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THE UNCERTAIN FUTURE OF ASSUMPTION OF RISK IN CALIFORNIA

*The phrase "assumption of risk" is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, indiscriminately used to express different and sometimes contradictory ideas.*¹

I. INTRODUCTION

Assumption of risk is a negligence defense that has long caused confusion in definition and application.² In some settings assumption of risk is concerned with the parameters of the duty of care a defendant owes a plaintiff. This area of assumption of risk is labeled primary assumption of risk.³ For example, a spectator who is sitting in the outfield at a baseball game and is injured by a baseball hit into the stands cannot maintain a negligence action against the stadium owner. Primary assumption of risk instructs that the stadium owner does not owe the spectator a duty of care.⁴ Since duty is one of the elements of the prima facie negligence case,⁵ the spectator is barred from recovery.

In other areas assumption of risk has been applied to situations where the plaintiff knowingly and voluntarily encountered a risk that the defendant's breach of duty created. This area of assumption of risk is labeled secondary assumption of risk.⁶ Consider the plaintiff who stands near the defendant while the defendant is carelessly drilling into a piece of metal. The plaintiff knows that the defendant is not using the drill properly and that it is possible pieces of metal will fly from the drill. Nonetheless, the plaintiff insists on standing next to the defendant to get a better view of what the defendant is doing. Unfor-

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

2. *See, e.g.*, 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 21.0, at 187-89 (2d ed. 1986); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68, at 480-81 (5th ed. 1984); VICTOR SCHWARTZ, COMPARATIVE NEGLIGENCE § 9.1, at 154 (2d ed. 1986).

3. *See infra* notes 54-80 and accompanying text.

4. *See infra* notes 54-80 and accompanying text.

5. *See, e.g.*, KEETON ET AL., *supra* note 2, § 68, at 164.

6. *See infra* notes 81-91 and accompanying text.

tunately, the defendant is negligent and the plaintiff is injured when hit in the eye with a flying piece of metal. Because the plaintiff has knowingly and voluntarily encountered the risk the defendant's negligent drilling created, secondary assumption of risk bars the plaintiff's recovery.⁷

Secondary assumption of risk is further divided into two categories. If the trier of fact deems it reasonable for the plaintiff to be standing near the defendant, secondary assumption of a reasonable risk bars the plaintiff's recovery.⁸ If the trier of fact decides it was unreasonable, secondary assumption of an unreasonable risk will bar the plaintiff's recovery.⁹

Prior to the adoption of comparative fault,¹⁰ courts did not have any need to distinguish between the different types of assumption of risk outlined above.¹¹ However, when California abolished contributory negligence as a complete defense to negligence and adopted a comparative fault system,¹² the need to differentiate between the forms of assumption of risk arose.

Comparative fault is based on the principle that liability should be apportioned according to fault.¹³ Since contributory negligence barred recovery even to plaintiffs who only slightly contributed to their own injuries, the adoption of comparative fault necessitated the abolition of contributory negligence as a complete defense to negligence.¹⁴

The adoption of comparative fault necessitated the California Supreme Court's inquiry into which forms of assumption of risk were not compatible with the comparative fault system.¹⁵ The California Supreme Court determined that secondary assumption of an unreasonable risk overlapped contributory negligence and should not remain a complete bar to recovery under a comparative fault system.¹⁶ In *Knight v. Jewett*¹⁷ a majority of the court decided that secondary

7. See *infra* notes 81-91 and accompanying text.

8. See *infra* part II.B.2.b.i.

9. See *infra* part II.B.2.b.ii.

10. For a discussion of comparative fault, see *infra* part II.C.

11. *Knight v. Jewett*, 3 Cal. 4th 296, 304, 834 P.2d 696, 700, 11 Cal. Rptr. 2d 2, 6 (1992).

12. California adopted comparative fault in *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

13. See *infra* notes 95-97 and accompanying text.

14. See *Li*, 13 Cal. 3d at 812-13, 532 P.2d at 1232, 119 Cal. Rptr. at 864.

15. See *id.* at 824-25, 532 P.2d at 1240-41, 119 Cal. Rptr. at 872-73.

16. See *id.*

17. 3 Cal. 4th 296, 834 P.2d 696, 11 Cal. Rptr. 2d 2 (1992).

assumption of a reasonable risk should meet the same fate while primary assumption of risk would not.¹⁸

This Comment examines the California Supreme Court's decision in *Knight*, a case that is significant because it attempted to clarify the effect of the adoption of comparative fault on assumption of risk. This Comment also includes an explanation of the elements of the traditional assumption of risk case, as well as a discussion of the different forms of assumption of risk and how they relate to contributory negligence and comparative fault.¹⁹

Part III of this Comment examines California's adoption of comparative fault. It then discusses the factual background of *Knight* as well as the plurality's reasons for retaining primary assumption of risk and for abolishing secondary assumption of risk as a separate doctrine from comparative fault.

In Part IV, this Comment criticizes the plurality's merger of secondary assumption of risk into the comparative fault scheme.²⁰ Part IV is also critical of the manner in which the plurality defines primary assumption of risk.²¹

Finally, this Comment recognizes that courts since *Knight* have retained primary assumption of risk as a label for the defendant's lack of duty. It recommends that the court adopt a definition for primary assumption of risk separate from the "no duty" label that the doctrine has garnered in the courts of appeal and in *Knight* itself.²² It then recommends defining primary assumption of risk cases as those cases where the risk of the activity is necessarily inherent in—or inevitably a part of—the activity itself.²³

II. BACKGROUND

A. *The Elements of Assumption of Risk*

A defendant's successful assertion of the assumption of risk defense has traditionally required that the plaintiff have a subjective knowledge and appreciation of the risk.²⁴ Moreover, the plaintiff

18. *Id.* at 308, 834 P.2d at 703, 11 Cal. Rptr. 2d at 9.

19. *See infra* part II.

20. *See infra* part IV.A.

21. *See infra* part IV.B.

22. *See infra* part IV.C.

23. *See infra* part IV.C.

24. *See infra* notes 27-35 and accompanying text.

must confront the risk voluntarily.²⁵ Courts have applied these requirements to all forms of assumption of risk.²⁶

1. Knowledge and appreciation of the risk

To successfully utilize the assumption of risk defense, the defendant must first show that the plaintiff knew of the existence of the risk and appreciated its danger.²⁷ In order to truly have knowledge and appreciation of a risk, the plaintiff must not only be aware of what creates the risk, but must appreciate the character and extent of that risk.²⁸ Thus, a plaintiff may be aware that a piece of property is in poor condition, but may not know the specific danger the property presents. Even if it is known, the risk may appear negligible. In such situations the plaintiff does not assume the risk by using the property.²⁹

The plaintiff must know and comprehend the specific risk that eventually causes harm.³⁰ For example, suppose a plaintiff rents a car from the defendant, fully understanding that the defendant carelessly maintained the car's tires. However, the plaintiff does not know that the defendant also carelessly maintained the brakes. While driving the car, the plaintiff gets into an accident caused solely by the defective brakes. Because the plaintiff did not know and comprehend the specific risk that caused the accident, he or she will not be held to assume the risk of the car accident. This is true even though it was a foreseeable consequence of the poorly maintained tires the plaintiff did know about.³¹

Knowledge and appreciation of the risk are measured using a subjective standard geared to the particular plaintiff and the particular situation.³² For example, a plaintiff whose age or lack of experience prevents comprehension of a risk will not be held to assume the risk, even though a reasonable person of ordinary prudence would have

25. See *infra* notes 36-44 and accompanying text.

26. KEETON ET AL., *supra* note 2, § 68, at 486-92.

27. See *Gyeriman v. United States Lines Co.*, 7 Cal. 3d 488, 498 n.10, 498 P.2d 1043, 1049 n.10, 102 Cal. Rptr. 795, 801 n.10 (1972); *Prescott v. Ralphs Grocery Co.*, 42 Cal. 2d 158, 161-62, 265 P.2d 904, 906 (1954); RESTATEMENT (SECOND) OF TORTS § 496D (1965).

28. RESTATEMENT (SECOND) OF TORTS § 496D cmt. b.

29. See *id.*

30. KEETON ET AL., *supra* note 2, § 68, at 487.

31. See Robert E. Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 126 (1961).

32. See *Prescott*, 42 Cal. 2d at 161-62, 265 P.2d at 906 (1954); *Gonzalez v. Garcia*, 75 Cal. App. 3d 874, 878-79, 142 Cal. Rptr. 503, 505 (1977); RESTATEMENT (SECOND) OF TORTS § 496A cmt. d.

understood and appreciated the particular risk involved.³³ On the other hand, the defendant does not need to prove that the plaintiff foresaw the accident and the exact injury that occurred.³⁴ If the facts of the case indicate that the plaintiff must have known of a particular danger, or that the risk was obvious, then he or she will be deemed to have had actual knowledge of the risk.³⁵

2. Voluntary assumption of the risk

Since the basis of the assumption of risk defense is the plaintiff's consent to accept the risk and look out for him or herself,³⁶ the plaintiff must have encountered the risk voluntarily.³⁷ The acceptance of a risk is involuntary if the defendant's conduct has left the plaintiff no reasonable alternative to avoid the harm to him or herself or to another.³⁸ For example, a shipper of vegetables does not assume the risk of a defective car that a carrier supplied when the only alternative to shipping the vegetables is to let them rot.³⁹ However, if the plaintiff has a reasonable course of action,⁴⁰ but elects to pursue a more dangerous course, then the plaintiff's choice is voluntary.⁴¹ For instance, suppose the city has cleared the snow and ice from the sidewalk on only one side of a street. The plaintiff, free to choose which side of the street to walk on, elects the icy side of the street. Since the plaintiff chose the more dangerous course of action, the choice was voluntary.⁴²

The plaintiff's acceptance of the risk will be deemed voluntary if circumstances beyond the defendant's control compel the plaintiff to encounter a risk.⁴³ Thus, a plaintiff who cannot find a place to live

33. RESTATEMENT (SECOND) OF TORTS § 496A cmt. d.

34. See, e.g., *Prescott*, 42 Cal. 2d at 162, 265 P.2d at 906.

35. *Id.*

36. RESTATEMENT (SECOND) OF TORTS § 496E cmt. a.

37. *Prescott*, 42 Cal. 2d at 162, 265 P.2d at 906; RESTATEMENT (SECOND) OF TORTS § 496E.

