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Time to Abolish Implied Assumption of a Reasonable Risk in California*

By STEPHANIE M. WILDMAN** and JOHN C. BARKER***

IMPLIED ASSUMPTION of risk¹ is an anachronistic doctrine that only confuses courts trying to allocate responsibility in negligence cases.² The doctrine serves no purpose that is not already served by other aspects of the prima facie case of negligence. The use of the assumption of risk defense results in a doctrinal double-counting, where litigants make repetitive arguments under different doctrinal names. The elimination of implied assumption of risk would avoid this unnecessary duplication of doctrine and the confusion that has surrounded implied assumption of risk litigation.

In Li v. Yellow Cab Co.,³ the California Supreme Court adopted comparative negligence and abolished assumption of risk as a separate negligence defense “to the extent it is merely a variant of the former doctrine of contributory negligence.”⁴ The aspect of implied assumption of risk that was clearly abolished in Li involved assumption by plaintiff of an unreasonable risk—for instance accepting a ride home from an obvi-

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¹ The defense infers a plaintiff implicitly has agreed, voluntarily and knowingly, to encounter the defendant’s negligence. “By entering freely and voluntarily into any relation or situation where the negligence of the defendant is obvious, the plaintiff may be found to accept and consent to it, and to undertake to look out for himself and relieve the defendant of the duty.” W.P. KEETON, D. DOBBS, R. KEETON, & D. OWEN, FROSSLER AND KEETON ON TORTS (5th ed. 1984) at 485 [hereinafter FROSSLER AND KEETON ON TORTS].

² It is here that there is the greatest misapprehension and confusion as to assumption of risk, and its most frequent misapplication.” Id. at 484.


⁴ Id. at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875.

* Some of the authors’ views on this subject have been previously expressed in High Court Tackles Implied Assumption of Risk, San Francisco Banner Daily J., December 26, 1990, at 5, col. 1. Thanks to John Adler, Trina Grillo, Michael Tobriner, and Catharine Wells for helpful comments.

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ously drunk driver, especially when alternatives such as calling a cab or asking plaintiff’s wife to come pick him up, were readily available. A plaintiff who encounters a risk that is unreasonable in relation to his or her own safety is contributorily negligent.

Although the court in *Li* eliminated the doctrinal overlap between assumption of an unreasonable risk and contributory negligence, the court still must decide whether any part of the doctrine of implied assumption of risk remains. The aspect of implied assumption of risk that might theoretically be different from contributory negligence, and therefore not addressed by *Li*, involves the implied assumption by plaintiff of a reasonable risk. The court must decide whether implied assumption of a reasonable risk warrants treatment as a separate defense in a negligence case or whether it too should be abolished to avoid doctrinal redundancy with other aspects of the negligence prima facie case.

The *Li* court suggested that a separate assumption of risk defense might remain “where plaintiff is held to agree to relieve defendant” of defendant’s duty to plaintiff. If a separate defense remains when plaintiff knowingly and voluntarily agrees to encounter a risk that is reason-

5. See Gonzalez v. Garcia, 75 Cal. App. 3d 874, 142 Cal. Rptr. 503 (1977). See also Von Beltz v. Stuntman, Inc., 207 Cal. App. 3d 1467, 1480-82, 255 Cal. Rptr. 755, 762-63 (1989) (Plaintiff stuntperson was found thirty-five percent contributorily negligent for her stunt-car injury, because she did not request a readily available seat belt that would have significantly diminished her injuries; industry custom dictated that stuntpersons are generally responsible for overseeing their own safety equipment such as seat belts. Plaintiff’s conduct was thus characterized both as assumption of an unreasonable risk and as contributory negligence.).

6. California courts consistently have used the phrase “reasonable implied assumption of risk” (“RIAR”), rather than “implied assumption of a reasonable risk.” See, e.g., Ford v. Gouin, 217 Cal. App. 3d 1606, 1609, 266 Cal. Rptr. 870, 871 (1990), accepted for review, Supreme Ct. No. S014828; Segoviano v. Housing Auth., 143 Cal. App. 3d 162, 166, 191 Cal. Rptr. 578, 579 (1983). However, it is the risk that is or is not reasonable, so the more appropriate appellation, which this essay uses, is “implied assumption of a reasonable risk.”

Reasonableness is tested objectively. Putting the word “reasonable” first in the phrase, modifying “assumption” instead of “risk,” suggests that plaintiff’s assumption is being tested objectively. In fact, assumption of risk is tested subjectively. Gonzalez v. Garcia, 75 Cal. App. 3d at 879, 142 Cal. Rptr. at 505; Prescott v. Ralph’s Grocery Co., 42 Cal. 2d 158, 161-62, 265 P.2d 904, 906 (1954); Restatement (Second) of Torts §§ 496A comment d, 496D comment c. Thus, plaintiff could indeed assume a risk that no reasonable person would take, such as driving with a drunk driver. Gonzalez, 75 Cal. App. 3d at 880-81, 142 Cal. Rptr. at 506-07. Therefore, the assumption of risk is subjectively tested, but whether the risk was reasonable is objectively tested.

7. *Li*, 13 Cal. 3d at 824, 532 P.2d at 1240, 119 Cal. Rptr. at 872.

8. Assumption of risk is the “voluntary acceptance of a risk [where] such acceptance... has been made with knowledge and appreciation of the risk.” Prescott, 42 Cal. 2d at 161-62, 265 P.2d at 906 (citing Restatement (Second) of Torts § 496D (1965)).
able in relation to his or her own safety, defendant would be absolved of any responsibility toward plaintiff resulting from defendant’s negligence.

Negligent conduct involves taking unreasonable risks. Decisional law explains that conduct is negligent when the burden of adequate precaution is low compared to the probability of harm multiplied by the gravity of harm.\(^9\) Thus, unreasonableness is a relative concept that involves examining the nature of the risk, the likelihood of its occurrence, and the steps required for its prevention.

Just as unreasonableness is relational, so too is the notion of reasonable conduct. It is not some abstract idea of reason that is relevant, but rather reasonable conduct by plaintiff in relation to the prima facie case of negligence being argued against defendant. In each negligence controversy, the prima facie case examining defendant’s negligence must be analyzed before the defenses.

A separate defense of implied assumption of a reasonable risk is not necessary and only leads to a confused analysis in negligence cases. Rather, a proper analysis of each element of the prima facie case of negligence will yield the appropriate outcome. Defendant can argue that he or she had no affirmative duty toward plaintiff in the first place, or that there was no breach of duty, no actual cause, or no proximate cause. One need not reach affirmative defenses to negligence such as implied assumption of a reasonable risk unless the prima facie case for negligence against defendant has first been established. If the prima facie case can be established and the litigants must turn to defenses, the defense of comparative fault should be used to evaluate plaintiff’s conduct and to assess whether defendant’s liability should be reduced.

Section I of this article reviews the doctrine of assumption of risk, express and implied. Section II examines the California cases that have applied the doctrine of implied assumption of a reasonable risk and illustrates how each of them could have been decided using the existing elements of the prima facie case of negligence. Section III examines three possibilities for addressing implied assumption of a reasonable risk: 1) Plaintiff should not be held accountable for his or her reasonable actions at all; 2) Implied assumption of a reasonable risk is superfluous. Its elements are accounted for already in the negligence prima facie case and existing comparative fault defense. No separate defense is needed; 3) Implied assumption of a reasonable risk survives as a separate and complete defense to defendant’s negligence.\(^{10}\) This article concludes that the de-

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10. Although many decisions have stated that implied assumption of a reasonable risk
fense should be abolished in order to avoid doctrinal repetition. Sections IV and V examine the roles of judge and jury and the issue of burden of proof in relation to implied assumption of a reasonable risk, concluding that abolishing the doctrine does not damage the balance of interests implicit in the existing tort system.

I. The Doctrine of Assumption of Risk—Express and Implied

Twentieth century tort law marked the transformation of assumption of risk from an “equitable maxim”—volenti non fit injuria—“into a philosophical principle.” That philosophical principle emphasized “the individualistic tendency of the common law, which... naturally regards the freedom of individual action as the keystone of the whole structure,” and served to limit tort liability.

Assumption of risk strikes the twentieth-century observer as the archetypal doctrine of an age entranced with the idea that each man was equally capable of protecting himself against injury. In its most extreme applications the doctrine seems almost a parody of itself, an abstraction, that from current perspectives, [has] lost all touch with reality.

The doctrine had lost touch with reality because employees in negligently maintained workplaces, against whom the doctrine was commonly used, had no real means of bargaining for their own safety and no real choice about remaining employed under the dangerous conditions.

