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Tort Law - Negligence - Assumption of Risk - Sports Injuries

Kenneth Joseph

TORT LAW—NEGLIGENCE—ASSUMPTION OF RISK—SPORTS INJURIES—The Pennsylvania Supreme Court has held that except in certain specified instances, the doctrine of assumption of risk is abolished in Pennsylvania.

Rutter v. Northeastern Beaver County School District, 496 Pa. 590, 437 A.2d 1198 (1981).

On July 13, 1970, appellant Howard Rutter, a sixteen year old, was injured during a summer football practice supervised by appellees John North and Thomas W. George, Jr., football coaches at Riverside High School.[1] At the time of the injury, Rutter, who was playing in a game of jungle football,[2] was not wearing protective gear.[3]

Appellant Howard Rutter and his parents filed suit.[4] The case went to trial, and at the close of appellants' case, appellees moved for a compulsory non-suit and the motion was granted.[5] The trial court en banc refused a motion to strike the non-suit[6] and that decision was affirmed by the Pennsylvania Superior Court.[7] The Pennsylvania Supreme Court subsequently granted allocatur[8] and reversed, holding in a plurality opinion that the trial court had

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1. Rutter v. Northeastern Beaver County School Dist., 496 Pa. 590, 594-95, 437 A.2d 1198, 1200 (1981).

2. Jungle football is a type of two-handed touch football where each team has four downs to score. Its essential feature is a lack of any rules restricting passing. The offensive team may pass the ball any number of times in any direction from any place on the field. *Id.* at 596-97, 437 A.2d at 1201.

3. *Id.* at 595, 437 A.2d at 1200. Appellant was injured when a player from the opposing side, appellee Greg Zimmerman, struck him in the right eye, causing blindness due to a detached retina. *Id.*

4. *Id.* On April 16, 1974, a complaint in trespass was filed against Northeastern Beaver School District, coaches North and George, and Greg Zimmerman. Rutter v. Northeastern Beaver School Dist., 283 Pa. Super. 155, 159, 423 A.2d 1035, 1037 (1980).

5. *See* 496 Pa. at 595, 437 A.2d at 1200. *See* Rutter v. Northeastern Beaver School Dist., No. 1042 of 1972 (C.P. Beaver County, filed Oct. 2, 1975).

6. 496 Pa. at 595, 437 A.2d at 1200. *See* Rutter v. Northeastern Beaver School Dist., No. 1042 of 1972 (C.P. Beaver County, filed July 5, 1978).

7. 496 Pa. at 595, 437 A.2d at 1200. *See* Rutter v. Northeastern Beaver School Dist., 283 Pa. Super. 155, 423 A.2d 1035 (1980). The superior court affirmed the holding of the trial court that plaintiff's evidence had established that the plaintiff could not recover because of the doctrine of assumption of risk. *Id.* at 159-60, 423 A.2d at 1037-38. The court further held that the trial court did not abuse its discretion when it prevented the plaintiff's expert from testifying. *Id.* at 162, 423 A.2d at 1039.

8. 496 Pa. at 595, 437 A.2d at 1200.

erred in refusing to allow the appellant's expert witness to testify; in deciding that appellant had not presented enough evidence of negligence to go to a jury; and in granting a non-suit because of insufficient evidence of negligence and application of the assumption of risk doctrine.[9]

Justice Flaherty, writing for the plurality,[10] noted the standards for reviewing the validity of a non-suit.[11] He stated that when reviewing the grant of a non-suit, the court must interpret the evidence in the light most favorable to the plaintiff and resolve all conflicts to the plaintiff's advantage. A non-suit should only be entered when the evidence viewed in this fashion clearly supports a conclusion of no liability.[12]

Using this standard to review the record, Justice Flaherty found that the summer football program, sponsored by Riverside High School and supervised by the school's coaches, proceeded without the use of protective equipment by the players although the sessions involved rough body contact.[13] The plurality also found that students were informed by the football coach that they must not only attend the practice sessions, but must participate in all aspects of those sessions, including jungle football, or it would be unlikely that they would make the team.[14] Justice Flaherty further noted that on the day of the injury, the coach had directed the team to begin a game of jungle football[15] and that the coaches themselves had joined in the game; therefore, the coaches were not in a position to supervise the play.[16] Justice Flaherty also found that the appellant had testified that he did not anticipate the loss of an eye as an injury he was likely to suffer while playing football.[17]

The plurality observed that the lower court had held that the

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9. *Id.* at 605-06, 437 A.2d at 1205. On appeal, Rutter argued that the trial court had erred by: (1) entering a compulsory non-suit; (2) refusing to admit expert testimony; and (3) holding that, as a matter of law, the appellant had voluntarily assumed the risk of injury. *Id.* at 595, 437 A.2d at 1200.

10. Justice Flaherty's opinion was joined by Justices Larson and Kauffman. Chief Justice O'Brien concurred in the result.

11. *Id.* at 595, 437 A.2d at 1200.

12. *Id.* at 595-96, 437 A.2d at 1200. *See* McKenzie v. Cost Bros., 487 Pa. 303, 307, 409 A.2d 362, 364 (1979); Cushey v. Plunkard, 413 Pa. 116, 117, 196 A.2d 295, 296 (1964).

13. 496 Pa. at 596, 437 A.2d at 1200.

14. *Id.*

15. *Id.*

16. *Id.* Justice Flaherty indicated that the play was rough and that the participants played hard, hoping to impress the coaches. *Id.*

17. *Id.*

appellant had assumed the risk of injury, had not made out a case of negligence, and that the appellant's expert should not be permitted to testify.[18] Addressing the issue of expert testimony first, Justice Flaherty noted that the appellant had attempted to introduce the testimony of a former football coach to show that the football practices at Riverside varied from both the safety standards used at other schools and the rules of the Western Pennsylvania Interscholastic Athletic Association.[19] Pennsylvania, he stated, has a liberal standard for the qualification of expert witnesses.[20] Since the appellant's witness was a former football coach, he possessed specialized knowledge not within the common knowledge of laymen.[21] As this specialized knowledge was relevant to the central issue of negligence, the plurality held that it was error to refuse to admit the testimony.[22]

Justice Flaherty then turned to the trial court's holding that the evidence was not sufficient to permit the jury to consider the issue of negligence.[23] He noted that the trial court's decision was based on the conclusion that no amount of care on the part of the appellees could have prevented injuries such as the one suffered by the appellant.[24] According to Justice Flaherty, both the trial court and the superior court, in arriving at this conclusion, had in effect reversed the standard for reviewing evidence when hearing an appeal from a non-suit[25] by viewing the evidence in the light most favorable to the appellees.[26]

Specifically, the plurality held that the superior court erred in concluding that jungle football was no more dangerous than other forms of football and that the coaches were not negligent in their supervision.[27] If the evidence were viewed in the light most

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18. *Id.* at 597, 437 A.2d at 1201.

