



## Touro Law Review

---

Volume 7 | Number 1

Article 6

---

1990

### Assumption of Risk in New York Under CPLR 1411: Complete Bar or Comparative Fault?

Thomas P. Lalor

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>

 Part of the [Civil Law Commons](#), [Civil Procedure Commons](#), [Constitutional Law Commons](#), [Courts Commons](#), [Jurisprudence Commons](#), and the [State and Local Government Law Commons](#)

---

#### Recommended Citation

Lalor, Thomas P. (1990) "Assumption of Risk in New York Under CPLR 1411: Complete Bar or Comparative Fault?," *Touro Law Review*. Vol. 7 : No. 1 , Article 6.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol7/iss1/6>

This Notes and Comments is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact [lross@tourolaw.edu](mailto:lross@tourolaw.edu).

## ASSUMPTION OF RISK IN NEW YORK UNDER CPLR 1411: COMPLETE BAR OR COMPARATIVE FAULT?

The phrase “assumption of risk” is an excellent illustration of the extent to which uncritical use of words bedevils the law.<sup>1</sup>

### INTRODUCTION

Assumption of risk traditionally was an absolute defense and thus completely barred a plaintiff's claim.<sup>2</sup> The rationale for the defense was expressed in the ancient maxim, *volenti non fit injuria*—“a man who consents to the doing of an act cannot maintain an action in respect of the damage which results from that act.”<sup>3</sup> As such, assumption of risk as a defense to a negligence action was the counterpart of consent as a defense to an intentional tort.<sup>4</sup>

The doctrine of assumption of risk, almost from its inception, has been criticized severely by courts and commentators.<sup>5</sup>

---

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

2. *Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325, 329, 424 N.E.2d 531, 533, 441 N.Y.S.2d 644, 646 (1981); Gallub, *Assessing Culpability in the Law of Torts: A Call for Judicial Scrutiny in Comparing “Culpable Conduct” Under New York’s CPLR 1411*, 37 SYRACUSE L. REV. 1079, 1084 (1987); see *Maddox v. City of New York*, 66 N.Y.2d 270, 274-75, 487 N.E.2d 553, 554, 496 N.Y.S.2d 726, 727 (1985); *Ernst v. Hudson River R.R.*, 35 N.Y. 9, 36-37 (1866).

3. 1 T. STREET, *FOUNDATIONS OF LEGAL LIABILITY* 162 (1906). The maxim originally applied only when the injured party actually consented to the act that caused the harm. *Id.* Eventually, the maxim applied to situations where there was only implied consent to a known risk of harm. *Id.* at 163. See also Warren, *Volenti Non Fit Injuria in Actions of Negligence*, 8 HARV. L. REV. 457, 461-62 (1895).

4. Kionka, *Implied Assumption of the Risk: Does it Survive Comparative Fault?*, 1982 S. ILL. U.L.J. 371, 373-74 (1982); see also Simmons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U.L. REV. 213, 248-49 (1987) (stating textual proposition as general view but maintaining that consent and assumption of risk should not be linked to the type of tort).

5. See, e.g., *Tiller*, 318 U.S. at 69 (Frankfurter, J., concurring) (assumption of risk in master-servant context represents judicial expression of social policy which causes much human misery); *Eckert v. Long Island R.R.*, 43 N.Y. 502 (1871) (ma-

Critics noted that judges employed the doctrine to denote several distinct legal concepts.<sup>6</sup> Furthermore, the absolute nature of the defense often led to the harsh negation of a deserving plaintiff's claim.<sup>7</sup> The critics' call for the demise of assumption of risk as an absolute and distinct defense prompted both legislative and judicial action. Presently, thirty-six states have abrogated the defense as a complete bar, either by judicial decision

---

majority ignores assumption of risk defense, over dissent's objection, to allow plaintiff's recovery for death sustained while rescuing child on train tracks); *Woodley v. Metropolitan Dist. Ry.*, 2 L.R.-Ex. D. 384 (1887) (expressing view that application of assumption of risk is legally correct but morally reprehensible). *See generally* 4 F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 21.0 (2d ed. 1986 & Supp. 1990) [hereinafter HARPER & JAMES]; Bohler, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14 (1907); Gaetanos, *Essay-Assumption of Risk: Casuistry in the Law of Negligence*, 83 W. VA. L. REV. 471 (1981); James, *Assumption of Risk*, 61 YALE L.J. 141 (1952); Warren, *supra* note 3.

6. *See Tiller*, 318 U.S. at 58 (assumption of risk treated sometimes as defense to negligence action and sometimes as non-negligence); *Arbegast v. Board of Educ.*, 65 N.Y.2d 161, 166, 480 N.E.2d 365, 369, 490 N.Y.S.2d 751, 755 (1985) (assumption of risk may mean no breach of duty or no duty); *McFarlane v. City of Niagara Falls*, 247 N.Y. 340, 349, 106 N.E. 391, 394 (1928) (assumption of risk is sometimes synonymous with contributory negligence); *see also* HARPER & JAMES, *supra* note 5, § 21.8, at 259 (concept of assumption of risk duplicates other familiar tort principles such as contributory negligence and limited duty); W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER & KEETON ON THE LAW OF TORTS* § 68, at 480 (5th. ed. 1984) [hereinafter PROSSER & KEETON] ("assumption of risk has been used by courts in several different senses"); James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185, 186-88 (1968) (doctrine of assumption of risk is a more confusing way of expressing no-duty rules or contributory negligence); James, *supra* note 5, at 141 (assumption of risk refers to defendant's lack of duty or plaintiff's contributory negligence).

7. *See Maddox v. City of New York*, 66 N.Y.2d 270, 487 N.E.2d 553, 496 N.Y.S.2d 726 (1985) (professional baseball player denied all recovery for career ending injury because he assumed risk of dangerous playing field); *Nussbaum v. Lacopo*, 27 N.Y.2d 311, 265 N.E.2d 762, 317 N.Y.S.2d 347 (1970) (plaintiff denied all recovery for injury sustained by stray golf ball from adjoining country club because he assumed the risk); *Tuite v. Kruder*, 29 A.D.2d 975, 290 N.Y.S.2d 101 (2d Dep't 1968), *aff'd*, 24 N.Y.2d 769, 247 N.E.2d 859, 300 N.Y.S.2d 38 (1969) (eighty-five year old woman denied all recovery for injuries sustained by falling in six inch deep hole because she assumed the risk); *see also* C. MORRIS & C.R. MORRIS JR., *MORRIS ON TORTS* 217 (2d ed. 1980) (expressing view that assumption of risk permits a defendant who is at fault to escape liability); PROSSER & KEETON, *supra* note 6, at 493 (expressing view that assumption of risk sometimes results in denial of a deserving plaintiff's claim).