38. RESTATEMENT (SECOND) OF TORTS § 496E.

39. See *Missouri, Kan. & Tex. Ry. v. McLean*, 118 S.W. 161 (Tex. 1909).

40. Several factors determine whether a reasonable course of action exists. They include the importance of the interest the plaintiff is seeking to advance, the danger and the probability that it will occur, the inconvenience of a particular course of conduct compared to another, and "all other relevant factors which would affect the decision of a reasonable man under the circumstances." RESTATEMENT (SECOND) OF TORTS § 496E cmt. d.

41. *Id.* In this type of situation the plaintiff may not only have assumed the risk but will be contributorily negligent for taking the unreasonable course of action. KEETON ET AL., *supra* note 2, § 68, at 491.

42. RESTATEMENT (SECOND) OF TORTS § 496E cmt. d, illus. 9.

43. *Id.* § 496E cmt. b.

and must rent the defendant's house, which is obviously dangerous, will be deemed to have acted voluntarily.⁴⁴ Even though compulsion to encounter the risk exists, it does not stem from the defendant's conduct.

B. The Many Species of Assumption of Risk

Courts and commentators have divided assumption of risk into several categories.⁴⁵ The two basic types of assumption of risk are express and implied assumption of risk.⁴⁶ Within the implied assumption of risk category two subcategories exist: primary assumption of risk and secondary assumption of risk.⁴⁷ Secondary assumption of risk is further divided into two subcategories: secondary assumption of a reasonable risk and secondary assumption of an unreasonable risk.⁴⁸

1. Express assumption of risk

Express assumption of risk involves a plaintiff who contracts or expressly agrees⁴⁹ to accept a risk of harm stemming from a defendant's negligent or reckless conduct.⁵⁰

2. Implied assumption of risk

Implied assumption of risk typically involves a plaintiff who has knowledge and appreciation of a risk created by the defendant's conduct but who chooses to confront the risk anyway.⁵¹ Implied assumption of risk does not require the plaintiff's express consent to assume

44. *See id.*

45. *See infra* part II.B.1-2.

46. KEETON ET AL., *supra* note 2, § 68, at 481.

47. *Knight v. Jewett*, 3 Cal. 4th 296, 309, 834 P.2d 696, 704, 11 Cal. Rptr. 2d 2, 10 (1992).

48. *Id.*

49. Express assumption of risk usually involves a contract that declares that the defendant is not liable to the plaintiff for tortious conduct. RESTATEMENT (SECOND) OF TORTS § 496B cmt. a. Consent to the defendant's conduct can also be noncontractual, provided that some type of express agreement exists. *Id.*

50. *See Hulsey v. Elsinore Parachute Ctr.*, 168 Cal. App. 3d 333, 344-45, 214 Cal. Rptr. 194, 201 (1985); RESTATEMENT (SECOND) OF TORTS § 496B. Since this Comment does not require an in-depth understanding of express assumption of risk, I only provide a brief definition.

51. RESTATEMENT (SECOND) OF TORTS § 496C.

the risk of harm.⁵² Instead, a plaintiff manifests a willingness to accept the risk through conduct.⁵³

a. primary assumption of risk

Implied assumption of risk consists of two subcategories: primary and secondary implied assumption of risk. Primary assumption of risk occurs when a defendant is not negligent, because he or she did not breach a duty owed to the plaintiff.⁵⁴ To better understand primary assumption of risk, it is necessary to look at the common law in the master-servant context.⁵⁵ At common law, the master had a duty to provide the servant with a safe place to work.⁵⁶ If inherent risks in the employment situation remained, the master was not liable when those risks were responsible for the servant's injury.⁵⁷ The master did not have to plead the defense; rather, it was the servant who was required to prove that a risk that was not inherent in an ordinary and similar work place caused the injury.⁵⁸ In other words, primary assumption of risk is not, and never was, a defense to negligence at all. It was just a way of saying that the defendant was not negligent because the defendant did not breach a duty he or she owed to the plaintiff.⁵⁹

Primary assumption of risk has expanded beyond the master-servant context.⁶⁰ For example, sporting event spectators who are injured by foul balls or hockey pucks flying into the stands are generally barred from recovery due to primary assumption of risk.⁶¹ The owners of a baseball stadium or a hockey rink do not have a duty to screen every seat from a foul ball or errant puck.⁶² Rather, their duty is met if they provide screens for the spectators most likely to encounter in-

52. See *Gomes v. Byrne*, 51 Cal. 2d 418, 421, 333 P.2d 754, 755-56 (1959); RESTATEMENT (SECOND) OF TORTS § 496C cmt. b.

53. See *Gomes*, 51 Cal. 2d at 421, 333 P.2d at 755-56; RESTATEMENT (SECOND) OF TORTS § 496C cmt. b.

54. *Salinas v. Vierstra*, 695 P.2d 369, 372 (Idaho 1985); *Meistrich v. Casino Arena Attractions, Inc.*, 155 A.2d 90, 93 (N.J. 1959); *Williamson v. Smith*, 491 P.2d 1147, 1151 (N.M. 1971).

55. Today, with the promulgation of workers' compensation and other statutes, assumption of risk does not play a significant role in the master-servant context. HARPER ET AL., *supra* note 2, § 21.4, at 228 (1956).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. See Fleming James, Jr., *Assumption of Risk*, 61 YALE L.J. 141, 142 (1952).

61. See *Modoc v. City of Eveleth*, 29 N.W.2d 453, 455-57 (Minn. 1947).

62. *Id.*

jury, such as those seated immediately behind home plate or in the first rows of the hockey rink.⁶³

The focus on duty is interwoven with the traditional elements of assumption of risk. Thus, voluntary action in the face of a known and appreciated risk must also exist before a defendant can successfully assert primary assumption of risk.⁶⁴ For instance, in *Tancredi v. Dive Makai Charters*⁶⁵ the deceased went scuba diving on a trip the defendant guided and chartered.⁶⁶ When the deceased showed up to board the boat, the defendant informed him that they would be diving at the "Deep Reef."⁶⁷ "The plan was to dive to a maximum depth of 145 feet for a maximum time of 20 minutes, with decompression stops at 20 feet for three minutes and at ten feet for eight minutes."⁶⁸ Although the deceased was a certified diver, he was not experienced enough to participate in a dive that was this deep and included this many decompression stops.⁶⁹ After making the dive, the deceased and the group of other divers began to return to the boat.⁷⁰ The deceased began to have trouble breathing,⁷¹ and began to bleed out of his nose and mouth.⁷² He became negatively buoyant and sank to the ocean bottom.⁷³ Rescue efforts failed, and he died.⁷⁴

The defendant asserted primary assumption of risk as a defense.⁷⁵ The court noted that primary assumption of risk involves two factors:⁷⁶ first, whether the defendant owes the plaintiff a duty of care;⁷⁷ and second, whether the plaintiff with knowledge and appreciation of the danger, confronted that danger voluntarily.⁷⁸ The court held that primary assumption of risk would not bar the plaintiff's recovery.⁷⁹

63. *Id.*

64. *See, e.g., Tancredi v. Dive Makai Charters*, 823 F. Supp. 778, 789 (D. Haw. 1993); *Doe v. Brainerd Int'l Raceway, Inc.*, 514 N.W.2d 811, 820 (Minn. 1994); *Martin v. Buzan*, 857 S.W.2d 366, 368 (Mo. 1993) (citing *Ross v. Clouser*, 637 S.W.2d 11, 14 (Mo. 1982)).

65. 823 F. Supp. 778 (D. Haw. 1993).

66. *Id.* at 781.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 782.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 788.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 790.

The court felt that while the deceased understood some of the risks involved in diving at 140 feet, he did not comprehend all of them.⁸⁰

b. secondary assumption of risk

Secondary assumption of risk is applicable when the defendant has breached a duty of care that he or she owed to the plaintiff.⁸¹ A defendant can successfully invoke the defense by showing that the plaintiff voluntarily confronted a negligently created risk with knowledge and appreciation of that risk.⁸² Thus, suppose the defendant is dangerously setting off fireworks next to a public street. The plaintiff, fully aware of the risks involved, stands in the street near the fireworks to get a good view of them. A firework injures the plaintiff. The plaintiff will be deemed to assume the risk in the secondary sense.⁸³ Because the defendant breached a duty to the plaintiff by dangerously setting off the fireworks, primary assumption of risk does not apply to the situation.⁸⁴

i. secondary assumption of a reasonable risk

Under the rubric of secondary assumption of risk, courts recognize the doctrines of secondary assumption of a reasonable risk and secondary assumption of an unreasonable risk.⁸⁵ Secondary assumption of a reasonable risk generally means that the advantages to the plaintiff in encountering the risk the defendant's negligence caused outweigh the disadvantages.⁸⁶ In such a situation the plaintiff's assumption of risk is considered "reasonable." Even though the plaintiff's conduct was reasonable, the defendant can still take advantage of the defense.⁸⁷

As an example, consider the tenant who is injured after entering a burning apartment to save a child.⁸⁸ Because the advantages to saving the child outweigh the disadvantages, the conduct is considered reasonable. However, since the person acted voluntarily with knowl-

80. *Id.*

81. *Meistrich*, 155 A.2d at 93.

82. *See supra* part II.A.

83. *See* RESTATEMENT (SECOND) OF TORTS § 496C cmt. g.

84. *See supra* notes 24-35 and accompanying text.

85. *KEETON ET AL.*, *supra* note 2, § 68, at 481.

86. *Id.*

87. *See id.*

88. *Blackburn v. Dorta*, 348 So. 2d 287, 291 (Fla. 1977).

edge and appreciation of the risk of being injured, secondary assumption of a reasonable risk would bar recovery.⁸⁹

ii. secondary assumption of an unreasonable risk

Secondary assumption of an unreasonable risk, on the other hand, occurs when the advantage to be gained in encountering a risk is small when compared to the danger the plaintiff potentially will face.⁹⁰ Thus, a plaintiff who elects to run into a burning building to retrieve an old hat has assumed an unreasonable risk of being injured.⁹¹ Accordingly, the plaintiff cannot recover for that injury.

