.³⁵ He has satisfied the standard, to be sure, but more significantly he has violated no duty by acting reasonably. It is a fundamental premise that, absent sufficient cause, loss suffered by one ought never to be shifted to another.³⁶

Secondly, where the plaintiff has expressly consented to assume the risk, the preceding standard will apply just the same. Indeed, if the defendant knows of the plaintiff's willingness to encounter a risk it would not be inappropriate to suggest that the defendant is now endowed with a reliance interest and should therefore be held to a somewhat lesser duty.

When two parties proceed with eyes open to live somewhat dangerously, each knowing of the other's assent to accept certain risks, a situation exists where each can plan to minimize the likelihood of actual injury. Here, there is, *a priori*, less of a need to protect either from unexpected breaches of duty since each has plainly expected at least some of the hazards. As to these, no protection is warranted.

³³ F. HARPER & F. JAMES, THE LAW OF TORTS § 21.1 (Supp. to Vol. 2).

³⁴ It already exists in at least one jurisdiction. See *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90 (1959).

³⁵ See note 37 *infra* and accompanying text.

³⁶ R. Keeton, *supra* note 17, at 149.

Thirdly, where the defendant does not know of the plaintiff's express assumption of risk, or where the plaintiff might be held to have impliedly agreed to assume certain risks, the defendant, regardless of the reasonableness or unreasonableness of the conduct of the parties, is still only required to exercise reasonable care. This is because he still might reasonably anticipate that a given plaintiff would or would not assume a risk. Thus, this mere fact of anticipation will affect the duty owed. Clearly, there is a vast difference between the duty owed a plaintiff who, while walking his dog on a public sidewalk, is injured by a baseball mis-hit by a defendant playing in a sandlot game and one who, while sitting as a spectator in a stadium specially set aside for the purpose, is struck by an errantly hit foul ball. Assumption of risk aside, the duty to plaintiff in the latter case is plainly less. What need is there to resort to assumption of risk when the duty analysis will suffice? That duty encompasses a defendant's reasonable expectations of self-protective measures which would be taken by a prudent plaintiff.

This simpler formulation where both the plaintiff's and the defendant's conduct is evaluated according to the tried and true reasonable man standard avoids the confusion engendered by assumption of risk and provides to plaintiffs and defendants alike workable rules of conduct while simultaneously giving effect and maximization to the integral policy of freedom of choice. If the view set forth in this essay prevails, there will necessarily be less confusion without any corresponding drop-off in flexibility for duty is a broad enough concept to absorb assumption of risk without doing violence to its underlying policy.³⁷

³⁷ Arguably, the adoption of a duty/no duty approach to what is now covered by assumption of risk would be detrimental to the plaintiff. Under assumption of risk, the dual burdens of pleading and proof lie with the defendant. It is asserted that a plaintiff must, under a theory which at least partially subsumes assumption of risk into a duty framework, prove his own lack of acceptance of the risks.

This assertion should be rejected for when a plaintiff's own proof omits to show lack of acceptance, the practical burden of proving that he did in fact assume the risk falls to the defendant. Furthermore, it is not logical to believe that the no-duty formulation necessarily requires plaintiff to show all the facts. Plaintiff has only to prove that the defendant acted unreasonably, and if he does so, this should suffice to survive a motion for directed verdict. The rigidity of common-law pleading is ended. Under code pleading, these technicalities have no place.

V

At this point, a brief word is in order with respect to West Virginia law on assumed risks and the effect on this law of the West Virginia Supreme Court of Appeals' recent foray into the world of comparative negligence.

The law of assumed risks in West Virginia is largely the same as that which appears in part III of this essay. The doctrine becomes viable in West Virginia only "where one places himself in a posture of known danger with an appreciation of such danger."³⁸ Thus, "[p]roof of plaintiff's knowledge and volition are essential preconditions to [its] successful invocation . . ."³⁹ In short, the plaintiff must appreciate the danger to which he exposes himself and confront it without compulsion by any special exigency.⁴⁰

Assumption of risk is in theory distinguishable from contributory negligence, though this distinction appears only to be confined to the subjective judgment element, West Virginia courts having read into the doctrine the same proximate cause requirement of contributory negligence.⁴¹

The introduction of comparative negligence in *Bradley v. Appalachian Power Co.*⁴² has brought forth a flurry of speculation as to the continued vitality of the doctrine. No precise word has yet issued on the point, but the West Virginia Supreme Court of Appeals has within the past year acknowledged its ex-

³⁸ *Korzun v. Shahan*, 151 W.Va. 243, 151 S.E.2d 287, 292 (1966).

³⁹ *Clements v. Stephens*, 211 S.E.2d 110, 115 (W.Va. 1975).

⁴⁰ *Hunn v. Windsor Hotel Co.*, 119 W.Va. at 216, 193 S.E. at 58.

⁴¹ See *Mathews v. Cumberland & Allegheny Gas Co.*, 138 W.Va. 639, 77 S.E.2d 180 (1953).

Most commentators and courts make no mention of the proximate cause element. Indeed, its general absence appears to suggest that it is not an element. However, practically speaking, it must exist. A plaintiff who assumes a particular risk, and is not subsequently injured when the risk ripens, cannot thereby be said to have consented to other risks which did in fact ripen to injury-causing conduct. There is no such animal as transferred assumption of risk. The defense works only when the risk assumed and the injury suffered are causally related. In recognizing this, the West Virginia Supreme Court of Appeals appears to have been more intellectually perceptive and forthright than other writers on the subject.