or legislation.<sup>8</sup> Assumption of risk in New York, pursuant to section 1411 of the Civil Practice Law and Rules (CPLR 1411) enacted in 1975,<sup>9</sup> is now designated "culpable conduct" and will not bar recovery.<sup>10</sup> Instead, it is used to diminish the claimant's award of damages in proportion to the degree of his culpable conduct which caused the damage.<sup>11</sup> The legislature also codified the common law rule that assumption of risk is an affirmative defense, "to be pleaded and proved by the party asserting the defense."<sup>12</sup>

Despite the unequivocal language of CPLR 1411 to treat assumption of risk as a factor in apportioning fault,<sup>13</sup> the New York courts have continued to allow certain types of assumption of risk to completely bar a plaintiff's claim.<sup>14</sup> The courts have accomplished this through a jurisprudence which is vague and susceptible to misapplication. The misapplication of this jurisprudence circumvents the statutory and legislative directives of CPLR 1411. This Comment explores that jurisprudence and seeks to ascertain the present status of assumption of risk in New York.

---

8. See H. WOODS, *COMPARATIVE FAULT* §§ 6.2-6.6 (2d ed. 1987 & Supp. 1990). The states are Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Utah, Vermont, Washington, Wisconsin and Wyoming. *Id.* In addition to this enumeration, Judge Woods supplies the judicial or statutory authority for each state.

9. See N.Y. CIV. PRAC. L. & R. 1411 (McKinney 1976). The statute provides:

In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.

*Id.*

10. *Id.*

11. *Id.*

12. N.Y. CIV. PRAC. L. & R. 1412 (McKinney 1976).

13. N.Y. CIV. PRAC. L. & R. 1411 (McKinney 1976).

14. See *infra* notes 47-80 and accompanying text.

Part I of this Comment considers the plain language and legislative history and intent of CPLR 1411. Cases urging for a comparative fault system decided before the enactment of the statute also are considered.

Part II examines the present status of assumption of risk in New York. Judicial classifications of the doctrine, with pertinent case law, are listed and articulated. The jurisprudence utilized by the courts which can potentially circumvent CPLR 1411 is also discussed.

Part III focuses on the hazards of misclassifying the plaintiff's assumption of risk. Such a misclassification violates CPLR 1411 and returns assumption of risk to a complete bar. The point is illuminated by reference to a recent New York Court of Appeals' case.

Part IV concludes that the New York courts should recognize the legislative intent of CPLR 1411 and be circumspect in classifying the types of assumption of risk to ensure that the statutory directive is followed.

### I. CPLR 1411

Article 14A of the CPLR, which includes section 1411, was enacted upon recommendation of the State Judicial Conference on the CPLR.<sup>15</sup> The Judicial Conference relied upon the recommendation of its Advisory Committee,<sup>16</sup> which along with Professor M.E. Occhialino of Syracuse University College of Law researched the bill and prepared a draft.<sup>17</sup> A brief look at Professor Occhialino's study is enlightening.

Occhialino states that, under the new bill, neither contributory negligence nor assumption of risk shall serve as a complete bar to recovery, and that the inclusion of both defenses in the bill is commensurate with the result reached in most states that

---

15. See THIRTEENTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE TO THE 1975 NEW YORK LEGISLATURE ON THE CIVIL PRACTICE LAW AND RULES, reprinted in 1975 N.Y. Laws 1479, 1483 (McKinney) [hereinafter JUDICIAL CONFERENCE REPORT].

16. See *id.* at 1482.

17. *Id.* The Professor's study also appears in the N.Y. JUDICIAL CONFERENCE, SPECIAL SIXTH-MONTH REPORT 137-45 (1975).

have adopted comparative negligence principles.<sup>18</sup> The purpose of treating the two doctrines similarly is to eliminate the artificial distinctions between them. Professor Occhialino points out that his view comports with the general position taken by the New York courts that the difference between contributory negligence and assumption of risk is often merely one of terminology.<sup>19</sup> The professor then addresses the occasional position of the New York courts that assumption of risk is not merely a defense, but negates the duty owed by the defendant to the plaintiff.<sup>20</sup> His response to this position is direct and unambiguous:

Such an analysis would bar plaintiff's recovery as a matter of law, thereby undermining the purpose of this article—to permit partial recovery in cases in which the conduct of each party is culpable. Just as there has been a “general softening of the rigidities of the doctrine of contributory negligence” with “a tendency to treat it almost always as a question of fact,” as well as a growing recognition that “the great issue is not liability but damages recoverable for injuries”, it is expected that the courts will treat assumption of risk as a form of culpable conduct under this article.<sup>21</sup>

It is apparent from the plain language and legislative history of CPLR 1411 that the statute was enacted to permit a partially “culpable” plaintiff to recover damages.<sup>22</sup> It is equally apparent that assumption of risk is to be treated as a form of “culpable conduct.”<sup>23</sup> Moreover, the creators of the legislation explicitly proscribed treating the defense as negating the de-

18. JUDICIAL CONFERENCE REPORT, *supra* note 15, at 1484, comment (c).

19. *Id.* at 1484-85, comment (c). As authority for this proposition, the professor relies on Judge Cardozo's language from *McFarlane v. City of Niagara Falls*, 247 N.Y. 340, 349, 160 N.E. 391, 394 (1928), that there “is a borderland where the concept of contributory negligence merges almost imperceptibly into that of acceptance of a risk.” See JUDICIAL CONFERENCE REPORT, *supra* note 15, at 1485, comment (c).

20. See JUDICIAL CONFERENCE REPORT, *supra* note 15, at 1485, comment (c).

21. *Id.* (citations omitted). Further evidence that the creators of the bill intended assumption of risk not to negate the duty owed by the defendant is contained in the MEMORANDA OF THE JUDICIAL CONFERENCE (1975), reprinted in 1975 N.Y. LEGIS. ANN. 23-25.

22. See N.Y. CIV. PRAC. L. & R. 1411 (McKinney 1976); JUDICIAL CONFERENCE REPORT, *supra* note 15, at 1484-85, comment (c).

