Mississippi College Law Review

Volume 8
Issue 2 *Vol. 8 Iss. 2*

Article 4

1988

Stemming the Tide of Expanding Liability: The Coexistence of Comparative Negligence and Assuption of Risk

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STEMMING THE TIDE OF EXPANDING LIABILITY: THE COEXISTENCE OF COMPARATIVE NEGLIGENCE AND ASSUMPTION OF RISK

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I.

More and more the defense of assumption of risk has come under fire by courts and commentators alike.[1] Born of the common law at the beginning of the Industrial Revolution, assumption of risk is said to have developed as a means of insulating the employer from the "human overhead" incident to industrialized business.[2] By shielding the employer from liability, the defense gave the entrepreneur maximum freedom to continue the industrial expansion then sweeping the country. Expanding like the revolution for which it was born, assumption of risk soon found its way into areas other than employment cases, carrying along with it the individualism inherent in the common law.[3]

In the years since the Industrial Revolution, common law notions respecting liability have been liberalized considerably, with expanded tort liability in virtually all areas of the law.[4] This liberalization of tort recovery already claims as victims such defenses as the fellow servant doctrine and, for the most part, contributory negligence.[5] The critics of assumption of risk would add this defense to the list, and their cry of abolition is certainly consistent with the general liberalizing movement to afford plaintiffs relief where previously none existed. However, with respect to assumption of risk, the movement has no place.

Essentially, assumption of risk "gives legal recognition to the principle that a person who is willing to incur a potentially dangerous situation cannot later

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1. Rosenlund and Killion, *Once a Wicked Sister: The Continuing Role of Assumption of Risk Under Comparative Fault in California*, 20 U.S.F. L. REV. 225, 225 (1986); Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U.L. REV. 213, 213 (1987).

2. Rutter v. Northeastern Beaver County School Dist., 437 A.2d 1198, 1206 (1981) (quoting Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 58 (1943)); Rosenlund and Killion, *supra* note 1, at 226.

3. *Rutter*, 437 A.2d at 1206.

4. PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971); Simons, *supra* note 1, at 214.

5. *E.g.*, Rosenlund and Killion, *supra* note 1, at 226. Contributory negligence remains to some extent in varying degrees. According to one recent writing, forty-three jurisdictions have adopted some form of comparative negligence, thus leaving seven states still applying contributory negligence. *Id.* at 264-65 n.233. Moreover, according to that same writing only fourteen of the forty-three states which have adopted comparative negligence have adopted a "pure" form of comparative negligence. The remainder of the jurisdictions would apply a total bar to plaintiff's action where his fault exceeds some percentage, typically fifty percent or fifty-one percent. *Id.*

complain of injuries that arise out of that venturousness."[6] Typically, assumption of risk is said to have three elements:

> (1) Knowledge on the part of the injured party of a condition inconsistent with his safety; (2) appreciation by the injured party of the danger of the condition; and (3) a deliberate and voluntary choice on the part of the injured party to expose his person to that danger in such a manner as to register assent on the continuance of the dangerous condition.[7]

As is evident, the cornerstone of assumption of risk is the informed choice of the plaintiff to encounter a risk of known dangerousness. The plaintiff has elected to act despite the potential to be harmed by defendant's conduct. Moreover, assumption of risk is a complete bar to plaintiff's recovery. The plaintiff having made his choice to voluntarily encounter defendant's conduct and its concomitant risk of harm, the law forbids the plaintiff from later rescinding that choice after things have turned for the worst by seeking to recover from the defendant for his conduct.

In light of the trend liberalizing tort recovery, particularly the advent of the fault-based concept of comparative negligence, critics of assumption of risk would either abolish assumption of risk or merge the defense into comparative negligence. By merging the defense of assumption of risk and comparative negligence or by wholly supplanting assumption of risk with comparative negligence, the argument goes, the "all or nothing" result of the common law inherent in assumption of risk is mitigated, thereby distributing loss on a more equitable basis.[8] But does the abolition of assumption of risk result in a more equitable system?

One of the most fundamental tenets upon which our law is based is that "the legal system ought to leave a loss where it lies unless more good than harm will be accomplished by shifting it."[9] Indeed, it is said that this basic tenet remains "almost uniformly unchallenged."[10] Where assumption of risk is applicable, the plaintiff has made a choice to proceed in the face of a known danger, to take his chances that he might not suffer injury as a result of defendant's con-

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6. Note, *Assumption of Risk Merged with Contributory Negligence:* Anderson v. Ceccardi, 45 OHIO ST. L.J. 1059, 1060 (1984).