C. *The Relationship Between Contributory Negligence, Comparative Negligence, and Assumption of Risk*

Contributory negligence is an affirmative defense to negligence. It applies when the plaintiff's conduct falls below the conduct which a person of ordinary prudence would conform for their own protection.⁹² The defense becomes relevant after the trier of fact finds that the defendant has breached a duty and would otherwise be liable to the plaintiff.⁹³ The effect of the defense is to deny *any* recovery to the plaintiff, even if the plaintiff is only one percent at fault.⁹⁴

The hardship of this doctrine prompted many states to adopt a system of comparative negligence.⁹⁵ Although different forms of comparative negligence exist, the basic theory behind each form is the same—apportionment of liability according to fault.⁹⁶ For example, under a comparative negligence system a plaintiff who is 30% responsible for the damage arising from the defendant's negligent conduct will get 70% of the damages the plaintiff would have gotten had the plaintiff been 0% at fault.⁹⁷ Comparative negligence eliminates the inequity that occurs under contributory negligence, where a plaintiff who is only 1% at fault cannot recover anything.

89. *See id.*

90. KEETON ET AL., *supra* note 2, § 68, at 481.

91. *See id.*

92. *Id.* § 65, at 451.

93. *Id.* at 451-52.

94. *Id.*

95. *See, e.g.,* *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Alvis v. Ribar*, 421 N.E.2d 886 (Ill. 1981); *Placek v. City of Sterling Heights*, 275 N.W.2d 511 (Mich. 1979); *Scott v. Rizzo*, 634 P.2d 1234 (N.M. 1981); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979); KEETON ET AL., *supra* note 2, § 67, at 470-74.

96. *See* KEETON ET AL., *supra* note 2, § 67, at 470-74.

97. *See id.* at 468-73.

To a certain degree assumption of risk and contributory negligence overlap.⁹⁸ Secondary assumption of an unreasonable risk involves a plaintiff who confronts a risk where the danger incurred outweighs the benefit of that conduct.⁹⁹ In such a situation the plaintiff is also, by definition, engaging in conduct that falls below the standard of care an ordinary prudent person would use for his or her own protection—the plaintiff is contributorily negligent.¹⁰⁰ Recall the example used above to illustrate secondary assumption of an unreasonable risk—the plaintiff who runs into a burning house simply to retrieve a hat. The plaintiff is not only engaging in conduct where the risks outweigh the benefits but is also acting unreasonably.¹⁰¹ This plaintiff therefore created an undue risk of harm to him or herself and cannot recover in a contributory negligence jurisdiction.¹⁰² Since the plaintiff had knowledge and appreciation of the risk and voluntarily ran into the burning house, secondary assumption of an unreasonable risk would also bar recovery.¹⁰³

III. THE PRESENT STATE OF ASSUMPTION OF RISK IN CALIFORNIA

California adopted a comparative fault negligence scheme¹⁰⁴ in *Li v. Yellow Cab Co.*¹⁰⁵ In *Li*, the California Supreme Court discussed the effect of comparative negligence on assumption of risk, after noting that secondary assumption of an *unreasonable* risk and contributory negligence overlap to some degree.¹⁰⁶ The court went on to declare that “the adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault . . . [where] assumption of risk . . . is no more than a variant of contributory negligence.”¹⁰⁷ Secondary assumption of an *unreasonable* risk, therefore, became a dead letter in California.

The court also discussed primary assumption of risk. It stated that while primary assumption of risk does not involve the considera-

98. See *Gonzalez v. Garcia*, 75 Cal. App. 3d 874, 881, 142 Cal. Rptr. 503, 507 (1977); KEETON ET AL., *supra* note 2, § 68, at 495.

99. See *supra* notes 90-91 and accompanying text.

100. See *supra* note 92 and accompanying text.

101. See *supra* note 91 and accompanying text.

102. See RESTATEMENT (SECOND) OF TORTS § 463 cmt. b.

103. See *supra* note 91 and accompanying text.

104. See *supra* notes 95-97 and accompanying text.

105. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

106. *Id.* at 824, 532 P.2d at 1240, 119 Cal. Rptr. at 872. For a discussion on how contributory negligence and assumption of risk overlap, see *supra* part II.C.

107. *Li*, 13 Cal. 3d at 825, 532 P.2d at 1241, 119 Cal. Rptr. at 873.

tions of contributory and comparative negligence, it does involve a reduction of the defendant's duty of care.¹⁰⁸

Since the *Li* court did not address secondary assumption of a *reasonable* risk, courts of appeal were left to determine whether it remained a viable defense. The California Supreme Court answered this question in dicta in *Knight v. Jewett*.¹⁰⁹ The case involved an informal game of touch football during half time of the 1987 Super Bowl.¹¹⁰ Each team was comprised of four to five players that included both men and women.¹¹¹ The plaintiff, Kendra Knight, and the defendant, Michael Jewett, were on opposing teams.¹¹² During a play, the defendant ran into the plaintiff.¹¹³ The plaintiff alleged that she then told the defendant to stop playing rough or she was going to have to quit the game.¹¹⁴ On the very next play, the defendant injured the plaintiff.¹¹⁵ The defendant claimed that he jumped to intercept a pass and knocked the plaintiff to the ground.¹¹⁶ The plaintiff claimed that someone else had already caught the pass when the defendant struck the plaintiff from behind while he was chasing the person in possession of the ball.¹¹⁷ The plaintiff injured her hand.¹¹⁸ She had three operations that failed to restore movement in her finger or relieve the pain her injury caused.¹¹⁹ Eventually, doctors amputated her finger.¹²⁰

In a plurality decision, the court noted that prior to the adoption of comparative fault there was no need to distinguish between the various categories of assumption of risk.¹²¹ Whether a plaintiff was contributorily negligent or had assumed the risk, the plaintiff's recovery was completely barred.¹²² However, the court felt that with the adoption of comparative fault it had become essential to differentiate between the types of assumption of risk.¹²³

108. *Id.* at 824-25, 532 P.2d at 1240, 119 Cal. Rptr. at 872.

109. 3 Cal. 4th 296, 834 P.2d 696, 11 Cal. Rptr. 2d 2 (1992).

110. *Id.* at 300, 834 P.2d at 697, 11 Cal. Rptr. 2d at 3.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*, 834 P.2d at 697-98, 11 Cal. Rptr. 2d at 3-4.

118. *Id.*

119. *Id.* at 301, 834 P.2d at 698, 11 Cal. Rptr. 2d at 4.

120. *Id.*

121. *Id.* at 304, 834 P.2d at 700, 11 Cal. Rptr. 2d at 6.

122. *Id.*

123. *Id.*

The plurality in *Knight* stated that *Li* contemplated the merger of secondary assumption of an unreasonable risk with comparative fault¹²⁴ and recognized the disparate treatment given secondary assumption of a reasonable risk in the appellate courts since *Li*.¹²⁵ A majority of the court also declared that implied assumption of a reasonable risk did not survive California's comparative fault scheme.¹²⁶

The court chiefly relied on the unfairness that would result if it retained secondary assumption of a reasonable risk after the merger of secondary assumption of an unreasonable risk into the comparative fault scheme.¹²⁷ If the court did not merge secondary assumption of a reasonable risk into the comparative fault scheme, a plaintiff who acted reasonably in encountering a risk could be completely barred from any recovery under that defense. If the plaintiff acted unreasonably in encountering the risk, they would at least get some recovery under the comparative negligence scheme, because the *Li* court merged secondary assumption of an unreasonable risk into the comparative fault scheme.¹²⁸ In short, the *Knight* plurality did not want someone who acted unreasonably to be able to recover something while someone who acted reasonably got nothing.¹²⁹

The *Knight* plurality also discussed the effect comparative negligence had on primary assumption of risk.¹³⁰ It referred to the language in *Li* that distinguished primary assumption of risk from secondary assumption of an unreasonable risk¹³¹ and held that only primary assumption of risk survived the adoption of comparative fault.¹³²

Having determined that primary assumption of risk remains a complete bar to recovery in California, the next issue facing the *Knight* court was how to determine which cases involve primary assumption of risk rather than secondary assumption of risk.¹³³ The plu-

124. *Id.* at 306, 834 P.2d at 701, 11 Cal. Rptr. 2d at 7. A majority of the court took this view. *Id.* Justice Mosk joined the three judge plurality. *Id.* at 321, 834 P.2d at 712, 11 Cal. Rptr. 2d at 18 (Mosk, J., concurring).

125. *Id.* at 307, 834 P.2d at 702, 11 Cal. Rptr. 2d at 8.

126. *See id.* at 321, 834 P.2d at 712, 11 Cal. Rptr. 2d at 18 (Mosk, J., concurring).

127. *Id.* at 306-07, 834 P.2d at 701-02, 11 Cal. Rptr. 2d at 7-8.

128. *Id.*

129. *Id.*

130. *Id.* at 308, 834 P.2d at 703, 11 Cal. Rptr. 2d at 9.

131. *See supra* notes 105-107 and accompanying text.

132. *Knight*, 3 Cal. 4th at 308, 834 P.2d at 703, 11 Cal. Rptr. 2d at 9. Only one justice, Justice Mosk, would eliminate primary assumption of risk. *Id.* at 322, 834 P.2d at 712, 11 Cal. Rptr. 2d at 18 (Mosk, J., concurring).

