

Assumption of Risk Merged with Contributory Negligence: *Anderson v. Ceccardi*

I. INTRODUCTION

The Ohio legislature in 1980 adopted a system of comparative negligence¹ under which the contributory negligence of a plaintiff no longer acts as a complete bar to recovery of tort damages, provided that the plaintiff's negligence does not exceed the combined negligence of all of the defendants.² Not unlike comparative negligence statutes adopted by other states,³ the Ohio act failed to address the impact of comparative negligence on doctrines peripheral⁴ to the common law doctrine of contributory negligence. One of these peripheral doctrines, assumption of risk, traditionally acted as a complete bar to plaintiff's recovery if the plaintiff voluntarily incurred a known or appreciated risk of harm created by the defendant's conduct. Assumption of risk requires three elements: one must have full knowledge of a condition; the condition must be dangerous—a risk of harm; and the plaintiff must be voluntarily exposed to the hazard created.⁵

Numerous courts⁶ and legal scholars⁷ have addressed the issue whether assump-

1. OHIO REV. CODE ANN. § 2315.19 (Page 1981).

2. Ohio's comparative negligence statute is of the so-called modified form. The plaintiff can recover the percent of damages caused by the defendants only if the plaintiff's fault, as determined by the trier of fact, is "no greater than the combined negligence of all other persons from whom recovery is sought." *Id.* § 2315.19(A)(1). The pure form of comparative negligence allows a plaintiff to recover damages for injuries to the extent the defendant's negligence caused those injuries, even though the plaintiff's negligence exceeds the defendant's. Thus, when a plaintiff is responsible for 90% of his injuries, he may seek the remaining 10% from a negligent defendant. *See, e.g.,* *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). A variant of the modified form of comparative negligence allows a plaintiff to recover an amount diminished in proportion to his or her own negligence, provided that the plaintiff's negligence is not equal to or greater than the negligence of the defendant. A plaintiff subject to this type of comparative negligence can be at most 49% negligent without being barred completely. *See, e.g.,* ME. REV. STAT. ANN. tit. 14, § 156 (1980). Some have criticized the 49% form of comparative negligence because juries often apportion fault evenly between parties, and in such a situation, a 50% negligent plaintiff would recover nothing. However, under the same statute, a plaintiff determined by the trier of fact to be 49% negligent would be able to recover damages for the 51% negligence of the defendant. Prosser, *Comparative Negligence*, 41 CALIF. L. REV. 1, 25 (1953).

3. *See* Annot., 78 A.L.R.3d 339, 354-62 (1977).

4. Doctrines peripheral to contributory negligence include assumption of risk, last clear chance, and strict liability. *See generally* V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* §§ 2.3, 7.1-.3, 9.1-.5, 12.1-.7 (1974).

5. *Briere v. Lathrop Co.*, 22 Ohio St. 2d 166, 174-75, 258 N.E.2d 597, 603 (1970); *see also* RESTATEMENT (SECOND) OF TORTS § 496A-E (1965).

6. *See, e.g.,* *Leavitt v. Gillaspie*, 443 P.2d 61 (Alaska 1968); *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977); *Bulatao v. Kauai Motors, Ltd.*, 49 Hawaii 1, 406 P.2d 887 (1965); *Smith v. Blakey*, 213 Kan. 91, 515 P.2d 1062 (1973); *Wilson v. Gordon*, 354 A.2d 398 (Me. 1976); *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971); *Bolduc v. Crain*, 104 N.H. 163, 181 A.2d 641 (1962); *McGrath v. American Cyanamid Co.*, 41 N.J. 272, 196 A.2d 238 (1963); *Wentz v. Deseth* 221 N.W.2d 101 (N.D. 1974); *Zumwalt v. Lindland*, 239 Or. 26, 396 P.2d 205 (1964); *Farley v. MM Cattle Co.*, 529 S.W.2d 751 (Tex. 1975); *Lyons v. Redding Constr. Co.*, 83 Wash. 2d 86, 515 P.2d 821 (1973). In addition, some state legislatures have dealt with the problem of assumption of risk in a system of comparative negligence. *See, e.g.,* CONN. GEN. STAT. ANN. §§ 52-572h (West Supp. 1984); N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976).

7. *See, e.g.,* W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 68 (4th ed. 1971); James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968); Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122 (1961).

tion of risk should continue to act as a complete bar to a plaintiff's recovery in light of the adoption of comparative negligence. Although some states that have adopted comparative negligence continue to regard assumption of risk as an affirmative defense that completely bars recovery,⁸ the trend today is to treat assumption of risk as merged with or a form of contributory negligence.⁹ The Supreme Court of Ohio in *Anderson v. Ceccardi*¹⁰ held that, under Ohio's comparative negligence act, conduct by the plaintiff previously considered assumption of risk now will be considered contributory negligence.¹¹ *Anderson* represents Ohio's merger of the doctrines of assumption of risk and contributory negligence for purposes of Ohio's comparative negligence act. This Note will examine the merging of two doctrines that Ohio courts traditionally have considered distinguishable by examining the elements and various forms of assumption of risk and how the concept of assumption of risk relates to the doctrine of contributory negligence. An analysis of the *Anderson* holding reveals that, in Ohio, with two narrow exceptions (*i.e.*, when the plaintiff expressly assumes the risk¹² and when the defendant does not breach a duty of care¹³), assumption of risk no longer retains a meaning independent from contributory negligence.¹⁴ Although this result is an abrupt turnabout from prior Ohio law, the adoption of comparative negligence necessitated such a change.

II. THE DOCTRINE OF ASSUMPTION OF RISK: TYPES OF ASSUMPTION OF RISK

The assumption of risk doctrine gives legal recognition to the principle that a person who is willing to incur a potentially dangerous situation cannot later complain of injuries that arise out of that venturousness.¹⁵ Thus, under the assumption of risk

8. *See, e.g.*, *Arkansas Kraft Corp. v. Johnson*, 257 Ark. 629, 519 S.W.2d 74 (1975); *Riley v. Davison Constr. Co.*, 381 Mass. 432, 409 N.E.2d 1279 (1980); *Blum v. Brichacek*, 191 Neb. 457, 215 N.W.2d 888 (1974); *Kennedy v. Providence Hockey Club, Inc.*, 119 R.I. 70, 376 A.2d 329 (1977).

9. *See*, *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977); *Lyons v. Redding Constr. Co.*, 83 Wash. 2d 86, 515 P.2d 821 (1973); *McConville v. State Farm Mut. Auto. Ins. Co.*, 15 Wis. 2d 374, 113 N.W.2d 14 (1962).

10. 6 Ohio St. 3d 110, 451 N.E.2d 780 (1983).

11. *Id.* at 113, 451 N.E.2d at 783.

12. Express assumption of risk is present when a plaintiff signs an agreement expressly relieving the defendant of legal obligation should the plaintiff be harmed by the defendant's negligence. *See infra* text accompanying notes 23-26.

13. The Supreme Court of Ohio views primary assumption of risk as a situation in which the defendant is found to have either not owed a duty of care to the plaintiff or not breached a duty of care owed. In either situation, the defendant is not negligent. *See infra* text accompanying notes 80-89.