7. Nichols v. Western Auto Supply Co., Inc., 477 So. 2d 261, 264 (Miss. 1985).

8. *See, e.g.*, Van Eman, *Ohio's Assumption of Risk: The Deafening Silence*, 11 CAP. U.L. REV. 661, 679 (1982); Note, *Assumption of Risk Merges with Comparative Negligence:* National Marine Services, Inc. v. Petroleum Services Corp., 31 LOY. L. REV. 400, 404, 411 (1985). Indeed, Professor Fleming James notes:

> It will be apparent at once that the whole spirit of [assumption of risk] and of the reasoning it employs, bears the strong imprint of *laissez-faire* and its concomitant philosophy of individualism which has passed its prime . . . . Small wonder then that assumption of risk has lost ground as that climate of opinion has undergone modification . . . . It is likely to lose more ground as notions of social insurance gain strength and techniques for effecting broad distribution of enterprise liability are developed.

James, *Assumption of Risk*, 61 YALE L.J. 141, 153 (1952).

9. Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 151 (1961). *See also id.* at 149.

10. *Id.*

duct. The plaintiff having made his choice to accept this risk, there is little reason to shift the loss from where it lies. As Professor Mansfield notes, "[t]he notion that choice in many situations makes the difference is dug too deep into the soil of our thinking to be rooted out by any easy generalization [concerning assumption of risk and comparative negligence]."[11] Moreover, there is nothing in the enactment of comparative negligence that would, or even should, interfere with the plaintiff's choice.

This paper will explore these concepts and will present an argument that assumption of risk remains vitally important today both in terms of what is and in terms of what should be.

II.

Whether and to what extent assumption of risk remains a viable defense is the subject of much confusion.[12] Typical of the confusion among the jurisdictions is the treatment of the defense by the Mississippi Supreme Court. In *Braswell v. Economy Supply Co.*,[13] the Mississippi court seemed to have merged assumption of risk and comparative negligence:

> In all probability [application of assumption of risk in a state which has a comparative negligence statute] defeats the basic intention of the statute, since it continues an absolute bar in the case of one important, and very common, type of negligent conduct on the part of the plaintiff . . . . *All this goes to say, however, not that there is no such defense as assumption of risk, but in many cases, at least, where it overlaps and coincides with [comparative] negligence, the rule of that defense should be applied to it.*[14]

Although the *Braswell* court did not abolish assumption of risk, it certainly cast doubt on the defense. Doubt was also cast on the viability of assumption of risk in Mississippi in *Alley v. Praschak Mach. Co.*[15] There, then Justice Roy Noble Lee, writing the court's majority opinion, stated:

> The writer feels that the assumption of risk issue seldom should be submitted to a jury under Mississippi's Comparative Negligence Law. Where the assumption of risk doctrine would apply, the negligence of the injured person, for practical purposes, would have to be the sole proximate cause of the accident, and such issue should be submitted to the jury rather than assumption of risk.[16]

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11. Mansfield, *Informed Choice in the Law of Torts*, 22 LA. L. REV. 17, 22 (1961).
12. Rosenlund and Killion, *supra* note 1, at 229.
13. 281 So. 2d 669 (Miss. 1973).
14. *Id.* at 676-77.
15. 366 So. 2d 661 (Miss. 1979).
16. *Id.* at 665 n.1. Justice Lee's statement is rather curious. He seems to suggest that assumption of risk should be treated as either 100% fault under the comparative negligence law or as a directed verdict, for if the issue should not be submitted to the jury, a legal question, unless plaintiff's action was the sole proximate cause of his injuries, the case has already been decided where assumption of risk has been determined. In either event, the vitality of assumption of risk is questioned.

Similarly, speaking for the court in *Hill v. Dunaway*,[17] Justice Robertson noted the movement in other states to merge assumption of risk into the affirmative defense of comparative negligence and found that such movement "lays bare the reality that assumption of risk is only an artificial way of denominating a plaintiff's negligence."[18] Despite these indications that assumption of risk has been, at a minimum, merged with comparative negligence, in another recent decision, the Mississippi Supreme Court reversed directions: "Regardless of the feeling of attorneys and judges on assumption of risk, the doctrine has not been abolished in Mississippi . . . ."[19]

The confusion, both in Mississippi and elsewhere, as to the proper role of assumption of risk in today's world of comparative negligence has been fueled, in part, by the failure of the courts and commentators to recognize a consistent usage of assumption of risk.[20] Indeed, it has been said that assumption of risk "has generated so many elusive distinctions that precedent is often of little help."[21] Assumption of risk is generally divided into several categories, the number and content of which vary from one user to the next.[22] Perhaps the most common system of assumption of risk is that suggested by Harper and James in which assumption of risk is divided into three categories – (1) primary assumption of risk, which is really another way of saying the defendant violated no duty, (2) secondary or implied assumption of risk, where the plaintiff deliberately chooses to encounter a known risk, and (3) express assumption of risk, where the plaintiff by spoken or written words expressly agrees to assume the risk of the defendant's conduct.[23]

Division of assumption of risk into such categories is not, however, altogether helpful and may prove counterproductive. For instance, primary assumption of risk involves those circumstances where the defendant owes to the plaintiff no duty which would give rise to a cause of action for injuries suffered.[24] It arises out of the relationship between plaintiff and defendant and defendant's right to put the choice to the plaintiff as to whether to take or leave the risk.[25] Where the risk is one the defendant may leave to the choice of the plaintiff and

17. 487 So. 2d 807 (Miss. 1986).