133. *See id.* at 309, 834 P.2d at 703-04, 11 Cal. Rptr. 2d at 9-10.

rality first noted that in primary assumption of risk cases the defendant does not owe the plaintiff a duty of care, but in secondary assumption of risk cases the defendant owes the plaintiff a duty of care and has breached that duty.¹³⁴ The plurality stated that whether the defendant owes the plaintiff a duty does not depend on the reasonableness or unreasonableness of the plaintiff's conduct.¹³⁵ Rather, it depends on (1) the nature of the activity or sport involved and (2) the relationship of the defendant and the plaintiff to that activity or sport.¹³⁶

Applying this two-part test to the facts before it, the *Knight* plurality held that the nature of the activity and the parties' relationship to that activity were such that the defendant did not have a legal duty to protect the plaintiff from her injury.¹³⁷ Thus, primary assumption of risk barred the plaintiff's recovery.¹³⁸

In applying the nature of the activity part of the test, the court reasoned that the conduct at issue—the touch football game—inherently involved dangerous activity.¹³⁹ The court further recognized that although defendants do have a duty to use care not to increase the risks already present in a sport, they do not have a duty to protect plaintiffs against risks inherent in the activity itself.¹⁴⁰ Furthermore, the plurality specifically stated that under its “duty approach” to assumption of risk, the defendant does not need to demonstrate the plaintiff's subjective knowledge and appreciation of the risk.¹⁴¹ Thus, by adopting the duty approach, the plurality abandoned one of the traditional elements of the assumption of risk defense: subjective knowledge and appreciation of the risk.¹⁴²

The court then focused on the second part of its test: the relationship of the plaintiff and the defendant to the touch football game.¹⁴³ The plaintiff was a coparticipant, and the court referred to “[t]he overwhelming majority of the cases, both within and outside California . . . [that] have concluded that it is improper to hold a sports participant liable to a coparticipant for ordinary careless conduct com-

134. *Id.*

135. *Id.* at 314-15, 834 P.2d at 707-08, 11 Cal. Rptr. 2d at 13-14.

136. *See id.*

137. *Id.* at 321, 834 P.2d at 712, 11 Cal. Rptr. 2d at 18.

138. *Id.*

139. *Id.* at 315, 834 P.2d at 708, 11 Cal. Rptr. 2d at 14.

140. *Id.* at 316, 834 P.2d at 708, 11 Cal. Rptr. 2d at 14.

141. *Id.*, 834 P.2d at 709, 11 Cal. Rptr. 2d at 15.

142. *See supra* part II.B.

143. *Knight*, 3 Cal. 4th at 317, 834 P.2d at 709, 11 Cal. Rptr. 2d at 15.

mitted during the sport.”¹⁴⁴ The plurality found it persuasive that “vigorous participation” in sports would be chilled if liability was imposed on a participant because his or her conduct was merely careless.¹⁴⁵ Based on its review of the nature of sports activities in general and on the relationship that sports participants have with the sport itself, the plurality held that a sports participant can only be held liable for intentional and reckless conduct that is totally outside the activity normally involved in the sport.¹⁴⁶

Justice Kennard’s dissent maintained that secondary assumption of a reasonable risk should remain a complete bar to recovery.¹⁴⁷ The dissent accused the plurality of advocating a “radical transformation of tort law”¹⁴⁸ and was particularly critical of the plurality’s decision “to recast the analysis of implied assumption of risk from a subjective evaluation of what a particular plaintiff knew and appreciated . . . into a determination of the presence or absence of duty legally imposed on the defendant.”¹⁴⁹

IV. ANALYSIS

A. *The Flaws in the Knight Plurality’s Analytic Approach to Secondary Assumption of Risk*

The plurality in *Knight* stated that when the *Li* court adopted a comparative fault regime, the *Li* court merged implied assumption of an unreasonable risk with comparative fault.¹⁵⁰ Even though contributory negligence and implied assumption of an unreasonable risk overlap,¹⁵¹ the merger of the two was improper.

It is necessary to state briefly the argument for the merger of secondary implied assumption of an unreasonable risk with comparative fault. Secondary implied assumption of an unreasonable risk and contributory negligence often apply to the same case or the same set of circumstances.¹⁵² *Li* adopted a comparative fault scheme because of the inequity of the all or nothing contributory negligence defense.¹⁵³

144. *Id.* at 318, 834 P.2d at 710, 11 Cal. Rptr. 2d at 16.

145. *Id.*

146. *Id.* at 320, 834 P.2d at 711, 11 Cal. Rptr. 2d at 17.

147. *Id.* at 324, 834 P.2d at 714, 11 Cal. Rptr. 2d at 20 (Kennard, J., dissenting).

148. *Id.* (Kennard, J., dissenting).

149. *Id.* (Kennard, J., dissenting).

150. *Id.* at 306, 834 P.2d at 701, 11 Cal. Rptr. 2d at 7; see *supra* note 124 and accompanying text.

151. See *supra* part II.C.

152. See *supra* part II.C.

153. See *supra* notes 94-95 and accompanying text.

Since contributory negligence would apply in every secondary assumption of an unreasonable risk case, the argument runs, the all or nothing defense of secondary assumption of an unreasonable risk would frustrate the principle of comparative fault.¹⁵⁴

Secondary assumption of an unreasonable risk and contributory negligence, however, rest on different theoretical grounds. Because of this distinction and because assumption of risk promotes different values than contributory negligence, namely individualism and freedom of choice, secondary assumption of an unreasonable risk ought to maintain a separate existence as a complete defense under California's comparative negligence scheme.

The following hypothetical exemplifies the distinction between assumption of risk and contributory negligence. Plaintiffs *X* and *Y* are on a farm located in a farming community. Everything about the plaintiffs is the same, except *X* has grown up on a farm, while *Y* is from the city and has absolutely no knowledge about farm animals. *X* and *Y* both enter a pasture with the farmer's permission to look at a bull. *X* fully understands the risks of being in the vicinity of a bull, while *Y* does not understand the existence of any danger. *X* and *Y* get too close to the bull, and it attacks and injures both of them.

Assuming that the owner of the farm is negligent, *X* has knowledge and appreciation of the risk and has confronted the risk voluntarily. Since approaching a bull involves great danger and little benefit, *X* has impliedly assumed an unreasonable risk. Because *X* is acting unreasonably and not exercising due care for her own safety, *X* is also contributorily negligent.¹⁵⁵ *Y* is contributorily negligent as well.¹⁵⁶ But *Y* has not assumed any risk because he did not have the subjective knowledge that it was risky to get close to a bull.¹⁵⁷

154. See *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 824, 532 P.2d 1226, 1240, 119 Cal. Rptr. 858, 872 (1975).

155. The hypothetical assumes all of the traditional elements for the assumption of risk defense have been met. Plaintiff *X* has voluntarily encountered a known and appreciated risk. See *supra* part II.A. Since *Y* is contributorily negligent, *X* most certainly is. See *infra* note 156 and accompanying text.

156. See KEETON ET AL., *supra* note 2, § 32, at 184. In defining the proper standard of care that ought to be applied in a negligence case, Keeton notes:

[W]hen an . . . individual who lacks the experience common to the particular community comes into it, as in the case of the old lady from the city who comes to the farm without ever having learned that a bull is a dangerous beast, the standard of ordinary knowledge will still be applied, and it is the individual who must conform to the community, rather than vice versa.

Id. Since plaintiff *Y* got too close to the bull and someone with ordinary knowledge in the community would not have, plaintiff *Y* is contributorily negligent.

157. See *supra* part II.A.1.

It is not difficult to determine how the *Knight* plurality would rule as to plaintiffs *X* and *Y*. The hypothetical assumes the farmer was negligent. Thus, primary assumption of the risk does not apply because the farmer owed and breached a duty.¹⁵⁸

Since the *Knight* plurality held that secondary assumption of an unreasonable risk was merged into the comparative fault scheme in *Li*,¹⁵⁹ the defendant farmer cannot use this as a defense with respect to plaintiff *X*. However, *X* was also contributorily negligent, and the farmer could succeed in reducing *X*'s damage award under comparative fault. The result would be the same for *Y*, regardless of the fact that there was no assumption of risk issue with respect to *Y*.

Now assume the jurisdiction in the hypothetical is one that has adopted comparative negligence and *retained* secondary assumption of an unreasonable risk as a complete bar to the plaintiff's recovery.¹⁶⁰ Since *X* had knowledge and appreciation of the risk—the bull—and acted voluntarily, secondary assumption of an unreasonable risk would bar *X*'s recovery. *Y* would likely recover some damages under comparative negligence. Assumption of risk does not apply to *Y*, because *Y* had no knowledge or appreciation of the risk.

It could be argued that this result is unfair. *Y* will recover something under comparative fault while *X* will recover nothing because of secondary assumption of an unreasonable risk. This would be the result even though *X* and *Y* did the exact same thing. Perhaps such a result "seems to reward ignorance and penalize appreciation of the risk";¹⁶¹ however, "the quality of the conduct of one who acts with the benefit of greater knowledge is different from that of one who acts without it."¹⁶²

The conduct of the risk-assuming plaintiff is distinguishable from the plaintiff who does not appreciate a risk, because the conduct of the risk-assuming plaintiff approaches intentional conduct. Although a plaintiff with knowledge and appreciation of a risk cannot be said to

158. See *supra* note 134 and accompanying text.

159. See *supra* note 124 and accompanying text.

160. Some states adopt this very approach. See OKLA. STAT. ANN. tit. 23, § 12 (West 1987); *Osburn v. Pilgrim*, 273 S.E.2d 118, 124 (Ga. 1980); *Jackson v. City of Kansas City*, 680 P.2d 877, 899-900 (Kan. 1984); *Sandberg v. Hoogensen*, 266 N.W.2d 745, 749-50 (Neb. 1978); *Kennedy v. Providence Hockey Club, Inc.*, 376 A.2d 329, 332-33 (R.I. 1977); *Underberg v. Cain*, 348 N.W.2d 145, 146 (S.D. 1984).

161. Keeton, *supra* note 31, at 158.

162. *Id.* at 159.

intentionally subject him or herself to injury,¹⁶³ the conduct is akin to intentional conduct because it comes close to satisfying the elements for that type of conduct. "The three most basic elements . . . [of intentional conduct] are that (1) it is a *state of mind* (2) about *consequences* of an act . . . and (3) it extends . . . to having in mind a belief (or knowledge) that given consequences are substantially certain to result from the act."¹⁶⁴ Certainly, the risk-assuming plaintiff has a state of mind about consequences of an act. Knowledge and appreciation of risk, by definition, mean that the plaintiff is thoughtful of the consequences of his or her act.¹⁶⁵ Thus, plaintiff *X* in the hypothetical knew that one consequence of getting too close to the bull would be that the bull would chase after her. To the contrary, the plaintiff who is contributorily negligent and who does not have knowledge and appreciation of a risk—plaintiff *Y*—cannot foresee the consequences of an act because he does not comprehend the risk.