19. *Id.*

20. *Id.* at 597-98, 437 A.2d at 1201. *See* Kuisis v. Baldwin-Lima-Hamilton Corp., 457 Pa. 321, 338, 319 A.2d 914, 924 (1974). "If [a witness] has any reasonable pretension to specialized knowledge on the subject under investigation, he may testify . . . ." *Id.* (quoting McCullough v. Holland Furnace Co., 293 Pa. 45, 49, 141 A. 631, 632 (1928)).

21. 496 Pa. at 598, 437 A.2d at 1201.

22. *Id.* at 596, 437 A.2d at 1202.

23. *Id.*

24. *Id.*

25. *Id.* at 598-99, 437 A.2d at 1202. The plurality observed that under the proper standard, "the plaintiff must be given the benefit of all favorable testimony and every reasonable inference of fact arising therefrom and that all conflicts therein must be resolved in favor of the plaintiff." *Id.* (quoting Cushey v. Plunkard, 413 Pa. 116, 117, 196 A.2d 295, 296 (1964)). *See supra* note 13 and accompanying text.

26. 496 Pa. at 599, 437 A.2d at 1202.

27. *Id.*

favorable to appellants, the plurality maintained there was at least a jury question as to the relative dangerousness of the game and the negligence of the coaches.[28] Similarly, noted Justice Flaherty, the trial court en banc had reversed the standard, concluding that neither the lack of protective gear nor the lack of supervision were causes of the appellant's injury.[29] Had the lower court applied the correct standard, it would have found that the evidence presented a jury question as to the coaches' negligence in not providing protective equipment or adequate supervision.[30]

Turning to the question of whether the lower courts were correct in holding that the appellant had assumed the risk of injury, the plurality noted that the trial court had correctly cited the Restatement (Second) of Torts articulation of the doctrine of assumption of risk but had erred in barring the appellant's action on the assumption of risk theory.[31] Using the Restatement as a guide, the plurality articulated the elements of assumption of risk.

Justice Flaherty noted that the Restatement categorizes assumption of risk cases into four separate types.[32] He stated that this case could involve the second category in which the plaintiff enters voluntarily into a relationship with the defendant which he knows to involve the risk, and so is found to have agreed, tacitly or impliedly, to relieve the defendant of responsibility.[33] He also observed that under Restatement section 496 C, any instance of implied assumption of risk must involve the elements of knowledge and voluntariness.[34] Section 496 C also articulates the policy behind implied assumption of risk, which is that the law refuses to

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28. *Id.*

29. *Id.* The trial court had come to this conclusion through deciding that no amount of supervision or protective equipment would have prevented appellant's injuries. *Id.*

30. *Id.*

31. *Id.* at 600, 437 A.2d at 1202. "A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm." *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 496 A (1965)).

32. 496 Pa. at 600, 437 A.2d 1202-03. The first type is an express assumption of risk. In type two, the assumption of risk is implied by a relationship of the plaintiff to defendant. In type three, the implied assumption of risk arises from the plaintiff knowingly and voluntarily encountering the hazard created by the defendant. Type four occurs when a plaintiff unreasonably encounters a known risk. Since plaintiff's behavior is unreasonable, it is also negligent in type four. *See* RESTATEMENT (SECOND) OF TORTS § 496 A comment c, illustrations 1-4 (1965).

33. *Id.* at 600, 437 A.2d 1203. Section 496 A comment c, illustration 2 provides: "Plaintiff has entered voluntarily into some relation with the defendant which he knows to involve the risk, and so is regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility, and to take his own chances." *Id.*

34. *See* RESTATEMENT (SECOND) OF TORTS § 496 C comment a (1965).

permit one who manifests willingness that another shall continue in his course of conduct to complain of it later if he is injured as a result.[35]

Focusing upon the issues raised by the assumption of risk policy, the plurality questioned whether the appellant in *Rutter* had manifested a willingness that the appellee continue his conduct.[36] Justice Flaherty indicated that section 496 C makes clear that not every voluntary encounter with danger can be interpreted as a willingness to accept the risk. Such conduct is perhaps evidence of willingness, but it is not its equivalent.[37] Further, according to section 496 C, since interpretation of conduct is rarely so clearly indicated that reasonable men could not differ as to the conclusion, it is ordinarily a jury question whether what the plaintiff has done is a manifestation of willingness to accept the risk.[38] Justice Flaherty found that in this case, the appellant had not admitted that he accepted or even knew of the risk.[39] Therefore, the plurality concluded, whether the appellant's behavior manifested acceptance is precisely the kind of question which should be presented to the jury.[40]

Justice Flaherty maintained that even if the appellant's conduct had manifested a willingness to accept the risk, problems with respect to knowledge of the danger and voluntariness of action remained.[41] He turned to the Restatement section 496 D, which asserts that assumption of risk cannot be implied from the plaintiff's conduct unless the plaintiff then knows the existence of the risk and appreciates its unreasonable character.[42] Comment b to sec-

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35. *Id.* comment b (1965).

36. 496 Pa. at 601, 437 A.2d at 1203.

37. *Id. See* RESTATEMENT (SECOND) OF TORTS § 496 C comment h (1965), which provides:

> *Manifestation of acceptance.* The basis of assumption of risk is consent to accept the risk. In order for assumption of risk to be implied from the defendant's conduct, it must be such as fairly to indicate that the plaintiff is willing to take his chances. Implied consent is consent which exists in fact, but is manifested by conduct rather than words. It is not every voluntary encountering of a known and understood danger which is reasonably to be interpreted as evidence of actual consent . . . .