23. See N.Y. CIV. PRAC. L. & R. 1411 (McKinney 1976); JUDICIAL CONFERENCE REPORT, *supra* note 15, at 1485, comment (c).

defendant's duty.<sup>24</sup> The requirement of CPLR 1412 that the defendant prove the assumption of risk further evinces this latter point.<sup>25</sup>

Prior to the enactment of CPLR 1411, New York courts struggled with the problems presented by the harsh doctrines of contributory negligence and assumption of risk. In *Rossmann v. La Grega*,<sup>26</sup> the New York Court of Appeals traced the history of contributory negligence, articulated the doctrine, criticized its effects, and concluded that its potency was diminishing.<sup>27</sup> The same court, in *Codling v. Paglia*,<sup>28</sup> considered judicially creating a comparative fault system but decided that this was a legislative prerogative and function.<sup>29</sup> Judge Jasen, in a bold concurring opinion, argued that the harsh doctrines had lost all relevance in contemporary society<sup>30</sup> and expressed his belief "that there is no logical and just reason for the perpetuation of a rule that bars *any* recovery because of *some* fault."<sup>31</sup>

At times, New York judges have tempered the harshness of assumption of risk by strictly construing the elements necessary for the defense. For instance, courts have broad discretion in deciding whether a plaintiff fully appreciated the nature of a particular risk, since this is judged on a subjective standard.<sup>32</sup> The point is illustrated in *Larson v. Nassau Electric Railroad*.<sup>33</sup> The court, in an opinion written by Judge Cardozo, held that the plaintiff did not assume the risk of the injury-causing machine as a matter of law, because "[h]e may have known that there was a defect, but it does not follow that he

24. See N.Y. CIV. PRAC. L. & R. 1411 (McKinney 1976); JUDICIAL CONFERENCE REPORT, *supra* note 15, at 1485, comment (c).

25. See N.Y. CIV. PRAC. L. & R. 1412 (McKinney 1976).

26. 28 N.Y.2d 300, 270 N.E.2d 313, 321 N.Y.S.2d 588 (1971).

27. *Id.* at 303-08, 270 N.E.2d at 314-17, 321 N.Y.S.2d at 591-95.

28. 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

29. *Id.* at 344-45, 298 N.E.2d at 630, 345 N.Y.S.2d at 471-72.

30. *Id.* at 345-46, 298 N.E.2d at 630-31, 345 N.Y.S.2d at 472-73 (Jasen, J., concurring).

31. *Id.* at 346, 298 N.E.2d at 631, 345 N.Y.S.2d at 473.

32. See *Franco v. Zingarelli*, 72 A.D.2d 211, 219, 424 N.Y.S.2d 185, 190 (1st Dep't 1980).

33. 223 N.Y. 14, 119 N.E. 92 (1918).

knew the danger."<sup>34</sup> Accordingly, the lower court decision dismissing the complaint was reversed and the plaintiff was permitted to present his case to a jury.<sup>35</sup>

It is clear from these cases that the courts have recognized the inequities of a situation where the "culpable conduct" of the claimant negated all liability of an also "culpable" defendant. Section 1411 of the CPLR seeks to ameliorate the harshness of such a situation by apportioning fault between the "culpable" parties.<sup>36</sup> It is ironic that sometimes the New York courts ignore the statute and treat assumption of risk as a total bar,<sup>37</sup> resulting in the same harshness from which they sought relief.

## II. THE NEW YORK CLASSES OF ASSUMPTION OF RISK

Assumption of risk as a defense to a negligence action appears to have crystallized in England in the early nineteenth century.<sup>38</sup> In New York, it was developed by the mid-nineteenth century and was commonly referred to as *volenti non fit injuria*.<sup>39</sup> This relatively late flowering of the defense in the

34. *Id.* at 21, 119 N.E. at 93.

35. *Id.*

36. *Knieriemen v. Bache Halsey Stuart Shields Inc.*, 74 A.D.2d 290, 295, 427 N.Y.S.2d 10, 14 (1st Dep't 1980).

37. *See, e.g., Benitez v. New York City Bd. of Educ.*, 73 N.Y.2d 650, 541 N.E.2d 29, 543 N.Y.S.2d 29 (1989) (high school student paralyzed in football game denied all recovery because he assumed the risk of playing in mismatched game); *Herman v. State*, 63 N.Y.2d 822, 472 N.E.2d 24, 482 N.Y.S.2d 248 (1984) (claimant injured when he dove into dangerous sand bar on state property denied all recovery because he assumed the risk and state owed him no duty); *Sutfin v. Scheuer*, 145 A.D.2d 946, 536 N.Y.S.2d 320 (4th Dep't 1988) (fifteen-year old bystander denied all recovery for injury sustained from overthrown baseball because he assumed the risk).

38. *See Hott v. Wilkes*, 106 Eng. Rep. 674 (K.B. 1820).

39. *See Ernst v. Hudson River R.R.*, 35 N.Y. 9, 36-37 (1866). For a translation of the latin phrase, see *supra* note 3 and accompanying text. In New York, several versions of the translation exist but are essentially variations of the main theme. Judge Cardozo's version states: "One who takes part . . . accepts the dangers that inhere in it so far as they are obvious and necessary. . . ." *Murphy v. Steeple Chase Amusement Co.*, 250 N.Y. 479, 482, 166 N.E. 173, 174 (1929). In other words, "one cannot be heard to complain of an act in which he has participated." *Johnson v. City of New York*, 186 N.Y. 139, 148, 78 N.E. 715, 718 (1906).



common law corresponds to the similarly late flowering of the distinct American action of negligence, which did not raise its head until the mid-nineteenth century.<sup>40</sup> The explosion of both these legal devices during the early nineteenth century is attributable, in part, to their ability to limit a defendant's liability.<sup>41</sup> Limiting liability during this era permitted thriving, immature industries to prosper without the thwarting effect of overwhelming tort claims.<sup>42</sup>

Assumption of risk arises when a plaintiff knows of the risk,<sup>43</sup> appreciates its nature,<sup>44</sup> and voluntarily chooses to incur that risk.<sup>45</sup> It is interesting to note that at its early stages, assumption of risk was considered a type of contributory negli-

40. See Donnelly, *The Fault Principle: A Sketch of its Development in Tort Law During the Nineteenth Century*, 18 SYRACUSE L. REV. 728, 728-29 (1967); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 365-66 (1951).

The landmark case of *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850), is widely cited as initiating the American action of negligence. The New York counterpart of *Brown v. Kendall* appears to be *Harvey v. Dunlop*, 1 Hill & Den. 193 (1843).

41. With regard to assumption of risk, see *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 58-59 (1943); Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 44 (1972). With regard to negligence actions, see L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 409-11 (1973) [hereinafter FRIEDMAN].