1. G.E. White, Tort Law in America, An Intellectual History 43 (1980). The maxim translates roughly as “to one who is willing, no harm is done.”
3. White, supra note 11, at 45.
4. Id. at 41. See also the Black and Blue illustration in James II, supra note 10, at 190. Borrower of defectively designed motorcycle, warned of defect by the lender and reasonably proceeding to use it, would be barred from recovery against the manufacturer, “even where the maker’s duty to a foreseeable user of the motorcycle was not satisfied by warning.” Id.
5. White, supra note 11, at 41.
A. Voluntarily Encountering a Known Risk

Assumption of risk must be voluntary,16 so defendant must show that plaintiff knew of the risk and willingly took it.17 Thus, many cases and commentators point out that assumption of risk is based on consent.18 Plaintiff is implicitly agreeing to defendant's using less than reasonable care toward him or her. For plaintiff to assume a risk, plaintiff must be aware of both that specific risk,19 not just of general danger, and the degree or magnitude of that risk.20

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 their negligent driving.21 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 is characterizable as taking a risk, possibly a negligent one, but not as assumption of risk.

Assumption of risk is traditionally tested subjectively.22 Thus, plaintiff theoretically may assume a risk that the reasonable person would never assume. This notion affords defendants some advantage, because where proof of plaintiffs' assumption of risk is available, the defense can be raised successfully even where a reasonable person would have been irrational or crazy to have agreed to such a risk.23 The use of


17. Assumption of risk is the "voluntary acceptance of a risk [where] such acceptance . . . has been made with knowledge and appreciation of the risk." Prescott, 42 Cal. 2d at 161-62, 265 P.2d at 906; RESTATEMENT (SECOND) OF TORTS § 496D (1965).


The court in Ford inferred from plaintiff's knowledge of area waters, his years of experience water skiing, and his instructions to defendant boat driver, that plaintiff had indeed assumed the risk of being hit by an overhanging branch. Ford v. Gouin, 217 Cal. App. 3d 1606, 1620, 266 Cal. Rptr. 870, 878-79 (1990); but see RESTATEMENT (SECOND) OF TORTS § 496C comment h (1965).

20. Vierra, 60 Cal. 2d at 272, 383 P.2d at 781, 32 Cal. Rptr. at 197.

21. PROSSER AND KEETON ON TORTS, supra note 1, uses a similar example at 485.


23. See infra notes 29-30 and accompanying text.
comparative fault where plaintiff’s conduct can be characterized as unreasonable means that the separate defense of assumption of risk for unreasonable conduct by plaintiff is eliminated.24

B. Three Types of Assumption of Risk — Express, Implied
Assumption of a Reasonable Risk, and Implied
Assumption of an Unreasonable Risk

A plaintiff may give express consent, in advance, to relieve a defendant of a legal duty.25 Most jurisdictions conceive express assumption of risk as distinct from assumption of risk by conduct, or implied assumption of risk.26 California decisions concur that the adoption of comparative fault in the state did not affect express assumption of risk, which thus remains a complete defense to negligence.27 Thus defendants may provide and plaintiffs may engage in dangerous activities. With express waivers available, defendants in theory can offer such activities without incurring liability or prohibitive insurance costs.28

Implied assumption of risk is inferred from plaintiff’s conduct. Such behavior may be unreasonable, where plaintiff “carelessly or negligently chooses to encounter a known risk”29 such as getting into a car


25. Ford, 217 Cal. App. 3d at 1609, 266 Cal. Rptr. at 871. See also RESTATEMENT (SECOND) OF TORTS § 496B (1990).

26. Idaho requires oral or written consent for express assumption of risk, Ford, 217 Cal. App. 3d at 1616, 266 Cal. Rptr. at 876, whereas Florida does not distinguish between signing a waiver and acting as though one signed a waiver. Id. at 1611-12, 266 Cal. Rptr. at 872-73; Rosenlund & Killion, supra note 18, at 274-76. The California cases all separate express assumption from implied, although Li itself does not seem to acknowledge a separate category for express assumption of risk. Li, 13 Cal. 3d at 824-25, 532 P.2d at 1240-41, 119 Cal. Rptr. at 872-73.


Most comparative fault jurisdictions leave express assumption of risk as a separate defense. See Rosenlund & Killion, supra note 18, at 268 n.237 (list of jurisdictions that leave express assumption of risk as a separate defense).

28. In addition, some rights to safety involving public facilities cannot be signed away. See, e.g., Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).

with an obviously drunk driver,

Where plaintiff's behavior is unreasonable or negligent, the implied assumption of risk and contributory negligence defenses overlap. In this situation, Li v. Yellow Cab Co. held that plaintiff's and defendant's conduct should be compared; therefore implied assumption of an unreasonable risk is clearly merged into comparative negligence.

Li v. Yellow Cab incorporated assumption of an unreasonable risk into comparative fault, but left a separate assumption of risk defense "where plaintiff is held to agree to relieve defendant" of defendant's duty to plaintiff. Part of the controversy among appeal courts has been over this "held to agree" language and whether it referred to implied assumption of a reasonable risk.

This problem is made more complex because the line between assumption of an unreasonable risk and a reasonable one is not always

33. Restatement (Second) of Torts § 463 (1965) defines contributory negligence as plaintiff's conduct that "falls below the standard to which he should conform for his own protection . . ." and that partly causes plaintiff's injury.

Most comparative fault jurisdictions agree that unreasonable implied assumption of risk is subsumed into comparative fault. See Rosenlund & Killion, supra note 18, at 266 n.236 (list of comparative fault jurisdictions that subsume unreasonable implied assumption of risk into comparative fault).

35. Li, 13 Cal. 3d at 824, 532 P.2d at 1240, 119 Cal. Rptr. at 872.
36. One court applied this language to implied assumption of a reasonable risk. Ford, 217 Cal. App. 3d at 1618, 266 Cal. Rptr. at 877. See also Rosenlund & Killion, supra note 18, at 256.


clear. The reasonableness of conduct is an issue about which reasonable people might differ. There are also straightforward examples of behavior universally viewed as reasonable, for which plaintiff has given no express waiver to relieve defendant from liability: going to a ballgame, or playing flag or touch football. These activities have led to litigation using the doctrine of implied assumption of a reasonable risk. Thus, the status and usefulness of implied assumption of a reasonable risk as a separate defense remain at issue.

II. California Case Law

Certain fact patterns consistently appear in California cases concerning implied assumption of a reasonable risk. Injured plaintiffs in these cases have been spectators at sporting events, athletic participants, and workers on dangerous jobs. These fact patterns implicate different issues, yet they have all been analyzed by courts as involving implied assumption of risk. The cases have in common a plaintiff who knowingly and voluntarily takes a risk, like the pedestrian who dashes across the intersection. Athletic participants expect other players to use reasonable care in relation to their safety; spectators expect that reasonable precautions for their safety have been taken; and workers in dangerous jobs

37. See majority and dissenting opinions in Ford, 217 Cal. App. 3d 1606, 266 Cal. Rptr. 870. The Ford majority thought plaintiff waterskier was not unreasonable skiing barefoot and backwards in a narrow channel even though an average person certainly would be acting unreasonably doing this. Id. at 1620, 266 Cal. Rptr. at 878-79. The majority noted that plaintiff had skied barefoot and backwards more than 50 times, had 15 years waterskiing experience, including extensive exposure to area waterways, and had told defendant driver where to go and how fast. Id.

Conversely, the dissent noted that plaintiff had not mastered crossing a wake. Id. at 1623, 266 Cal. Rptr. at 880 (Kline, P.J., dissenting). One might wonder whether plaintiff's stunt skiing was careless no matter how familiar he was with the area waterways; in fact, if he knew them so well, perhaps he should have known better than to not look where he was going on them.

See also Cohen v. McIntyre, 226 Cal. App. 3d 801, 277 Cal. Rptr. 612 (1991) (Kline, P.J., dissenting): “reasonable minds will often differ as to whether a particular claimed assumption of risk is reasonable or unreasonable. Confusion of this sort is one of the reasons that, as the courts of other states are increasingly coming to realize, ‘the term “assumption of risk” is so apt to create mist that it is better banished from the scene.’” Id. at 811, 277 Cal. Rptr. at 97 (citations omitted).


40. Professor Frizell contributed the grouping of cases by categories. Frizell, Assumption of Risk in California: It's Time to Get Rid of It, 16 Western State U. L. Rev. 627 (1989). He uses different terms, describing the categories as "vocational assumption of risk," "sporting event assumption of risk," and "spectator assumption of risk."
believe no unanticipated hazards will occur. The issues raised by these fact patterns could be resolved without resorting to the assumption of risk doctrine, by correctly using duty, breach, actual cause, and proximate cause elements of the negligence prima facie case.

Spectators at sporting events, injured while watching an activity such as baseball, chose to risk remote injury by attending such an event. In *Rudnick v. Golden West Broadcasters*, plaintiff was allegedly injured by a foul ball in the first-base stands at a California Angels baseball game. The trial court granted summary judgment for defendant team owner, finding that defendant owed no duty beyond providing the 2,300 screened seats already available for fans and that plaintiff assumed the commonly appreciated risk of being hit by a ball. This analysis is an example of the unnecessary doctrinal double-counting of many implied assumption of risk cases. Where defendant has met the duty to provide reasonable protection to fans, no prima facie negligence case is established. The plaintiff cannot prove prima facie negligence; there is no need to address the defense of implied assumption of risk.