Id.

38. *See* RESTATEMENT (SECOND) OF TORTS § 496 C comment h (1965).

39. 496 Pa. at 601, 437 A.2d at 1203.

40. *Id.*

41. 496 Pa. at 601-02, 437 A.2d at 1203.

42. 496 Pa. at 602, 437 A.2d at 1203. *See* RESTATEMENT (SECOND) OF TORTS § 496 D which provides: "*Knowledge and Appreciation of Risk.* Except where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character." *Id.*

tion 496 D indicates that the basis of the assumption of risk doctrine is the plaintiff's consent to accept the risk.[43] Therefore, in the absence of an express agreement,[44] the plaintiff will not be found to assume any risk unless he has knowledge of its existence.[45]

Section 496 D, comment c indicates that the standard to be applied in assessing the plaintiff's knowledge and appreciation of risk is a subjective one, involving what the plaintiff in fact sees, knows, understands and appreciates.[46] It thus differs from the objective standard which is applied in contributory negligence cases.[47] Section 496 D, comment e, indicates that whether the plaintiff has knowledge of the risk or whether he appreciates its magnitude and unreasonable character is a question of fact, usually to be determined by the jury, or by the court itself where reasonable men could not differ as to its conclusion.[48]

Justice Flaherty maintained that it was obvious that the appellant could not be found to have implicitly assumed a risk of which he had no knowledge.[49] He emphasized that comment b states that the whole concept of implied assumption of risk is based on the actor's consent to accept the risk, which necessarily entails that he understand the nature, character, and extent of the danger *in ad-*

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43. RESTATEMENT (SECOND) OF TORTS § 496 D comment b (1965).

44. *Id.* The agreement must be clearly construed to be express. *Id.*

45. *Id. See* 496 Pa. at 602, 437 A.2d at 1203. According to comment b, § 496 D, this means that the plaintiff "must not only be aware of the facts which create the danger, *but must also appreciate the danger itself and the nature, character, and extent which make it unreasonable.*" RESTATEMENT (SECOND) OF TORTS § 496 D comment b (1965) (emphasis added). Comment b also indicates:

> Thus the condition of premises upon which [the plaintiff] enters may be quite apparent to him, but the danger arising from the condition may be neither known nor apparent, or, if known or apparent at all, it may appear to him to be so slight as to be negligible. In such a case the plaintiff does not assume the risk. His failure to exercise due care either to discover or to understand the danger is not properly a matter of assumption of risk, but of the defense of contributory negligence. *Id. See* 496 Pa. at 602, 437 A.2d at 1203-04.

46. RESTATEMENT (SECOND) OF TORTS, § 496 D comment c (1965). *See* 496 Pa. at 602, 437 A.2d at 1204.

47. RESTATEMENT (SECOND) OF TORTS, § 496 D comment c (1965). *See* 496 Pa. at 602-03, 437 A.2d at 1204. Comment c further provides:

> *If by reason of age, or lack of information, experience, intelligence, or judgment, the plaintiff does not understand the risk involved in a known situation, he will not be taken to assume the risk,* although it may still be found that his conduct is contributory negligence because it does not conform to the community standard of the reasonable man.

§ 496 D comment c (1965) (emphasis added).

48. RESTATEMENT (SECOND) OF TORTS, § 496 D comment e (1965). *See* 496 Pa. at 603, 437 A.2d at 1204.

49. 496 Pa. at 603, 437 A.2d at 1204.

dition to the facts which create it.[50] Justice Flaherty emphasized that the standard of knowledge is subjective, permitting the trier of fact to consider the appellant's age, lack of information, experience, intelligence, or judgment.[51] He indicated that the court was concerned with what appellant actually knew and not with what the reasonable man should have known.[52]

Justice Flaherty observed that the appellant was a high school student of limited experience who had testified that he did not imagine he would lose his eye.[53] Viewing these facts in light of the Restatement, Justice Flaherty found it improper for the trial court to have granted a non-suit on the basis of the appellant's supposed assumption of risk.[54] The plurality maintained that barring the appellant's action on an assumption of risk theory was also error because there was a question as to whether appellant's action was voluntary.[55] The court turned to Restatement section 496 E[56] which states that the plaintiff's assumption of risk must be voluntary. Further, the plaintiff's assumption is not voluntary "if the defendant's tortious conduct has left him no reasonable alternative course of conduct in order to . . . (b) exercise or protect a right or privilege of which the defendant has no right to deprive him."[57]

Justice Flaherty pointed out that the voluntariness of assumption of risk remained an issue in *Rutter* because the appellant may have been wrongfully forced to choose between two evils.[58] He stated that voluntariness cannot be implied merely from the fact of a relationship, and the fact that appellant volunteered to play foot-

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50. *Id.*

51. *Id. See* RESTATEMENT (SECOND) OF TORTS § 496 D comment c (1965).

52. 496 Pa. at 603, 437 A.2d at 1204.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 604, 437 A.2d at 1204-05.

57. RESTATEMENT (SECOND) OF TORTS § 496 E (1965). Comment c to § 496 E provides in pertinent part:

> A defendant who, by his own wrong, has compelled the plaintiff to choose between two evils cannot be permitted to say that the plaintiff is barred . . . . Therefore, where the defendant is under a duty to the plaintiff, and his breach of duty compels the plaintiff to encounter the particular risk in order to avert other harm to himself, his acceptance of risk is not voluntary, and he is not barred from recovery. The same is true where the plaintiff is forced to make such a choice in order to avert harm to a third person . . . . The existence of an alternative course of conduct which would avert the harm, or protect the right or privilege, does not make the choice voluntary, if the alternative is one which he cannot reasonably be required to accept.

Id.