42. See *Tiller*, 318 U.S. at 58-59; Gregory, *supra* note 40, at 368; FRIEDMAN, *supra* note 41, at 409-12.

43. See *Pisciotta v. Parisi*, 155 A.D.2d 422, 547 N.Y.S.2d 352 (2d Dep't 1989). The plaintiff in this case sustained injuries as a result of being bitten by the defendant's dog. *Id.* at 422, 547 N.Y.S.2d at 353. The dog was chained to a fence when the plaintiff approached it and attempted to pet it. *Id.* The plaintiff did not assume the risk because she was not "aware of the dog's alleged vicious propensities." *Id.*

44. *McCabe v. Easter*, 128 A.D.2d 257, 259, 516 N.Y.S.2d 515, 517 (3d Dep't 1987). In this case, the plaintiff was injured when he fell on a patch of ice located on the defendant's property. *Id.* at 258, 516 N.Y.S.2d at 516. The defense of assumption of risk was asserted, and the court held that the plaintiff could not have fully appreciated the risk because the ice was covered by a light dusting of snow. *Id.* at 259, N.Y.S.2d at 517. Therefore, the plaintiff did not assume the risk. *Id.*

45. *Yarborough v. City Univ.*, 137 Misc. 2d 282, 286, 520 N.Y.S.2d 518, 521 (N.Y. Ct. Cl. 1987). The plaintiff was injured in a sack race conducted by her instructor during a college class. *Id.* at 284, 520 N.Y.S.2d at 520. Evidence revealed that the plaintiff reasonably believed that her failure to participate in the sack race would detrimentally affect her grade. *Id.* With this in mind, the court concluded that the plaintiff did not assume the risk because she did not voluntarily participate in the injury causing event. *Id.* at 287-88, 520 N.Y.S.2d at 522.

gence.<sup>46</sup> In New York, assumption of risk sometimes was employed to refer to a defendant's lack of duty with respect to a particular plaintiff.<sup>47</sup> In other situations, assumption of risk suggested that the defendant did not breach his duty to the plaintiff and thus was not negligent.<sup>48</sup> In still other situations, assumption of risk was synonymous and merged imperceptibly with contributory negligence.<sup>49</sup>

However, the characterization of the assumption of risk was insignificant, since the result in all cases was to bar the plaintiff's claim.<sup>50</sup> But with the enactment of CPLR 1411, it became paramount to identify which categories of assumption of risk were subject to the apportioning scheme of the statute. Thus, the judiciary undertook the task of defining the term assumption of risk as that term exists in the context of CPLR 1411.

#### A. *Express-Implied Assumption of Risk*

Assumption of risk is a chameleon term which has different meanings in different situations.<sup>51</sup> As the doctrine evolved, courts and commentators recognized its polymorphic nature and sought to classify its diverse forms. The New York Court of Appeals, in *Arbegast v. Board of Education*,<sup>52</sup> articulated the classes of assumption of risk and the effect of each type on a plaintiff's claim.<sup>53</sup> In that case, the plaintiff, a high school student-teacher, was injured during a donkey basketball game.<sup>54</sup> She sued the company that provided the donkeys, al-

---

46. See *Ernst v. Hudson River R.R.*, 35 N.Y. 9, 36-37 (1866). Judge Cardozo, in comparing the doctrines, said, "[v]ery often, the difference is chiefly one of terminology." *McFarlane v. City of Niagra Falls*, 247 N.Y. 340, 349, 160 N.E. 391, 394 (1928).

47. *Arbegast v. Board of Educ.*, 65 N.Y.2d 161, 166, 480 N.E.2d 365, 369, 490 N.Y.S.2d 751, 755 (1985).

48. *Id.*

49. *Id.*; see *McFarlane v. City of Niagra Falls*, 247 N.Y. 340, 349, 160 N.E. 391, 394 (1928).

50. See PROSSER & KEETON, *supra* note 6, at 481.

51. See *supra* note 6 and accompanying text.

52. 65 N.Y.2d 161, 480 N.E.2d 365, 490 N.Y.S.2d 751 (1985).

53. *Id.* at 169, 480 N.E.2d at 371, 490 N.Y.S.2d at 757.

54. *Id.* at 162, 480 N.E.2d at 366, 490 N.Y.S.2d at 752-53.

leging insufficient warning and failure to provide adequate supervision and adequate safety equipment.<sup>55</sup> A key fact of the case is that the plaintiff was told before the game of the dangers involved and that the players participated at their own risk.<sup>56</sup>

The court held that such a statement constituted an "express" assumption of risk.<sup>57</sup> This class of assumption of risk is not subject to CPLR 1411 and thus can completely bar a plaintiff's claim.<sup>58</sup> "Express" assumption of risk was defined as an advance agreement that the defendant need not use reasonable care and would not be liable if his lack of reasonable care resulted in damage to the plaintiff.<sup>59</sup> As such, it resembles a contract, and the usual policy considerations of individual autonomy and economic conceptions of bargaining for benefits justify honoring the contract. However, the *Arbegast* court indicated that these types of exculpatory agreements are not effective if they are interdicted by statute or violate public policy.<sup>60</sup> In addition, an effective exculpatory contract must name specifically the party to be released and describe the nature of the risk assumed.<sup>61</sup>

In defining "express" assumption of risk, the court, in *Arbegast*, distinguished and defined "implied" assumption of risk.<sup>62</sup> A plaintiff impliedly assumes the risk when he fully appreciates the possible harm to himself from the defendant's conduct

55. *Id.* at 163, 480 N.E.2d at 367, 490 N.Y.S.2d at 753.

56. *Id.* at 162-63, 480 N.E.2d at 367, 490 N.Y.S.2d at 753.

57. *Id.* at 171, 480 N.E.2d at 372, 490 N.Y.S.2d at 758.

58. *Id.* at 162, 480 N.E.2d at 371, 490 N.Y.S.2d at 752.

59. *Id.* at 169, 480 N.E.2d at 371, 490 N.Y.S.2d at 757.

60. *Id.* at 169-70, 480 N.E.2d at 371, 490 N.Y.S.2d at 757. An example of an agreement that was found to be proscribed by statute and violative of public policy appears in *Meir v. Ma-Do Bars, Inc.*, 106 A.D.2d 143, 484 N.Y.S.2d 719 (3d Dep't 1985). Plaintiff was injured while riding on a "mechanical bull" in defendant's tavern. *Meir*, 106 A.D.2d at 143, 484 N.Y.S.2d at 719. Defendant sought to escape liability by relying on an exculpatory agreement signed by the plaintiff. *Id.* at 144, 484 N.Y.S.2d at 720. The court held that the agreement was null and void under section 5-326 of the General Obligations Law. *Id.* at 145, 484 N.Y.S.2d at 720-21. See N.Y. GEN. OBLIG. LAW §§ 5-321, 5-322, 5-322.1, 5-322.2, 5-323, 5-326 (McKinney 1989) (listing types of exculpatory agreements which are prohibited).