Although the Fourth District was comfortable with the trial court's analysis adopted from a line of baseball cases, the appeal court reversed summary judgment for the defendant because the baseball stadium had not met its burden of proof regarding duty in this particular case. Defendant offered no evidence that any screened seats had been available to single-ticket purchasers (non-season-ticket holders), and although defendant's employee's affidavit had stated the number of screened seats, no

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42. *Id.* at 795, 202 Cal. Rptr. at 901.
43. *Id.* at 796, 202 Cal. Rptr. at 901.
44. Justice Crosby, writing separately, agreed that in an implied assumption of a reasonable risk situation, since plaintiff cannot establish a prima facie case of negligence, affirmative defenses are not reached. *Id.* at 796-800, 202 Cal. Rptr. at 902-05. The optimal point in this case to have addressed the issues raised by the defense of implied assumption of a reasonable risk would have been in plaintiff's prima facie case: here at the point of analyzing defendant's lack of a duty toward plaintiff.
45. *Quinn v. Recreation Park Ass'n*, 3 Cal. 2d 725, 729, 46 P.2d 144, 146 (1935) (citations omitted), set the California standard of care for these baseball cases: spectators who voluntarily sit in seats not protected by screens or netting assume the risk of being hit; defendant ballparks owe no duty to prevent such possible injuries if "screened seats are provided for as many as may be reasonably expected to call for them on any ordinary occasion." Brown v. San Francisco Ball Club, 99 Cal. App. 2d 484, 487-88, 222 P.2d 19, 20-21 (1950) followed *Quinn*'s standard for duty, and found no duty in a similar case involving a baseball injury. Notice the combination in these cases of an analysis of no duty, indicating that the prima facie case of negligence has not been proven, with the unnecessary notion of a defense to that prima facie case.
46. 156 Cal. App. 3d at 796, 202 Cal. Rptr. 901-02.
evidence showed any correlation between the number provided and the number requested.47

*Neinstein v. Los Angeles Dodgers, Inc.*,48 another baseball case, involved a plaintiff who claimed that injuries from a foul ball eventually led to her breast cancer.49 The Second District upheld summary judgment for defendant, finding no triable issue of fact.50 The unanimous panel rejected plaintiff’s contention that the issue of reasonableness of the screening protection should go to the fact finder, because the standard of care was well established and left “no room for a reasonable difference of opinion.”51

Defendant fulfilled any duty owed to fans by placing a warning on the backs of tickets, and by providing a minimal number of protected seats, according to precedent.52 The appeal court balanced burdens and benefits to reaffirm that defendant ballpark owners had two alternatives, both of which would have been too costly to outweigh the injuries prevented: 1) enclose all seats with expensive wire netting that would obstruct views and might even “change the very nature of the game” because foul balls could no longer be caught by fielders reaching into the stands; and 2) increase ticket prices, which would “price out” the indigent from “the great American pastime.”53

*Neinstein* embraced the position that implied assumption of a reasonable risk survived *Li*’s adoption of comparative fault, as a separate defense.54 Reiterating that *Li* merged implied assumption of an *unrea-

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47. *Id.*
49. *Id.* at 179 n.1, 229 Cal. Rptr. at 613 n.1. The appellate decision does not allude to any of the proximate cause issues such a claim might have raised at trial, although it does mention that plaintiff received first aid after her injury during the first inning, and then went back to her seat to watch the rest of the game. *Id.* at 180, 229 Cal. Rptr. at 613.
50. *Id.* at 179, 229 Cal. Rptr. at 613. The opinion finds no triable issue of fact, despite the deference given plaintiff because “[a]ll reasonable inferences are drawn in favor of [the non-moving party.]” *Id.*
51. *Id.* at 182, 229 Cal. Rptr. at 615 (quoting Gregorian v. National Convenience Stores, Inc., 174 Cal. App. 3d 944, 948, 220 Cal. Rptr. 302, 304 (1985)).
52. *Id.* at 181-82, 229 Cal. Rptr. at 614-15. The controlling precedent, *Quinn v. Recreation Park Ass’n*, 3 Cal. 2d 725, 729, 46 P.2d 144, 156 (1935), set the California standard of care for these baseball cases: spectators who voluntarily sit in seats not protected by screens or netting assume the risk of being hit; defendant ballparks owe no duty to prevent such possible injuries if “screened seats are provided for as many as may be reasonably expected to call for them on any ordinary occasion.” *Brown v. San Francisco Ball Club*, 99 Cal. App. 2d 484, 488, 222 P.2d 19, 21 (1950), followed *Quinn*’s standard for duty, and found no duty in a similar case involving a baseball injury.
54. *Id.* at 183, 229 Cal. Rptr. at 615.
reasonable risk into comparative fault, the Neinstein panel distinguished consent from fault. If a plaintiff's consent were reasonable, it could not be faulty, so plaintiff and defendant's conduct should not be compared.

Again, discussion of assumption of risk was unnecessary in this case, where no prima facie case of negligence could be established against defendant. Defendant did not breach the limited duty it owed to plaintiff and to other patrons to protect them from being hit. Lack of causation might also have provided a doctrinal vehicle for the no-liability result. The facts that plaintiff was a longtime Dodgers fan and had even sat in those seats before might have led the court to think in terms of voluntariness, knowledge, and implied assumption of risk. The Neinstein line of cases used both a no-duty analysis and an implied assumption of risk analysis to reach a defendant's victory, when a conclusion of no duty or no breach of duty or no actual causation would have sufficed. The assumption of risk discussion is superfluous.

55. *Id.* See Li v. Yellow Cab Co., 13 Cal. 3d 804, 824-25, 532 P.2d 1226, 1240-41, 119 Cal. Rptr. 858, 872-73 (1975).
56. 185 Cal. App. 3d at 183, 229 Cal. Rptr. at 615-16.
57. *Id.* at 180, 229 Cal. Rptr. at 613.

Athletic participants injured while engaging in a sporting activity usually knew that there was a risk of injury involved in the activity but chose to engage in it anyway. For example, *Segoviano v. Housing Authority* 59 involved a flag football game sponsored by defendant housing authority. A player pushed plaintiff, who was running for a touchdown out of bounds, and plaintiff fell, injuring his shoulder. 60 The rules provided that players were prohibited from pushing and could only stop a player by pulling a flag from that player’s belt. 61

Plaintiff argued that his knowledge that players might violate the rules was not a basis for attributing fault to him. 62 The trial court said it would instruct the jury on comparative negligence, but not permit any reference to assumption of risk. 63 The jury returned a verdict for plaintiff, “assessing him 30 percent fault and assessing 70 percent fault to the defendant.” 64

The appellate court, interpreting the “held to agree” language from *Li* to refer to express assumption of the risk, 65 found that “the separate defense of implied assumption of the risk is abolished under the comparative negligence law.” 66 The court found nothing unreasonable in plaintiff’s decision to play flag football, and so found the trial court’s contributory negligence instruction erroneous. 67 The appellate court believed that its holding would “enable the jury to focus its attention on the real issues in the case: the negligence of the parties who were directly involved in plaintiff’s injury and whether such negligence was a proximate cause of the injury.” 68

The *Segoviano* analysis seems correct to the extent it focuses on the prima facie case of negligence as the foremost issue to evaluate. If defendant were not negligent, then plaintiff should not recover. Furthermore, if defendant were negligent and plaintiff were not, then as a matter of law, plaintiff’s recovery should not be reduced. But a jury should be permitted to consider both whether defendant did breach a duty toward plaintiff and proximately caused the injuries, as well as whether plaintiff’s conduct was in any way negligent. It would not be fair to prevent

60. Id. at 165, 191 Cal. Rptr. at 580.
61. Id.
62. Id.
63. Id.
64. Id. at 164-65, 191 Cal. Rptr. at 580.
65. Id. at 168, 191 Cal. Rptr. at 582-83.
66. Id. at 169, 191 Cal. Rptr. at 583.
67. Id. at 175-76, 191 Cal. Rptr. at 588.
68. Id. at 175, 191 Cal. Rptr. at 588.
the jury from considering plaintiff's conduct, unless a court found no negligence as a matter of law. Plaintiff may have been reasonable to choose to play the game, but plaintiff's conduct at the time of the injury must be examined to determine if it was reasonable at that time.

In *Ordway v. Superior Court*, a professional jockey was injured when thrown from her horse after another horse crossed in front of her without sufficient clearance, violating a racing rule. The court of appeal found that implied assumption of a reasonable risk survived the adoption of comparative negligence and that plaintiff had reasonably assumed the risk of her injury. The court found that her action was "barred as a matter of law" and that defendants were "entitled to summary judgment."

The court related the doctrine of assuming a reasonable risk to the concept of no duty, stating:

Where no duty of care is owed with respect to a particular mishap, there can be no breach; consequently, as a matter of law, a personal injury plaintiff who has voluntarily—and reasonably—assumed the risk cannot prevail. Or stated another way, the individual who knowingly and voluntarily assumes a risk, whether for recreational enjoyment, economic reward, or some similar purpose, is deemed to have agreed to reduce the defendant's duty of care.