58. 496 Pa. at 605, 437 A.2d at 1205.

ball is not dispositive of whether he volunteered to play jungle football.[59] Viewing the evidence in the light most favorable to the appellant, the plurality assumed that the appellee's conduct was tortious and that the appellant had a right or privilege to try out for the football team. Further, the plurality concluded that the football coach had implied that those who did not participate in all aspects of the summer conditioning program would be unlikely to make the team.[60] Thus, Justice Flaherty found that there was at least a jury question as to whether the appellant was compelled to accept the risk of playing jungle football in order to exercise his right to try out for the team.[61] Additionally, the plurality held that there was a jury question as to whether the appellant had a reasonable alternative course of action. These jury questions being present, the plurality ruled that the trial court was in error in granting a non-suit based on assumption of risk.[62]

Because of the serious problems of application of the doctrine of assumption of risk, the plurality continued, it was necessary to examine the origins of the doctrine as well as the question of whether it should continue to be applied in Pennsylvania.[63] Justice Flaherty explained that assumption of risk is a relatively late development in common law.[64] Traditionally, the doctrine had been associated with master-servant cases where it was used to prevent recovery by an employee from an employer for work-related injuries.[65] He observed that the doctrine had never been restricted to master-servant cases and had been used in many different circumstances and reflected the individualistic philosophy of the common law that the individual is competent to protect himself.[66] The common law does not assume to protect the individual from the consequences of his own voluntary actions.[67]

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59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 606, 437 A.2d at 1205.
64. *Id.*
65. *Id.* at 606, 437 A.2d at 1206. *See* Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14 (1906) and W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 68 (4th ed. 1971). *See also* Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 58-59 (1943), which asserts that the main purpose of the doctrine was to protect the freedom of expanding industry.
66. 496 Pa. at 606-07, 437 A.2d at 1206. *See* Bohlen, *supra* note 65, at 14.
67. *Id.* Bohlen emphasized that the freedom of individual action is a foundation of the common law. That idea implies that a person given his freedom can protect himself and, consequently, the law should not presume to protect him from himself. Bohlen, *supra* note 65, at 14.

Noting that the philosophy underlying the doctrine of assumption of risk is now somewhat disfavored and that the doctrine presents difficult problems of application, the court questioned whether the doctrine should continue to survive in Pennsylvania law and concluded that it should not.[68] The court illustrated some of the difficult problems of application of the doctrine. Under the Restatement analysis, four distinct meanings are given to the term assumption of risk.[69] The first meaning involves express consent given by the plaintiff to assume the risk. Under this meaning, the defendant is relieved of his duty to exercise care to protect the plaintiff.[70] Under the second meaning, the plaintiff's consent is tacit and is implied through a voluntary relationship between the plaintiff and defendant. Under this meaning, the defendant is also relieved of his duty to protect the plaintiff.[71] The plaintiff's consent is also tacit in the third Restatement meaning but the consent is implied through the plaintiff's voluntarily encountering a risk created by the defendant after becoming aware of the risk.[72] The fourth type is identical to the third except that the plaintiff's decision to encounter the risk is itself unreasonable and amounts to contributory negligence. Thus, there is negligence on the part of both parties and recovery by the plaintiff is barred.[73]

According to the plurality, the facts in *Rutter* potentially fit within either the second or third type.[74] Rutter's consent to assume the risk could be implied by his entering into a voluntary relationship with the defendant or it could be implied by his voluntarily continuing to encounter a known risk caused by the defen-

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68. 496 Pa. at 607, 437 A.2d at 1206.

69. *See supra* note 32.

70. *See* RESTATEMENT (SECOND) OF TORTS § 496 A comment c, illustration 1 (1965).

71. *Id.* comment c, illustration 2. The example is given of a spectator at a ball game. The spectator may be seen as consenting that the game proceed without the players taking precautions to protect him. *Id.*

72. *Id.* comment c, illustration 3.

> For example, an independent contractor who finds that he has been furnished by his employer with a machine which is in dangerous condition, and that the employer, after notice, has failed to repair it or substitute another, may continue to work with the machine. He may not be negligent in doing so, since his decision may be an entirely reasonable one, because the risk if relatively slight in comparison with the utility of his own conduct; and he may even act with unusual caution because he is aware of the danger. The same policy of the common law which denies recovery to one who expressly consents to accept a risk will, however, prevent his recovery in such a case
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> . . . .

Id. See 496 Pa. at 608, 437 A.2d at 1207.

73. *Id.* comment c, illustration 4.

74. 496 Pa. at 609, 437 A.2d at 1207.

dant's negligence.[75] The classification is important, Justice Flaherty observed, because in the second type, the voluntariness of the conduct will not usually be an issue because a voluntary relationship is assumed. Once a situation is viewed as an example of type two, the voluntary relationship then gives rise to the conclusion that the risk has also been voluntarily accepted.[76]

To show that this conclusion will not necessarily be correct, the plurality discussed the question of how a particular risk should be defined. Given the facts of *Rutter,* one possible definition would be the risk of all injuries related to training for and playing football. The plurality pointed out, however, that another possibility would be that the appellant assumed only the risk of participating in a program conducted with adequate supervision and protective equipment.[77]

Justice Flaherty indicated that the way in which the risk is defined will influence the analysis of voluntariness.[78] In this case, the appellant was familiar with varsity football and he voluntarily participated in it. This does not, however, lead to the conclusion that he voluntarily participated in jungle football if he was required to participate in order to make the team.[79] Justice Flaherty maintained that the voluntariness must relate to the risk which caused the injury; any other voluntariness is irrelevant.[80] Here, the appellant's voluntary act was that he agreed to participate in a safely conducted athletic program. Justice Flaherty found that whether he also volunteered to participate in jungle football, assuming all of the risks incident to that activity, is at least a jury question.[81]

The plurality noted that a similar problem had arisen in *Green v. Sanitary Scale Co.*[82] In *Green,* the Third Circuit Court of Appeals held that the trial judge erred in refusing to give the defen-

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75. *Id.*

76. *Id.* The plurality explained that "the analysis of voluntariness *seems* to be that if appellant voluntarily played football (i.e., if he voluntarily entered into a relationship with the school district), he has voluntarily assumed the risk of injury due to playing football." *Id.* (emphasis added by the court).

77. *Id.* at 609-10, 437 A.2d at 1207-08.

78. *Id.* at 610, 437 A.2d at 1208.