61. See *Long v. State*, 158 A.D.2d 778, 780-81, 551 N.Y.S.2d 369, 371-72 (3d Dep't 1990).

62. *Arbegast*, 65 N.Y.2d at 169, 480 N.E.2d at 371, 490 N.Y.S.2d at 757.

and voluntarily chooses to incur it.<sup>63</sup> Stated simply, the plaintiff tacitly consents to the risk. The court indicated that if the plaintiff in *Arbegast* had not expressly agreed to assume the risk, a jury charge on implied assumption of risk would have been proper.<sup>64</sup> Thus, the facts of *Arbegast*, without the plaintiff's pre-activity waiver, represent an implied assumption of risk and fall within CPLR 1411 with the appropriate apportionment of fault.

### B. "Primary Implied" Assumption of Risk

Unfortunately, the *Arbegast* "express-implied" classification scheme would not remain that simple. The court of appeals, a year after *Arbegast*, decided *Turcotte v. Fell*.<sup>65</sup> The plaintiff, a professional jockey, was injured in a horse race and brought a negligence action against another jockey and the owner-operator of the race track.<sup>66</sup> The plaintiff alleged that he suffered severe physical injuries caused by the negligent horsemanship of the defendant jockey and the improper and careless manner in which the owner-operator groomed the race track.<sup>67</sup> The high court granted the defendants' motion for summary judgment; no apportionment of fault or damages was made.<sup>68</sup>

The court, in *Turcotte*, found that the plaintiff "impliedly" assumed the risk.<sup>69</sup> However, this type of assumption of risk is distinct from the type enunciated in *Arbegast*. The court labeled it "primary" assumption of risk,<sup>70</sup> borrowing the term from Prosser and Keeton.<sup>71</sup> The hallmark of this class is that

63. *Id.*

64. *Id.* at 162, 480 N.E.2d at 366, 490 N.Y.S.2d at 752.

65. 68 N.Y.2d 432, 502 N.E.2d 964, 510 N.Y.S.2d 49 (1986).

66. *Id.* at 435-36, 502 N.E.2d at 966, 510 N.Y.S.2d at 51.

67. *Id.* at 436, 502 N.E.2d at 966, 510 N.Y.S.2d at 51.

68. *Id.* at 445, 502 N.E.2d at 972, 510 N.Y.S.2d at 57.

69. *Id.* at 438-41, 502 N.E.2d at 967-69, 510 N.Y.S.2d at 52-54.

70. *Id.* at 438, 502 N.E.2d at 968, 510 N.Y.S.2d at 53.

71. *See id.* The Prosser and Keeton treatise relied on by the court describes assumption of risk from three separate perspectives: (1) Express consent; (2) Duty; and (3) Misconduct Defense. PROSSER & KEETON, *supra* note 6, at 480-81. The type enunciated in *Turcotte* is the duty perspective, and the Prosser and Keeton treatise identifies this form of the doctrine as "primary" assumption of risk. *Id.* at 481 n.10.

the risks assumed by the plaintiff are inherent in the activity, rather than being created by the defendants' negligence.<sup>72</sup> "Primary" assumption of risk occurs when the plaintiff voluntarily enters into a relationship or activity in which he tacitly agrees that the defendant need not protect him against risks indigenous to the activity or relationship.<sup>73</sup> The court then reasoned, and this was in no sense an original idea, that "primary" assumption of risk connotes an absence of duty on the part of the defendant.<sup>74</sup>

The court, in *Turcotte*, must have known instinctively that in the type of situation presented, a plaintiff's claim should be barred. But faced with an assumption of risk defense, the court was in a quandary about how to avoid allowing the jury to apportion "culpability" pursuant to CPLR 1411. In fact, the court acknowledged that prior to CPLR 1411, this plaintiff's claim would have been analyzed under the absolute defense of assumption of risk.<sup>75</sup> The court solved the predicament by defining the duty owed by the defendant in terms of the risks assumed by the plaintiff.<sup>76</sup>

Under this formula, the risks assumed by the plaintiff are deducted from the defendant's duty owed to that plaintiff.<sup>77</sup> Once that step is taken, the rest becomes obvious and logical: if the defendant owes no duty to the plaintiff with respect to a certain risk, there can be no breach of that duty and hence no negligence.<sup>78</sup> If the defendant is not negligent, there is no need to consider the apportioning scheme of CPLR 1411. The court

72. *Turcotte v. Fell*, 68 N.Y.2d 432, 439, 502 N.E.2d 964, 968, 510 N.Y.S.2d 49, 53 (1986).

73. *Id.*

74. *Id.* at 438, 502 N.E.2d at 967-68, 510 N.Y.S.2d at 52-53. As early as 1895, Charles Warren expressed the view that assumption of risk connotes an absence of defendant's duty: "[T]owards a person fully cognizant and appreciative of the danger and risk to which the defendant's conduct exposes him, the defendant has no duty of taking care, and therefore is not negligent." Warren, *supra* note 3, at 459.

75. *Turcotte*, 68 N.Y.2d at 437-38, 502 N.E.2d at 967, 510 N.Y.S.2d at 52 ("Traditionally, the participant's conduct was conveniently analyzed in terms of the defensive doctrine of assumption of risk.").

76. *Id.* at 438-39, 502 N.E.2d at 967-68, 510 N.Y.S.2d at 52-53.

77. *Id.* This concept can be expressed in a simple mathematical equation: Defendant's usual duty - Plaintiff's assumed risks = Defendant's adjusted duty

78. *Id.* at 438, 502 N.E.2d at 968, 510 N.Y.S.2d at 53.

indicated that this analysis applies in the context of a professional sporting event where the plaintiff is a participant and the defendant is a co-participant or the proprietor of the facility.<sup>79</sup> This is appropriate because “primary” assumption of risk occurs often in sporting events. The participants voluntarily enter into a known risky activity impliedly agreeing that they will not be responsible for injuries resulting from that activity.

There is no dispute that the court’s treatment of “primary” assumption of risk in *Turcotte* is technically correct. Commentators have argued consistently that “primary” assumption of risk is nothing more than a confusing way to establish a lack of duty.<sup>80</sup> But, in light of the plain language of CPLR 1411, and its legislative intent not to circumvent the statute by a no-duty analysis,<sup>81</sup> the question arises whether the *Turcotte* analysis is faulty. Under the facts of *Turcotte*, the no-duty analysis leads to the correct result. The path used to arrive at that result, however, creates much confusion and has led to a disregard of the directive of CPLR 1411. The no-duty approach should be articulated in an alternative fashion which is clearer and is consistent with the mandate of the statute. The court should characterize the defendant’s behavior, if appropriate, as not negligent.