18. *Id.* at 810 n.1.

19. Nichols v. Western Auto Supply Co., Inc., 477 So. 2d 261, 264 (Miss. 1985). Other commentators have similarly been confused over the state of affairs in Mississippi. *Compare* Rosenlund and Killion, *supra* note 1, at 266 n.236 and Note, *supra* note 8, at 405 *with* Comment, *Assumption of the Risk in Alaska after the Adoption of Comparative Negligence*, 6 UCLA-ALASKA L. REV. 244, 254-55 (1977) and Note, *Contributory Negligence and Assumption of Risk - The Case For Their Merger*, 56 MINN. L. REV. 47, 70 (1971).

20. Keeton, *supra* note 9, at 123; Rosenlund and Killion, *supra* note 1, at 232-33; Shaw, *The Role of Assumption of Risk in Systems of Comparative Negligence*, 46 INS. COUNS. J. 360, 360 (1979).

21. Shaw, *supra* note 20, at 360 (quoting Rosas v. Buddies Food Store, 518 S.W.2d 534, 539 (Tex. 1975)).

22. *E.g.*, Kennedy, *Assumption of the Risk, Comparative Fault and Strict Liability after Rozell*, 47 LA. L. REV. 791, 797 n.34; Keeton, *supra* note 9, at 130; Rosenlund and Killian, *supra* note 1, at 233-34.

23. Rosenlund and Killion, *supra* note 1, at 234, 239-40; Kennedy, *supra* note 22, at 797 n.34.

24. Shaw, *supra* note 20, at 382.

25. James, *supra* note 8, at 142.

the plaintiff so chooses to accept the risk, the defendant discharges his only duty owing to the plaintiff by warning of the risk.[26] Use of assumption of risk in such cases, though, where all we mean to say is that the defendant breached no duty in the first place, is of little value. Professor Mansfield puts the problem thusly: A defendant may not be negligent in conducting certain activity if one in his position would reasonably believe that those approaching his activity will perceive the risk and take the necessary precautions to avoid injury. Because of the foreseeability that adequate precautions will be taken, the law in such case will not find the defendant negligent for undertaking the activity. Where a particular plaintiff approaches the defendant's activity without knowledge of the reasonably apparent risk and consequently is injured, the non-negligent conduct of the defendant is not somehow transformed into negligent conduct. By reasonably believing all passers-by will take adequate precautions, the defendant has acted reasonably, i.e., non-negligently, despite the fact that this particular plaintiff did not take adequate precautions. If assumption of risk is used solely in this manner, "it serves only the cause of confusion to speak of the plaintiff's having 'assumed the risk,' as if some independent legal principle, distinct from the non-negligence of the defendant, was operating to defeat liability."[27]

Similarly, to borrow the example of Professor Robert Keeton, the shortcoming of measuring defendant's duty by plaintiff's conduct is illustrated in the example of a defectively designed motorcycle being used by two people, one of whom is aware of the defect and the other of whom is ignorant of the defect. In such a case, the manufacturer has clearly violated a duty toward the ignorant user. The informed user, however, ordinarily may not recover against the manufacturer because he voluntarily encountered an appreciated risk. The nonliability of the manufacturer to the informed user, i.e., the lack of duty on the part of the manufacturer, turns not necessarily on the defendant manufacturer's conduct, but rather on the *plaintiff*'s conduct. As Professor Keeton concludes, "[t]he statement that defendant had 'no duty' in these circumstances is at least misleading . . . ."[28]

All this goes to show that assumption of risk is properly a consequence of the plaintiff's action; "duty" is necessarily a consequence of the defendant's action. In this regard, so long as the outcome of the matter "does not turn on the circumstance of informed choice by the particular plaintiff who was exposed to the risk, there seems no need to invoke a special concept of assumption of risk."[29] Rather, the outcome is more properly explained as non-negligence without reference to assumption of risk.[30] Conversely, where the outcome is dependent

26. *Id.* at 147.

27. Mansfield, *supra* note 11, at 19.

28. Keeton, *supra* note 9, at 161.

29. Mansfield, *supra* note 11, at 20 n.4.

30. *Id.* Similarly, as we will see later, the use of express assumption of risk also only interjects confusion into the matter. *See infra* text accompanying notes 37-45.

on plaintiff's informed choice, there appears no need to address the problem as one of no duty or of non-negligence; assumption of risk suffices nicely.

Having reached this conclusion, we are left with assumption of risk in what has been called the secondary or implied sense and assumption of risk in the express sense. The focus of the remainder of this paper will be on these two concepts.

III.

