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Implied Assumption of a Reasonable Risk: Much Ado About Nothing or Radical Departure in California Law?

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IMPLIED ASSUMPTION OF A REASONABLE RISK: MUCH ADO ABOUT NOTHING OR RADICAL DEPARTURE IN CALIFORNIA LAW?

By Stephanie M. Wildman

The California Supreme Court recently decided two companion cases concerning assumption of risk, a common law tort defense. The decisions do not signal a major theoretical change in tort law in California, simply some new vocabulary applied to existing concepts. However, the application by the court of this new vocabulary to the facts of these cases may mark a radical departure from the traditional analysis of duty of care owed by a negligent defendant to an injured plaintiff. The different views held by the litigants and judges of the facts in these cases suggest the importance of a continuing role for the jury in tort adjudication.

In Knight v. Jewett (1992) 3 Cal. 4th 296 and Ford v. Gouin (1992) 3 Cal. 4th 339, the court considered whether the classic tort defense of implied assumption of a reasonable risk had survived in California after the adoption of comparative fault with Li v. Yellow Cab (1975) 13 Cal. 3d 804. In Li, the supreme court eradicated assumption of risk as a separate negligence defense "to the extent it is merely a variant of the former doctrine of contributory negligence." Li at 825.

The aspect of implied assumption of risk that had been abolished in Li seemed to involve assumption by plaintiff of an *unreasonable* risk, such as accepting a ride home from an obviously drunk driver. See, e.g., Gonzalez v. Garcia, 75 Cal.App. 3d 874, 142 Cal. Rptr. 503 (1977) (plaintiff accepting ride when alternatives such as calling a

cab or asking wife to come pick him up, were readily available). Such conduct by a plaintiff, encountering a risk that is unreasonable in relation to his or her own safety, is contributorily negligent. After Li, the question remained whether any part of the doctrine of implied assumption of risk endured.

The doctrine is commonly misconstrued. A pedestrian who dashes across the middle of a busy street, trying to beat the oncoming cars, is not assuming the risk of the drivers' negligence. (A much used torts hornbook, W.P. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Torts (5th ed. 1984) uses a similar example at 484-85.) In fact the pedestrian is assuming that the drivers will be extra careful and alert, slowing down when they see someone crossing illegally. The pedestrian's conduct can be char-

acterized as *taking a risk*, possibly a negligent one, but not as assumption of risk.

Assumption of risk is traditionally tested on a subjective basis. Gonzalez, *supra*, 75 Cal. App. 3d at 878. Assumption of risk must be voluntary. Prescott v. Ralph's Grocery Co. (1954) 42 Cal. 2d 158, 162, Restatement (Second) of Torts 496E (1965). Defendant must show that plaintiff knew of the risk and willingly took it. Assumption of risk is the "voluntary acceptance of a risk [where] such acceptance...has been made with knowledge and appreciation of the risk." Prescott, *supra*, 42 Cal. 2d at 161-62.

Under assumption of risk, plaintiff is implicitly agreeing to a defendant's use of less than reasonable care toward him or her. For plaintiff to assume a risk, plaintiff must be aware both of that specific risk, not just of general danger, and of the degree or magnitude of that risk. Thus, a plaintiff theoretically might agree, voluntarily and knowingly, to assume an unreasonable or a reasonable risk. As noted, the defense of assumption of an unreasonable risk was merged into comparative fault. In Knight and Ford, the California Supreme Court had promised to resolve the question whether the defense of implied assumption of a reasonable risk remained a distinct part of California tort law.

In Knight the court issued several opinions, with no clear majority voice. The Knight plurality decision, authored by Justice George and joined by Jus-

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tices Lucas and Arabian, acknowledged that assumption of risk has been used in very dissimilar cases involving "analytically different legal concepts." *Knight supra*, 3 Cal.4th at 303. Those different legal concepts included using assumption of risk to describe either "a reduction of defendants duty of care" (*Id.* at 308) toward a a plaintiff or plaintiff's contributory negligence. *Id.* at 307. As to the distinction between reasonable and unreasonable assumption of risk, the court said that the distinction was "more misleading than helpful." *Id.* at 309.

Thus the plurality drew a distinction between two historical uses of the assumption of risk doctrine. The plu-

under the comparative fault framework, which might allow some tort recovery.