Less clear is whether the risk-assuming plaintiff is substantially certain of the consequences of proceeding in the face of the known risk. Most common are situations like the hypothetical above, where the reward—getting close to a bull—would not induce the plaintiff to incur a risk where injury is a substantially likely result. In such situations, it is not accurate to say the plaintiff is substantially certain injury will result because the plaintiff cannot possibly be substantially certain of the actions of a bull. However, the contributorily negligent plaintiff who has not assumed any risk also cannot possibly be substantially certain that injury will result from his or her actions. In many instances, this plaintiff does not even comprehend the risk involved,¹⁶⁶ foreclosing all possibility of being substantially certain of a particular injury.

Even though neither the risk-assuming plaintiff nor the contributorily negligent plaintiff are intentionally acting to injure themselves, comparing their conduct makes it clear that there is a sound basis for allowing the contributorily negligent plaintiff partial recovery under comparative fault while barring any of the risk-assuming plaintiff's recovery. Not only does the risk-assuming plaintiff meet the first two elements of intentional conduct, unlike the contributorily negligent

163. See KEETON ET AL., *supra* note 2, § 8, at 36 ("[M]ere knowledge and appreciation of a risk—something short of substantial certainty—is not intent.").

164. *Id.* at 34 (footnotes omitted).

165. See *supra* part II.A.1.

166. A contributorily negligent plaintiff who does not assume the risk usually does not appreciate the risk, save those circumstances where he or she does appreciate the risk but does not act voluntarily.

plaintiff, the risk-assuming plaintiff is far more certain that injury will occur because he or she has knowledge and appreciation of the particular risk involved.¹⁶⁷ Thus, the risk-assuming plaintiff's conduct is much more intentional than the contributorily negligent plaintiff's conduct. Because more responsibility should attach to intentional conduct,¹⁶⁸ there is reason for barring the risk-assuming plaintiff's recovery while allowing partial recovery to the contributorily negligent plaintiff. Thus, the adoption of comparative fault does not necessarily warrant the abolition of secondary assumption of an unreasonable risk as a separate doctrine.

The reasoning outlined above is buttressed by a well-accepted negligence rule.¹⁶⁹ An expert or a person who is particularly knowledgeable of the dangers of some object "is judged by the standard of an ordinarily prudent person with his exceptional knowledge."¹⁷⁰ Therefore, the law demands that a person with superior knowledge conduct him or herself consistently with that knowledge, while a person without extra knowledge must only conduct him or herself as an ordinary prudent person would.¹⁷¹ For example, if expert skiers are privy to special accident avoidance techniques that ordinary skiers are not aware of, the law will demand that the expert skiers conduct themselves consistently with their special knowledge.¹⁷² Essentially, the person who has, but does not use, the special knowledge to avoid harm is more blameworthy than the person who lacks the knowledge.

The argument that the plaintiff who secondarily assumed an unreasonable risk should be treated differently from the contributorily negligent plaintiff can be stated another way. Put simply, the risk-assuming plaintiff has consented to the risk while the contributorily negligent plaintiff has not consented to anything at all.¹⁷³ Whether the risk-assuming plaintiff has consented to the risk or is acting more intentionally, the differences between the contributorily negligent plaintiff and the plaintiff who has assumed an unreasonable risk warrant the separate existence of implied assumption of an unreasonable risk as a complete defense in a comparative negligence scheme.

167. See *supra* part II.A.1.

168. See KEETON ET AL., *supra* note 2, § 8, at 37; Ralph S. Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. PA. L. REV. 586, 596 (1933).

169. See Keeton, *supra* note 31, at 158.

170. *Id.* at 158-59.

171. See *id.*

172. See *LaVine v. Clear Creek Skiing Corp.*, 557 F.2d 730, 734 (10th Cir. 1977).

173. Keeton, *supra* note 31, at 159.

The California Supreme Court should have made the distinction between secondary assumption of an unreasonable risk and contributory negligence outlined above and retained secondary assumption of an unreasonable risk to promote individual action and freedom of choice. One of the purposes behind the formation of assumption of risk was to promote individualism.¹⁷⁴ At the time of the doctrine's inception, it was an important societal goal that each individual be free to act as he or she chose.¹⁷⁵ It was felt that the individual should be free from outside interference, and in the absence of interference the individual was competent enough to protect him or herself.¹⁷⁶ Thus, the common law did not protect the individual from "the effects of his own personality and from the consequences of his voluntary actions."¹⁷⁷

Although assumption of risk developed during the Industrial Revolution,¹⁷⁸ individualism and freedom of action are goals that should still be pursued today. All individual action has some effect on the community's welfare.¹⁷⁹ The individual has a better understanding of his or her own needs than the government or any other body and is better able to envision the goals he or she ought to pursue.¹⁸⁰ Through the process of letting each individual choose the course of action that is best for him or her, the common good is more likely to result.¹⁸¹

The promotion of freedom of choice and individualism in the context of assumption of risk has two consequences. First, the plaintiff should have freedom to do what he or she chooses to do. If proceeding in the face of a known risk is what the plaintiff wants to do, the plaintiff should not be held back.¹⁸² Secondly, if the plaintiff is injured after making a choice to proceed in a certain manner with full knowledge and appreciation of the risk involved, the law should not

174. See Francis H. Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 14 (1906). Bohlen states that assumption of risk was grounded in the "individualistic tendency of the common law, which . . . regard[ed] the freedom of individual action as the keystone of the whole [legal] structure." *Id.*

175. See John H. Mansfield, *Informed Choice in the Law of Torts*, 22 LA. L. REV. 17, 23-24 (1961).

176. Bohlen, *supra* note 174, at 14.

177. *Id.*

178. *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 58-59 (1943).

179. See Mansfield, *supra* note 175, at 23.

180. *Id.* at 24.

181. *Id.*

182. *Id.* at 24.

allow compensation for the undesirable results.¹⁸³ Allowing the plaintiff to recover would necessarily affect the defendant, because the defendant would be required to compensate the plaintiff. Thus, the defendant might respond by not offering the choice to confront the risk out of fear of being held partially liable if the plaintiff is injured. In turn, the plaintiff will no longer have the choice to engage in the activity and society will be worse off.¹⁸⁴

Thus, the *Knight* plurality's endorsement of the *Li* court's decision to abolish secondary assumption of an unreasonable risk as a doctrine separate from comparative fault rests on the failure to recognize the difference between assumption of risk and contributory negligence.¹⁸⁵ Moreover, the plurality appears to fail to recognize the separate policy reasons for treating the two doctrines differently.¹⁸⁶

The failure of the court to recognize the differences between the two doctrines also led the plurality to declare the merger of secondary assumption of a *reasonable* risk into the comparative fault scheme.¹⁸⁷ The *Knight* plurality argued that it would be unjust for the plaintiff who acted unreasonably only to have his or her recovery reduced under comparative fault while the plaintiff who acted reasonably would be completely barred from recovery under assumption of risk.¹⁸⁸ Thus, the *Knight* plurality held that the abolition of secondary assumption of an unreasonable risk necessitated the abolition of secondary assumption of a reasonable risk.¹⁸⁹ Since the *Li* court should not have merged secondary assumption of an unreasonable risk into comparative fault, as discussed above, the *Knight* plurality was mistaken in abolishing secondary assumption of a reasonable risk. Instead, the *Knight* plurality should have taken the opportunity to correct the mistake made in *Li* and infused secondary assumption of an unreasonable risk with new life.

In summary, a ground exists for retaining secondary assumption of risk as a doctrine distinct from comparative fault. Mainly, the risk-assuming plaintiff's conduct is different from the contributorily negligent plaintiff's conduct, because the risk-assuming plaintiff has greater knowledge about the risks involved in an activity. The plain-

183. *Id.* at 25.

184. *See id.* at 27.

185. *See Knight*, 3 Cal. 4th at 324, 834 P.2d at 714, 11 Cal. Rptr. 2d at 20 (Kennard, J., dissenting).

186. *See supra* notes 174-84 and accompanying text.

187. *See id.* at 307, 834 P.2d at 702, 11 Cal. Rptr. 2d at 8.

188. *Id.*

189. *Id.*

tiff who is contributorily negligent—but who does not assume the risk—acts without knowledge as to the risks involved, or cannot use the knowledge to change his or her conduct. Thus, the risk-assuming plaintiff is in a position to look out for him or herself while the contributorily negligent plaintiff is not.

A ground for treating contributory negligence and secondary assumption of risk differently is not enough. There needs to be a reason for giving secondary assumption of risk a separate existence under a comparative fault scheme. The plurality should have given secondary assumption of risk a new life in order to promote individualism and freedom of choice.

B. *The Flaws in the Knight Plurality's Approach to Primary Assumption of Risk*

The *Knight* plurality held that primary assumption of risk remains a complete bar to recovery.¹⁹⁰ However, the plurality dramatically changed the doctrine. Traditionally, subjective knowledge and appreciation of a voluntarily confronted risk have characterized primary assumption of risk.¹⁹¹

Ignoring the traditional view of assumption of risk, the plurality in *Knight* held that they would not attempt to ascertain the plaintiff's subjective knowledge and appreciation of the risk under a duty approach to primary assumption of risk.¹⁹² The court believed that assumption of risk should not depend on such "variable factors that the defendant . . . [has] no way of ascertaining."¹⁹³ Instead, the plurality focused on the nature of the activity involved in the dispute and the parties' relationship to that activity.¹⁹⁴ If, based on these factors, a court determines that the defendant does not owe the plaintiff a legal duty, the *Knight* plurality stated that it should attach the label "primary assumption of risk" and completely bar the plaintiff's recovery.¹⁹⁵

The *Knight* plurality's treatment of primary assumption of risk is really no different than the inquiry into whether the defendant owes the plaintiff a duty. This is exemplified by tracking the plurality's disposition of the *Knight* case itself.