Even though the court alluded to this connection between implied assumption of a reasonable risk and the duty element of the prima facie case, it failed to see that a separate assumption of risk defense is not necessary to achieve a no-liability result. A no-duty analysis, concluding that defendant was not negligent because there was no duty, could achieve that same result, without reaching affirmative defenses. Yet in athletic participation cases, defendant usually owes a duty to act reasonably. At issue in these cases most often is whether defendants acted unreasonably, thereby breaching the duty they owed to plaintiff.

70. Id. at 101, 243 Cal. Rptr. at 537.
71. Id. at 102, 243 Cal. Rptr. at 538.
72. Id. at 112, 243 Cal. Rptr. at 544.
73. Id.
74. Id. at 104, 243 Cal. Rptr. at 539. "The correct analysis is this: The doctrine of reasonable implied assumption of risk is only another way of stating that the defendant's duty of care has been reduced in proportion to the hazards attendant to the event." Id.
75. Id.
76. The question of breach of duty, historically, is in the province of the jury. PROSSER AND KEETON ON TORTS, supra note 1, at 237. See also infra notes 181-189 and accompanying text.
Ford v. Gouin involved a water-skier who was injured when he collided with a tree limb overhanging the water while water-skiing barefoot and backwards. The court of appeal held that plaintiff had reasonably assumed the risk of encountering such a danger, which relieved defendant boat driver of his duty to use reasonable care.

The Ford majority inferred from plaintiff's knowledge of area waters, years of experience, and instructions to defendant that plaintiff knowingly assumed the risk of being hit by an overhanging branch. The court thus found that implied assumption of a reasonable risk was a valid defense, justifying the no-liability result. Plaintiff's level of experience actually better supported the kind of assumption of risk that overlaps with contributory negligence, because if he knew the area and knew that branches hung over the waterway, he really should have known better than not to look where he was going. If the prima facie case analysis showed negligence by the defendant, then plaintiff's conduct, which might have been less than reasonable, is appropriately analyzed by comparative fault. Again a separate defense of implied assumption of a reasonable risk was not necessary to analyze the case.

In Harrold v. Rolling J Ranch, plaintiff's horse suddenly spooked, while plaintiff's arms were pinned behind her as she was removing her jacket. The evidence showed that the horse had spooked on a previous ride, but that plaintiff had not been told this fact. The appeal court held that the trial court's granting of summary judgment for defendant was improper, even if assumption of risk remained a separate defense,
because plaintiff did not have actual knowledge of the danger involved.\(^\text{87}\) Because assumption of risk must be voluntary—whether or not the risk is reasonable—one cannot assume a risk one does not know about.\(^\text{88}\)

While this case could be litigated in terms of plaintiff’s knowledge, using the conventional assumption of risk doctrine, it could also be litigated in terms of breach of a duty to warn plaintiff about the horse’s dangerous propensities. The established doctrines of the negligence prima facie case are well-suited to analyzing a case such as this, without need to reach the question of defenses. If the reasonableness of plaintiff’s conduct is at issue, then the defense of comparative fault should be used.

In *Knight v. Jewett*,\(^\text{89}\) during an amateur touch football game, plaintiff player’s finger was crushed by defendant player; the finger was later amputated.\(^\text{90}\) Plaintiff contended that defendant’s conduct went beyond normal bounds of aggressiveness in an informal, coed game and testified that she, plaintiff, had asked defendant to be less rough.\(^\text{91}\) The court used this evidence against plaintiff to show that she must therefore have appreciated just how aggressively defendant had been playing.\(^\text{92}\)

A unanimous appellate panel followed *Ordway’s* preservation of implied assumption of a reasonable risk as a complete defense and held that plaintiff had assumed the risk of contact injuries inherent even in touch football, especially since she was a football fan and had played touch football before.\(^\text{93}\) Furthermore, even though plaintiff’s and defendant’s accounts of the incident differed, the court upheld the trial court’s summary judgment because this “factual dispute . . . is immaterial to the issue of assumption of risk.”\(^\text{94}\) But the negligence prima facie case must be examined to ensure an appropriate analysis of the issues raised here. Did defendant breach a duty to use reasonable care toward plaintiff? Did the breach actually and proximately cause plaintiff’s harm? Was

\(^{87}\) *Id.* at 50, 266 Cal. Rptr. at 743.

\(^{88}\) *Id. for *Vierra v. Fifth Avenue Rental Service, 60 Cal. 2d 266, 271, 383 P.2d 777, 780, 32 Cal. Rptr. 193, 196 (1963); Von Beltz v. Stuntman, Inc., 207 Cal. App. 3d 1467, 1479-80, 255 Cal. Rptr. 755, 762 (1989). See also *Lipson v. Superior Court, 31 Cal. 3d 362, 644 P.2d 822, 182 Cal. Rptr. 629 (1982), (plaintiff firefighter was misinformed that a chemical accident did not involve any toxic chemicals, so plaintiff did not assume the risk of toxic-related harm).\(^{89}\)


\(^{90}\) *Id.* at 891, 275 Cal. Rptr. at 293.

\(^{91}\) *Id.* at 894 n.3, 275 Cal. Rptr. at 296 n.3. The court declined to set a different standard for implied assumption of risk for amateur sports.

\(^{92}\) *Id.*

\(^{93}\) *Id.*

\(^{94}\) *Id.* at 895, 897, 275 Cal. Rptr. at 294, 297. The court also affirmed summary judgment for defendant on plaintiff’s assault and battery claim, because plaintiff had consented and because it saw no evidence that defendant had the requisite intent. *Id.* at 897, 275 Cal. Rptr. at 297-98.
plaintiff's conduct reasonable? Just because plaintiff took a risk in playing sports does not mean she should not be able to use conventional negligence doctrine to measure defendant's conduct against a standard of reasonable behavior under the circumstances.

Similarly, in *Krol v. Sampson*,95 the trial court entered summary judgment against plaintiff who had been injured—by a thrown ball—in a recreational league softball game, while running from first to second base.96 Plaintiff appealed, arguing that implied assumption of a reasonable risk had been eliminated as a defense.97 The appeal court affirmed the defendant's summary judgment award, finding that implied assumption of a reasonable risk remained as a distinct negligence defense that can negate the duty element of a negligence cause of action.98

This language is confusing, because a defense does not negate elements of a prima facie case. Even a second base player starting a double play must throw to first base reasonably. If a prima facie negligence case is established, then defenses to negligence must be considered. If the runner acted carelessly with regard to his safety, then comparing fault is appropriate.

The case reprises the problem of the assumption of risk defense. Ballplayers have a duty to act reasonably. Reasonable action might be throwing the ball fast in a double play, even if tragic injury results. That is the reason for comparing fault. Plaintiff did not slide or otherwise seek to avoid the throw that he should have realized was coming.

In *Van Meter v. American Motorsports Ass'n*,99 summary judgment was granted for defendants when plaintiff suffered injuries working as a checkpoint captain during a motor vehicle race.100 The detailed factual

96. *Id.* at 727-28, 278 Cal. Rptr. at 166. Plaintiff was struck in the face by the ball which broke facial bones and resulted in the loss of his right eye. *Id.*
97. *Id.* at 736-37, 278 Cal. Rptr. at 172-73. Plaintiff argued alternatively that triable issues of fact remained ("he could not have assumed the risk unless he knew the second baseman would throw to first base without looking to see where plaintiff was in the base path"), even if assumption of a reasonable risk remained as a negligence defense, precluding a summary judgment. *Id.*
98. *Id.* at 728-32, 278 Cal. Rptr. at 167-69. Justice White concurred specially. Although troubled by the implied assumption of risk doctrine, he agreed it exists as a separate defense. *Id.* at 738, 278 Cal. Rptr. at 174. He raised the concern that the difference between knowing a risk and knowing its magnitude has been clouded in the case law. *Id.* at 740-41, 278 Cal. Rptr. at 175-77.
100. *Id.* at 1201, 278 Cal. Rptr. at 289. A checkpoint captain would stop race cars and mark them as they passed through the checkpoint during the race. *Id.*
record showed that plaintiff did not have appropriate staffing at his checkpoint, but chose to continue with his job during the race.101

The appeal court reversed summary judgment, showing distaste for the doctrine of assumption of risk. This case also shows the difficulty with trying to use categories such as spectator and participant. The checkpoint captain might be regarded as a spectator to the race, since he was not driving a car, yet he was a kind of participant in the event, since his participation was required to conduct the race. Whatever his status, he had every reason to expect that reasonable care would be used for his safety. He, like all of these plaintiffs, never agreed that defendants could use less than reasonable care toward him under the circumstances.

In cases involving dangerous jobs, the plaintiff knows that a risk of danger is associated with the job, yet performs the task anyway. Often, defendants owe a duty toward these plaintiffs to use reasonable care, and that duty is breached. In many cases proximate cause is the real issue: is it fair to make the defendant pay for the plaintiff’s harm?