79. *Id.*

80. *Id.*

81. *Id.*

82. 431 F.2d 371 (3d Cir. 1970). In *Green,* the plaintiff was a sixteen year old employee of a grocery store. While operating a meat grinder, he placed his hand near the grinder's worm gear. The motion of the gear trapped his hand and drew it into the grinder blades. The plaintiff testified that he had used the machine infrequently and had never been instructed on how to use the machine. *Id.* at 372-73.

dant's requested instruction on assumption of risk to the jury. A strong dissenting opinion, however, argued that the definition of risk used in the majority opinion was incorrect.[83] Because the dissent used a different definition of the risk, there followed a different analysis of both the voluntariness in assuming the risk and the plaintiff's knowledge of the risk.[84]

According to the *Rutter* plurality, the *Green* case demonstrates that the problem of defining the risk not only is recurrent, but that it also influences the analysis of the plaintiff's knowledge and voluntariness.[85] The plurality stated that it is likely the lower courts in this case did not recognize the issues of knowledge and voluntariness because they did not correctly define the risk. That same mistake may also have led to the erroneous exclusion of the expert testimony.[86]

The plurality suggested that not only is assumption of risk a difficult doctrine, it is duplicative of the concepts of scope of duty and plaintiff's contributory negligence.[87] In support of this conclusion, Justice Flaherty cited two cases from other jurisdictions which had abolished the doctrine, *Tiller v. Atlantic Coast Line Railroad*[88] and *McGrath v. American Cyanamid Co.*[89] In the latter case, the New Jersey Supreme Court held that assumption of risk added nothing to the issues of defendant's negligence and plaintiff's negligence.[90] The *Rutter* plurality agreed and concluded that the issues in all negligence cases should be limited to the defen-

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83. 431 F.2d at 375 (Staley, J., dissenting). *See Rutter*, 496 Pa. at 611, 437 A.2d at 1208. Judge Staley would have defined the risk as the danger of one's hand being drawn into the worm gear by the meat if one places one's hand in the machine's funnel. The majority, stated Judge Staley, defined the risk as the danger that one's hand would be injured if it were placed into the worm gear itself. 431 F.2d at 375 (Staley, J., dissenting).

84. 496 Pa. at 611, 437 A.2d at 1208.

85. *Id.* at 612, 437 A.2d at 1208.

86. *Id.* at 612, 437 A.2d at 1209. The court explained that the expert testimony only becomes relevant if the possible negligence of the coaches is related to the risk.

87. *See* 2 F. HARPER and F. JAMES, THE LAW OF TORTS § 21.8, at 1191 (1956).

88. 318 U.S. 54 (1943). In *Tiller*, the court was construing legislation which appeared to abolish the doctrine of assumption of risk in cases brought under the Federal Employers Liability Act (FELA). Commenting on the doctrine generally, Justice Frankfurter, in a concurring opinion, stated: "Because of its ambiguity the phrase 'assumption of risk' is a hazardous legal tool. As a means of instructing a jury, it is bound to create confusion. It therefore should be discarded." *Id.* at 72.

89. 41 N.J. 272, 196 A.2d 238 (1963).

90. *Id.* at 274, 196 A.2d at 239-40. The New Jersey court stated that assumption of risk is used in two ways. In one, the defendant is not negligent, as he owes the plaintiff no duty. In the other, the plaintiff is contributorily negligent. Thus negligence and contributory negligence are the true issues in an assumption of risk case. *Id.*

dant's negligence and the plaintiff's contributing negligence.[91] Justice Flaherty stated that the policy reasons which once supported the doctrine are gone.[92] Further, in situations where the doctrine would have been appropriate, the same results could be achieved either through a determination that the defendant owed no duty to the plaintiff or that the plaintiff was contributorily negligent.[93] The plurality concluded that, except in cases involving express assumption of risk or in cases brought under a strict liability theory,[94] the doctrine of assumption of risk is abolished where not specifically preserved by statute.[95]

Justice Roberts, in a dissenting opinion,[96] stated that the appellant had not presented any evidence which would support a jury verdict that a breach of duty on the part of the appellees was the proximate cause of the appellant's injury.[97] Absent such evidence, stated Justice Roberts, the jury could only guess at whether protective equipment or better supervision would have prevented the appellant's injury.[98]

Regarding the issue of the doctrine of assumption of risk, Justice Roberts noted that because the appellant had not met his burden of proof as to proximate cause, the issue of whether the doctrine was applicable to this case was not properly before the court.[99] Thus, it is not appropriate to decide the continuing vitality of a doctrine which the court has not previously questioned.[100] Finally, Justice Roberts, pointing out that only three of the seven partici-

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91. 496 Pa. at 613, 437 A.2d at 1209.

92. The court pointed out that under Pennsylvania's Workmen's Compensation Act, PA. STAT. ANN. tit. 77, § 41 (Purdon 1952), assumption of risk is abolished in most master-servant cases. *Id.* n.4.

93. *Id. See* PA. BAR INST., PENNSYLVANIA SUGGESTED STANDARD CIVIL JURY INSTRUCTIONS § 3.04 (1981).

94. *See* RESTATEMENT (SECOND) OF TORTS § 402 A (1965).

95. 496 Pa. at 613, 437 A.2d at 1209. The appellant's motion to remove the non-suit was granted and the case remanded to trial court. *Id.*

With this holding, Justice Flaherty noted that Pennsylvania joined nineteen other jurisdictions which have abolished or severely restricted the defense of assumption of risk. Those jurisdictions include Alaska, California, Delaware, Hawaii, Idaho, Iowa, Kansas, Kentucky, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, North Carolina, Oregon, Texas, Washington, and Wyoming. *Id.* at 613-14 n.5, 437 A.2d at 1209-10 n.5.

96. Justice Wilkinson joined in this dissent.

97. 496 Pa. at 616, 437 A.2d at 1211 (Roberts, J., dissenting).

98. *Id.*

99. *Id.* at 617, 437 A.2d at 1211 (Roberts, J., dissenting).