At the heart of the controversy surrounding assumption of risk is the rise of comparative negligence. Starting with Mississippi in 1910,[31] the various jurisdictions began to ameliorate the "all or nothing" consequences of contributory negligence by enacting comparative negligence laws which apportion a plaintiff's damages between plaintiff and defendant according to relative degrees of fault.[32] As noted previously,[33] the comparative negligence enactments vary between "pure" comparative negligence where the plaintiff is allowed to recover except where his fault is 100% and "modified" comparative negligence where the plaintiff is allowed to recover except where his fault exceeds some maximum degree, usually fifty percent or fifty-one percent. The growing trend among the jurisdictions today which have adopted comparative negligence is to hold that assumption of risk overlaps comparative negligence and to merge the defense into comparative negligence, thereby considering assumption of risk simply as another form of negligence.[34] This is particularly so with so-called unreasonable implied/secondary assumption of risk.[35] While the conclusion that assumption of risk overlaps comparative negligence and should either be abolished or merged into comparative negligence is inviting at first blush, upon closer analysis it is seen that assumption of risk rests on very different grounds; and comparative negligence and neither one should be consumed by the other. Moreover, almost without exception, those jurisdictions which have abolished or merged assumption of risk have curiously retained express assumption of risk, even though the plaintiff acted unreasonably in expressly assuming the risk.[36] In essence, however, there is little reason to treat express assumption of risk any differently from implied/secondary assumption of risk.

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31. PROSSER, *supra* note 4, at 436.

32. *Id.* at 434-37. Mississippi's comparative negligence statute, for example, is found at MISS. CODE ANN. § 11-7-15 (1972).

33. *See supra* note 5.

34. Kennedy v. Providence Hockey Club, Inc., 119 R.I. 70, 75, 376 A.2d 329, 332 (1977); Rosenlund and Killion, *supra* note 1, at 266; Note, *supra* note 6, at 1060, 1070; Note, *supra* note 8, at 403, 411.

35. Rosenlund and Killion, *supra* note 1, at 266.

36. *Id.* at 266-67; Van Eman, *supra* note 8, at 668; Note, *supra* note 6, at 1062.

A.

Express assumption of risk arises where a plaintiff expressly, whether orally or in writing, agrees to take responsibility for defendant's failure to exercise the requisite degree of care and to relieve the defendant from the consequences of otherwise actionable conduct.[37] In short, the plaintiff expressly agrees "to assume the risk of what would ordinarily be a breach of duty" by the defendant.[38] Despite the controversy surrounding implied/secondary assumption of risk and the growing call to abolish that form of assumption of risk, there is very little debate regarding express assumption of risk.[39] Even those, such as Professor Fleming James, who would abolish or merge implied/secondary assumption of risk, advocate the retention of express assumption of risk.[40] Treating express assumption of risk differently from implied/secondary assumption of risk, though, is fundamentally inconsistent and should be avoided.

The basis of assumption of risk, whatever classification is used, is the plaintiff's consent to accept the risk created by the defendant's conduct.[41] The manifestation of consent giving rise to express assumption of risk appears through spoken or written words, while implied/secondary assumption of risk derives its consent from implications inherent in the plaintiff's action. Notwithstanding that consent may be implied in the latter instance, it is, nevertheless, consent "in fact."[42] Whether we speak of assumption of risk, then, in terms of contract (express) or in terms of conduct (implied/secondary), the defendant is relieved from the consequences of his action by the plaintiff's informed choice to proceed in the face of, and consent to, a known danger created by the defendant's conduct.[43] There is no justification for relieving the defendant of liability simply because the plaintiff manifested his consent through words – spoken or written – while imposing liability on him because the plaintiff's consent is manifested through conduct.[44] That plaintiff's consent, real as it is, is manifested in conduct rather than words surely is no reason to shift the loss from where it lies, *viz.*, with the plaintiff, and it certainly does not make for a more equitable allocation of loss.

Thus, in considering whether to retain assumption of risk, we should not consider express assumption of risk any differently from implied/secondary assumption of risk. The query should rather focus on whether the single principle of assumption of risk, the plaintiff's informed choice, however manifested, to

37. PROSSER, *supra* note 4, at 442; Keeton, *supra* note 9, at 124; Kennedy, *supra* note 22, at 797; Note, *supra* note 6, at 1061-62.

38. James, *supra* note 8, at 162.

39. Van Eman, *supra* note 8, at 668.

40. James, *supra* note 8, at 166.

41. RESTATEMENT (SECOND) OF TORTS § 496C comment h (1965); Kennedy, *supra* note 22, at 803 n. 60.

42. Kennedy, *supra* note 22, at 803 n.60.

43. Mansfield, *supra* note 11, at 31 & n.16.

44. Rosenlund and Killion, *supra* note 1, at 240.

encounter and accept the consequences of the defendant's conduct, is of such value as to be retained as a means of precluding the plaintiff from shifting his loss.[45]

B.