In “primary” assumption of risk, the plaintiff encounters a risk inherent in the activity. For example, the plaintiff in *Turcotte* was injured when a co-participant’s horse crossed into his lane and caused the plaintiff to fall.<sup>82</sup> This is a risk incidental to horse racing. The defendant did owe a duty and exercised reasonable care under the circumstances—the circumstances being a horse race. The plaintiff’s injury, therefore, resulted not from the negligence of the defendant, but from a risk incidental to the activity. From this perspective, it is accurate to conclude that the defendant was not negligent. To say there is no duty confuses and obscures the issues, resulting in

---

79. *Id.* at 438, 502 N.E.2d at 968, 510 N.Y.S.2d at 52.

80. See HARPER & JAMES, *supra* note 5, at 188-89; PROSSER & KEETON, *supra* note 6, at 481; Warren, *supra* note 3, at 459.

81. See JUDICIAL CONFERENCE REPORT, *supra* note 15, at 1485, comment (c); MEMORANDA OF THE JUDICIAL CONFERENCE, *supra* note 21, at 23-25.

82. *Turcotte*, 68 N.Y.2d at 440-41, 502 N.E.2d at 969, 510 N.Y.S.2d at 54.

misapplication of CPLR 1411. Indeed, the court in *Turcotte* found that the New York Racing Association owed a duty to exercise reasonable care under the circumstances.<sup>83</sup> It concluded that the defendant owed no duty only after subtracting the risks assumed by the plaintiff from the defendant's original duty.<sup>84</sup>

### C. "Secondary Implied" Assumption of Risk

The New York courts appear also to have considered a "secondary implied" class of assumption of risk. The *Turcotte* court intimated that "primary" assumption of risk was a subspecies of the general implied class.<sup>85</sup> It is peculiar, however, that the courts, although recognizing and applying a "secondary implied" class, have not clearly articulated or labeled it as such.<sup>86</sup> This may be because it is considered to fall under the heading of "implied" assumption of risk proper. This Comment employs the term "secondary implied" to denote this class of assumption of risk.<sup>87</sup>

83. *Id.* at 442, 502 N.E.2d at 970, 510 N.Y.S.2d at 55.

84. *Id.* at 442-43, 502 N.E.2d at 970-71, 510 N.Y.S.2d at 55-56.

85. *Id.* at 438-39, 502 N.E.2d at 968, 510 N.Y.S.2d at 53.

86. Research for this Comment did not reveal a single New York case using this term. It is interesting to note that the New York Pattern Jury Instructions contain only two charges on assumption of risk: One for express and one for implied. *See* NEW YORK PATTERN JURY INSTRUCTIONS — CIVIL §§ 2.55-2.55A (Comm. on Pattern Jury Instructions, Supp. 1989). Nevertheless, "secondary implied" assumption of risk is applied in many cases. *See, e.g.,* Ciserano v. Sforza, 130 A.D.2d 618, 515 N.Y.S.2d 548 (2d Dep't 1987) (plaintiff's conduct of driving with drunken driver was assumption of risk and considered "culpable conduct" with only diminution of damages pursuant to CPLR 1411); Meyer v. State, 92 Misc. 2d 996, 403 N.Y.S.2d 420 (N.Y. Ct. Cl. 1978) (plaintiff's claim for injuries sustained by falling from negligently maintained bridge was subject to assumption of risk defense and reduced accordingly pursuant to CPLR 1411).

For a non New York case employing the term "secondary implied," see *Duffy v. Midlothian Country Club*, 135 Ill. App. 3d 429, 481 N.E.2d 1037 (Ill. App. Ct. 1985).

87. Harper and James use the term "assumption of risk in a secondary sense" for this class. HARPER & JAMES, *supra* note 5, at 189. Prosser and Keeton call it implied assumption of risk from a misconduct defense perspective. *See* PROSSER & KEETON, *supra* note 6, at 481, 484-86. Both of these labels are synonymous with "secondary implied" as utilized in this Comment.

*Messick v. State*<sup>88</sup> illustrates the principles involved in “secondary implied” assumption of risk. In that case, the plaintiff was injured while jumping into a water hole located on state property.<sup>89</sup> He used a rope attached to a branch to swing out over a rocky bank and into the water hole.<sup>90</sup> On the jump in question, the plaintiff slipped before grasping the rope, causing him to tumble into the rocky bank below.<sup>91</sup> He suffered a severe spinal cord injury and laceration to the head as a result of the fall.<sup>92</sup> The plaintiff sued the state alleging that it was negligent because it knew a dangerous condition existed on its land and failed to adequately warn of and correct the danger.<sup>93</sup> The court found that the state was negligent for those very reasons, but found that the plaintiff impliedly assumed the risk.<sup>94</sup> Accordingly, they apportioned fault at fifty percent on the part of the plaintiff and fifty percent on the part of the state, pursuant to CPLR 1411.<sup>95</sup>

The plaintiff’s assumption of risk in *Messick* is representative of the “secondary implied” class.<sup>96</sup> He, unlike the plaintiff in *Turcotte*, was not injured from a risk inherent in the activity or relationship into which the defendant and the plaintiff voluntarily entered. The injury, instead, was a result of the plaintiff encountering a risk negligently created by the defendant. The state, by acquiescing in the dangerous condition on its land, and in failing to take proper remedial measures, created a risk from its negligence. The plaintiff, with awareness and appreciation of the risk involved, voluntarily encountered it by swinging from the rope and into the water hole.

---

88. 118 A.D.2d 214, 504 N.Y.S.2d 279 (3d Dep’t), *appeal denied*, 68 N.Y.2d 611, 502 N.E.2d 1007, 510 N.Y.S.2d 1025 (1986).

89. *Id.* at 215-16, 504 N.Y.S.2d at 280.

90. *Id.*

91. *Id.* at 216, 504 N.Y.S.2d at 280.

92. *Id.* at 216, 504 N.Y.S.2d at 280-81.

93. *Id.* at 216, 504 N.Y.S.2d at 281.

94. *Id.* at 217-19, 504 N.Y.S.2d at 281-82.

95. *Id.* at 219-20, 504 N.Y.S.2d at 283.