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

15. *See* RESTATEMENT (SECOND) OF TORTS § 496A (1965).

doctrine a plaintiff who voluntarily¹⁶ incurs a known¹⁷ risk of harm arising from the conduct of the defendant will be unable to recover for resulting injuries.¹⁸

During the 19th century, assumption of risk, like contributory negligence,¹⁹ emerged as a judicially created response to the needs of expanding industry.²⁰ Protecting emerging industries from the prohibitive expense of compensating workers' employment-related injuries, courts held that workers were free to choose their place of employment and that workers, therefore, voluntarily assumed the risk of dangerous working conditions.²¹ Unfortunately, the assumption of risk doctrine soon expanded from master-servant relationships into general areas of tort law. Consequently, the phrase "assumption of risk" became so overused that today it encompasses several related, but distinct legal concepts.²²

A. Express Assumption of Risk

Though generally understood in terms of a plaintiff's voluntary incurrence of a known risk, assumption of risk signifies many situations involving a defendant and a risk-assuming plaintiff. Express assumption of risk, the most obvious form of risk assumption, occurs when a plaintiff expressly states that the defendant will be held blameless for the plaintiff's failure to exercise due care for his or her protection in

16. The doctrine of assumption of risk only bars a plaintiff who voluntarily assumes the risk. "Since the basis of assumption of risk is the plaintiff's willingness to accept the risk, take his chances, and look out for himself, his choice in doing so must be a voluntary one." *Id.* § 496E(1) comment a. "If the defendant's tortious conduct has left him [the plaintiff] no reasonable alternative course of conduct to (a) avert harm to himself or another, harm or (b) exercise or protect a right or privilege of which the defendant has no right to deprive him," the plaintiff's acceptance of the risk is not voluntary. *Id.* § 496E(2). Thus, if a plaintiff incurs the risk of entering a burning building to save his child from a fire, caused by the defendant's negligence, the plaintiff does not assume the risk voluntarily. Comment, *Assumption of Risk in a Comparative Negligence System—Doctrinal, Practical, and Policy Issues*: Kennedy v. Providence Hockey Club, Inc.; Blackburn v. Dorta, 39 OHIO ST. L.J. 364, 376 (1978). However, the plaintiff's acceptance of a risk is voluntary even though no reasonable alternatives are available in the circumstances, if the defendant is not responsible for or negligent in creating such a situation. "Thus a plaintiff who is forced to rent a house which is in an obvious dangerous condition because he cannot find another dwelling, or cannot afford another, assumes the risk notwithstanding the compulsion under which he is acting." RESTATEMENT (SECOND) OF TORTS § 496E comment b (1965).

17. Since the basis for assumption of risk is the plaintiff's consent to incur a potentially dangerous situation, absent an express agreement, courts will not find the plaintiff to have assumed the risk unless he has knowledge or appreciation of the risk of harm. RESTATEMENT (SECOND) OF TORTS § 496D (1965). The trier of fact will apply a subjective test of what the plaintiff actually knew or understood about the risk of harm in the situation; however, an adult will be held to have knowledge of obvious dangers such as burning by fire, drowning in water, or falling from a height. *Id.* § 496D comments c-c.

18. RESTATEMENT (SECOND) OF TORTS § 496A (1965); see also Benjamin v. Deffet Rentals, Inc., 66 Ohio St. 2d 86, 90, 419 N.E.2d 883, 886 (1981).

19. Contributory negligence, a common law doctrine that completely bars a negligent plaintiff from recovery from a negligent defendant, generally is thought to have originated in the English case of *Butterfield v. Forrester*, 103 Eng. Rep. 926 (1809); see W. PROSSER, *supra* note 7, § 65, at 416 n.1. Acceptance of contributory negligence as a legal doctrine grew quickly in the United States during the nineteenth century, a period of rapid industrial expansion. Both contributory negligence and assumption of risk are generally believed to have been created as judicially imposed forms of protection of developing industries from the high costs of workers' injuries. See *Tiller v. Atlantic Coast Line R.R. Co.*, 318 U.S. 54, 58-59 (1943).

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

21. *Id.* at 61. Today, however, workers' compensation acts put the risk of injury from industrial accidents directly upon industry. Thus, assumption of risk no longer is applicable to the master-servant relationships for which courts originally developed it. See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 21.4 (1956).

22. See *infra* text accompanying notes 27-56.

certain circumstances.²³ Thus, if a plaintiff signs an exculpatory agreement with the defendant whereby the plaintiff agrees not to hold the defendant liable for injuries resulting from a given situation, the plaintiff has relieved the defendant of a duty of care and, thus, has assumed the risk of any harm that may arise from that situation.²⁴ Express assumption of risk resembles consent²⁵ because the plaintiff affirmatively and clearly waives his or her rights. Therefore, most comparative negligence jurisdictions have retained express assumption of risk as a complete bar to plaintiff's recovery.²⁶

B. Implied Assumption of Risk

Implied assumption of risk is present when a plaintiff's actions imply a knowing and voluntary assumption of a risk of harm created by the defendant. The plaintiff does not "expressly consent to accept the risk; but by voluntarily electing to proceed with knowledge of the risk in a manner which will expose him to it, he manifests a willingness to accept" the risk and, therefore, is barred from recovery.²⁷

1. Implied Primary Assumption of Risk

Implied assumption of risk can be categorized into primary and secondary forms.²⁸ Primary assumption of risk occurs when a defendant is not negligent. It may arise either when the defendant owes no duty of care to the plaintiff or when the defendant does not breach the duty that was owed.²⁹ Unlike secondary assumption of risk and contributory negligence, primary assumption of risk is not an affirmative defense; rather, primary assumption of risk describes a situation in which the defendant breached no duty to plaintiff and therefore was not negligent.³⁰

A common example of implied primary assumption of risk occurs when a sports fan attends a baseball or hockey game. Under traditional negligence analysis, though the management initially owes a duty of care to spectators, that duty is fulfilled by providing a number of screened-off seats to prevent spectators from being injured.³¹ The concept of primary assumption of risk, however, presents another way of reaching the same conclusion. Although foul balls and errant hockey pucks are unavoid-

23. RESTATEMENT (SECOND) OF TORTS § 496B (1965).

24. *Id.* Such an agreement need not be for consideration, and can concern general conduct by the defendant or relate to specific acts. *Id.* at comment b. Some express agreements may be unenforceable because of public policy or disparity in bargaining power. *Id.* at comments e-j.

25. Express assumption of risk is similar to consent, an affirmative defense that completely bars a plaintiff's recovery for a defendant's intentional tort. Express assumption of risk can be seen as plaintiff's consent to the risk of defendant's negligent conduct—the plaintiff expressly agrees to hold the defendant harmless for the risk. *See* V. SCHWARTZ, *supra* note 4, § 9.5; *see also infra* text accompanying notes 23–26, 96–99.

26. V. SCHWARTZ, *supra* note 4, § 9.2; *see, e.g.*, *Wilson v. Gordon*, 354 A.2d 398, 401 (Me. 1976); *Springrose v. Willmore*, 292 Minn. 23, 24, 192 N.W.2d 826, 827 (1971); *see also* Comment, *supra* note 16, at 367, 373–74.

27. RESTATEMENT (SECOND) OF TORTS § 496C comment b (1965).

28. *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 48–49, 155 A.2d 90, 93 (1959).

29. *Id.*

30. "Primary assumption of risk . . . relates to the initial issue of whether a defendant was negligent at all—that is, whether the defendant had any duty to protect the plaintiff from a risk of harm. It is not, therefore, an affirmative defense." *Springrose v. Willmore*, 292 Minn. 23, 24, 192 N.W.2d 826, 827 (1971).