Assumption of risk involves the plaintiff's consent to assume the consequences of the defendant's otherwise actionable conduct. The decision to proceed in the face of such conduct, and to consent to the danger created by such conduct may objectively be seen as being either reasonable or unreasonable, much like conduct constituting comparative negligence. That is to say, whether we are speaking of assumption of risk or of comparative negligence, in so consenting to the risk created by the defendant's conduct, the plaintiff may have acted as the ordinarily prudent man would have acted, in which case we say his conduct was reasonable, or his actions may have gone beyond that of the ordinarily prudent man, in which case we say his conduct was unreasonable. Where plaintiff's conduct is deemed objectively unreasonable and assumption of risk is otherwise appropriate, assumption of risk would act as a complete bar to plaintiff's recovery, whereas comparative negligence would only reduce plaintiff's recovery in proportion to his degree of fault. Seizing upon this apparent inconsistency, critics of assumption of risk would find assumption of risk to be simply another form of comparative negligence and would apportion damages strictly according to fault.[46]

The argument advanced by the critics in this regard is based essentially on the notion that the "all or nothing" result of assumption of risk conflicts, or as the critics say, overlaps, the "more equitable" fault-based comparative negligence laws.[47] Since application of assumption of risk would, the argument goes,

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45. This is not to say that there are no differences between express assumption of risk and implied/secondary assumption of risk. However, such differences are of no moment to our discussion. For example, as Professor Mansfield notes, in contract cases and other like cases, such as express assumption of risk, where the parties have "averted to their future legal relations," most probably they have considered more carefully the risks inherent in the circumstances. Consequently, the risks for which a defendant will be relieved in cases of express assumption of risk may be more general risks than where a defendant is relieved from liability on account of implications from the plaintiff's conduct, which would require a more particularized knowledge of the injury-producing risk. Mansfield, *supra* note 11, at 30 n.16a. While a greater degree of knowledge of the risk – or perhaps more precisely, a greater degree of proof of knowledge of the risk – may be required with implied/secondary assumption of risk, such a distinction poses no fundamental threat to the conclusion reached in the text that express assumption of risk and implied/secondary assumption of risk be, in the main, treated no differently.

46. *E.g.*, James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185, 185-86 n.4 (1968).

47. That assumption of risk merely overlaps comparative negligence is not a sufficient reason of itself to abolish assumption of risk. The law affords many instances where two or more remedies are available for the same conduct. It is only where the overlap results in antagonism to the policies underlying comparative negligence that abolition should be considered. *See, e.g.*, Martin v. George Hyman Const. Co., 395 A.2d 63, 69 (D.C. 1978) and *infra* note 48.

contravene the comparative negligence enactments, assumption of risk must give way to comparative negligence.[48] As one critic argues,

> The most credible argument relating to the dismissal of the defense is that it totally undermines the purpose of comparative negligence. Such purpose is, of course, to apportion damages on the basis of fault, thereby short circuiting the primitive "all or nothing" result of a pure contributory negligence system.[49]

Similarly, one court addressing the issue has charged that since assumption of risk operates as a complete bar to plaintiff's recovery, "a defendant can circumvent the comparative negligence statute entirely by asserting the assumption of risk defense alone."[50]

Assumption of risk, however, rests on very different theoretical grounds than does comparative negligence. As such, it neither conflicts with the policies underlying comparative negligence nor does its application circumvent the comparative negligence enactments. Comparative negligence rests on the plaintiff's failure to exercise reasonable care. It measures the plaintiff's conduct objectively, against that of the "reasonable man." Assumption of risk eschews any such notion of fault or negligence and rests on the plaintiff's informed consent to encounter the risk created by the defendant's dangerous conduct. It is measured subjectively: what did this plaintiff know and to what did he consent?[51] Despite suggestions to the contrary,[52] these differences are quite significant in several respects.

At the outset, it is apparent at once that the critics' argument regarding overlap does not address every instance of assumption of risk. Assumption of risk and comparative negligence overlap, if at all, only where both defenses are applicable to the same conduct. That is to say, only where the plaintiff's conduct can be characterized as either assumption of risk or comparative negligence is there any claim to overlap. Since comparative negligence is concerned only with the plaintiff's unreasonable conduct, the argument regarding overlap does not extend to those instances in which the plaintiff assumes the risk of the defen-

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48. There is in the critics' argument the hint that the judicially created defense of assumption of risk is pre-empted by the comparative negligence enactments, at least where the comparative negligence law is legislatively created. *See, e.g.*, Van Eman, *supra* note 8, at 676. As will be seen in greater detail, *see infra* text accompanying notes 41-66, assumption of risk and comparative negligence enactments do not conflict in purpose or effect. Whether the two defenses conflict or not, though, does not settle the matter. Martin v. George Hyman Const. Co., 395 A.2d 63, 69 (D.C. 1978) ("The effect of a statute or regulation depends upon an analysis not only of the policies of the enactment but also the relation of those policies to each of the defenses [*viz.*, comparative negligence and assumption of risk] individually."). Thus, we must inquire into whether the policies of assumption of risk and comparative negligence conflict.