This dangerous job issue is classically raised by cases involving the firefighter’s rule, which bars police or firefighters from recovering damages from a party whose negligence proximately caused injury to them during their rescue work. The theory of the rule is that “one who has knowingly and voluntarily confronted a hazard cannot recover for injuries sustained thereby.”102 In Walters v. Sloan, the court acknowledged that the rule blurs together “a number of doctrines, including nullification of the duty of care, satisfaction of the duty to warn because the hazard is known, contributory negligence, and assumption of risk.”103 The court concluded that “it is unnecessary to attempt to separate the legal theories or to catalog their limitations.”104 Rather than throwing up its hands at the doctrinal confusion, the court should begin eliminating repetitive and useless doctrine, starting with implied assumption of risk.

101. Id. at 1202-03, 278 Cal. Rptr. at 290-91. “After the first vehicle arrived, he knew it [operating the checkpoint] was unsafe and he might be hurt if a second car hit the stopped one. However he discounted the chance of injury because he had been working at checkpoints for so many years.” Id. at 1203, 278 Cal. Rptr. at 291.


103. Id. A recent court of appeal decision held that although the firefighter’s rule did not bar plaintiff’s claim (plaintiff firefighter had been conducting a fire safety inspection when he slipped on wet steps and broke his arm), the doctrine of reasonable assumption of risk did prevent his recovery. The dissent objected to the use of summary judgment in the application of this defense. Donohue v. San Francisco Hous. Auth., 91 Daily Journal D.A.R. 6217 (May 30, 1991).

104. Id.
The recent dangerous job cases that have been litigated using the doctrine of implied assumption of risk have involved dog bites, ladders, and stunts. The legal result in many of these cases has been to deny recovery to plaintiffs under the guise of assumption of a reasonable risk. The theory is used to argue that because it is reasonable to assume a dangerous job in some situations and because plaintiff voluntarily and knowingly did so, then defendant should not be responsible. But a no-liability result can be reached in these cases, if one is desired, using the doctrine of proximate cause.

The use of assumption of risk in this context reflects a policy decision by the court that those who undertake dangerous jobs for compensation should not avail themselves of tort actions. The tort doctrine of proximate cause, which is part of both the negligence and strict liability prima facie cases, is a doctrine created to introduce policy consideration into the evaluation of the prima facie case. A firefighter or veterinarian no-recovery rule could easily be applied by finding defendant's conduct was not a proximate cause of plaintiff's harm, again obviating the need for implied assumption of risk.

Nelson v. Hall and Cohen v. McIntyre both affirmed summary judgments for defendant dog owners whose dogs had bitten plaintiffs. In Nelson, plaintiff had sought to establish strict liability under a dog bite statute; in Cohen, the cause of action was based on negligence. Citing Nelson for announcing a "veterinarian's rule," the Cohen court agreed that veterinarians and their assistants assume a risk of being bitten as part of their employment. Observing that assumption of risk historically served as a defense to strict liability as well as to negligence, the court found that assumption of risk appropriately barred recovery.

Two other dangerous job cases, brought by plaintiffs who fell from ladders, raised different questions involving assumption of a reasonable risk. Defendant in King v. Magnolia Homeowners Ass'n violated a safety statute regulating toe space on rooftop access ladders. The statu-
ute required that ladders attached to buildings have a minimum 3 1/2 " space between the ladder and the building.\textsuperscript{115} Plaintiff's expert testified that adequate toe space was necessary to ensure proper balance in climbing.\textsuperscript{116} In \textit{Nunez v. R'Bibo}\textsuperscript{117} plaintiff gardener borrowed a rickety ladder from defendant. Plaintiff climbed the ladder to cut a tree branch, even though he had noticed that the ladder was "'shaky' or 'loose.'"\textsuperscript{118} The branch hit the ladder, which fell, and plaintiff was injured.\textsuperscript{119} Both courts found the doctrine of implied assumption of a reasonable risk barred plaintiffs' recovery.

Although the cases appear to have parallel fact patterns, they should be analyzed very differently, beginning with the prima facie case of negligence in each. Defendant's negligence in \textit{King} was established by a statutory violation, a particularly insidious kind of negligence that as a matter of public policy should not go unnoticed.\textsuperscript{120} Defendant's negligence in \textit{Nunez} was illusive; evidently defendant's only conduct was to loan a rickety ladder to plaintiff. \textit{Nunez} is a case in which it was hard to establish a negligence prima facie case; \textit{King} had a strong negligence prima facie case based on the statutory violation, and defenses to negligence should have been considered. In \textit{King}, plaintiff's conduct in climbing the dangerous ladder should have been weighed to reduce his recovery. But the doctrine of implied assumption of a reasonable risk is again unnecessary to an analysis of these cases. The existing negligence doctrines available for evaluating the negligence prima facie case and defenses suffice.

Finally, consider \textit{Von Beltz v. Stuntman, Inc.},\textsuperscript{121} which originated during filming of the movie "Cannonball Run,"\textsuperscript{122} when plaintiff stuntperson was paralyzed below her neck in a car crash on the second take of a stunt.\textsuperscript{123} Plaintiff knew from the first take that the car had no seat belts.\textsuperscript{124} She could have requested that belts, which were readily available, be installed.\textsuperscript{124} The trial court jury found her thirty-five percent

\textsuperscript{115} 205 Cal. App. 3d at 1314, 253 Cal. Rptr. at 141-42.
\textsuperscript{116} \textit{Id.} at 1315, 253 Cal. Rptr. at 141-42.
\textsuperscript{118} \textit{Id.} at 562, 260 Cal. Rptr at 1.
\textsuperscript{119} \textit{Id.} at 562, 260 Cal. Rptr. at 2.
\textsuperscript{120} See, e.g., \textit{Haft v. Lone Palm Hotel}, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970) (stretching the doctrine of actual causation by shifting the burden of proof to defendant who had been a statutory violator).
\textsuperscript{121} 207 Cal. App. 3d 1467, 255 Cal. Rptr. 755 (1989).
\textsuperscript{122} \textit{Id.} at 1476, 255 Cal. Rptr. at 759.
\textsuperscript{123} \textit{Id.} at 1482, 255 Cal. Rptr. at 763.
\textsuperscript{124} \textit{Id.} Evidently, at least 10 seat belts were available at the scene and would have taken no more than 20 minutes to install. Industry custom dictates that stuntpersons oversee their
contributorily negligent for not so requesting, and the appeals panel found no reason to disturb the finding, noting that plaintiff had sufficient opportunity to take precautions that industry custom delegated to stuntpersons, and that the need for such precautions was obvious. The court reconfirmed that where assumption of risk overlapped with contributory negligence, such as with plaintiff's disregard of her seat belt protection, Li had merged the assumption defense into comparison of fault.

Where plaintiff's assumption was of a reasonable risk, however, Von Beltz adopted Ordway's repetitive dual analysis, finding that defendant either owed no duty toward plaintiff and/or plaintiff assumed the risk. In spite of this theoretical holding, the court affirmed the finding below that plaintiff had not assumed that specific risk. In this case, plaintiff had not been told of material changes in the stunt decided on between the two takes, and one cannot assume an unknown risk. Thus the court recognized the theoretical possibility of a defense of implied assumption of a reasonable risk, but in reality the fact pattern did not fit that defense.

own safety equipment and that stuntpersons have control over safety precautions such as seat belts.

125. Id. at 1480-85, 255 Cal. Rptr. at 763-65.
126. Id. at 1477, 255 Cal. Rptr. at 759.
127. Id. at 1477-79, 255 Cal. Rptr. at 760-61, states the popular position that implied assumption of a reasonable risk survived Li as a complete defense. The court does stress that it agrees with Ordway as far as the latter's no-duty analysis, Id. at 1477-78, 255 Cal. Rptr. at 760-61, thus endorsing the separate implied assumption of a reasonable risk defense somewhat equivocally.

128. Id. at 1480, 255 Cal. Rptr. at 762. See supra notes 16-20 and accompanying text.
129. Id. See also Harrold v. Rolling J Ranch, 218 Cal. App. 3d 36, 266 Cal. Rptr. 734 (1990), accepted for review, Supreme Ct. No. S014818, (plaintiff did not assume risk of equine injury because she was not told of the horse's known tendency to spook); Lipson v. Superior Court, 31 Cal. 3d 362, 644 P.2d 822, 182 Cal. Rptr. 629 (1982), (plaintiff firefighter was misinformed that a chemical accident did not involve any toxic chemicals, so plaintiff did not assume risks of toxic-related harm).

130. Another recent dangerous job case, Hacker v. City of Glendale, — Cal. App. 3d —, 279 Cal. Rptr. 371 (1991), in which a tree trimmer was electrocuted by high voltage power lines that passed through the branches of a tree he was cutting. Id. at 372, approved the use of implied assumption of a reasonable risk as a complete bar to recovery. Id. at 374-75. The dissent lamented: "As construed and applied by the majority in this case, the assumption of the risk defense resurrects the discredited and discarded defense of contributory negligence in all—or at least nearly all—its 'glory.'" Id. at 376-77.
III. Possible Resolutions for the Implied Assumption of a Reasonable Risk Problem

From these cases, three positions have emerged as the courts wrestle with the doctrine of implied assumption of a reasonable risk. The first position states plaintiff should not be held accountable for his or her reasonable actions at all. The second position finds that implied assumption of a reasonable risk is superfluous. Its elements are accounted for already in the negligence prima facie case and existing comparative fault defense. No separate defense is needed. The third view holds that implied assumption of a reasonable risk survives as a separate and complete defense to defendant's negligence. Most decisions have taken overlapping positions, contributing to the confusion surrounding this doctrine and illustrating why judicial clarification is essential.