31. *See, e.g.*, *Kavafian v. Seattle Baseball Club Ass'n*, 105 Wash. 215, 181 P. 679 (1919) (*per curiam*).

able aspects of the games being played, the average spectator believes that the value of watching the event outweighs the possibilities of being injured and, therefore, assumes these risks. In this case, the owner has not necessarily affirmatively fulfilled the duty of care owed by providing protected seats, but the spectator's conduct in accepting the known risk extinguishes the owner's duty. Whether the owner fulfills the duty owed by providing reasonably safe seats, or whether the owner's duty is extinguished by the spectator's assumption of risk, the injured spectator will not recover. Both of these situations, however, differ from when the owner owed no duty at all.³²

Some commentators believe that by dropping the primary assumption of risk label and analyzing this form of conduct in a no-duty context, much of the confusion and ambiguity that presently exist with respect to assumption of risk as a general doctrine would be alleviated.³³ Prosser rejects these suggestions, however, arguing that no advantage is gained by a simple change in terminology.³⁴ Whether phrased in terms of no duty or primary assumption of risk, this conduct continues to act as a complete bar to the plaintiff's recovery despite the enactment of a system of comparative fault; since the defendant is by definition not negligent, comparative fault analysis is unnecessary.

2. Implied Secondary Assumption of Risk

Implied secondary assumption of risk occurs when the defendant has breached a duty of care owed to the plaintiff and the plaintiff has not expressly assumed the risk.³⁵ While primary assumption of risk occurs when either the defendant is not negligent or the defendant's duty is extinguished by the plaintiff's conduct, secondary assumption of risk occurs when the plaintiff voluntarily encounters a known risk of harm created by the defendant's negligence.³⁶ Since the negligence of the defendant has been established, secondary assumption of risk is an affirmative defense.³⁷

Implied secondary assumption of risk can be broken down further into the plaintiff's reasonable and unreasonable assumption of risk.³⁸ The effect of comparative negligence upon these forms of assumption of risk has caused a split among courts³⁹ and legal scholars.⁴⁰ Reasonable implied assumption of risk leads to policy problems even if a jurisdiction has adopted a system of comparative negligence, for

32. W. PROSSER, *supra* note 7, § 68; *see infra* text accompanying notes 81–85.

33. *E.g.*, 2 F. HARPER & F. JAMES, *supra* note 21, § 21.1.

34. W. PROSSER, *supra* note 7, § 68, at 456.

35. *See* Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 49, 155 A.2d 90, 93 (1959).

36. *Id.*

37. *Id.*

38. *See* James, *supra* note 7, at 188–89.

39. *Compare* McConville v. State Farm Mut. Auto. Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962) and Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977) (secondary assumption of risk is merged with or treated as a form of contributory negligence) with D'Andrea v. Sears, Roebuck & Co., 109 R.I. 479, 287 A.2d 629 (1972) and Kennedy v. Providence Hockey Club, Inc., 119 R.I. 70, 376 A.2d 329 (1977) (assumption of risk and contributory negligence are not synonymous and traditionally have been treated as conceptually distinct doctrines).

40. *See* James, *supra* note 7, at 185; W. PROSSER, *supra* note 7, § 68, at 454–57; RESTATEMENT (SECOND) OF TORTS § 496C (1965).

even though the plaintiff voluntarily has assumed a known risk and is a partial author of the injury suffered, the plaintiff has acted in a reasonable manner. The issue is whether courts should deny recovery to a plaintiff who has acted reasonably solely because the plaintiff voluntarily incurred a known risk. The inconsistency of a policy denying recovery is that the plaintiff is, in effect, punished for acting in a manner that the law encourages. Courts denying recovery in this situation reason that, "[w]hen one acts knowingly, it is immaterial whether he acts reasonably."⁴¹ Other courts⁴² hold that assumption of risk should not bar a reasonable plaintiff from recovery. According to those courts, the central issue is the plaintiff's exercise of reasonable care.⁴³

Unreasonable secondary assumption of risk occurs when the plaintiff voluntarily but unreasonably decides to proceed in the face of a known risk created by the defendant's negligent conduct.⁴⁴ The classic illustration of the difference between reasonable and unreasonable secondary assumption of risk is a plaintiff who enters a blazing building to rescue a child, and then re-enters to recover a favorite hat.⁴⁵ Unreasonable assumption of risk creates a problem of doctrinal overlap since the plaintiff's conduct can be characterized as both assumption of risk and contributory negligence.⁴⁶ "[T]here are situations where the defenses of assumption of risk and contributory negligence will overlap. The plaintiff's conduct in accepting the risk may itself be unreasonable, because the danger is out of all proportion to the interest which he is seeking to advance. . . ."⁴⁷ The doctrinal overlap between unreasonable secondary assumption of risk and contributory negligence is particularly important in a comparative negligence jurisdiction. In *Anderson*, the Ohio Supreme Court stressed that if assumption of risk remains a complete bar to recovery despite enactment of a comparative negligence statute, "a defendant can circumvent the comparative negligence statute entirely by asserting the assumption of risk defense alone."⁴⁸ For example, if a plaintiff passenger unreasonably assumed the risk of riding with an intoxicated defendant driver, the defendant could defend by proving that the plaintiff either was contributorily negligent or had assumed the risk. In a comparative negligence jurisdiction the plaintiff's contributory negligence would not act as a complete

41. *Kennedy v. Providence Hockey Club, Inc.*, 119 R.I. 70, 77, 376 A.2d 329, 333 (1977).

42. The Ohio Supreme Court in *Anderson* did not specifically discuss the problems of reasonable and unreasonable secondary assumption of risk. However, the cases cited by the majority hold that reasonable assumption of risk is not a valid defense. *See Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971); *Lyons v. Redding Constr. Co.*, 83 Wash. 2d 86, 515 P.2d 821 (1973); *McConville v. State Farm Mut. Auto. Ins. Co.*, 15 Wis. 2d 374, 113 N.W.2d 14 (1962).

43. "[T]he key concern should be whether the plaintiff exercised reasonable care; if he did, he should be allowed to recover. . . ." *Rea v. Leadership Hous.* 312 So. 2d 818, 823 (Fla. Dist. Ct. App. 1975), *aff'd*, 348 So. 2d 287 (1977); *see also Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977); *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971); *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90 (1959); *Lyons v. Redding Constr. Co.*, 83 Wash. 2d 86, 515 P.2d 821 (1973); *McConville v. State Farm Mut. Auto. Ins. Co.*, 15 Wis. 2d 374, 113 N.W.2d 14 (1962).

44. *See Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 53, 155 A.2d 90, 95 (1959).

45. *Id.* However, entering a blazing building to rescue a spouse or a child may differ from rescuing a total stranger. Since the former conduct may be involuntary, it may not constitute assumption of risk. *See supra* note 16.

46. *See Masters v. New York Cent. R.R. Co.*, 147 Ohio St. 293, 301, 70 N.E.2d 898, 903 (1947).

47. *Id.* (quoting W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* (1st ed. 1941)).

48. *Anderson v. Ceccardi*, 6 Ohio St. 3d 110, 113, 451 N.E.2d 780, 783 (1983); *see also* W. PROSSER, *supra* note 7, § 68 at 456-57.

bar, but merely would reduce the plaintiff's recovery. If assumption of risk remains a defense independent from contributory negligence, the defendant avoids apportionment under comparative negligence principles by raising the assumption of risk defense alone. However, if the doctrines are merged, assumption of risk no longer completely bars recovery; rather, as a form of contributory negligence, assumption of risk becomes a factor in the apportionment process.