96. *Id.* at 219, 504 N.Y.S.2d at 283. Judge Mahoney, writing for the court, made it crystal clear that this class of assumption of risk “does not act to bar the claim, but is a factor to be taken into account in ascertaining the proportionate culpable conduct.” *Id.*



The quintessential example of “secondary implied” assumption of risk is a “slip and fall” case. In *Capelli v. Prudential Building Maintenance*,<sup>97</sup> the plaintiff observed that the defendant’s floor was wet, was apprehensive about falling, but chose to cross it.<sup>98</sup> On these facts, the court held that a jury charge of assumption of risk would be proper.<sup>99</sup> The defendant negligently created the risk, the wet floor, and the plaintiff, with knowledge and appreciation of the danger, voluntarily encountered that risk. This constitutes “secondary implied” assumption of risk and was subject to the apportionment of fault scheme in CPLR 1411.<sup>100</sup>

There is considerable overlap between secondary implied assumption of risk and comparative negligence.<sup>101</sup> If a plaintiff *unreasonably* encounters an apparent risk, then he is not exercising due care for his own safety and clearly is comparatively negligent.<sup>102</sup> If, however, a plaintiff *reasonably* encounters the risk, he is not comparatively negligent but still may be found to have assumed the risk.<sup>103</sup> Therefore, secondary assumption of risk has an existence apart from comparative negligence.<sup>104</sup> Cognizance of this concept is imperative for a proper application of CPLR 1411.

97. 99 A.D.2d 501, 471 N.Y.S.2d 7 (2d Dep’t 1984).

98. *Id.*

99. *Id.* at 501, 471 N.Y.S.2d at 8.

100. *Id.* In summary, a paradigm of assumption of risk in New York seems to be as follows:

I. Express

II. Implied

A. Primary

B. Secondary

101. *Meyer v. State*, 92 Misc. 2d 996, 1002, 403 N.Y.S.2d 420, 425 (N.Y. Ct. Cl. 1978).

102. PROSSER & KEETON, *supra* note 6, at 481; *see Meyer*, 92 Misc. 2d at 1002, 403 N.Y.S.2d at 425-26.

103. PROSSER & KEETON, *supra* note 6, at 481-82.

104. *Id.* at 482.

### III. MISCLASSIFICATION OF ASSUMPTION OF RISK

The preceding discussion demonstrates that the applicability of CPLR 1411 and apportionment of fault turns on how the court classifies the plaintiff's assumption of risk. Only the "secondary implied" class is subject to the mandate of the statute. Unfortunately, courts can easily misclassify the defense because of the difficulty in distinguishing between the categories and the absence of judicially drawn bright lines. Such a misclassification circumvents CPLR 1411 and can bar a deserving plaintiff's claim, as illustrated in the following discussion.

The plaintiff in *Benitez v. New York City Board of Education*<sup>105</sup> suffered a broken neck during a high school football game.<sup>106</sup> He sued the New York City Board of Education and its Public Athletic League.<sup>107</sup> The plaintiff alleged that the defendants were negligent in permitting plaintiff's school to play the opposing team in light of an obvious mismatch between the teams.<sup>108</sup> The facts revealed that the plaintiff's school, originally a Division "B" team, was transferred to the more competitive Division "A" by the defendant prior to the game in which the injury occurred.<sup>109</sup> The football coach and the assistant principal of plaintiff's school recommended to the principal that the game in question not be played.<sup>110</sup> They argued that the game was a mismatch and involved a high risk of injury.<sup>111</sup> Nevertheless, the game was played and the plaintiff was injured severely.

105. 73 N.Y.2d 650, 541 N.E.2d 29, 543 N.Y.S.2d 29 (1989).

106. *Id.* at 654, 541 N.E.2d at 31, 543 N.Y.S.2d at 31.

107. *Id.* at 655, 541 N.E.2d at 31, 543 N.Y.S.2d at 31. The action was also initiated against the City of New York but was dismissed prior to trial. *Id.*

108. *Id.* Benitez also alleged that the defendants were negligent in placing and retaining his school in Division "A" and in permitting him to play the game without adequate rest. *Id.*

The former averment was dismissed upon motion for judgment notwithstanding the verdict. *Id.*

109. *Id.* at 654, 541 N.E.2d at 31, 543 N.Y.S.2d at 31.

110. *Id.* at 654-55, 541 N.E.2d at 31, 543 N.Y.S.2d at 31.

111. *Id.* Officials at plaintiff's school first argued through administrative appeals. *Id.* They again sought transfer back to Division "B" before the start of the football season. *Id.* Prior to the game in question, they once again requested relief, but were

The jury returned a verdict for the plaintiff and apportioned fault, pursuant to CPLR 1411, thirty percent against the plaintiff and seventy percent against the defendants.<sup>112</sup> The appellate division affirmed the judgment.<sup>113</sup> The New York Court of Appeals held that the plaintiff “failed to meet the burden of showing some negligent act or inaction, referenced to the applicable duty of care owed to him by these defendants,”<sup>114</sup> reversed the lower court and dismissed the complaint.<sup>115</sup> The “applicable duty of care” was determined by using the *Turcotte* formula of subtracting from the defendants’ duty all risks assumed by the plaintiff.<sup>116</sup> The plaintiff, the court reasoned, assumed the risks of injury inherent in the game of football;<sup>117</sup> hence, the defendants owed no duty to the plaintiff with respect to these risks. If there is no duty owed, there is no cause of action and CPLR 1411 is rendered inapplicable.

The high court treated the assumption of risk in *Benitez* as the “primary implied” class announced in *Turcotte*.<sup>118</sup> The plaintiff and defendants entered into an activity where the plaintiff agreed that the defendants would not be liable to him for injuries received during the normal course of the game. Upon closer examination, the flaw in this analysis becomes apparent. Plaintiff’s assumption of risk in *Benitez* is of the “secondary implied” type and should have been subject to only a diminution of damages under CPLR 1411. As the trial and appellate court found, the defendants were negligent in allowing the game in issue to be played in light of the obvious

---

told that if the football program was dropped, the school would be barred from all interscholastic competition. *Id.*

112. *Id.* at 655, 541 N.E.2d at 31, 543 N.Y.S.2d at 31.

113. *Id.*

114. *Id.* at 659, 541 N.E.2d at 34, 543 N.Y.S.2d at 34.

115. *Id.* at 660, 541 N.E.2d at 34, 543 N.Y.S.2d at 34.

116. This is evidenced by the sentence preceding the “applicable duty of care” language, where the court stated, “[w]ithin the breadth and scope of his consent and participation, plaintiff put himself at risk in the circumstances of this case for the injuries he ultimately suffered.” *Id.* at 659, 541 N.E.2d at 34, 543 N.Y.S.2d at 34.