190. *Id.* at 314-15, 834 P.2d at 707-08, 11 Cal. Rptr. 2d at 13-14.

191. *See supra* parts II.A.1, II.B.2.a.

192. *Knight*, 3 Cal. 4th at 312, 834 P.2d at 706, 11 Cal. Rptr. 2d at 12.

193. *Id.*

194. *Id.* at 314-15, 834 P.2d at 707-08, 11 Cal. Rptr. 2d at 13-14.

195. *See id.* at 314-15, 834 P.2d at 707-08, 11 Cal. Rptr. 2d at 13-14.

The *Knight* plurality began its analysis by focusing on the duty one participant in a sport owes to another.¹⁹⁶ It restated the rule that it is "improper to hold a sports participant liable to a coparticipant for ordinary careless conduct committed during the sport."¹⁹⁷ It then stated that "the conclusion that a coparticipant's duty of care should be limited in this fashion [is supported by public policy]."¹⁹⁸ The plurality went on to survey cases that have dealt with the liability of sports participants, and, in particular, the standard of care used when deciding whether one participant is liable to another.¹⁹⁹ After analyzing these cases, the plurality concluded that "a participant in an active sport breaches a legal duty of care to other participants . . . only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport."²⁰⁰ Disposing of the case, the plurality determined that the defendant's conduct was neither intentional nor reckless.²⁰¹

The plurality in *Knight* did not apply assumption of risk at all. If any difference between primary assumption of risk and the element of duty in the prima facie negligence case ever existed, it was the subjective analysis that traditionally accompanies assumption of risk. Furthermore, the *Knight* plurality opinion is nothing more than a quest for the duty of care applicable in each case. The *Knight* plurality acknowledged this when it said "our resolution of [the case] *turns on whether*, in light of the nature of the sporting activity in which defendant and plaintiff were engaged, *defendant's conduct breached a legal duty of care to plaintiff*."²⁰² In effect, the plurality in *Knight* abolished primary assumption of risk without acknowledging that they were doing so.²⁰³

The primary assumption of risk doctrine, as the *Knight* plurality uses it, stands for the concept of no duty and nothing more.²⁰⁴ Thus, "the invocation of [primary] assumption of risk is superfluous,"²⁰⁵ because it really adds nothing more to the prima facie negligence case.

196. *Id.* at 318, 834 P.2d at 710, 11 Cal. Rptr. 2d at 16.

197. *Id.*

198. *Id.*

199. *Id.* at 319-20, 834 P.2d at 710-11, 11 Cal. Rptr. 2d at 16-17.

200. *Id.* at 320, 834 P.2d at 711, 11 Cal. Rptr. 2d at 17.

201. *Id.* at 320-21, 834 P.2d at 711-12, 11 Cal. Rptr. 2d at 17-18.

202. *Knight*, 3 Cal. 4th at 315, 834 P.2d at 708, 11 Cal. Rptr. 2d at 14 (emphasis added).

203. *See id.* at 324, 834 P.2d at 714, 11 Cal. Rptr. 2d at 20 (Kennard, J., dissenting).

204. *See supra* notes 190-203 and accompanying text.

205. *Knight*, 3 Cal. 4th at 321, 834 P.2d at 712, 11 Cal. Rptr. 2d at 18 (Mosk, J., concurring and dissenting).

The plaintiff must already prove that the defendant had a duty to use reasonable care toward the plaintiff.²⁰⁶ If no duty exists it would be less confusing to say "the plaintiff did not prove his or her negligence case" or "no duty existed" than to say the plaintiff is barred from recovery by primary assumption of risk.²⁰⁷ Thus, the *Knight* plurality should have abolished primary assumption of risk rather than adopt its duty approach to the doctrine.

C. *A Proposed Definition for Primary Assumption of Risk*

Even though California's version of primary assumption of risk is a superfluous doctrine, California courts continue to use it.²⁰⁸ Thus, it is necessary for courts and practitioners to understand the difference between primary and secondary assumption of risk. This section attempts to clarify the difference between the two doctrines and criticizes California's new method of labeling a case a "primary assumption of risk case." Through this criticism emerges a proposal for a different definition of primary assumption of risk.

In its attempt to distinguish between primary assumption of risk and secondary assumption of risk, the *Knight* court stated that a primary assumption of the risk case is one where, "by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury."²⁰⁹ A secondary assumption of risk case is one where "the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty."²¹⁰ Applying this distinction to the case before it, the *Knight* plurality focused on the particular duty a sports participant owes to his or her coparticipant. The court stated:

Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.²¹¹

206. See *id.* (Mosk, J., concurring and dissenting) (citations omitted).

207. See *id.* at 321-22, 834 P.2d at 712-13, 11 Cal. Rptr. 2d at 18-19 (Mosk, J., concurring and dissenting).

208. See cases cited *infra* note 219.

209. *Knight*, 3 Cal. 4th at 314-15, 834 P.2d at 708, 11 Cal. Rptr. 2d at 14.

210. *Id.*

211. *Id.* at 315-16, 834 P.2d at 708, 11 Cal. Rptr. 2d at 14.

After discussing this general duty rule, the plurality added that "the scope of the legal duty owed by a defendant frequently will also depend on the defendant's role in, or relationship to, the sport."²¹² The plurality proceeded to apply these duty rules to the facts of the case.²¹³

On its face, the *Knight* plurality's distinction between primary assumption of risk and secondary assumption of risk appears to lie in the nature of the activity and the parties' relationship to that activity. However, the court did not apply this test any differently than it would apply a normal duty analysis.²¹⁴ Admittedly, the *Knight* plurality analyzed cases involving the duty of persons participating in competitive sports—the nature of the activity.²¹⁵ It also analyzed the coparticipant's duty—the parties' relationship to the activity.²¹⁶ However, since *Knight*, and any other case, involves both an activity and parties, an analysis of the nature of the activity and the parties' relationship to that activity is not a special analysis. Instead it is a search for the ordinary duty of care that is a part of the prima facie negligence case. The *Knight* plurality admitted this when it stated that its goal was to determine the nature of the defendant's duty in the sports context.²¹⁷

Knight has not been applied any differently in the courts of appeal.²¹⁸ In the few assumption of risk cases decided since *Knight*, the focus is on duty.²¹⁹ Since the courts of appeal rely on *Knight*, it fol-

212. *Id.* at 317, 834 P.2d at 709, 11 Cal. Rptr. 2d at 14.

213. *Id.*

214. *See supra* part IV.B.

215. *See Knight*, 3 Cal. 4th at 315-17, 834 P.2d at 708-09, 11 Cal. Rptr. 2d at 14-15.

216. *Id.* at 318, 834 P.2d at 710, 11 Cal. Rptr. 2d at 16.

217. *See id.* at 316-17, 834 P.2d at 709, 11 Cal. Rptr. 2d at 15.

218. *See cases cited infra* note 219.

219. *See Harrold v. Rolling J Ranch*, 19 Cal. App. 4th 578, 584, 23 Cal. Rptr. 2d 671, 674 (1993) ("[T]he critical inquiry is whether the riding stable owes a duty of care to riders who rent horses for trail rides."); *Bush v. Parents Without Partners*, 17 Cal. App. 4th 322, 328-30, 21 Cal. Rptr. 2d 178, 181-82 (1993) (holding that dancing is not inherently dangerous so primary assumption of risk does not apply); *Galardi v. Seahorse Riding Club*, 16 Cal. App. 4th 817, 823, 20 Cal. Rptr. 2d 270, 274 (1993) (holding that case involved secondary assumption of risk because defendant had duty to avoid unreasonable risk of injury to plaintiff); *Donohue v. San Francisco Hous. Auth.*, 16 Cal. App. 4th 658, 666, 20 Cal. Rptr. 2d 148, 152 (1993) (holding that slippery steps were not danger inherent in firefighter's inspection of building so case is secondary assumption of risk case); *Milwaukee Elec. Tool Corp. v. Superior Court*, 15 Cal. App. 4th 547, 551, 19 Cal. Rptr. 2d 24, 27 (1993) (holding that nature of activity and parties' relationship to activity show case is one of secondary assumption of risk); *Curties v. Hill Top Developers, Inc.*, 14 Cal. App. 4th 1651, 1656, 18 Cal. Rptr. 2d 445, 448 (1993) (holding that case falls into secondary assumption of risk category because defendants were required to use due care to eliminate dangerous conditions on

lows that they are not using a special test made for primary assumption of risk. For example, in *Curties v. Hill Top Developers, Inc.*,²²⁰ the plaintiff was injured in a fall while traversing a wet, sloping lawn in front of the defendant's apartment building.²²¹ Applying *Knight*, the court discussed the effect assumption of risk had on the case.²²² It held that the "case [fell] within the secondary assumption of risk category. . . . [The defendant], as a property owner or manager, was required to use due care to eliminate dangerous conditions on its property in order to avoid exposing tenants such as Curties to unreasonable risks of harm."²²³ In essence, the *Curties* court reasoned that since the defendant owed the plaintiff a duty under ordinary negligence principles, the case was a secondary assumption of risk case.²²⁴ Thus, as in *Knight* itself, the application of the *Knight* plurality's test in the appellate courts has been to determine whether the defendant owed the plaintiff a duty.²²⁵ If the answer to that question is no, primary assumption of risk bars the plaintiff's recovery; if the answer is yes, the case is a secondary assumption of risk case and comparative fault applies.

The California Supreme Court should adopt a new test to determine whether a case is a primary assumption of risk case. The way the current test is applied gives the impression that every case is an assumption of risk case. Certainly, not every case where the defendant does *not* owe a duty to the plaintiff is a primary assumption of risk case. Similarly, not every case where the defendant does owe the plaintiff a duty is a secondary assumption of risk case. The label, assumption of risk, has traditionally only applied to specific circumstances, rather than to every negligence case.²²⁶ Courts have traditionally decided that primary assumption of risk applies given the

their property); *Lucas v. Fresno Unified Sch. Dist.*, 14 Cal. App. 4th 866, 872, 18 Cal. Rptr. 2d 79, 83 (1993) (holding that since statute provided duty of care, primary assumption of risk did not apply); *Davis v. Gaschler*, 11 Cal. App. 4th 1392, 1401, 14 Cal. Rptr. 2d 679, 685 (1992) (holding that because statute provided duty of care case was secondary assumption of risk case); *Stimson v. Carlson*, 11 Cal. App. 4th 1201, 1205-06, 14 Cal. Rptr. 2d 670, 673 (1992) (holding that moving mainsheets were fundamental risk of sailing, therefore primary assumption of risk barred plaintiff's recovery).