The debate over unreasonable assumption of risk revolves around the issue whether the doctrine is necessary in light of its similarity to contributory negligence. Not unlike the position that primary assumption of risk should be abandoned in favor of a no duty analysis,⁴⁹ some commentators argue that secondary unreasonable assumption of risk has no meaning independent from contributory negligence and, therefore, should be abrogated to avoid unnecessary confusion.⁵⁰ Harper and James contend that the assumption of risk concept is merely a duplication of other, more widely understood doctrines such as scope of duty and contributory negligence.⁵¹ Harper and James argue that except for express assumption of risk—cases in which an actual agreement to assume a risk exists—the term and concept of assumption of risk should be abolished.⁵²

The opposing view is that although assumption of risk and contributory negligence may at times overlap and coincide, they are conceptually different.⁵³ Courts that retain assumption of risk as a complete bar to recovery despite the adoption of comparative negligence have noted three primary differences between assumption of risk and contributory negligence: (1) assumption of risk concerns knowledge of the danger and voluntary acquiescence in it, but contributory negligence is simply an unknowing and unsuspecting departure from the standard of reasonable care; (2) assumption of risk is judged by a subjective standard based upon what the plaintiff actually knew, but contributory negligence employs an objective, "reasonable person" standard; and (3) assumption of risk is based upon the plaintiff's venturousness, but contributory negligence is based upon reasonableness.⁵⁴ Ohio had accepted these rationales prior to the *Anderson* decision.⁵⁵

These opposing positions differ only with respect to the weight of culpability a jurisdiction gives to the plaintiff's knowledge of the risk. In jurisdictions that view secondary unreasonable assumption of risk as merely a form of contributory negligence, the plaintiff's knowledge is a factor mitigating against recovery but is not a per

49. See *supra* note 33 and accompanying text.

50. See 2 F. HARPER & F. JAMES, *supra* note 21, § 21.8; James, *supra* note 7, at 187–88; Note, *Contributory Negligence and Assumption of Risk—The Case for Their Merger*, 56 Minn. L. Rev. 47 (1971).

51. See 2 F. HARPER & F. JAMES, *supra* note 21, § 21.1.

52. *Id.*

53. See, e.g., *Arkansas Kraft Corp. v. Johnson*, 257 Ark. 629, 519 S.W.2d 74 (1975); *Riley v. Davidson Constr. Co.*, 381 Mass. 432, 409 N.E.2d 1279 (1980); *Blum v. Brichacek*, 191 Neb. 457, 215 N.W.2d 888 (1974); *Kennedy v. Providence Hockey Club, Inc.*, 119 R.I. 70, 376 A.2d 329 (1977).

54. See *Riley v. Davidson Constr. Co.*, 381 Mass. 432, 409 N.E.2d 1279 (1980); *Blum v. Brichacek*, 191 Neb. 457, 215 N.W.2d 888 (1974); *Kennedy v. Providence Hockey Club, Inc.*, 119 R.I. 70, 376 A.2d 329 (1977).

55. See *infra* text accompanying notes 57–69.

se bar to recovery.⁵⁶ Other jurisdictions view the difference between a plaintiff's contributory negligence and knowledge of the risk as one of substance rather than degree and retain unreasonable assumption of risk as a complete bar to recovery.⁵⁷

Both reasonable and unreasonable secondary assumption of risk are affected by a state's adoption of comparative negligence. Express and primary assumption of risk arise in situations in which the defendant's breach of duty is not established so comparative negligence does not apply. An analysis of why the Supreme Court of Ohio in *Anderson* decided to merge secondary assumption of risk with contributory negligence first requires an examination of Ohio's prior decisions that distinguish between assumption of risk and contributory negligence. Furthermore, the *Anderson* decision must be examined to determine if the abrogation of assumption of risk as a complete bar to recovery is warranted and if so, to measure the effect of this decision upon Ohio's comparative negligence system.

III. OHIO LAW PRIOR TO *ANDERSON V. CECCARDI*

Prior to *Anderson*, Ohio law held that assumption of risk and contributory negligence were not synonymous, although the two defenses sometimes applied to the same conduct.⁵⁸ The Ohio courts held that contributory negligence was based upon carelessness, but assumption of risk was based upon the venturousness of the plaintiff.⁵⁹ The courts distinguished the doctrines because "assumption of risk is a matter of [the plaintiff's] knowledge of the danger and intelligent acquiescence in it. . . ,"⁶⁰ "[w]hile contributory negligence is a matter of some fault or departure from the standard of reasonable conduct," regardless of the plaintiff's knowledge.⁶¹ Furthermore, Ohio courts held that although assumption of risk and contributory negligence overlap in some situations, the doctrines are neither exclusive nor inclusive.⁶² Since assumption of risk requires that the plaintiff have knowledge of a dangerous situation before voluntarily encountering it, a subjective inquiry is necessary.⁶³ Contributory negligence is determined by an objective inquiry into what

56. See *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977); *Lyons v. Redding Constr. Co.*, 83 Wash. 2d 86, 515 P.2d 821 (1973); *McConville v. State Farm Mut. Auto. Ins. Co.*, 15 Wis. 2d 374, 113 N.W.2d 14 (1962).

57. See, e.g., *Riley v. Davison Constr. Co.*, 381 Mass. 432, 409 N.E.2d 1279 (1980); *Kennedy v. Providence Hockey Club, Inc.*, 119 R.I. 70, 376 A.2d 329 (1977).

58. See, e.g., *DeAmiches v. Popczun*, 35 Ohio St. 2d 180, 299 N.E.2d 265 (1973); *Wever v. Hicks*, 11 Ohio St. 2d 230, 228 N.E.2d 315 (1967); *Porter v. Toledo Terminal R.R. Co.*, 152 Ohio St. 463, 90 N.E.2d 142 (1950); *Masters v. New York Cent. R.R. Co.*, 147 Ohio St. 293, 70 N.E.2d 898 (1947).

59. *Porter v. Toledo Terminal R.R. Co.*, 152 Ohio St. 463, 446, 90 N.E.2d 142, 143 (1950).

60. *Masters v. New York Cent. R.R. Co.*, 147 Ohio St. 293, 301, 70 N.E.2d 898, 903 (1947) (quoting W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 378-79 (1st ed. 1941)).

61. *Id.*; see generally W. PROSSER, *supra* note 7, § 68.

62. Thus, Ohio accepted the position that in some cases assumption of risk might exist when contributory negligence was not applicable (reasonable assumption of risk). *DeAmiches v. Popczun*, 35 Ohio St. 2d 180, 186, 299 N.E.2d 265, 268 (1973). After *Anderson*, reasonable assumption of risk is unlikely to have any significance in negligence actions; undoubtedly, it will not act as a complete bar to plaintiff's recovery, nor should reasonable assumption of risk act to reduce the recovery of a plaintiff. See *infra* notes 120-27 and accompanying text. But see *VanEman, Ohio's Assumption of Risk: The Deafening Silence*, 11 CAP. U.L. REV. 661, 680 (1982) ("[o]ne who reasonably assumes a risk will nevertheless be barred from recovery if such contributing conduct exceeds the negligence of all defendants combined.").