A. Plaintiff Should Not Be Held Accountable for His or Her Reasonable Actions at All

_Segoviano v. Housing Authority_,131 involving a flag-football injury, held that implied assumption of a reasonable risk "plays no part in the comparative negligence system of California."132 The court continued:

[I]t is neither a bar to plaintiff's recovery on the theory that it forecloses the existence of a duty of care by the defendant toward the plaintiff nor is it a partial defense justifying allocation of a portion of the fault for the accident to the plaintiff on the theory that he or she was contributorily negligent in confronting the risk.133

The implication of this approach goes too far. A failure to evaluate plaintiff's conduct provides defendants no protection at all unless plaintiff has signed an express waiver. For example, a hockey rink owner would be fully liable for any injury from a stray puck, provided that the injured spectator had acted reasonably in attending the game and that a prima facie case of negligence could be proved.134 Such liability would be the functional equivalent of strict liability. Imposing such liability simply because the accident happened would put owning a skating rink on a par with blasting or other activities that have been regarded as abnormally dangerous.135

132. Id. at 164, 191 Cal. Rptr. at 579.
133. Id.
134. If the spectator was reasonable in watching the game, the rink owner was probably also reasonable in providing the game to be seen. Absent any proof of prima facie negligence, the need for any defense evaporates.
135. PROSSER AND KEETON ON TORTS, supra note 1, at 549-50.
Plaintiffs should ultimately be responsible for their behavior, no matter how careful it is, just as defendants should be responsible for their’s. As long as the spectator seats behind each goal, up to a certain predictable height for lifted shots, are protected with plexiglass, the rink owner cannot be responsible for every inattentive spectator or stray shot. No duty is owed to these spectators, because the burden of closing off the entire rink outweighs the chance that a patron will be sufficiently unobservant and unfamiliar with the game to be inattentive.

The Segoviano court correctly pointed out that allowing implied assumption of reasonable risk to remain a complete bar to recovery, while comparing implied assumption of unreasonable risk, punishes reasonable behavior. The reasonable plaintiff’s award is totally barred, while the unreasonable plaintiff’s award is merely reduced, allowing some recovery for unreasonable behavior, depending on the jury’s comparison. If and when a prima facie negligence case is established, then plaintiff’s conduct, whether reasonable or unreasonable, should be compared to that of defendant.

Ford and Ordway contended that such rewarding of unreasonable conduct is “only superficially anomalous” and that the focus should be on defendant’s expectations, not on plaintiff’s behavior. Thus, defendant should be able to ignore reasonable risks and let plaintiff guard against them (e.g., it should be up to plaintiffs to protect themselves against their own normal sports injuries); on the other hand, defendant should anticipate unreasonable risks and take precautions. This shift of focus does not really rebut Segoviano’s point that retaining a separate defense for implied assumption of a reasonable risk punishes reasonable behavior. Also, defendant in some ways is in a better position to guard against reasonable risks than unreasonable ones, because the former are more predictable: for example, defendant rink owner should certainly put up plexiglass directly behind the goals, or require that players wear appropriate padding. An appropriate analysis of the prima facie negligence

\[136. \text{Segoviano, 143 Cal. App. 3d at 169, 191 Cal. Rptr. at 583. See Ford v. Gouin, 217 Cal. App. 3d 1606, 1610, 266 Cal. Rptr. 870, 872 (1990), accepted for review, Supreme Ct. No. 5014828; Harrold v. Rolling J Ranch, 218 Cal. App. 3d 36, 44, 266 Cal. Rptr. 734, 739 (1990), accepted for review, Supreme Ct. No. 501488; Rosenlund & Killion, supra note 18, at 280. Rosenlund and Killion observe that plaintiff is not exactly “rewarded” for unreasonable behavior, because plaintiff’s recovery is still reduced; this sidesteps Segoviano’s point that plaintiff is being punished for reasonable behavior, because partial recovery is better than no recovery. See also Frizell, supra note 40, at 643-45.}

\[137. \text{Segoviano, 143 Cal. App. 3d at 169, 191 Cal. Rptr. at 583.}


\[139. \text{Ford, 217 Cal. App. 3d at 1613, 266 Cal. Rptr. at 874.} \]
case can incorporate these considerations. If defendant has been negligent, then plaintiff should be accountable for his or her conduct, which should be evaluated under comparative fault principles.

B. Implied Assumption of a Reasonable Risk Is Superfluous

The doctrine of implied assumption of a reasonable risk is superfluous in tort law. A proper analysis of the prima facie case of negligence will require addressing all issues that might be raised under the doctrine of implied assumption of a reasonable risk. Any issues that might not be addressed as part of the prima facie negligence case can easily be addressed by the doctrine of comparative fault.

1. Analysis of the Prima Facie Case of Negligence Accounts for All Relevant Issues

Several decisions have recognized that a proper analysis of plaintiff's prima facie case of negligence resolves the issues traditionally addressed under the doctrine of assumption of risk, but have incongruously retained the separate defense. As Fleming James has explained, if prima facie negligence cannot be established, then the assumption of risk defense is redundant:

[T]he concept of assuming the risk is purely duplicative of other more widely understood concepts, such as scope of duty or contributory negligence . . . . Except for express assumption of risk, therefore, the term and the concept should be abolished. It adds nothing to modern law except confusion.

This confusion is apparent in the Ford and Ordway line of cases. James identifies two categories of assumption of risk: primary assumption of

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140. For a list of decisions that have endorsed this dualistic approach, see supra note 58.
141. James, Assumption of Risk, 61 YALE L.J. 141, 169 (1952) [hereinafter James I].

risk, which is a recasting of the absence of any duty, and secondary assumption of risk, which considers plaintiff’s fault. In California case law, James’s secondary assumption of risk would be roughly equivalent to the assumption of risk that overlaps with contributory negligence.

Within this simple framework, one needs first to determine if defendant was negligent: For example in Harrold, did defendant horse owner fulfill the duty to tell plaintiff rider about the horse’s volatile disposition, and if not, did that omission cause plaintiff’s injury? Only if negligence is found, would one then inquire whether plaintiff’s conduct contributed to the accident, and accordingly compare the fault of the parties.

The Ford and Ordway line of cases focused on the duty element of the prima facie case. However, other elements of the prima facie case might also be used to resolve the traditional assumption of risk issues. For example, ice hockey was a relatively new sport in California in the 1930s, and the risk of being hit by a puck was not well known. Rink owners introducing the sport would have had a duty to warn patrons of the risk. But suppose that the injured plaintiff had been an avid ice hockey fan from Minnesota. Some would say that such a patron had


Various jurisdictions have modified the separate assumption of risk defense: See, e.g., Kuehner v. Green, 436 So. 2d 78 (Fla. 1983); Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977) [See Ford, 217 Cal. App. 3d at 1611-12, for discussion of Kuehner and Blackburn: Florida relabels RIAR as “express” assumption of risk. Express assumption of risk (including equivalent of RIAR) is still a complete defense]; Thompson v. Crownover, 259 Ga. 126, 381 S.E.2d 283 (1989) (assumption of risk must go to jury, so no summary judgment); Jackson v. Kansas City, 235 Kan. 278, 680 P.2d 877 (1984) (upholding “fireman’s rule” assumption of risk); Smith v. Blakey, 213 Kan. 91, 515 P.2d 1062 (1973) (implied assumption of risk defense limited to master-servant cases; in other cases, implied assumption of risk neither merged with contributory negligence nor available as a defense); Brubach v. Almy, 520 A.2d 334 (Me. 1987) (defendant can assert assumption of risk or contributory negligence defenses only for non-business exemption cases); Wilson v. Gordon, 354 A.2d 398 (Me. 1976) (voluntary assumption of risk abolished by comparative fault); Melendres v. Soales, 105 Mich. App. 73, 306 N.W.2d 399 (1981) (implied assumption of risk only in master-servant cases; workers’ compensation therefore abolishes assumption of risk); McDaniel v. Ritter, 556 So. 2d 303 (Miss. 1990); Singleton v. Wiley, 372 So. 2d 272 (Miss. 1979) (instructions for both contributory negligence and implied assumption of an unreasonable risk are acceptable); Ballard v. Happy Jack’s Supper Club, 425 N.W.2d 385 (S.D. 1988) (assumption of risk is jury question).

142. James I, supra note 141, at 141.
143. See also Frizell, supra note 40, at 246, stressing the importance of the difference between primary and secondary assumption of risk.
assumed the risk of being hit and that plaintiff's recovery should be barred. But the doctrine of assumption of risk is not necessary to reach the correct no-liability result. The breach by the rink owners of the duty to warn would not have actually caused the harm, because the fan had the knowledge that the warning would have brought.146 Once again the need for a separate doctrine of assumption of risk is rendered superfluous by the existing doctrines of the prima facie case of negligence.