49. Van Eman, *supra* note 8, at 676.

50. Anderson v. Ceccardi, 6 Ohio St. 3d 110, 113, 451 N.E.2d 780, 783 (1983).

51. Rosenlund and Killion, *supra* note 1, at 231; Note, *supra* note 6, at 1067; Note, *Contributory Negligence and Assumption of Risk - The Case for Their Merger*, 56 MINN. L. REV. 47, 51 (1971). *See also* Shurley v. Hoskins, 271 So. 2d 439, 443 (Miss. 1973); Daves v. Reed, 222 So. 2d 411, 414 (Miss. 1969).

52. *See* Note, *supra* note 51, at 51.

dant's conduct but acts reasonably in doing so. Assumption of risk would not frustrate the purposes of comparative negligence in such circumstances for the simple reason that comparative negligence would not apply in the first instance.

The difference in the two defenses is also seen in the standard to be applied to each – an objective standard to comparative negligence and a subjective standard to assumption of risk. With its subjective standard, assumption of risk looks to the individual and focuses on individual choice. By definition, at the time of acting – and, it might be added, at the time of foregoing avoidance of the risk – the risk-assuming plaintiff, with full knowledge of the potential for harm, makes the decision to proceed notwithstanding the risk. It is a deliberate choice made by the particular individual. In this regard, it has been said that whether the plaintiff will accept the risk and proceed is determined by his own reasonableness assessment: "It seems axiomatic that an individual's willingness to consent to risks in a situation (or relationship) will be in direct proportion to the relative benefits he will be able to derive from placing himself in that situation."[53] In assumption of risk, the plaintiff makes his own assessment as to whether he should take his chances based on a comparison of the benefit he would gain on the one hand, and the likelihood of harm on the other.

Comparative negligence stands or falls on the reasonableness of the plaintiff's conduct. In cases where assumption of risk is also applicable, or indeed in any case, whether the plaintiff has acted in such a manner as to be negligent also involves an assessment of reasonableness:

> The distinction between reasonable and unreasonable assumption of risk is determined by the ever present balancing of interest test. If the utility or societal advantages of the plaintiff's conduct outweigh its risks, then the conduct is reasonable. If the utility or societal advantages of the plaintiff's conduct are outweighed by its risks, then the conduct is unreasonable.[54]

However, unlike assumption of risk, the assessment of reasonableness for comparative negligence purposes is determined by reference to what the ordinarily prudent man would do under similar circumstances. Thus, in cases where assumption of risk gives way to comparative negligence, the plaintiff acts based on his individual and personal assessment of the advantages he will gain and risks he may suffer, yet that very same action is judged based on an assessment of a very different nature, *viz.*, the reasonable man. Such a formula skews the scales in favor of the plaintiff and against the defendant as the plaintiff is given two bites at the apple – the first when he chooses whether to proceed based on his own reasonableness assessment and the second when he is allowed to second guess his first choice by applying a reasonable man standard at the courthouse.

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53. Shaw, *supra* note 20, at 373.
54. Van Eman, *supra* note 8, at 665-66.

The distinction between reasonable and unreasonable conduct gives rise to another problem in merging assumption of risk and comparative negligence. It is argued that where assumption of risk overlaps comparative negligence, i.e., where the plaintiff's assumption is unreasonable, the question of comparative negligence and not assumption of risk should be submitted to the jury.[55] Since reasonable assumption of risk does not overlap or otherwise conflict with notions of comparative negligence, though, the problem arises as to when the reasonableness of plaintiff's actions, a question of fact to be decided by the jury, is to be determined. If reasonable minds could differ[56] as to whether plaintiff acted reasonably, the question of whether plaintiff's assumption of risk was reasonable must be submitted to the jury, like the question of plaintiff's comparative negligence. In such cases, both questions must still be submitted to the jury despite merger, and the jury must employ a several-step analysis.[57]

Perhaps the most significant manner in which assumption of risk and comparative negligence differ, though, is that assumption of risk is based on the plaintiff's consent and comparative negligence is based on the plaintiff's fault. This difference is significant in two respects: (1) consent and fault are distinct concepts which cannot easily be compared in a comparative negligence system; and (2) principles of consent and choice carry with them certain significant overriding considerations.

In the typical comparative fault system, the plaintiff's damages are diminished in proportion to the amount of negligence attributable to him.[58] His negligence, or fault, then is compared to that of the defendant. Where assumption of risk is thrown into the equation, the comparison is one of fault and consent. As one commentator has noted though, the two are quite different concepts: "Consent, in and of itself, is not based upon fault or departure from the reasonable person standard; it is essentially contractual in nature."[59] Unlike comparative negligence, there is, for instance, lacking from assumption of risk "any inquiry into whether plaintiff's behavior was a proximate cause of his injury."[60] Comparing such concepts with different theoretical bases in a comparative negligence formula is fiction at best:

> To ask the fact-finder to determine how much of the plaintiff's injury is due to the defendant's negligence and how much is due to the plaintiff's promise to hold the defendant harmless is, to use Prosser's simile, like ask-

55. *E.g.*, Braswell v. Economy Supply Co., 281 So. 2d 669, 677 (Miss. 1973); Richardson v. Clayton & Lambert Mfg. Co., 657 F. Supp. 751, 753 (N.D. Miss. 1987).