63. *DeAmiches v. Popczun*, 35 Ohio St.2d 180, 186, 299 N.E.2d 265, 268 (1973).

a plaintiff should have known and whether the plaintiff departed from the standard of a reasonable person under similar circumstances.⁶⁴ These distinctions represent the conceptual differences between the doctrines, and prior to *Anderson*, were sufficient to prevent the Supreme Court of Ohio from merging assumption of risk and contributory negligence.⁶⁵

Before comparative negligence was adopted, the distinctions between assumption of risk and contributory negligence were irrelevant because both acted to bar completely the plaintiff's recovery.⁶⁶ Comparative negligence developed as a means of reducing the harshness of the "all or nothing" doctrine of contributory negligence. Rather than acting as a total bar to recovery, comparative negligence allows contributorily negligent plaintiffs to recover damages that are diminished in proportion to the plaintiffs' culpability.⁶⁷ A comparative negligence statute that does not address assumption of risk leads to the problem of distinguishing assumption of risk and contributory negligence, two very similar doctrines of law that require vastly different results. As noted in *Anderson*, retaining assumption of risk as a total bar would enable the defendant to avoid completely the apportionment of damages under the comparative negligence act by asserting the assumption of risk defense alone.⁶⁸ In this situation, the difference between a complete denial of a recovery because of unreasonable implied assumption of risk and a diminished recovery because of contributory negligence statute rests upon the subjective inquiry whether the plaintiff had knowledge of the risk. Courts in the past have examined assumption of risk and contributory negligence for distinguishing elements significant enough to justify the dichotomy of a partial recovery in the latter situation but no recovery in the former.⁶⁹ Though prior to adopting comparative negligence, Ohio had adhered to the notion that assumption of risk and contributory negligence represented different doctrines, the *Anderson* opinion shows that the distinctions separating the doctrines are not sufficient to withstand the strains created by adopting comparative negligence and the resulting rejection of the all or nothing approach to recovery.

IV. ANALYSIS OF *ANDERSON V. CECCARDI*

The plaintiff in *Anderson* leased a home from the defendant landlord. The home had three entrances, but the entrance to the front door was unsafe because of faulty steps.⁷⁰ *Anderson* continued to use the front entrance despite his knowledge of the faulty steps and his opportunity to use one of the other two safe entrances.⁷¹ As a result of the landlord's negligence in failing to repair these steps, *Anderson* fell and was injured.⁷²

64. *Id.*

65. See *Wever v. Hicks*, 11 Ohio St. 2d 230, 233; 228 N.E.2d 315, 317 (1967).

66. See W. PROSSER, *supra* note 7, § 68 at 441.

67. See V. SCHWARTZ, *supra* note 4, § 2.1.

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

69. See, e.g., *Benjamin v. Deffet Rentals, Inc.*, 66 Ohio St. 2d 86, 419 N.E.2d 883 (1981); *DeAmiches v. Popczun*, 35 Ohio St. 2d 180, 299 N.E.2d 265 (1973); *Wever v. Hicks*, 11 Ohio St. 2d 230, 228 N.E.2d 315 (1967).

70. *Anderson v. Ceccardi*, 6 Ohio St. 3d 110, 110, 451 N.E.2d 780, 781 (1983).

71. *Id.*

72. *Id.*

Anderson's attempt to recover damages was denied by the trial court, which granted the defendant's motion for summary judgment based upon Anderson's voluntary assumption of the risk of using the unsafe steps.⁷³ The court of appeals reversed, ruling that although assumption of risk and contributory negligence did not merge under Ohio's comparative negligence act, Anderson was not barred by his landlord's assumption of risk defense. The court held that the determinative issue was a factual question whether the defendant had caused the plaintiff's injury.⁷⁴ The Supreme Court of Ohio held "that the defense of assumption of risk is merged with contributory negligence under R.C. 2315.19,"⁷⁵ Ohio's comparative negligence statute.

[C]onduct previously considered as assumption of risk by the plaintiff shall be considered by the trier of the fact under the phrase "contributory negligence of the person bringing the action" under R.C. 2315.19, and the negligence of all parties shall be apportioned by the court or jury pursuant to that statute.⁷⁶

A. *Express Assumption of Risk*

In merging the two doctrines, the *Anderson* decision followed other states that have merged assumption of risk and contributory negligence and specifically excluded express assumption of risk from that merger.⁷⁷ Express assumption of risk remains a complete bar to recovery in jurisdictions on both sides of the issue of the role of assumption of risk in a comparative negligence system.⁷⁸ In addition, commentators who argue that assumption of risk is a confusing duplication of other more easily understood doctrines and should be abandoned acknowledge that express agreements represent an area in which assumption of risk retains an independent vitality.⁷⁹

B. *Implied Assumption of Risk: Primary Sense*

Like express assumption of risk, primary implied assumption of risk was excluded from the merger with contributory negligence under the *Anderson* decision and, therefore, remains a complete bar to recovery.⁸⁰ Although the court in *Anderson* referred to primary assumption of risk as a situation in which "there is a lack of duty owed by the defendant to the plaintiff,"⁸¹ the court did not adopt the position that

73. *Id.* at 111, 451 N.E.2d at 781.

74. *Id.*

75. *Id.* at 113, 451 N.E.2d at 783.

76. *Id.*

77. *Id.* at 114, 451 N.E.2d at 783. Other cases that have excluded express assumption of risk from the merger with contributory negligence include: *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977); *Smith v. Blakey*, 213 Kan. 91, 515 P.2d 1062 (1973); *Wilson v. Gordon*, 354 A.2d 398 (Me. 1976); *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971); *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90 (1959); *Lyons v. Redding Constr. Co.*, 83 Wash. 2d 86, 515 P.2d 821 (1973).

78. *See, e.g.*, *Riley v. Davison Constr. Co.*, 381 Mass. 432, 409 N.E.2d 1279 (1980); *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971); *see also V. SCHWARTZ, supra* note 4, § 9.2.

79. *See* 2 F. HARPER & F. JAMES, *supra* note 21, § 21.6; Note, *supra* note 50.

80. *Anderson v. Ceccardi*, 6 Ohio St. 3d 110, 114, 451 N.E.2d 780, 783-84 (1983).

81. *Id.*

primary assumption of risk should be abrogated in favor of the no duty analysis.⁸² However, since the court referred to primary assumption of risk as a situation in which the defendant owes no duty to the plaintiff, the court failed to distinguish its position of retaining the doctrine from that of adopting a strict no duty analysis. If primary assumption of risk is simply a situation in which the defendant owes no duty, then a no duty analysis is sufficient, and primary assumption of risk should be discarded. Prosser argues that assumption of risk should not be discarded in favor of no duty analysis. In his view, a plaintiff's primary assumption of risk may extinguish the defendant's duty of care but this is not the same as the defendant not having owed any duty at all. "What, in such a case, changes 'duty' to 'no duty'; and if it is not to be called assumption of risk, what better name can be found?"⁸³

The Supreme Court of Ohio refused to abrogate primary assumption of risk, apparently accepting Prosser's view that primary assumption of risk differs from the no duty analysis.⁸⁴ In some cases, the defendant's duty to protect the plaintiff is extinguished not because the defendant did not owe a duty to the plaintiff but because the plaintiff voluntarily assumed the risk.⁸⁵ Burden of proof considerations make important the distinction between situations in which the defendant owes no duty at all and those in which the plaintiff's assumption of risk extinguishes the defendant's duty.⁸⁶ In all cases, the plaintiff must prove that the defendant both owed a duty to the plaintiff and breached that duty. The defendant must prove assumption of risk since it is an affirmative defense. A shift to a strict no duty analysis would remove the defendant's burden of proving plaintiff's assumption of risk. Instead, the plaintiff would bear the added burden of disproving assumption of risk as part of the prima facie case.⁸⁷ Proponents of abrogating the use of primary assumption of risk argue that in practice courts are unlikely to shift the burden of proof from the defendant to the plaintiff.⁸⁸ As Professor James noted:

While the assumption of risk formulation is *theoretically* more likely to induce courts to put the burden of proof on defendant than is the no-duty formulation of the same problem, this is not likely to be the result in practice. Courts rarely lose sight of the duty issue where burden of proof is concerned⁸⁹

The *Anderson* court did not expressly reject the Harper and James view that a strict no-duty analysis should replace primary assumption of risk. However, the

82. 2 F. HARPER & F. JAMES, *supra* note 21, § 21.1. Because primary assumption of risk was not at issue in the *Anderson* case, the court simply may have decided that this issue was not yet ripe for decision. However, the court expressly mentioned that primary assumption of risk remains unaffected by the merger of secondary assumption of risk and contributory negligence. This indicates that the court considered the issue.