Prosser uses as an example of assumption of risk a case involving a government inspector during wartime who is injured by an explosion while on the job at defendant's munitions plant.147 The case involved the question of defendant's strict liability, and the court reached the no-liability result by finding strict liability did not apply.148 The case's holding on strict liability doctrine is curious,149 and similar facts involving an explosion would likely implicate strict liability for an abnormally dangerous activity in American jurisprudence.150 If strict liability were found, would a doctrine of assumption of risk be required to reach a no-liability result? Again, assumption of risk is unnecessary because the policy doctrine of proximate causation could yield a no-liability result by finding as a policy matter that wartime munitions inspectors could not recover for work-related injuries.151

2. The Existing Defense to Negligence, Comparative Fault, Is Sufficient

The tone of \textit{Li v. Yellow Cab Co.} was inclusive; the court wanted to incorporate more rather than less into comparative fault.152 One policy objective behind softening the all-or-nothing finality of both the assumption of risk and contributory negligence defenses had been to avoid the inequitable result that a defendant ninety-nine percent at fault might es-

146. Special thanks to Professor Marc Franklin, Stanford Law School, for this example and many conversations about assumption of risk.
148. \textit{Prosser and Keeton on Torts}, \textit{supra} note 1, at 548. (Strict liability limited "to cases in which there has been an 'escape' of a dangerous substance from land under the control of the defendant.").
149. \textit{Id.} ("The decision appears definitely out of line with other English cases . . . .").
cape liability because plaintiff was one percent to blame. The protection of fledgling industry is no longer as essential as it arguably was at the start of this country's Industrial Revolution, while protection and compensation for plaintiff consumers may be an important role of the tort system, rendering complete defenses to negligence anachronistic in a post-industrial setting. Over the past 30 years, the California Supreme Court has repeatedly endorsed cost-sharing approaches to liability, which consider a party's ability to pay and spread its costs (for example, to its customers) as a prime factor in determining which party should pay.

In Daly v. General Motors Corp., the supreme court sanctioned the comparison of fault and no-fault based conduct. Even the Ford majority acknowledged that if the court allowed a jury to compare these conceptually disparate measurements of responsibility, the court should not balk at the easier comparison of plaintiff's and defendant's respective fault. These policy considerations militate in favor of comparing fault rather than barring recovery entirely, once affirmative defenses are reached.

153. See Ford, 217 Cal. App. 3d at 1615, 266 Cal. Rptr. at 875; Rosenlund & Killion, supra note 18, at 226; Brown v. Kendall, 6 Cush. (60 Mass.) 292 (1850).


155. See, e.g., J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979) (recovery upheld for defendant's negligent delay in airport facility construction, where economic disadvantage from delay was foreseeable, even though plaintiff and defendant not in privity); Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (therapist has duty to protect identifiable third party from harm foreseeably caused by therapist's patient); Barker v. Lull, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978) (when plaintiff proves defect caused harm in strict products liability case, burden of proof shifts to defendant to show benefits outweighed risks of such design); Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (landowners owe duty to use reasonable care toward any person foreseeably injured on their land); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (establishing a cause of action for strict liability for defective products because defendants better able to pay costs of injuries).


157. Ford, 217 Cal. App. 3d at 1617, 266 Cal. Rptr. at 877. However, the court's current composition, different from that at the time of Daly in 1978, may lead to a different outcome when the case is heard.
Some commentators argue that since assumption of risk is based on consent rather than fault, plaintiff’s conduct should not be compared to defendant’s. They analogize plaintiff’s assumption of risk to plaintiff’s making a contract, and assert that “agreements are either enforceable or unenforceable.” They suggest that the position of retaining an express assumption of risk defense while not retaining an implied assumption of risk defense, is inconsistent with the equal enforceability of express and implied contracts.

This analogy leaves consideration and other elements in contract law unaddressed. Another writer also approaches implied assumption of risk as an implied contract issue, identifying defendant’s duty as defendant’s consideration. While this analogy has some merit, it does not adequately preserve the line between bargain and accident that, among other elements, characterizes the line between contract and tort law. More significantly, the differences in available remedies reflect the traditional policy that an accident deserves compensation, while remuneration is spelled out in a true bargain. A bargain is conceptually different from implying an assumption of risk, just as contract law’s goal of returning the parties to their bargained-for positions is distinct from tort law’s several goals of compensation, deterrence, and loss-spreading.

Arguably one could partially consent to a certain risk. For example, consider *Von Beltz*, in which plaintiff stuntperson suffered partial paralysis from an accident filming “Cannonball Run.” Stuntpersons are expected to contribute to their own standard safety precautions, according to industry custom, and defendant company provided seat belts at the scene. An independent analysis of plaintiff’s implied assumption of the foreseeable risks from not wearing a belt is redundant. However, defendant altered the layout of the stunt between the unsatisfactory first take and the ill-fated second take, by directing the driver of plaintiff’s car

159. Rosenlund & Killion, *supra* note 18, at 279 (“the defense [should] remain a complete bar where the risk assumed is reasonable”).
160. *Id.* at 270-71.
161. *Id.* at 240, 273.
162. *Restatement (Second) of Torts* § 496B comment a, alludes to “non-contractual consent,” thus also distinguishing the two concepts.
165. 207 Cal. App. 3d at 1476, 255 Cal. Rptr. at 759.
to drive into oncoming traffic rather than around it on the shoulder.\textsuperscript{166} Defendant withheld this material change from plaintiff, thereby breaching a duty to inform her of such alterations, which might have persuaded her to have belts installed or even to turn down the job.\textsuperscript{167} Without this knowledge, her consent to the job might be characterized as an example of partial consent.

More significantly, even if one concedes that consent must only be all or nothing, a jury could still consider both parties’ respective responsibilities for the injury and then award damages by comparing fault. By using the comparative fault doctrine, it becomes unnecessary for courts to examine whether consent is fully or only partially established. Arguably, defendant breached the duty to let the stuntpersons know of significant changes in the stunts; plaintiff convinced the court that defendant’s negligence caused plaintiff’s injuries; and plaintiff’s careless failure to have seat belts installed reduced her recovery by thirty-five percent.\textsuperscript{168} The whole analysis can be accomplished without any need for a separate defense of implied assumption of risk.

C. Implied Assumption of a Reasonable Risk Survives as a Separate and Complete Defense to Defendant’s Negligence

This position, retaining implied assumption of risk as a separate defense, is taken by most California appeal courts\textsuperscript{169} and by law review commentators Paul Rosenlund and Paul Killion.\textsuperscript{170} The California Supreme Court expressed interest in this view, directing the Fourth District in \textit{Ordway} \textsuperscript{171} to New York’s \textit{Turcotte v. Fell},\textsuperscript{172} which combined a no-duty analysis\textsuperscript{173} with retention of a complete assumption of risk defense. \textit{Ford} inferred that this gesture indicated the supreme court’s “tacit approval” for this position.\textsuperscript{174}

\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.} at 1479, 255 Cal. Rptr. at 761.
\item \textit{Id.} at 1480-83, 255 Cal. Rptr. at 762-64.
\item For a list of decisions that have endorsed this dualistic approach, see \textit{supra} note 58.
\item Rosenlund \& Killion, \textit{supra} note 18.
\item \textit{See supra} note 141 and accompanying text.
\item Ford v. Gouin, 217 Cal. App. 3d 1606, 1619, 266 Cal. Rptr. 870, 878 (1990), \textit{accepted for review}, Supreme Ct. No. S014828. The supreme court supported the firefighter’s rule, barring firefighter’s recovery for negligence in the creation of a fire that led to injury on the job, after \textit{Li}. Lipson v. Superior Court, 31 Cal. 3d 362, 371, 644 P.2d 822, 829-31, 182 Cal. Rptr. 629, 635-38 (1982); Hubbard v. Boelt, 28 Cal. 3d 480, 484-85, 620 P.2d 156, 159, 169 Cal. Rptr. 706, 708-09 (1980). Firefighter’s rules have been viewed as a form of assumption of risk warranting a no-liability result. Notice that the same no-liability result may be achieved by the use of traditional proximate cause doctrine, finding it would not be fair to make the negligent
Rosenlund and Killion are not satisfied with the second approach, which they label “abolitionist.” To them, James’s characterization of primary assumption of risk—the mirror image of lack of duty—and secondary or unreasonable assumption of risk, which overlaps with contributory negligence, is not complete because implied assumption of a reasonable risk fits neither category. Thus, since the abolitionists cannot account for all implied assumptions of risk, implied assumption of a reasonable risk deserves to be an independent defense. But whenever each element of the negligence prima facie case is examined, including the comparative fault defense, the need for a separate assumption of risk defense evaporates.

They offer a ballpark injury example to illustrate that because the no-duty analysis, overlapping contributory negligence, and express assumption of risk together cannot account for all assumption of risk, implied assumption of a reasonable risk must be retained as a separate defense. Plaintiff spectator P sits voluntarily in ballpark seats without protective netting (e.g., bleacher seats). Defendant park owner D owes a duty to protect foreseeable plaintiffs, including P, so a no-duty analysis does not apply to D. P’s conduct was not unreasonable or careless, and P signed no waiver, so D is liable.