56. *See, e.g.*, Nunez v. Superior Oil Co., 572 F.2d 1119, 1124 (5th Cir. 1978).

57. One such process is suggested in Rosenlund and Killion, *supra* note 1, at 275.

58. *E.g.*, MISS. CODE ANN. § 11-7-15 (1972); 42 PA. CONS. STAT. ANN. § 7102(a) (Purdon 1982); R.I. GEN. LAWS § 9-20-4 (1956).

59. Rosenlund and Killion, *supra* note 1, at 270.

60. Shaw, *supra* note 20, at 387.

> ing the fact-finder to balance "ten pounds of sugar . . . against half-past two in the afternoon."[61]

In this regard, at least one commentator, conceding that it would be "difficult to apply to assumption of risk a rule of proration according to relative degrees of fault, as is done in some forms of comparative negligence," suggests that such problems of administration should result in "equal sharing among co-authors of the harm, like that applicable to contribution among tortfeasors" rather than in a complete bar.[62] Such an approach has at least two shortcomings. First, many states which have adopted comparative negligence would completely bar a plaintiff from recovery where his proportion of fault is fifty percent or greater.[63] Thus, in those states, to be consistent with the comparative negligence enactment, an equal sharing of harm would bar the plaintiff's recovery. Second, since an apples and oranges comparison cannot determine what portion of the plaintiff's damages were brought about by the defendant's substandard conduct rather than the plaintiff's consent, imposing an inflexible fifty percent liability rule on the defendant may well subject him to liability for which he was not responsible. In such circumstances where liability cannot be accurately apportioned, rather than impose on the merely careless defendant liability for which he may not be responsible, would not the more equitable rule place the complete loss on the party who has voluntarily consented to the consequences of the entire risk? Indeed, as will be seen next, consent and choice carry with them certain significant consequences.

That individual freedom and choice is the rock upon which our nation and our legal system is founded is beyond dispute. It is said in this regard that "[e]mbedded in our political philosophy is a fundamental judgment that events should be ordered according to individual choice."[64] It is, after all, the individual who is better able to survey and assess his own needs,[65] and it is this individualism, our diversity of wants and needs, that makes a particularly risky activity the source of great satisfaction to one individual but a source of great fear to another. I would not, for example, take much pleasure out of sky diving, but a number of individuals apparently do. For this reason, "the common good" is better achieved through "individual choice rather than governmental regulation."[66]

With respect to plaintiffs, these principles result in two very important consequences. First, the plaintiff may neither "be compelled to do what he does

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61. Rosenlund and Killion, *supra* note 1, at 270-71 (quoting Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 225 & n.240 (1949)).

62. Keeton, *supra* note 9, at 159-60.

63. *See* Rosenlund and Killion, *supra* note 1, at 264-65 n.233, for a list of those states which completely bar a plaintiff where his fault is fifty percent or greater.

64. Mansfield, *supra* note 11, at 23.

65. *Id.* at 24.

66. *Id.*

not choose to do nor prevented from doing what he does choose to do."[67] Where the plaintiff is denied the choice to expose himself to a risk or is denied the advantages gained by that choice, we have acted "to suspend the operation of that very process of free choice upon which . . . the hopes of realizing the individual and common good are primarily founded."[68]

However, a second consequence results to the plaintiff from the principle of individual choice, and that is, having made his choice, "the law will not compensate the plaintiff for those results of his choice that he finds undesirable."[69] In assumption of risk cases, the plaintiff has made an assessment regarding the relative benefits he will derive from an activity and the costs, or risks, of obtaining those benefits.[70] Electing to proceed and to not avoid those risks, the plaintiff has made the choice that to him the advantages to be gained from going forward, rather than remaining safely where he is, outweigh the potential for harm. At that point, the plaintiff is all too willing that the defendant provide him with the election:

> The plaintiff was satisfied enough with the defendant's conduct when he hoped to gain by it. Only when things have gone badly does he complain that the defendant has violated a duty owing him and demand compensation for the consequences. The plaintiff wanted something for nothing, but when a cost was exacted seeks to cast this upon the defendant.[71]

As Justice James Robertson of the Mississippi Supreme Court stated in a somewhat different context, "It would be irrational in my view for our law to allow such free choice and at once allow one injured as a result of exercising that choice to recover damages from the one who enabled him to exercise that choice."[72]

Notions of choice do not go so far as to afford the plaintiff, who once stood at the threshold of action armed with both knowledge of the risks ahead and the opportunity to avoid those risks, the ability to cast back upon the defendant the cost of his choice. The more equitable approach is to enforce the "fundamental principle" of assumption of risk that "where the plaintiff has voluntarily and intelligently consented to relieve the defendant of liability for certain known risks, the plaintiff's choice should be enforced."[73] The differences in compara-