83. See W. PROSSER, *supra* note 7, § 68 at 455-56.

84. *Id.*

85. See Shaw, *The Role of Assumption of Risk in Systems of Comparative Negligence*, 46 INS. COUNS. J. 360, 383 (1979). A plaintiff's recovery is denied not because the owner of a baseball park owes no duty to spectators to protect them from foul balls, but because either (i) the owner fulfills his duty by providing a reasonable number of protected seats, or (ii) the spectator who sits in an unscreened seat voluntarily incurs a known, obvious risk, and therefore extinguishes the owner's duty. See W. PROSSER, *supra* note 7, § 68 at 455-56.

86. See W. PROSSER, *supra* note 7, § 68 at 454-57.

87. *Id.*

88. See James, *supra* note 7, at 196.

89. *Id.*

court's position that primary assumption of risk was unaffected by the merger of secondary assumption of risk and contributory negligence indicates this result. Thus, although the *Anderson* decision merged assumption of risk and contributory negligence for purposes of comparative negligence, the *Anderson* court stopped short of adopting the full Harper and James position that primary assumption of risk be abrogated as well.

C. *Secondary Assumption of Risk*

The adoption of comparative negligence requires an examination of the policies underlying secondary assumption of risk and contributory negligence to determine whether these policies warrant different results from the application of the two doctrines. Some courts hold that secondary assumption of risk, whether reasonable or unreasonable, remains a complete bar to recovery despite the enactment of comparative negligence.⁹⁰ Other courts hold that secondary assumption of risk no longer completely bars recovery but merges with contributory negligence, and conduct previously considered assumption of risk now is subject to negligence standards.⁹¹ The latter view is the general trend⁹² and is the view Ohio adopted in *Anderson*.

1. *Secondary Assumption of Risk Remaining a Complete Bar to Recovery*

Some courts have retained assumption of risk as a complete defense despite the enactment of a comparative negligence statute.⁹³ These courts recognize that the basis for denying recovery under assumption of risk differs from that under contributory negligence. The former bases denial of recovery upon the plaintiff's knowledge and voluntary choice in incurring a risk of harm; the latter bases denial of recovery on the failure of plaintiff's conduct to conform to a standard of reasonable care. Those in favor of retaining assumption of risk as a complete bar view knowledge and voluntary incurrence of risk sufficiently important to justify denying recovery, even if the plaintiff has acted reasonably.⁹⁴

[T]he plaintiff's knowledge and voluntary decision to proceed is the basis for denying recovery, rather than the plaintiff's negligence. . . . One who undertakes a risk, knowing and appreciating the danger involved, may also in so doing fail to exercise due care for his own safety. It must be emphasized, however, that one may voluntarily assume the risk of harm and yet not be negligent in doing so.⁹⁵

These are valid distinctions between the doctrines. Certainly, these distinctions show that assumption of risk concerns knowledge and choice, subjective factors, in an area of law dominated by objectivity. The most tenable argument favoring reten-

90. See, e.g., *Riley v. Davison Constr. Co.*, 381 Mass. 432, 409 N.E.2d 1279 (1980); *Blum v. Brichacek*, 191 Neb. 457, 215 N.W.2d 888 (1974); *Kennedy v. Providence Hockey Club, Inc.*, 119 R.I. 70, 376 A.2d 329 (1977).

91. See, e.g., *Lyons v. Redding Constr. Co.*, 83 Wash. 2d 86, 515 P.2d 821 (1973).

92. See *supra* text accompanying notes 6-9.

93. See *supra* note 90 and accompanying text.

94. See, e.g., *Riley v. Davison Constr. Co.*, 381 Mass. 432, 409 N.E.2d 1279, 1282-83 (1980); *Kennedy v. Providence Hockey Club, Inc.*, 119 R.I. 70, 77, 376 A.2d 329, 333 (1977).

95. *Riley v. Davidson Constr. Co.*, 381 Mass. 432, 437, 409 N.E.2d 1279, 1283 (1980).

tion of secondary assumption of risk as a total bar to recovery bases the denial of recovery not upon the plaintiff's fault but upon the plaintiff's conscious agreement, similar to consent, to proceed in the face of a risk of harm.⁹⁶ However, consent differs from secondary assumption of risk in that consent to an intentional tort⁹⁷ manifests an agreement by the plaintiff to incur an actual injury. Assumption of risk is merely an agreement by the plaintiff to be subject to a possible injury that the plaintiff hopes will not actually occur.⁹⁸ "This is a giant step away from consent when viewed from the perspective of whether plaintiff has *actually* agreed to hold defendant harmless for the risk."⁹⁹

Under express assumption of risk, the plaintiff actually has agreed to hold the defendant blameless, and, as a result, it seems fair to deny recovery to the plaintiff. However, a plaintiff whose conduct constitutes secondary implied assumption of risk is not in the same position:

It must surely be a rare case in which a party encountering a danger subjectively intends that the creators of the danger should bear no responsibility for any injury he might suffer. Quite to the contrary, in the usual case the state of mind of the encountering party will be hope that the danger does not materialize into actual harm, and expectation of some recourse if harm does occur. Such a person's attitude is not one of consent, but of acquiescence.¹⁰⁰

Although the plaintiff's knowledge of the risk may not rise to the level of consent to the harm, in fairness, knowledge should impose a greater degree of responsibility upon the plaintiff, certainly more than if the plaintiff is merely negligent. The error of retaining assumption of risk as a complete bar to recovery is not that these factors are unimportant but that they are not of enough importance to justify a total bar to recovery. Though knowledge of the risk coupled with contributory negligence should reduce plaintiff's recovery to a greater extent than contributory negligence alone, knowledge does not warrant a complete abandonment of the apportionment principles of comparative negligence. The policy of apportionment of comparative fault should continue to determine the extent of recovery with the plaintiff's knowledge of the risk weighing against recovery.

a. Reasonable Assumption of Risk

Reasonable assumption of risk has been an issue of dispute among both courts¹⁰¹ and commentators.¹⁰² The controversy surrounding this doctrine arises from the

96. See V. SCHWARTZ, *supra* note 4, § 9.5.

97. See *supra* note 25 and accompanying text.

98. V. SCHWARTZ, *supra* note 4, § 9.5, at 174. The court in *McConville v. State Farm Mut. Auto. Ins. Co.*, 15 Wis. 2d 374, 378, 113 N.W.2d 14, 16 (1962), observed that while assumption of risk is similar to consent, assumption of risk represents "consent only to being exposed to danger which one hopes will not materialize in harm."

99. V. SCHWARTZ, *supra* note 4, § 9.5, at 174 (emphasis in original).

100. See *Shaw*, *supra* note 85, at 405; see also *McConville v. State Farm Mut. Auto. Ins. Co.*, 15 Wis. 2d 374, 379, 113 N.W.2d 14, 17 (1962) in which the court refers to assumption of risk conduct as acquiescence.

101. See, e.g., *Springrose v. Willmore*, 292 Minn. 23, 192 N.W. 2d 826 (1971); *Braswell v. Economy Supply Co.*, 281 So.2d 669 (Miss. 1973); *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90 (1959); *McConville v. State Farm Mut. Auto. Ins. Co.*, 15 Wis. 2d 374, 113 N.W.2d 14 (1962).