220. 14 Cal. App. 4th 1651, 18 Cal. Rptr. 2d 445 (1993).

221. *Id.* at 1654, 18 Cal. Rptr. 2d at 446-47.

222. *Id.* at 1655-56, 18 Cal. Rptr. 2d at 447-48 (citing *Knight*, 3 Cal. 4th at 315, 834 P.2d at 696, 11 Cal. Rptr. 2d at 2).

223. *Id.* at 1656, 18 Cal. Rptr. 2d at 448.

224. *Id.*

225. See *supra* notes 215-24 and accompanying text.

226. See *supra* part II.A-B.

facts of the case.²²⁷ Only after this has been determined does the court lessen or abrogate the defendant's duty to the plaintiff.²²⁸ To rectify these areas of its assumption of risk jurisprudence, and to assist appellate courts in distinguishing primary from secondary assumption of risk cases, the California Supreme Court should adopt a better analytical framework for determining whether a case involves primary assumption of risk.

It is clear that primary assumption of risk cases involve plaintiffs who are injured because of some risk *inherent* in the activity in which they are participating. While it is true that the *Knight* plurality did not refer to "inherent risks" when determining whether the case was a primary assumption of risk case, and only used the term in determining a coparticipant's duty in the sports context,²²⁹ risks inherent in an activity have always been a part of primary assumption of risk.²³⁰ Primary assumption of risk has its origins in the master-servant context.²³¹ The master had a duty to provide a safe workplace, but if risks *inherent* in the occupation remained, the master was not liable if the servant was injured due to those risks.²³²

However, problems arise if primary assumption of risk cases are defined as those cases where a risk inherent in an activity caused the plaintiff's injury. Judge Johnson's dissenting opinion in *Hacker v. City of Glendale*²³³ offers a disadvantage to this approach.²³⁴ The problem with an inherency definition is that many risks are inherent in every activity, and those inherent risks are usually the cause of a plaintiff's injury.²³⁵ If primary assumption of risk applied to bar recovery by a plaintiff who was injured by one of the many inherent risks in every

227. See, e.g., *Knight*, 3 Cal. 4th at 333-34, 834 P.2d at 720-21, 11 Cal. Rptr. 2d at 26-27 (Kennard, J., dissenting).

228. See *supra* parts II.A, II.B.2.a.

229. See *supra* notes 204-07 and accompanying text.

230. See *supra* notes 55-59 and accompanying text.

231. See *supra* part II.B.2.a.

232. See *supra* notes 55-59 and accompanying text. Courts of appeal since *Knight* have used the "inherent risk" concept in cases outside the sports and recreation context. See *Donohue*, 16 Cal. App. 4th at 665, 20 Cal. Rptr. 2d at 152; *Milwaukee Elec. Tool Corp.*, 15 Cal. App. 4th at 563, 19 Cal. Rptr. 2d at 35.

233. 16 Cal. App. 4th 1419, 20 Cal. Rptr. 2d 847, review granted and transferred, 859 P.2d 671, 23 Cal. Rptr. 2d 591 (1993), and review denied and order directing publication denied, 1994 Cal. LEXIS 4836 (Cal. Sept. 7, 1994). Because the order directing publication was denied, the opinion does not appear in *California Appellate Reports*; hereinafter the citations, to the appellate court's decision are only to *West's California Reporter*.

234. See *id.* at 865 (Johnson, J., dissenting).

235. See *id.* (Johnson, J., dissenting).

activity, a plaintiff's recovery would be rare.²³⁶ Judge Johnson offers an example involving highway maintenance workers.²³⁷ In California primary assumption of risk does not bar the recovery of a highway worker who is hit by a car due to the driver's negligence.²³⁸ However, it is obvious that being hit by a car while working on the side of the highway is an inherent risk in the highway worker's job.²³⁹

In contrast to the highway worker, consider the firefighter who is injured while fighting a fire that the defendant's negligence caused. It is a well-accepted negligence rule that primary assumption of risk—or a version of it—prohibits the firefighter's negligence suit.²⁴⁰ The principle defining primary assumption of risk lies in the difference between the highway worker and the firefighter. Primary assumption of risk bars the firefighter's recovery because the very nature of fighting fires is to confront danger.²⁴¹ It is not the very nature of highway maintenance to confront traffic.²⁴² To express this notion, the California Supreme Court should define primary assumption of risk cases as those cases where a risk *necessarily inherent* in the activity caused the plaintiff's injury. By necessarily inherent, in the activity I mean that the risk is inevitably a part of the particular activity.²⁴³

Using an inherency definition for primary assumption of risk can become slippery. Necessarily, whether a particular set of facts constitutes primary assumption of risk depends on the scope given to the term inherent. My "necessarily inherent" definition is an attempt to restrict the scope of the term in light of Judge Johnson's criticism. In other words, the necessarily inherent definition for primary assumption of risk is an attempt to limit the number of risks inherent in any activity that will suffice for primary assumption of risk. It limits the applicable risks to only those risks which are inevitably part of the particular activity.

Another problem arises when courts and commentators use a "risk inherent in the activity" definition to define primary assumption of risk. It is often difficult to define the activity involved in any partic-

236. *See id.* (Johnson, J., dissenting).

237. *Id.* at 864 (Johnson, J., dissenting).

238. *Id.* (Johnson, J., dissenting).

239. *Id.* (Johnson, J., dissenting).

240. *Knight*, 3 Cal. 4th at 309-10 n.5, 834 P.2d at 704 n.5, 11 Cal. Rptr. 2d at 10 n.5.

241. *See Lipson v. Superior Court*, 31 Cal. 3d 362, 369, 644 P.2d 822, 826, 182 Cal. Rptr. 629, 633 (1982).

242. *Hacker*, 20 Cal. Rptr. 2d at 865 (Johnson, J., dissenting).

243. A jury could decide this question without usurping the judge's role in determining duty. *See Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 46, 539 P.2d 36, 39, 123 Cal. Rptr. 468, 471 (1975).

ular case. Justice Kennard recognized this in her *Knight* dissent.²⁴⁴ In her quest for the relevant activity, she stated:

"Touch football" is less the name of a game than it is a generic description that encompasses a broad spectrum of activity. At one end of the spectrum is the "traditional" aggressive sandlot game, in which the risk of being knocked down and injured should be immediately apparent to even the most casual observer. At the other end is the game that a parent gently plays with young children, really little more than a game of catch.²⁴⁵

Consider, as another example, *Bush v. Parents Without Partners*.²⁴⁶ In that case the defendant sponsored a dancing event.²⁴⁷ When the plaintiff arrived, she observed a substance on the dance floor that she thought was Ivory Snow Flakes.²⁴⁸ The plaintiff had seen this substance used on the dance floor on prior occasions and was aware that it made it easier for a dancer's foot to slide on the floor.²⁴⁹ The plaintiff waited until the floor was swept.²⁵⁰ However, the substance was still visible on the dance floor when the plaintiff began to dance.²⁵¹ The plaintiff slipped and fell while dancing.²⁵² A majority of the court characterized the relevant activity in *Bush* as dancing.²⁵³ However, the dissent argued that "the activity was not just dancing; it was dancing on a slippery floor."²⁵⁴

Had the *Knight* plurality not abolished the subjective inquiry that traditionally accompanies an assumption of risk analysis, the solution to this problem would be to look at evidence of what the plaintiff thought the activity was. However, under the plurality's new form of primary assumption of risk, it is necessary to inquire into what a reasonable person would think the activity is. Under my necessarily inherent definition, this would be a jury question.²⁵⁵

244. See *Knight*, 3 Cal. 4th at 335, 834 P.2d at 722, 11 Cal. Rptr. 2d at 28 (Kennard, J., dissenting).

245. *Id.* (Kennard, J., dissenting).

246. 17 Cal. App. 4th 322, 21 Cal. Rptr. 2d 178 (1993).

247. *Id.* at 325, 21 Cal. Rptr. 2d at 179.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. See *id.* at 329, 21 Cal. Rptr. 2d at 182.

254. *Id.* at 330-31, 21 Cal. Rptr. 2d at 183 (Nicholson, J., dissenting).

255. This would not usurp a judge's role in determining duty as a question of law. See *Weirum*, 15 Cal. 3d at 46, 539 P.2d at 39, 123 Cal. Rptr. at 471. I do not mean to give the

To demonstrate how the necessarily inherent language should be applied, it is necessary to revisit *Knight* and *Ford v. Gouin*,²⁵⁶ *Knight*'s companion case. In *Knight* the defendant injured the plaintiff while they were both playing a touch football game.²⁵⁷ Because the parties disputed the facts, the precise manner in which the accident occurred remains a mystery.²⁵⁸ The defendant claimed he jumped into the air to intercept a pass and the plaintiff fell, landing on her hand.²⁵⁹ The plaintiff claimed that the ball was already caught and the defendant ran her down from behind.²⁶⁰

It is undisputed that in games such as football "a participant's normal energetic conduct often includes accidentally careless behavior."²⁶¹ Due to this fact, participation in every football game includes the risk of careless behavior and injury resulting from that behavior. In other words, the risk of injury due to careless behavior is necessarily inherent in every touch football game. Beside abolishing the subjective inquiry and assuming it properly defined the relevant activity as "football,"²⁶² the *Knight* plurality correctly determined the plaintiff's recovery was barred by primary assumption of risk.²⁶³

Ford v. Gouin involved a plaintiff who was water-skiing barefoot and backward.²⁶⁴ The back of his head struck a tree limb that was overhanging a channel of the Sacramento River Delta.²⁶⁵ The plaintiff alleged that the defendant was negligent in driving the boat too close to the riverbank.²⁶⁶ In a motion for summary judgment, the defendant asserted the assumption of risk defense.²⁶⁷ The defendant pointed to the plaintiff's deposition testimony.²⁶⁸ The plaintiff had testified

impression that this is the best way to analyze the problem. Instead, I offer the only solution available due to the *Knight* plurality's distaste for the subjective inquiry.