In this example, D has breached no duty to P sitting in the bleachers, as a matter of law. Although it is indeed foreseeable that home run balls will land in bleacher seats, the burden on ballpark owners (to cover all seats with netting) is too great when juxtaposed to the minor risk that unusually inattentive spectators might be hit. And so the breach element of the negligence prima facie case disposes of the issue.

Another alternative would be to hold that D owed no duty as a matter of law, relying on the duty element to dispose of the issue. Rudnick dicta affirmed that a no-duty analysis is as appropriate for baseball spectator cases as is an implied assumption of a reasonable risk analysis: “Schwartz . . . would abandon the plaintiff’s [implied assumption of a reasonable risk] theory in favor of an eliminated or diminished duty of care by the defendant: ‘a number of fact patterns that look like [implied assumption of a reasonable risk] may still result in a verdict for defend-

defendant pay for plaintiff’s harm when plaintiff was a firefighter injured in the course of employment.

175. Rosenlund & Killion, supra note 18, at 234, 237.
176. Id.
177. Id. at 242-44.
178. Id.
ant [under a comparative fault system] if they are recast under the duty concept.'

Keeping implied assumption of a reasonable risk as a complete defense imposes a strategic dilemma on plaintiffs. Plaintiffs can only avoid reduction of recovery through comparison of fault, by showing that their conduct was reasonable, yet if their behavior was reasonable and they voluntarily and knowingly accepted a risk, any recovery would be completely barred. Plaintiffs need to demonstrate unreasonable behavior to avoid the implied assumption of a reasonable risk total bar to recovery, resulting in a reduction of recovery through comparative fault. Much unnecessary litigation about reasonable and unreasonable conduct could be avoided by following the Li mandate to compare fault of the parties in accident litigation where the question of defenses is reached.

IV. The Roles of Judge and Jury

Traditionally, the fact finder determines both the reasonableness of plaintiff’s actions and the assumption of risk. Nevertheless, confusion about the doctrine of assumption of risk has led courts, struggling to apply the doctrine, to usurp the traditional role of the jury. For example, the court in Ford upheld summary judgment for defendant, finding that plaintiff had assumed the risk, thereby depriving the fact finder of a chance to consider that question. Summary judgment is appropriate where there is “no material issue of fact, . . . and the sole issue remaining is one of law.” Where “the navigable width of the channel was between 65 and 90 feet” and the angle of the tow line reduced that width “an additional 55 to 67 feet,” it is difficult to regard the reasonableness of plaintiff’s water-skiing backwards and barefoot as not raising a question of fact. Contrary to the court’s holding, it appears that plaintiff’s conduct could easily be described as contributorily negligent and should be treated under the doctrine of comparative negligence.

179. Rudnick v. Golden West Broadcasters, 156 Cal. App. 3d 793, 798-800, 202 Cal. Rptr. 900, 903 (1984) (quoting SCHWARTZ, COMPARATIVE NEGLIGENCE § 9.4, pp. 168-69 (1974)). (Emphasis in the original) Rosenlund and Killion even state that “If a risk is so obvious it is reasonably foreseeable a plaintiff will take protective measures against it, a duty analysis may be more appropriate . . . .” Supra note 18 at 243. It is not clear why their own ballpark example would not be just such a situation.


183. Id. at 1619-20, 266 Cal. Rptr. at 878.
The *Harrold* court reversed a summary judgment favoring defendant, who did not controvert plaintiff’s allegation of the horse’s propensity to spook or demonstrate plaintiff’s knowledge of that particular risk and its magnitude. The court here could decide if the horse ranch had an obligation to warn plaintiff rider. If so, the fact finder could then determine if the breach proximately caused the injury. If defenses are reached, the fact finder could consider plaintiff’s and defendant’s relative degrees of fault, and apportion liability accordingly.

The existence of duty is usually a question of law. Some courts favor resolution of plaintiff’s assumption of risk as a duty issue because they want the court to control the finding. For example, baseball injuries are so universally handled with a no-duty analysis or its equivalent, that ad hoc jury determination could lead to arbitrariness and inconsistency of outcomes. *Ford* approved of the expedition of cases gained by no-duty analysis. In situations where there is no question of fact, this analysis is sufficient and retains appropriate judicial control. The use of no-duty analysis requires no separate defense of implied assumption of risk, merely an appropriate analysis of the negligence prima facie case.

V. Burden of Proof

The placement of the analysis of plaintiff’s reasonable behavior, either as part of the negligence prima facie case or as an affirmative defense, affects the parties’ burdens of proof. Plaintiff has the burden of proving each element of the prima facie case of negligence, including defendant’s duty, and defendant traditionally bears the burden of showing plaintiff’s fault or assumption of risk. The side opposing summary judgment also has a burden to produce some evidence contrary to the

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184. *Harrold*, 218 Cal. App. 3d at 38, 266 Cal. Rptr. at 735.
185. *Id.* at 49-50, 266 Cal. Rptr. at 742-43.
186. The court in Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) thought juries capable of the conceptually challenging comparison of fault and no-fault, indicating faith in juries' competency. See *supra* note 156 and accompanying text.
moving side's evidence, in order to get beyond summary judgment by demonstrating a triable controversy.\textsuperscript{191}

Commentators argue against abolishing implied assumption of a reasonable risk because “abolishing assumption of risk in favor of a [no-]duty analysis would have the effect of shifting the traditional burden of proof [which defendant would ordinarily bear for implied assumption of risk] from the defendant to the plaintiff.”\textsuperscript{192} But plaintiff must prove the prima facie case \textit{anyway}, so requiring plaintiff to prove the negligence case and then analyzing defenses as suggested by this article, adds nothing to plaintiff’s burden.\textsuperscript{193}

Eliminating the implied assumption of risk defense would indeed remove defendant’s burden of proving an affirmative defense, although defendant still must controvert plaintiff’s claims that defendant owed a breachable duty. Where defendant’s negligence has been shown, incorporation of plaintiff’s fault into comparative fault helps plaintiff by transforming what might otherwise be a total loss into a reduced recovery. Requiring negligent defendants to compensate injured plaintiffs remains well within the premise of tort law.

The post-industrial, pro-plaintiff trend away from the classic common law “Bad Samaritan Rule”\textsuperscript{194} has broadened the concept of duty and increased responsibilities for defendants.\textsuperscript{195} Negligence jurisprudence pursues fairness by the policy choices underlying the limitation or expansion of both duty\textsuperscript{196} and proximate causation. It is these explicit or subtle policy determinations that will ultimately favor plaintiff or defendant, regardless of which side is assigned the burden of proof at different stages of a negligence action. For example, compare the policy choices in recent California products liability cases\textsuperscript{197} with those in the ballpark cases\textsuperscript{198} discussed above; courts have needed only the prima facie case elements to regulate respective burdens and essential fairness.

The complaint that eliminating (or for that matter, retaining) the separate assumption of risk defense will handicap plaintiff is merely a

\begin{itemize}
\item \textsuperscript{191} This is the burden that defendant did not meet in Harrold v. Rolling J Ranch, 218 Cal. App. 3d 36, 49-50, 266 Cal. Rptr. 734, 743 (1990), \textit{accepted for review}, Supreme Ct. No. S014818.
\item \textsuperscript{192} Rosenlund & Killion, \textit{supra} note 18, at 239; see \textit{RESTATEMENT (SECOND) OF TORTS} § 496G comments b and c.
\item \textsuperscript{193} James II, \textit{supra} note 10, at 195-97, rebuts arguments that plaintiffs benefit by the separate doctrine of assumption of risk because it is defendant’s burden to prove.
\item \textsuperscript{194} See James I, \textit{supra} note 141, at 142.
\item \textsuperscript{195} James II, \textit{supra} note 10, at 192.
\item \textsuperscript{196} See James I, \textit{supra} note 141, at 152.
\item \textsuperscript{197} See \textit{supra} notes 155-156 and accompanying text.
\item \textsuperscript{198} See \textit{supra} notes 41-58 and accompanying text.
\end{itemize}
tangential concern. What ultimately will make any difference is the definition of what duty is owed and what causation is called “proximate.” A defense of implied assumption of a reasonable risk only adds repetitive doctrine, clouding the fundamental fairness issues at stake. If duty standards are sufficiently broad and inclusive, it will be fair to leave plaintiff with the burden of proof. If the duty standards (and analysis of the rest of the prima facie case) are also fair enough to defendants, then they will not miss the opportunity to litigate issues that would have been raised by an implied assumption of risk defense.

Conclusion

Implied assumption of a reasonable risk is a superfluous doctrine. Its elements are accounted for already in the negligence prima facie case and existing comparative fault defense. Plaintiffs should be responsible for their reasonable behavior, which can be analyzed under comparative fault principles; no separate defense is needed.

It is time for the California Supreme Court to abolish the doctrine of implied assumption of a reasonable risk. It serves no purpose in tort jurisprudence that cannot be analytically accomplished through the existing prima facie case and comparison of fault. The continued presence of the separate defense creates unnecessary confusion that diverts judicial attention from a more straightforward analysis of cases.