⁴² 256 S.E.2d 879 (W.Va. 1979).

istence in products liability suits sounding in strict liability in tort.⁴³

The fundamental concept embodied in comparative negligence is that the apportionment of liability should be on the basis of fault. However, not all assumptions of risk amount to fault, though it is arguable that most in fact do. As to those which resemble contributory negligence, it stands to reason that they be subsumed by the comparative negligence doctrine. Fault after all is fault by any other name. The label "assumption of risk" should not obscure this.

As to those assumptions of risk which are not tantamount to contributory negligence, there is the analytical problem of subsuming reasonable conduct into a fault concept. One is an apple, the other an orange and the two cannot be cross-bred.

New York State, a "pure" comparative negligence jurisdiction, has nevertheless attempted to do just that by statutorily directing that all assumption of risk is culpable conduct.⁴⁴ There are, ominously, no reported cases telling just how this is to be done. Connecticut has done likewise,⁴⁵ and the courts there also appear to be reluctant to explain how all assumption of the risk is culpable conduct.

New Jersey, which has adopted a variation of the 50% rule of comparative negligence, and California, like New York, a "pure" jurisdiction, have split the doctrine in two, allocating unreasonable assumptions to fault and the rest to a duty/no-duty analysis.⁴⁶ It would appear that this approach is best, having the advantages of intellectual tidiness and support from the commentators.⁴⁷ It would be incongruous to permit a continuation of an all or nothing doctrine where apportionment has become the watchword. The controlling question in all negligence cases is reasonableness of conduct and we know that liability founded

⁴³ See *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666 (W.Va. 1979).

⁴⁴ N.Y. CIV. PRAC. LAW § 1411 (McKinney 1972).

⁴⁵ CONN. GEN. STAT. ANN. § 52-572 (West Cum. Supp. 1979). See also ARK. STAT. ANN. § 27-1763 (1966) and PA. CONS. STAT. ANN. § 7102(a), (b) (Purdon Cum. Supp. 1979).

⁴⁶ See *Meistrich v. Casino Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90 (1959); *Li v. Yellow Cab Company*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

⁴⁷ See generally DOOLEY, MODERN TORT LAW: LIABILITY & LITIGATION § 6.15 (1977); SCHWARTZ, COMPARATIVE NEGLIGENCE § 9.5 (1974).

upon relative unreasonableness is now apportionable. The same ought to be true of assumption of risk.

VI

That confusion is engendered by continued adherence to the doctrine of assumption of risk is best demonstrated by this quote from a supporter, the late Dean Prosser:

It is not true that in any case where the plaintiff voluntarily encounters a known danger he necessarily consents to negligence of the defendant which creates it. A pedestrian who walks across the street in the middle of a block, through a stream of traffic travelling at high speed, cannot by any stretch of the imagination be found to consent that the drivers shall not use care to avoid running him down. On the contrary, he is insisting that they shall. This is contributory negligence pure and simple; it is not assumption of risk. And if A leaves an automobile stopped at night on the travelled portion of the highway, and his passenger remains sitting in its, it can readily be found that there is consent to the negligence of A, but not to that of B, who runs into the car from the rear. *This is a distinction which has baffled a great many law students, some judges, and unhappily a few very learned legal writers.*⁴⁸

Indeed it continues to baffle. Can it not be said that the pedestrian took the risk that he might be struck by a car? What is it about these examples that compels the conclusion reached by Dean Prosser? I am afraid that I cannot explain, and would venture to say that few lawyers and judges could. This in itself is not too troubling but can we really expect a lay jury to comprehend that which reduces trained minds to befuddlement? I think not.

Assumption of risk is a relic of a day, now largely past, where an all or nothing principle of tort liability predominated. In today's more equitable jurisprudence, this crude relative fault concept has no place and should, therefore, be banished. Its emphasis on subjective analysis contradicts centuries of precedent holding that objective standards are apropos.⁴⁹ It offers

⁴⁸ PROSSER, *supra* note 10, at § 68 (emphasis supplied).

⁴⁹ See *Vaughan v. Menlove*, 132 Eng. Rep. 490 (1738), cited by PROSSER, *supra* note 10, at § 32 n.5 as the first case mentioning the reasonable man of ordinary prudence.

little in the way of guiding rules of behavior, and indeed, in some cases, effectively punishes reasonableness and rewards its converse. Truly, this is a problematic doctrine.

The policy underlying assumption of risk—personal liberty with concomitant responsibility—is sound. But, assumption of risk calls forth so many different images that danger truly exists that not all those who deal with it will effectively limit it to its proper uses. The duty/no-duty model set forth in part IV avoids the uncertainty of confusion and improper application.

Generally, the ultimate arbiter of legal propriety, particularly in negligence cases, is the jury. Their model of determination is aided by common sense and the court's instructions. Why confuse them about a policy which they no doubt intuitively comprehend by couching it in the language of intellectual aestheticism? Law can be simpler than it's cracked up to be and this is one area where real opportunity exists for simplification. Hopefully, the courts will seize upon the doctrine and banish it from our jurisprudence.