Now every first year law student studying hornbook tort law will tell you that if the defendant owes no duty toward the plaintiff to use reasonable care then there is no prima facie case of negligence and no tort liability. Lawyers only concern themselves with the question of **defenses** to negligence once the prima facie case of tort liability has been established. So the court's retention of primary assumption of risk in California tort vocabulary means that there is now another way for defense counsel to argue that no duty is owed to the plaintiff: defense counsel

for the defendant. Evidently he thought that the duty inquiry made by the plurality, whether called the duty element of the prima facie case or primary assumption of risk, led to the same no liability result. He urged the court to abolish the so-called defense and to reach the no duty conclusion using traditional tort analysis. By abolishing the doctrine of assumption of risk, the court could have avoided the confusion that will be generated by calling the doctrine a defense, but applying it as part of the plaintiff's prima facie case. In terms of tort theory, plaintiff must still show defendant owes her or him a duty to use reasonable care. No duty may be viewed as a failure to prove the negligence prima facie case or may be called primary assumption of risk. If a duty is owed by defendant to plaintiff, then the negligence prima facie case must be analyzed, followed by defenses, including comparative fault, which will include secondary assumption of risk.

Nothing has changed in theory, except that a new name for the judicial ruling "no duty of reasonable care owed" has been added to California law: "primary assumption of risk." Are these cases, then, much ado about nothing? Unfortunately they are not, because it is in the application of this tort theory to the facts of these cases that we see the radical change that has been slipped into California law by these decisions. The situated nature of the judicial decision about duty of care is veiled under a new layer of vocabulary.

Generally when one engages in an activity, the actor has the duty to do so reasonably, using reasonable care toward those with whom the actor will come into contact. Special duty issues historically have arisen in cases of failure to act, control of the conduct of

It is unfortunate that the court chose to retain this assumption of risk language, instead of relegating it to the realm of tort defense, and to inject it into the question of duty, the first issue in analyzing the negligence prima facie case.

rality differentiated "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 . . . 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." *Id.* at 308.

According to the court, the first kind of assumption of risk, termed primary assumption of risk, is not merged into comparative negligence. Thus a plaintiff's recovery would be barred in those cases. In the second sort of case, involving secondary assumption of risk, a plaintiff's conduct is analyzed

will say it is a case of primary assumption of risk.

It is unfortunate that the court chose to retain this assumption of risk language, instead of relegating it to the realm of tort defense, and to inject it into the question of duty, the first issue in analyzing the negligence prima facie case. The court gave no elaboration on how a judge should decide if a duty is owed, using primary assumption of risk. Presumably, using the language of primary assumption of risk should not warrant a different inquiry than is usually made by a judge on the duty question.

Justice Mosk, concurring and dissenting in *Knight*, provided the fourth vote for affirming summary judgment

another, landowners and occupiers, economic harm, and emotional harm. These special duty cases have raised the question whether the defendant

The three justice plurality seemed very concerned with co-participants in sports and how to ensure that players should not be liable for every little push and jostle that might lead to injury.

owes the plaintiff a duty to use reasonable care toward his or her safety. But in ordinary behavior and social relations, actors have the duty to act reasonably. This common law premise is codified by statute in California in Civil Code 1714. As the *Knight* court said: "As a general rule, persons have a duty to use due care to avoid injury to others, and may be held liable if their careless conduct injures another person. (See Civ. Code, 1714.)" *Id.* at 315.

In *Knight* the plaintiff's finger was mangled during a touch football game. After three operations "failed to restore the movement in [plaintiff's] little finger or to relieve the ongoing pain of the injury," the finger was amputated. *Id.* at 301.

Before the injury occurred, plaintiff had complained to defendant that he was playing too roughly. *Id.* at 300. She had said she would not continue playing unless he was more careful, and, according to plaintiff, he had said that he would. *Id.* at 300. Defendant

and plaintiff recalled the injury-causing play differently. Defendant recalled jumping to intercept a pass, missing the ball, and colliding with plaintiff. As he landed, he stepped backward onto plaintiff's hand. *Id.* at 300. Plaintiff and another participant, Starr, recalled that Starr had caught the pass, and that defendant ran into plaintiff from behind, knocking her down. Defendant then continued running until he tagged Starr, injuring her as well. *Id.* at 300-01.

The gender division between the litigants is striking in these different views of the case. The different viewpoints held by the participants in the injury-causing event provide a fascinating backdrop from which to view the divergent viewpoints of the justices. By calling this case one of primary assumption of risk, the court is saying that this football playing defendant owed no duty to use reasonable care toward other players in the game for the injuries that he caused. Yet Civil Code 1714 states that as a general rule persons have a duty to use due care to avoid injury to others. The court's decision implies that recreational sports participants are in a different category regarding duty.