256. 3 Cal. 4th 339, 834 P.2d 724, 11 Cal. Rptr. 2d 30 (1992).

257. *Knight*, 3 Cal. 4th at 300, 834 P.2d at 697-98, 11 Cal. Rptr. 2d at 3-4.

258. *Id.* at 300-01, 834 P.2d at 697-98, 11 Cal. Rptr. 2d at 3-4.

259. *Id.*

260. *Id.*

261. *Id.* at 318, 834 P.2d at 710, 11 Cal. Rptr. 2d at 16.

262. Under my analysis the jury would decide this question. Thus, in *Knight* the jury would determine whether this was the type of football game in which a reasonable person would expect the defendant's type of careless behavior. As Justice Kennard pointed out in her *Knight* dissent, the definition of the activity is not always a simple classification. *Id.* at 335, 834 P.2d at 722, 11 Cal. Rptr. 2d at 27-28 (Kennard, J., dissenting).

263. *Id.* at 321, 834 P.2d at 712, 11 Cal. Rptr. 2d at 32.

264. *Ford*, 3 Cal. 4th at 342-43, 834 P.2d at 727, 11 Cal. Rptr. 2d at 32.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

that he had been water-skiing barefoot and backward for two years prior to the accident, although he could not ski over the boat's wake without falling.²⁶⁹ He admitted that he selected the water-skiing site, chose the length of the tow rope, and had skied in the area at least fifty times in the past.²⁷⁰ Moreover, the plaintiff knew the sport was risky.²⁷¹

In the lead opinion, Justice Arabian relied on *Knight* to hold that the defendant's conduct was not "so reckless as to be totally outside the range of the ordinary activities involved in the sport."²⁷² Accordingly, primary assumption of risk barred the plaintiff's recovery.²⁷³

Under my necessarily inherent definition, primary assumption of risk would not apply. However, this would depend on the jury's classification of the activity. It could decide that the activity involved in *Ford* was water-skiing, water-skiing barefoot, water-skiing barefoot and backward, or water-skiing barefoot and backward immediately adjacent to a shore that has tree limbs hanging over it. A rational trier of fact would not likely conclude the relevant activity is water-skiing barefoot and backward immediately adjacent to a shore that has tree limbs hanging over it. No evidence in *Ford* suggested the plaintiff was water-skiing in the particular area because tree limbs overhung the water there.

Using all of the activity definitions, except for the last, it seems that hitting one's head on a tree limb is not necessarily inherent in—or inevitably a part of—the particular activity. There are many risks necessarily inherent in the sport of water-skiing. For example, a water skier is often forced to ski over the wakes of other boats. The wakes create rough water and could cause the plaintiff to fall and injure him or herself. However, running into a branch overhanging the riverbank is not part of water-skiing, barefoot water-skiing, or water-skiing barefoot and backward. Thus, contrary to the lead opinion in *Ford*, primary assumption of risk should not have barred the plaintiff's recovery.²⁷⁴

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 345, 834 P.2d at 727-28, 11 Cal. Rptr. 2d at 33-34.

273. *See id.*

274. The only justice in *Ford* to take the position that primary assumption of risk barred the plaintiff's recovery was Justice Arabian. *See id.* at 350-51, 834 P.2d at 732, 11 Cal. Rptr. 2d at 38. Justice Kennard's opinion argued that secondary assumption of risk barred the plaintiff from recovery. *Id.* at 363-64, 834 P.2d at 741, 11 Cal. Rptr. at 47 (Kennard, J., concurring). Justice George, who was part of the *Knight* plurality, was of the opinion that

It is less clear how the necessarily inherent test applies outside of the sports and recreation arena. Suppose the defendant negligently caused a car accident with the plaintiff. The risk of having a car accident seems to be necessarily inherent in or is ordinarily a part of driving, yet it is common knowledge that we do not assume the risk in most car accident cases.²⁷⁵ The answer lies in the traditional assumption of risk rule that the plaintiff must have knowledge and appreciation of the specific risk causing the injury, rather than the general risks inherent in driving.²⁷⁶ The *Knight* plurality eschewed the use of a subjective test.²⁷⁷ Thus, whether the particular plaintiff knew and appreciated the specific risk of being hit by the defendant in the manner the accident happened will have to be judged on an objectively reasonable person standard. Since the objectively reasonable person cannot likely predict the risks that lead to a particular accident,²⁷⁸ assumption of risk does not apply in the ordinary car accident case.

Consider the facts of *Hacker v. City of Glendale*.²⁷⁹ The deceased was hired to trim a tree that had a power line passing through it.²⁸⁰ He was electrocuted after coming into contact with a branch that touched the power line.²⁸¹ The court determined that the case was a primary assumption of risk case, explaining that electrocution was an inherent risk in the deceased's occupation.²⁸²

Under the necessarily inherent test the trier of fact must first determine the relevant activity. The activity issue is particularly important under these facts because electrocution is probably not inherent in ordinary tree trimming. This is especially true considering the necessarily inherent test's policy of restricting the number of risks in an activity that will suffice for primary assumption of risk.²⁸³ On the other hand, if the activity is trimming a tree with an electric power line

Ford was not a primary assumption of risk case. See *id.* at 368-69, 834 P.2d at 744, 11 Cal. Rptr. 2d at 50 (George, J., concurring and dissenting).

275. The court in *Bush v. Parents Without Partners* criticized the use of the inherent test using this example. See *Bush*, 17 Cal. App. 4th at 329-30, 21 Cal. Rptr. 2d at 182.

276. See *supra* notes 30-31 and accompanying text.

277. *Knight*, 3 Cal. 4th at 316-17, 834 P.2d at 709, 11 Cal. Rptr. 2d at 15.

278. See James, *supra* note 60, at 150.

279. 16 Cal. App. 4th 1419, 20 Cal. Rptr. 2d 847, review granted and transferred, 859 P.2d 671, 23 Cal. Rptr. 2d 591 (1993), and review denied and order directing publication denied, 1994 Cal. LEXIS 4836 (Cal. Sept. 7, 1994).

280. *Id.* at 849.

281. *Id.*

282. *Id.* at 851.

283. See *supra* notes 229-44 and accompanying text.

running through it, being electrocuted is necessarily inherent in that activity.

It is clear from the facts of the case that the decedent knew the power line ran through the tree before he gave his estimate for the cost of the job.²⁸⁴ Moreover, he had turned down jobs in the past because electrical wires might have interfered with his tree trimming.²⁸⁵ While trimming the tree involved in this case, the decedent was careful not to touch the power lines and not to drop branches on them.²⁸⁶ Thus, it appears the activity involved was trimming a tree with an electric power line running through it. Since the trier of fact would likely determine that being electrocuted is necessarily inherent in trimming a tree with a power line running through it, primary assumption of risk would bar the plaintiff's recovery.

V. CONCLUSION

In its plurality decision in *Knight v. Jewett*,²⁸⁷ the California Supreme Court emasculated the common-law defense of assumption of risk. The plurality merged *secondary* assumption of risk into California's comparative fault scheme, because it believed secondary assumption of risk was duplicative of contributory negligence.²⁸⁸ To the contrary, secondary assumption of risk encompasses a different form of conduct than contributory negligence does.²⁸⁹ The risk-assuming plaintiff's choice to confront a risk, by definition, is informed and voluntary. The contributorily negligent plaintiff's choice can be informed and voluntary, but it does not have to be.²⁹⁰ Therefore, a ground exists for retaining secondary assumption of risk as a complete bar to recovery. The California Supreme Court should have used this ground to retain secondary assumption of risk and to promote individualism and freedom of action.²⁹¹ If defendants are held partially liable for allowing plaintiffs to engage in certain activities, the range of activities offered to everyone is reduced.²⁹² Moreover, since a person who acts voluntarily with knowledge and appreciation of a risk can look

284. *Id.* at 849.

285. *Id.*

286. *Id.*

287. 3 Cal. 4th 296, 834 P.2d 696, 11 Cal. Rptr. 2d 2 (1992).

288. *See supra* part III.

289. *See supra* part IV.A.

290. *See supra* part IV.A.

291. *See supra* part IV.A.

292. *See supra* part IV.A.

out for him or herself, it is best to let him or her decide what conduct to undertake.²⁹³

The plurality in *Knight* purported to retain *primary* assumption of risk as a complete bar to recovery in a negligence suit.²⁹⁴ However, the plurality dramatically changed the doctrine by prohibiting an inquiry into the plaintiff's subjective state of mind.²⁹⁵ Furthermore, its determination that a case is a primary assumption of risk case is no different than the normal duty analysis in every negligence case.²⁹⁶ Because the plurality applies primary assumption of risk in this way, it should be abolished because it is a superfluous doctrine and only serves to confuse courts and practitioners.²⁹⁷

Since courts have continued to use primary assumption of risk to stand for a particular kind of case, I have tried to define the term.²⁹⁸ Primary assumption of risk cases could be defined as those cases where the risk that caused the injury is necessarily inherent in the activity itself or where the risk is inevitably part of the activity.²⁹⁹ Whether this definition encompasses all primary assumption of risk cases is difficult to determine. However, if the California Supreme Court insists on retaining primary assumption of risk, it should give the term its own meaning to clarify the doctrine. Perhaps in its quest to define primary assumption of risk³⁰⁰ the court will realize that it is better to abolish the doctrine than to live with a doctrine that cannot be expressed in simple terms.

*Scott Giesler**

293. See *supra* part IV.A.

294. See *supra* part IV.B.

295. See *supra* part IV.B.

296. See *supra* part IV.B.

297. See *supra* part IV.B.

298. See *supra* part IV.C.

299. See *supra* part IV.C.

300. The elimination of the subjective inquiry makes this particularly difficult.

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