102. See, e.g., RESTATEMENT (SECOND) OF TORTS § 496C comment g (1965); W. PROSSER, *supra* note 7 § 68; Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14 (1906); James, *supra* note 7; Keeton, *supra* note 7.

anomalous results its application can produce; the doctrine prevents recovery by a plaintiff who has acted reasonably.¹⁰³ This denial of recovery, despite reasonable conduct on the part of the plaintiff, moved some courts to abrogate reasonable assumption of risk as a complete bar even before the adoption of comparative negligence.¹⁰⁴

Adoption of comparative negligence, a doctrine that indicates a reluctance to make judgments according to all or nothing standards, further magnifies the problems of reasonable assumption of risk. A comparative negligence jurisdiction that retains reasonable assumption of risk as a complete bar would allow an unreasonable plaintiff to be awarded a partial recovery yet would deny recovery to a reasonable plaintiff who had assumed the risk.¹⁰⁵ By denying recovery to plaintiffs who reasonably assume risks, the retention of assumption of risk as a complete bar to recovery defeats the policy of deterring negligence—encouraging people to act reasonably—that underlies the law of torts. Thus, reasonable assumption of risk should not reduce plaintiff's recovery in any way.

b. *Unreasonable Assumption of Risk*

Before the adoption of comparative negligence, both assumption of risk and contributory negligence acted as a complete bar to recovery. Therefore, it did not matter which defense the defendant chose to use against a plaintiff who had unreasonably assumed a risk.¹⁰⁶ However, comparative negligence transforms plaintiff's contributory negligence from a complete bar to a partial bar to recovery and fairly equates liability to fault.¹⁰⁷ Knowledge of a risk, the distinctive aspect of assumption of risk in most states, does not create the level of culpability necessary to deny completely a recovery to a plaintiff.¹⁰⁸ Unreasonable assumption of risk, conduct that constitutes both contributory negligence and knowledge of a risk, raises the question whether two forms of conduct that independently do not bar recovery should act as a bar in combination. A plaintiff who unreasonably assumes the risk is more culpable than either a plaintiff who reasonably assumes the risk or who is simply contributorily negligent.

However, rather than allow the combination of knowledge and unreasonableness to create a *per se* bar to recovery when none independently exists, the policies supporting comparative negligence mitigate for a treatment of dual culpability as a factor that further reduces plaintiff's recovery. In effect, states that choose to merge secondary assumption of risk with contributory negligence treat unreasonable assumption of risk in this manner.¹⁰⁹

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

104. See, e.g., *Bulatao v. Kauai Motors, Ltd.*, 49 Hawaii 1, 406 P.2d 887 (1965); *Fawcett v. Irby*, 92 Idaho 48, 436 P.2d 714 (1968); *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90 (1959); cf. *Ford Motor Co. v. Arquello*, 382 P.2d 886 (Wyo. 1963).

105. See Comment, *supra* note 16, at 375.

106. See *supra* text accompanying note 66; W. PROSSER, *supra* note 7, § 68 at 441.

107. *Blackburn v. Dorta*, 348 So. 2d. 287, 293 (Fla. 1977).

108. See *supra* text accompanying notes 94–95. But see *Arkansas Kraft Corp. v. Johnson*, 257 Ark. 629, 519 S.W.2d 74 (1975); *Riley v. Davison Constr. Co.*, 381 Mass. 432, 409 N.E.2d 1279 (1980); *Blum v. Brichacek*, 191 Neb. 457, 215 N.W.2d 888 (1974); *Kennedy v. Providence Hockey Club, Inc.*, 119 R.I. 70, 376 A.2d 329 (1977).

109. See *supra* text accompanying note 9.

2. Ohio's Decision: Secondary Assumption of Risk Merged with Contributory Negligence

By ruling in *Anderson* that assumption of risk and contributory negligence are merged under Ohio's comparative negligence statute, the Supreme Court of Ohio abandoned the position that assumption of risk in its secondary sense has a meaning independent of contributory negligence. The court stated that "conduct previously considered assumption of risk by the plaintiff shall be considered by the trier of the fact under the phrase 'contributory negligence of the person bringing the action'. . . ." ¹¹⁰ In *Anderson* the Ohio court heavily relied upon several cases that support the position favoring the merger of assumption of risk and contributory negligence. ¹¹¹ For instance, in *McConville v. State Farm Mutual Automobile Insurance Co.* ¹¹² the Wisconsin Supreme Court held that assumption of risk, implied from willingness to proceed in the face of a known hazard, is no longer a defense separate from contributory negligence. ¹¹³ The *McConville* case dealt with a guest's assumption of risk in accepting an automobile ride with a host driver who the guest knew lacked driving skills and had been drinking. ¹¹⁴ The court held that "if a guest's exposure of himself to a particular hazard be unreasonable and a failure to exercise ordinary care for his own safety, such conduct is negligence, and is subject to the comparative negligence statute." ¹¹⁵ Under this rule, the plaintiff's knowledge of the circumstances is a factor that the trier of fact considers in determining whether the plaintiff failed to exercise ordinary care, but does not act as a component independent of or distinguishable from contributory negligence in reducing the plaintiff's recovery. ¹¹⁶ The court additionally held that reasonable assumption of risk would not reduce a plaintiff's recovery:

In a particular situation the utility of riding with the host and the inadequacy of any alternative course may both be so obvious that the guest's acquiescence might constitute assumption of risk as heretofore existing, but not a lack of ordinary care. In such circumstances the guest's acquiescence will constitute no defense under the rule we are now adopting. We make the policy judgment, however, that much more injustice will be avoided in the instances where acquiescence [assumption of risk] ceases to raise a complete defense and becomes a matter for comparison by the trier of fact than will be created in the instances where the acquiescence is not unreasonable and therefore raises no defense at all under the principles of contributory and comparative negligence. ¹¹⁷

Thus, the Wisconsin court decided that conduct that constitutes secondary assumption of risk will affect the apportionment of damages only if the plaintiff unreasonably

110. *Anderson v. Ceccardi*, 6 Ohio St. 3d 110, 113, 451 N.E.2d 780, 783 (1983). Since the court specifically excluded express and primary assumption of risk from this merger, the quoted passage applies to secondary assumption of risk only.

111. See, e.g., *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977); *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971); *Lyons v. Redding Constr. Co.*, 83 Wash. 2d 86, 515 P.2d 821 (1973); *McConville v. State Farm Mut. Auto. Ins. Co.*, 15 Wis. 2d 374, 113 N.W.2d 14 (1962).

112. 15 Wis. 2d 374, 113 N.W.2d 14 (1962).

113. *Id.* at 378, 113 N.W.2d at 16.

114. *Id.* at 376, 113 N.W.2d at 15.

115. *Id.* at 378, 113 N.W.2d at 16-17.

116. *Id.* at 379, 113 N.W.2d at 17.