100. Justice Roberts cited Jones v. Three Rivers Management Corp., 483 Pa. 75, 394 A.2d 546 (1978), as a recent case in which the doctrine was accepted without question. 496 Pa. at 617, 437 A.2d at 1211 (Roberts, J., dissenting).

pating justices had joined Justice Flaherty's opinion, stated in a footnote that assumption of risk remains the law in Pennsylvania.[101]

Justice Nix, in a dissenting opinion,[102] asserted that assumption of risk, a doctrine retained in most jurisdictions, is a necessary part of tort law which has been needlessly complicated by the majority.[103] He acknowledged that assumption of risk and contributory negligence do overlap, but stated that they are separate and distinct defenses.[104] Assumption of risk is based on a theory of a known risk while contributory negligence involves some fault or departure from the standard of reasonable conduct.[105]

Justice Nix stated that one indication that the doctrines are truly distinct is the fact that contributory negligence must be the proximate cause of an injury if it is to bar plaintiff's recovery, while assumption of risk bars recovery even if it plays no part in the causation of the injury.[106] He cited an example of a case where contributory negligence is absent but assumption of risk is applicable. In *Schentzel v. Philadephia National League Club,*[107] the plaintiff had been injured by a foul ball while watching a game at defendant's ballpark. The superior court reversed a verdict for the plaintiff, holding that the plaintiff had assumed the risk. To reach this holding, the court concluded that the plaintiff knew that foul balls sometimes go into the stands and injure spectators even though there was no direct evidence on this point. The superior court reached this conclusion because a plaintiff must be presumed to know what individuals living in this society normally know.[108]

The standard of a reasonable man's conduct, according to Justice Nix, is the benchmark of negligence cases and should be used even in cases involving assumption of risk.[109] To make an exception for assumption of risk cases places the defendant in the all but impossible position of attempting to prove the plaintiff's state of mind.[110] Using the objective standard of a reasonable man in this case, Justice Nix stated that it was clear that a reasonable per-

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101. 496 Pa. at 617 n.2, 437 A.2d at 1211 n.2 (Roberts, J., dissenting).
102. Justice Wilkinson also joined in this dissent.
103. 496 Pa. at 617, 437 A.2d at 1212 (Nix, J., dissenting).
104. *Id.* at 617-18, 437 A.2d at 1212 (Nix, J., dissenting).
105. *Id.* at 618, 437 A.2d at 1212 (Nix, J., dissenting).
106. *Id.*
107. 173 Pa. Super. 179, 96 A.2d 181 (1953).
108. 496 Pa. at 618, 437 A.2d at 1212 (Nix, J., dissenting).
109. *Id.*
110. *Id. See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 68 (4th ed. 1971).

son in Rutter's situtation would have been aware of the risk involved in playing football and, specifically, jungle football.[111] Rutter had been on the team for two years and had played jungle football during those years.[112] Thus, it was logical that the appellant knew the risks involved and voluntarily assumed them.[113] Finally, Justice Nix noted that the risk involved in jungle football is no greater than the risk of playing football generally.[114] He concluded that because the appellant had voluntarily assumed the risk of playing football generally, he may not attempt to isolate one segment of the risk he had voluntarily assumed.[115]

As the *Rutter* plurality noted, assumption of risk is a relatively late development in tort law.[116] The first cases adopting the principle of assumption of risk occurred either at the end of the eighteenth century or early in the nineteenth century.[117] Sometime after 1870, assumption of risk matured into a doctrine and became an accepted part of tort law, especially in cases involving master and servant.[118] In these cases, assumption of risk operated to defeat a plaintiff's recovery in one of two ways: 1) the plaintiff's assumption of risk would be found to be an implicit term of the employment contract;[119] or 2) it would be found as implicit in a servant's continuing to remain in the master's employ after he knew or should have known the risk involved.[120] The rationale for the doctrine lay in public policy. Without such a doctrine, it was thought that suits by employees would ruin employers financially and that employees would become careless.[121]

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111. 496 Pa. at 619, 437 A.2d at 1212 (Nix, J., dissenting).

112. *Id.*

113. *Id.* at 619, 437 A.2d at 1213 (Nix, J., dissenting).

114. *Id.*

115. *Id.*

116. *Id.* at 606, 437 A.2d at 1205.

117. According to Prosser, Cruden v. Fentham, 170 Eng. Rep. 496 (1799), is the first clearly distinguishable assumption of risk case. W. PROSSER, *supra* note 65, at 439 n.9. Wallace identifies the first case as Illot v. Wilkes, 3B. & Ald., 311 (1820). Wallace, *Volenti Non Fit Injura in Actions of Negligence*, 8 HARV. L. REV. 457, 462 (1894).

118. *See* 35 AM. JUR. *Master and Servant* § 294 (1941).

119. *See* Smith v. Baker & Sons, 1891 A.C. 325, 346 (Bramwell, L., dissenting).

120. *See* Brossman v. Lehigh Valley R.R., 113 Pa. 490, 6 A. 226 (1886). In *Brossman*, the plaintiff was a brakeman who was killed when his train passed under a low bridge while he was riding on the top of a car. The court held that once an employee becomes familiar with the risks of his job, he accepts them by remaining in employment. *Id.* at 499, 6 A. at 228.

121. *See* Tuttle v. Detroit G.H. & M.R. Co., 122 U.S. 189 (1887). In this negligence action, the court explained the rationale for the doctrine of assumption of risk by describing it as "a rule of public policy, inasmuch as an opposite doctrine would not only subject em-

The first major attack on the doctrine came legislatively rather than judicially. In 1906, Congress enacted the Federal Employers Liability Act (FELA).[122] Although the act arguably intended to remove assumption of risk as a defense in cases arising under FELA,[123] the United States Supreme Court construed the act as permitting the defense of assumption of risk.[124] Thus, it was suddenly important to distinguish between the similar doctrines of assumption of risk and plaintiff's contributory negligence, as the former would bar recovery while the latter, under the terms of the legislation, would only diminish it.

Although commentators and courts sometimes saw clear distinctions between assumption of risk and plaintiff's contributory negligence,[125] the federal courts had a difficult time distinguishing the two doctrines.[126] After twenty-three years of confusion, Congress enacted an amendment to FELA,[127] which appeared to completely bar the use of assumption of risk in FELA cases.[128] The Court of Appeals for the Fourth Circuit held that assumption of risk remained a valid defense under FELA,[129] but the Supreme Court re-

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ployers to unreasonable and often ruinous responsibilities, thereby embarassing all branches of business, but it would be an encouragement to the servant to omit the diligence and caution he is duly bound to exercise . . . ." *Id.* at 196.