The three justice plurality seemed very concerned with co-participants in sports and how to ensure that players should not be liable for every little push and jostle that might lead to injury. Justice Mosk agreed that no duty owed was the correct analysis, providing the fourth vote to affirm summary judgment for the sports defendant. We might call this the "sports standard" — hang tough in sports because no one owes you a duty to use reasonable care in a rough game.

Recent academic writing has identified gendered, socialized differences in how children play. *See* Carol Gilligan,

In A Different Voice. The sports standard reflects this male gendered orientation. This acceptance of a sports standard makes an interesting contrast to the views of the other justices. Justice Kennard, dissenting, found that a duty to use reasonable care was owed by the sports defendant. She analyzed the case as one raising issues of knowledge and voluntary consent, which classically are raised by an assumption of risk defense. She believed that a trial would be necessary to resolve the issues. Two other justices, Baxter and Panelli, agreed with the majority result, no recovery for the injured player; but would have arrived at that result using the consent-based assumption of risk analysis, finding that the injured player had agreed to the defendant's using the care of a football player toward her. The female litigant's view that players should act reasonably toward each

Most justices either scoff at the idea of co-participant duty (the sports standard) or discount the breach issue raised by the plaintiff's version of the facts.

other, within the rules of the game and that the defendant breached that duty is not seen by most justices. Most justices either scoff at the idea of co-participant duty (the sports standard) or discount the breach issue raised by the plaintiff's version of the facts. It remains to be seen whether similar devaluation of duty as articulated in Civil Code 1714 will occur outside the sports setting.

In *Ford v. Gouin*, *supra*, a gendered view of the problem is not in evidence, but a different serious issue emerges. In that case, the plaintiff water-skier was injured when he collided with an overhanging tree limb while water-skiing barefoot and backwards. *Ford supra*, 3 Cal.4th at 343. This conduct probably could be termed foolhardy. The court, in its application of *Knight*,

tort cases.

Implied assumption of a reasonable risk remains a superfluous tort doctrine. A proper analysis of the existing elements of the prima facie case of negligence, duty, breach, actual cause, and proximate cause, will result in a fitting disposition of the case. In cases where the plaintiff's conduct is at issue, the existing tort doctrine of com-

making process. The evaluation of whether a duty is owed is within the province of the judge, but the negligence determination, if defendant does owe plaintiff a duty, should be allowed to the jury.

Traditionally the jury is called upon to resolve cases upon which reasonable people might differ. Reasonable men and reasonable women often see the same situation from very different perspectives. Cf. *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (establishing a reasonable woman standard to evaluate sexual harassment: "conduct that many men consider unobjectionable may offend many women." *Id.* at 878.) A touch football game is another place where gender differences might color a participant's or decisionmaker's view of reality. Understanding that these gender differences exist would be a beneficial step toward greater fairness in judging and in decisionmaking. Cf. Catharine Wells, *Situated Decision-making*, 63 S. Cal. Law Rev. 1727 (1990). Obfuscating the issue of viewpoint with more doctrinal language, such as primary assumption of risk, will not bring us closer to our aspiration for justice. ■

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Hiding behind the language of "primary assumption of risk" courts may be permitted to duck serious issues of social obligation traditionally raised by the duty issue, without doing the analysis necessary to reveal the decisionmaking process.

states that "the assumption of risk doctrine operates as a complete bar [when] . . . the defendant's conduct did not breach a legal duty of care owed to the plaintiff." (Emphasis added) *Ford* at 342.

The *Ford* plurality purports to be applying its newly articulated no-duty owed standard from the *Knight* case, yet the court says that its analysis is about **breach** of duty. The question of breach is traditionally one that is within the province of the jury in tort cases. If the court is advocating using primary assumption of risk, under the guise of duty analysis, as a substitute for the negligence determination historically made by the trier of fact, that usurpation of jury function would be a radical departure from traditional handling of

parative fault provides an appropriate vehicle for analyzing those issues.

The so-called defense of implied assumption of a reasonable risk, whether primary or secondary, is not necessary to tort analysis. Assumption of risk raises no arguments that are not already served by other aspects of the prima facie case of negligence. The retention of the assumption of risk defense results in doctrinal double-counting, where litigants make repetitive arguments under different doctrinal names.

Hiding behind the language of "primary assumption of risk" courts may be permitted to duck serious issues of social obligation traditionally raised by the duty issue, without doing the analysis necessary to reveal the decision-