117. *Id.*

assumes the risk. Plaintiff's actions will be considered in light of plaintiff's knowledge of the risk, and if these actions constitute reasonable conduct, the plaintiff will recover fully. If the plaintiff's actions under the circumstances constitute a failure to exercise ordinary care, recovery will be reduced proportionately.¹¹⁸

In *Lyons v. Redding Construction Co.*¹¹⁹ the Supreme Court of Washington adopted the Wisconsin approach. The Washington court eliminated the doctrine of secondary assumption of risk by rejecting reasonable assumption of risk as a recovery reducing concept, and by merging unreasonable assumption of risk with contributory negligence:

Our limited retention of the doctrine of assumption of risk is, of course, a form of contributory negligence. Adoption of the standard of comparative negligence is necessarily accompanied by a more flexible weighing of the relative fault attributable to each party. A concomitant effect of this more delicate apportionment of damages will be the elimination of the need for the assumption of the risk doctrine. Thus, the calculus of balancing the relative measurements of fault inevitably incorporates the degree to which the plaintiff assumed the risk.¹²⁰

The Supreme Court of Florida set forth similar reasoning in *Blackburn v. Dorta*.¹²¹ The Florida court first criticized the view that reasonable assumption of risk acts as a bar to plaintiff's recovery, stating that no Florida case had reached that result and that "there is no reason supported by law or justice in this state to give credence to such a principle of law."¹²² The court noted that comparative negligence is the doctrine that best achieves the goal of tort law—equating liability with fault. "Is liability equated with fault under a doctrine which would totally bar recovery by one who voluntarily, but reasonably, assumes a known risk while one whose conduct is unreasonable but denominated 'contributory negligence' is permitted to recover a proportionate amount of his damages for injury? Certainly not."¹²³ The court therefore treated unreasonable assumption of risk as simply another form of contributory negligence. The trier of fact would consider whether the plaintiff's conduct constituted a "failure to exercise the care of a reasonably prudent man under similar circumstances."¹²⁴ Thus, the plaintiff's knowledge of the risk is simply another circumstance to be weighed against the plaintiff in the comparative fault analysis.¹²⁵

Like Florida, California adopted comparative negligence by judicial decision rather than by statute and also merged assumption of risk with contributory negligence in *Li v. Yellow Cab Co.*¹²⁶ The court in *Li* stated that "the defense of assump-

118. The Wisconsin court specifically stated that

[u]nder the new rule, the trier of the fact may determine that a guest failed to exercise ordinary care in riding with a particular host with knowledge of the host's deficiencies in driving, but may also evaluate such failure in the light of all the circumstances and then compare it with the failures of the host which contribute to the injury.

Id. at 379, 113 N.W.2d 14, 17 (1962).

119. 83 Wash. 2d 86, 515 P.2d 821 (1973).

120. *Id.* at 96, 515 P.2d at 826.

121. 348 So. 2d 287 (Fla. 1977). Florida adopted comparative negligence judicially rather than by statute in *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

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

123. *Id.* at 293.

124. *Id.* at 291.

125. *Id.* at 293.

126. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

tion of risk is also abolished to the extent that it is merely a variant of the former doctrine of contributory negligence; [assumption of risk is] to be subsumed under the general process of assessing liability in proportion to negligence."¹²⁷

V. CONCLUSION

In *Anderson*, the Supreme Court of Ohio correctly dealt with the problems created when a comparative negligence statute mentions contributory negligence but not the related doctrine of assumption of risk. Under the *Anderson* approach, the plaintiff's knowledge of the risk will not by itself act to bar or to reduce plaintiff's recovery, but will be considered in the inquiry "whether a reasonably prudent man in the exercise of due care . . . would have incurred the known risk. . . ."¹²⁸ This interpretation of *Anderson* retains at least some semblance of the concept of assumption of risk—the plaintiff's appreciation of the risk—as a mitigating factor in an unreasonable assumption of risk situation.

The *Anderson* approach recognizes assumption of risk as culpable conduct yet remains true to the principles of comparative negligence. Instead of completely abrogating assumption of risk as a concept, the distinctive elements of the assumption of risk doctrine—knowledge and free will in accepting a risk—are considered as factors in determining the reasonableness of the plaintiff's conduct for purposes of comparative negligence. Thus, although the reasonableness of the plaintiff's conduct is the ultimate issue for determination by the trier of fact, the plaintiff's knowledge of the risk is considered because it supports a finding of unreasonableness. As a result, reasonable assumption of risk should not bar or reduce recovery, because objectively reasonable conduct by the plaintiff cannot be considered contributory negligence and, therefore, does not meet the requirements of Ohio's comparative negligence statute.

Accordingly, if the plaintiff's actions are deemed to be reasonable despite knowledge of the circumstances, the plaintiff should recover. However, knowledge of the circumstances in most cases will limit the plaintiff's choices of reasonable courses of action. Increased knowledge of a given set of circumstances affords the plaintiff a greater opportunity to anticipate and avoid a defendant's negligent actions. As a result, what may constitute reasonable conduct by an unknowing plaintiff may be considered unreasonable if the plaintiff had knowledge of the circumstances.

For example, assume a large dead branch from defendant's tree overhangs an often used pathway. If a reasonable person using ordinary care would not ascertain that the branch was about to break, an unknowing plaintiff's use of the path would not constitute contributory negligence. However, the use of the path by a plaintiff with knowledge of the weak branch must be judged in light of that knowledge. If a reasonable person in the plaintiff's position would have continued to use the path despite this knowledge, the plaintiff should recover fully. On the other hand, if a reasonable person would have acted differently based upon the knowledge, the plain-

127. *Id.* at 829, 532 P.2d at 1243, 119 Cal. Rptr. at 875; see also *Anderson v. Ceccardi*, 6 Ohio St. 3d 110, 113, 451 N.E.2d 780, 783 (1983).

128. *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 54, 155 A.2d 90, 95-96 (1959).

tiff's recovery should be diminished in proportion to the extent the plaintiff's actions deviated from those of a reasonable person.

Ohio's merger of unreasonable secondary assumption of risk into contributory negligence probably will have little effect beyond eliminating unreasonable secondary assumption of risk as a per se bar to recovery. Since Ohio has adopted a modified form of comparative negligence,¹²⁹ which denies recovery if the plaintiff's comparative fault exceeds fifty percent, negligent conduct that previously would have amounted to assumption of risk probably now will constitute contributory negligence greater than fifty percent. For example, an unknowing plaintiff's conduct may amount to forty percent negligence. The plaintiff in this situation is entitled to a sixty percent recovery. However, if the same plaintiff had prior knowledge of the danger, similar conduct might be considered to constitute over fifty percent negligence since the relevant inquiry is whether a reasonable person in the same circumstances would have incurred the known risk. Thus, although the *Anderson* decision will eliminate secondary unreasonable assumption of risk as an automatic bar to recovery,¹³⁰ in many cases an unreasonable and knowing plaintiff may nevertheless be barred completely.

Merging secondary assumption of risk with contributory negligence will not eliminate the concept of assumption of risk, and probably will not eliminate the use of assumption of risk as a term descriptive of plaintiffs' conduct.¹³¹ A plaintiff's voluntary acceptance of a known risk should be considered in determining responsibility for a resulting harm. Thus, the concept of assumption of risk will not disappear. Instead, its application under comparative fault principles will remove the sting of the all-or-nothing common law doctrine, and will focus attention upon key elements—knowledge and freedom of choice—that comprise the doctrine of assumption of risk.

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129. See *supra* notes 1–2.

130. See *Danner v. Medical Center Hosp.*, 8 Ohio St. 3d 19, 19–20, 456 N.E.2d 503, 504 (1983); *Hirschbach v. Cincinnati Gas & Elec. Co.*, 6 Ohio St. 3d 206, 209, 452 N.E.2d 326, 329–30 (1983).

131. As noted by Prosser, assumption of risk "is a distinctive kind of contributory negligence, in which the plaintiff knows the risk and voluntarily accepts it. . . ." W. PROSSER, *supra* note 7, § 68 at 456. Further, the term assumption of risk serves to focus attention upon the plaintiff's action—the voluntary acceptance of a known risk. *Id.* at 457.