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67. *Id.*
68. *Id.*
69. *Id.* at 25.
70. *See supra* text accompanying note 53.
71. Mansfield, *supra* note 11, at 73.
72. Cuevas v. Royal D'Iberville Hotel, 498 So. 2d 346, 361 (Miss. 1986) (Robertson, J., dissenting). This conclusion is particularly true with respect to those instances where the defendant has acted on the plaintiff's willingness to accept the risk of the defendant's conduct or when the defendant reasonably believes that the plaintiff was willing to accept the risks. Indeed, in such instances the case takes on notions of estoppel. Mansfield, *supra* note 11, at 25, 30; Rosenlund and Killion, *supra* note 1, at 245.
73. Rosenlund and Killion, *supra* note 1, at 255.

tive negligence and assumption of risk being too great, there simply is nothing in the comparative negligence laws which should be allowed to uproot this fundamental principle.

C.

As we have previously seen, the critics' argument that assumption of risk frustrates the policies of comparative negligence does not implicate reasonable assumption of risk, where the plaintiff has assumed the risk of the defendant's conduct but has acted, objectively speaking, reasonably in doing so. Undaunted, the critics continue their attack by arguing that reasonable assumption of risk must be abolished to "prevent the illogical and grossly inequitable result of preventing recovery by a plaintiff who acts reasonably, but allowing it to a plaintiff who acts unreasonably."[74] To the extent, then, that unreasonable assumption of risk retains a separate and independent existence, this argument loses all force of persuasion. Assuming for the moment, though, that unreasonable assumption of risk is merely another way of denominating comparative negligence, the retention of reasonable assumption of risk is neither illogical nor grossly inequitable.

When we speak of assumption of risk, we are concerned not with the plaintiff's knowledge alone, but also with "the quality of the conduct of one who acts with the benefit of the greater knowledge."[75] At issue in assumption of risk is what the plaintiff does with this knowledge:

> The fundamental consideration underlying the doctrine [of assumption of risk] as it is applied to noncontractual situations is that one should not be permitted knowingly and voluntarily to incur an obvious risk of harm when he has the ability to avoid doing so, and then hold another person responsible for his injury.[76]

Indeed, the plaintiff who ventures forth with knowledge of the potential harm is "not merely contributorily negligent":[77] "[O]ne who 'sees, knows, understands and appreciates' what he is doing . . . is worlds apart from one who unwittingly and unsuspectingly falls prey to another's negligence."[78] The risk-assuming plaintiff having greater culpability than the merely negligent plaintiff, it is neither illogical nor inequitable to apply a more "demanding standard" to the knowledgeable plaintiff than his "less learned contemporaries."[79] Moreover, though some

74. Van Eman, *supra* note 8, at 680. *See also* Note, *supra* note 8, at 405 (citing Braswell v. Economy Supply Co. , 281 So. 2d 669 (Miss. 1973)); Note, *supra* note 6, at 1071-72; Note, *supra* note 51, at 57.

75. Keeton, *supra* note 9, at 159; Shaw, *supra* note 20, at 368.

76. Griffin v. Griffin, 282 S.C. 288, 294, 318 S.E.2d 24, 28-29 (Ct. App. 1984) (quoting 65A C.J.S. Negligence § 174(1) (1966)).

77. Riley v. Davison Const. Co., Inc., 381 Mass. 432, 438, 409 N.E.2d 1279, 1283 (1980).

78. Kennedy v. Providence Hockey Club, Inc., 119 R.I. 70, 76, 376 A.2d 329, 333 (1977).

79. Keeton, *supra* note 9, at 158-59.

argue otherwise,[80] retention of reasonable assumption of risk despite the merger of unreasonable assumption of risk with comparative negligence does not encourage plaintiffs to act negligently. Although knowledgeable plaintiffs who voluntarily consent to the risk of harm will be barred from recovery, it is unlikely that plaintiffs will intentionally remain aloof to dangers simply to retain the hope of recovering monetary damages, particularly where such damages are not likely to fully compensate a plaintiff for personal injuries.[81]

CONCLUSION

Despite a growing trend to eliminate assumption of risk from our jurisprudence, the defense retains an inherent worth justifying, even demanding, its continued existence. In the final analysis, notwithstanding the development of comparative negligence, where assumption of risk is applicable, the plaintiff, although able to avoid the risk proceeding offers, has made a conscious, informed choice to accept such risk and to proceed in harm's way. Having made such a choice and given his consent, it is neither illogical nor inequitable to require the plaintiff to accept the consequences, which so easily could have been avoided, of such a decision. Surely our law should, at a minimum, require us to take greater responsibility toward protecting ourselves from ourselves. The law so requires where we expressly agree to assume the risk; there is no reason to require otherwise where our assumption, though implied from conduct, is nevertheless as real.

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80. *E.g.*; Note, *supra* note 6, at 1072.

81. I would, for example, find the exchange of even one of my arms for any sum of money a poor bargain indeed.