122. Federal Employers Liability Act of 1906, 45 U.S.C. § § 51-60 (1976).

123. *See* Buford, *Assumption of Risk Under the Federal Employers Liability Act*, 28 HARV. L. REV. 163 (1915).

124. Seaboard Air Line v. Horton, 233 U.S. 492 (1913). In *Seaboard*, the court held that § 4 of the statute abolishing assumption of risk applied only when the defendant was in violation of a specific federal statute. *Id.* at 501.

125. *See, e.g.*, Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 91 (1906); Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233 (1908). The court in *Seaboard* had no difficulty in distinguishing the two doctrines. *See* 233 U.S. at 503-04.

126. *See Tiller*, 318 U.S. at 63, where the court stated: "The language of the statute itself seemed to impel the courts to practice the niceties, if not the casuistries of distinguishing between assumption of risk and contributory negligence, conceptions which never originated in clearly distinguishable categories but were loosely interchangeable until the statute attached vital differences to them." *Id.* (quoting Pacheco v. New York, N.H. & H.R., 15 F.2d 467 (1926)). The problems courts had in distinguishing the two is evidenced by the fact that 172 cases involving the act came before the court in the first twenty-five years of the act's existence. Schoene and Watson, *Workmen's Compensation on Interstate Railways*, 47 HARV. L. REV. 389, 394 (1934).

127. Act of Aug. 11, 1939, 53 Stat. 1404 (1939) (codified at 45 U.S.C. §§ 51, 54, 56 (1976)).

128. 45 U.S.C. § 54 provides in part:

> In any action brought against any common carrier under . . . [this Act] to recover damages for injuries to . . . any of its employees, such employee shall not be held to have assumed the risks of his employment where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury . . . .

Id.

129. *See* Tiller v. Atlantic Coast Line R.R., 128 F.2d 420, 424 (4th Cir. 1942).

versed, leaving little doubt that the doctrine was abolished in cases arising under that enactment.[130]

In other jurisdictions, the doctrine has been under judicial attack. In 1959, the Supreme Court of New Jersey held that assumption of risk would no longer be part of that state's law except where plaintiff's consent to assume the risk was explicit.[131] Up to the time of the *Rutter* decision, eighteen other states had abandoned or greatly restricted the doctrine judicially.[132]

This recent judicial attack on assumption of risk is very different from the earlier legislative attack on the doctrine. Legislation such as FELA and the various workers' compensation statutes[133] abolished or limited the doctrine because it consistently produced judicial outcomes which were undesirable.[134] The legislative disapproval of the doctrine was part of the movement away from the common law's individualistic philosophy.[135] The current judicial attack, however, has no apparent philosophical quarrel with assumption of risk, but instead asserts that assumption of risk is simply a phrase which adds nothing to the concepts of plaintiff's negligence and defendant's duty to plaintiff.[136] If, indeed, assumption of risk adds nothing to negligence concepts, judicial outcomes reached using assumption of risk should not be altered if negligence concepts alone are used, provided that assumption of risk is

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130. *See Tiller*, 318 U.S. at 58. The court stated, "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendments . . . . *Id.*

131. *See* Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90 (1959). The case cited by Justice Flaherty, McGrath v. American Cyanamid, restated the holding of *Meistrich*. *See supra* note 89 and accompanying text.

132. *See supra* note 95.

133. *See, e.g.*, Pennsylvania Workmen's Compensation Act, PA. STAT. ANN. tit. 77, § 41(b) (Purdon 1952).

134. *See* Buford, *supra* note 123, at 170 n.13. In passing FELA, Congress believed that the law as it stood failed to meet "the modern industrial conditions." The law failed in that its decisions placed the burden of industrial injuries on those less able to bear the injury. *Id.* at 170-71.

135. *See supra* note 68 and accompanying text.

136. Most of the cases cited in the opinion as abolishing assumption of risk express this idea. *See* 496 Pa. at 614-15 n.5, 437 A.2d 1209-10 n.5. A few do not state that assumption of risk adds nothing to negligence concepts, but state that assumption of risk is so similar to negligence as to cause much confusion when it must be distinguished from plaintiff's negligence, as it must be when comparative negligence is the rule. *See, e.g.*, Colson v. Rule, 15 Wis. 2d 387, 390-91, 113 N.W.2d 21, 23 (1962). One case cited in the opinion is not part of the recent judicial movement away from assumption of risk but instead restates an old restriction of assumption of risk to parties to a contract. McWilliams v. Parham, 269 N.C. 162, 152 S.E.2d 117 (1967).

applied correctly by the courts.[137] The evil of the doctrine lies not in its philosophy, but in its application. It is inherently confusing and lends itself to incorrect application.[138]

Whether or not assumption of risk really adds nothing to negligence concepts is a question which has divided the authorities.[139] To shed some light on the question, it is helpful to state a classification of assumption of risk cases used by both courts[140] and scholars.[141] This classification divides cases into two types: primary, in which the doctrine relieves the defendant of any duty to the plaintiff, and secondary, in which the plaintiff's conduct is unreasonable. In secondary assumption of risk, the use of negligence concepts clearly will achieve the same result, unreasonable conduct being also negligent conduct. The problem involves primary assumption of risk, the question being whether a defendant who had been relieved of his duty under assumption of risk will now have a duty to a plaintiff if assumption of risk is abolished. Both of the cases cited in the *Rutter* dissents, *Jones v. Three Rivers Management Corp.*[142] and *Schentzel v. Philadelphia National League Club*[143] are examples of primary assumption of risk. It is possible that either of these cases could have been decided for the defendant without the use of assumption of risk. For example, in other jurisdictions, cases involving injuries to spectators at baseball games have been decided without using the doctrine, employing instead a general rule which limits the defendant's duty to spectators at sporting events.[144]

Although this analysis does not conclusively show that all primary assumption of risk cases may be decided in the same way without using the doctrine, it does suggest how courts could decide

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137. *See, e.g.*, Felgner v. Anderson, 375 Mich. 23, 56, 133 N.W.2d 136, 154 (1965).