117. *Id.*

118. *See id.* at 657, 541 N.E.2d at 32, 543 N.Y.S.2d at 32.

mismatch.<sup>119</sup> Thus, the defendants created a negligent risk, that of allowing a mismatched, unreasonably dangerous game to be played. The plaintiff then encountered the risk by voluntarily participating in the game with knowledge of the risk of injury. His assumption of risk falls within the “secondary implied” class because he approached an already existing negligent risk caused by the defendants.

A distinguishing characteristic of the “secondary implied” class is that it consists of two events separated in time. First, the defendant’s negligent conduct creates a risk; and second, the plaintiff approaches and assumes the risk.<sup>120</sup> In contrast, the “primary implied” class of assumption of risk occurs in one event: the relationship in which the plaintiff and defendant have entered.<sup>121</sup> For instance, the risk of a jockey being injured from an improperly groomed racetrack *is inherent* in the relationship that arises between that jockey and the caretaker of the track. Whereas the risk of playing in a dangerously mismatched football game *is not inherent* in a relationship that arises between a student and his coaches and administrators, which was the relationship in the *Benitez* case.<sup>122</sup>

An analysis of the decisions applying “primary” assumption of risk reveals that the courts have expanded the amount of individuals and types of risks included in the initial risky activity or relationship. Thus, a spectator at a sporting event assumes the risk of that event, even though the spectator is not participating in the risky activity.<sup>123</sup> Extending the relationship further, a mere bystander to an athletic activity assumes the

---

119. *Id.* at 655-66, 541 N.E.2d at 31-32, 543 N.Y.S.2d at 31-32. In addition, on another cause of action, the courts held that the defendants were negligent for playing *Benitez* under fatigued conditions, which substantially increased the likelihood of injury. *Id.*

120. See HARPER & JAMES, *supra* note 5, at 189; PROSSER & KEETON, *supra* note 6, at 481.

121. See HARPER & JAMES, *supra* note 5, at 199-200; PROSSER & KEETON, *supra* note 6, at 481.

122. See *Turcotte v. Fell*, 68 N.Y.2d 432, 502 N.E.2d 964, 510 N.Y.S.2d 49 (1986). The case addressed the inherent risks associated with horse racing and the relationship between the jockeys and the owner of the track. See also *supra* notes 69-72 and accompanying text.

123. *Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325, 329, 424 N.E.2d 531, 532, 441 N.Y.S.2d 644, 645-46 (1981).

risk of that activity, even though the bystander is not a participant nor a spectator.<sup>124</sup> By extending the amount of individuals and types of risks included in sporting events, any assumption of risk appears as the "primary implied" type subject to a no-duty analysis. Consequently, the plaintiff's claim may be completely barred.

Perhaps the policy rationale for limiting liability is that "the law should not place unreasonable burdens on the free and vigorous participation in sports."<sup>125</sup> However, expansively classifying assumption of risk as "primary implied" blurs the distinction with the "secondary implied" category. This, in turn, can result in the imprecise use of the no-duty analysis to completely bar a claim, instead of only diminishing the plaintiff's award pursuant to CPLR 1411.

When the jury determines that the plaintiff's assumption of risk amounted to only thirty percent of the total "culpable conduct" that caused the injury, as in *Benitez*, then the plaintiff's award should only be diminished by thirty percent. This is the mandate and intent of CPLR 1411.<sup>126</sup> The New York Court of Appeals subsequently should not misclassify the assumption of risk as "primary implied" and use the no-duty analysis to bar the plaintiff's claim as a matter of law.<sup>127</sup> Such an approach, as evidenced by the plain language and legislative intent of the statute, was explicitly proscribed by its creators. By using a no-

124. See *Sutfin v. Scheuer*, 145 A.D.2d 946, 948, 536 N.Y.S.2d 320, 321 (4th Dep't 1988).

125. *Turcotte v. Fell*, 68 N.Y.2d 432, 439, 502 N.E.2d 964, 968, 510 N.Y.S.2d 49, 53 (1986).

126. See *supra* notes 9, 16-23 and accompanying text.

127. See *Akins*, 53 N.Y.2d at 337, 424 N.E.2d at 531, 441 N.Y.S.2d at 650 (Cooke, J., dissenting). In this poignant dissent, Judge Cooke noted the purpose and intent of CPLR 1411 and stated that the no-duty analysis used by the majority "denies recovery . . . as effectively as the old doctrines of assumption of risk and contributory negligence." *Id.* Another candid judicial statement was made in *Yarborough v. City Univ.*, 137 Misc. 2d 282, 520 N.Y.S.2d 518 (N.Y. Ct. Cl. 1987). Judge Weisberg took the position that the court of appeals, after *Turcotte*, treats assumption of risk, in effect, as a complete defense. *Id.* at 287, 520 N.Y.S.2d at 522. See also Stewart, *Akins v. Glens Falls City School District: A Crack in the Wall of Comparative Negligence*, 46 ALB. L. REV. 1533, 1545-46 (1982) (maintaining that the court of appeals rule of limited duty is based on concept of assumption of risk as a total bar).

duty analysis in this fashion, the courts have effectively returned assumption of risk to its pre-CPLR 1411 past, where the defense completely, and many times unjustly, barred a plaintiff's claim.

#### CONCLUSION

The New York legislature enacted CPLR 1411 to ameliorate the harshness of the defense of assumption of risk. The legislative history of the statute evinces that the courts should not circumvent the statute by employing a no-duty analysis. Such an analysis bars a plaintiff's claim as a matter of law and removes it from the apportionment of fault mandate of CPLR 1411.

The New York courts, in construing the statute, have decided that certain classes of assumption of risk are subject to CPLR 1411 while others are not. The "primary implied" class is not subject to the statute. In this situation, where there actually is no negligence at all, the courts employ a no-duty analysis to avoid the statute. The "secondary implied" class of assumption of risk is subject to the apportionment of fault under CPLR 1411.

Because the classification scheme employed by the courts is not developed fully, or articulated clearly, assumption of risk is sometimes misclassified. This misclassification leads to a disregard of CPLR 1411, resulting in a complete bar of the plaintiff's claim instead of a diminution of damages. The courts could avoid misclassification by recognizing, articulating, and distinguishing the "primary" and "secondary" implied classes of assumption of risk. They have already done this with the general "express" and "implied" classes.

The courts also should abandon the no-duty analysis. This analysis is used in the "primary implied" situation, and in this situation it is correct to say there was no negligence. Moreover, if the no-duty analysis is abandoned, it cannot be used incorrectly in the "secondary implied" situation. The assumption of risk then could be properly classified so as not to circumvent CPLR 1411 and unjustly bar a plaintiff's claim.

*Thomas P. Lalor*