138. *See, e.g., Meistrich*, 31 N.J. at 50-51, 155 A.2d at 93-94.

139. Much has been written on this question. "The attempt to distinguish between the affirmative defenses of contributory negligence and assumption of risk has been a favorite subject of many courts, law journalists and reviewers." Frelick v. Homeopathic Hospital Ass'n. of Del., 150 A.2d 17 (Del. Ch. 1959). For a description of the disagreement on this issue among the advisors to the Reporter of the *Restatement of Torts (Second)*, *see* Wade, *The Place of the Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5, 7 (1961) and Halepeska v. Callihan Interest, Inc., 371 S.W.2d 368, 378 n.3 (TEX. 1963).

140. *See, e.g.*, Springrose v. Willmore, 292 Minn. 23, 24, 192 N.W.2d 826, 827 (1971).

141. *See, e.g.*, James, *Assumption of Risk*, 61 YALE L.J. 141 (1952).

142. 483 Pa. 75, 394 A.2d 546 (1978). This case involved a plaintiff who was injured by a batted baseball. The opinion reversed the superior court decision for the defendant, analyzing the case both in terms of assumption of risk and a "no duty" rule.

143. 173 Pa. Super. 179, 96 A.2d 181 (1953). *See supra* note 107 and accompanying text.

144. *See* Felgner v. Anderson, 375 Mich. 23, 37 n.3, 133 N.W.2d 136, 148 n.3 (1965).

such cases. A court could invoke a specific "no duty rule" which limits the duty of a class of defendants to a class of plaintiffs.[145]

In Pennsylvania, assumption of risk has not been strongly articulated as an independent doctrine. Although the phrase appeared fairly frequently in nineteenth century master-servant cases,[146] the Pennsylvania Supreme Court in 1943 wrote about assumption of risk as if it were identical to contributory negligence.[147] One author reviewing the situation in 1952, concluded that assumption of risk had not, to date, been applied in Pennsylvania independently of contributory negligence.[148] A trial judge, while holding that assumption of risk and contributory negligence were indeed two distinct doctrines, noted that Pennsylvania courts regard the two as the same.[149] Thus, not only have Pennsylvania courts generally not distinguished assumption of risk as an independent doctrine, they have usually recognized only secondary assumption of risk. Viewed in this light, Justice Flaherty's abolition of the doctrine is not as sharp a break from precedent as the dissents suggest.

One additional indication that *Rutter* is not a sharp break from Pennsylvania judicial tradition is the fact that Justice Flaherty does not use a single Pennsylvania case in his lengthy analysis of assumption of risk; he uses the Restatement exclusively. The detailed presentation found in the Restatement is not even approached by any reported Pennsylvania case or cases.[150]

With regard to assumption of risk, the Pennsylvania courts now have three choices: first, accept Justice Flaherty's opinion and, for

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145. *See* James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185, 188 (1968). James views primary assumption of risk as nothing more than a collection of various "no-duty" rules. *Id.*

146. *See, e.g.*, Bemisch v. Roberts, 143 Pa. 1, 21 A. 998 (1891).

147. *See* Earll v. Wichser, 346 Pa. 357, 30 A.2d 803 (1943). In *Earll*, the plaintiff was injured while riding on the tailboard of the defendant's truck. In its holding, the court described the case as involving assumption of risk, as the plaintiff had voluntarily placed himself in a position of danger. The court then stated: "Hence a passenger who rides on the running board of an automobile and is injured through the fault of the driver is . . . guilty of contributory neligence as a matter of law." *Id.* at 359, 30 A.2d at 804.

148. 13 U. PITT. L. REV. 769, 771 (1952).

149. Knepper v. Township of E. Taylor, 21 Cambria County L.J. 63 (1959). Before holding that assumption of risk and contributory negligence were indeed distinct doctrines, the court commented, "the courts in Pennsylvania seem to regard the defenses of assumption of risk and contributory negligence as the same . . . ." *Id.* at 67.

150. It has been suggested that Pennsylvania courts would begin distinguishing between assumption of risk and contributory negligence if they were to adopt the Restatement of Torts. *See* 13 U. PITT. L. REV. at 771.

most purposes, abolish assumption of risk;[151] second, accept the Restatement's detailed statement of the doctrine; or third, simply rely upon case law where assumption of risk is not clearly distinguishable from contributory negligence. Choices two and three present serious problems.

The problem with adopting the text of the Restatement is well illustrated by Justice Flaherty's analysis. The Restatement's articulation of the doctrine may be sound in theory, but it is difficult in application. The problem with choice three is that it gives the courts no clear way to distinguish assumption of risk and contributory negligence. This problem had been largely academic in Pennsylvania, but will be a problem with great practical consequences now that comparative negligence has replaced contributory negligence.[152] Justice Flaherty's solution may be the best.

It may not be long before the issue is again before the court. Justice Flaherty's opinion was joined by only two justices of the seven member court. As was recently stated by the United States Court of Appeals for the Third Circuit, plurality opinions of the Pennsylvania Supreme Court are not considered binding precedent.[153] Thus, the issue of the role of assumption of risk in Pennsylvania law is still unsettled.

Kenneth Joseph

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151. *See* 496 Pa. at 613, 437 A.2d at 1209.

152. As noted in the opinion, Pennsylvania has recently adopted a comparative negligence statute, 42 PA. CONS. STAT. ANN. § 7102 (Purdon 1981). 496 Pa. at 614 n.6, 437 A.2d at 12 n.6. In cases brought under a comparative negligence rule, it becomes imperative to sharply distinguish between assumption of risk and plaintiff's negligence. The former will bar recovery while the latter will only reduce it. Application of assumption of risk to completely bar recovery would seem to be at odds with the legislative intent in adopting comparative negligence. *See* 496 Pa. at 614 n.6, 437 A.2d at 1210 n.6.

153. Vargus v. Pitman Mfg. Co., 675 F.2d 73 (3d Cir. 1982). Appellants in *Vargus* requested that the court vacate a district court judgment because of the change in Pennsylvania law effected by *Rutter*. The court refused, holding that plurality opinions are ineffective to change Pennsylvania law. *Id.* at 74.