Assumption of Risk As a Defense to Negligence

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I. INTRODUCTION

This article suggests that it is time to revive assumption of risk as a defense to negligence. Traditionally, assumption of risk held that a person who made an informed and voluntary decision to encounter a risk gave up his right to recover for harm that resulted from the risk.

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Such a suggestion apparently runs against the grain of recent authority. The comparatively recent Restatement (Third) of Apportionment of Liability rejects a general defense of assumption of risk that is non-contractual. The California courts, where many of these ideas first developed, have continued to reject general standards of assumption of risk, instead proceeding through case-by-case adjudication of which activities preclude a duty between their participants.

Despite this apparent trend, recent cases illustrate the desirability of allowing an assumption of risk defense to negligence, even under circumstances that do not amount to a traditional contract. Last year, the California Supreme Court decided the case of Gomez v. Superior Court, which involved a person injured on an amusement park ride. The ride was meant to be somewhat rough and shaky.

Under standard assumption of risk principles, which received perhaps their most famous expression from Judge Cardozo's opinion on another amusement park ride, Murphy v. Steeplechase Amusement Co., the riders assume the obvious risks of such a ride. California, having abolished assumption of risk, was left with its justices debating the issue of whether the amusement ride could be considered common carriage. The majority concluded that it should, in line with considerable California precedent.

Although the Gomez dissent may have erred in disagreeing on this narrow issue, its observation that "dangerous elements are intentionally incorporated into such rides, and patrons choose such rides precisely for this reason," was surely relevant in deciding whether the ride should be judged by the usual standards for common carriers. As Judge Cardozo observed in his Murphy opinion: "A fall was foreseen as one of the risks of the adventure. There would have been no point to the whole thing, no adventure about it, if the risk had not been there."

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1. Restatement (Third) of Torts abolished the defense of assumption of risk, unless it was under circumstances that amounted to consent to an intentional tort. Restatement (Third) of Torts: Apportionment of Liability § 2 cmt. f (2000).
3. See infra at § II.B.3, pp. 11-14 (criticizing the cases adjudicating the existence of a duty).
5. Id. at 1148 (Chin, J., dissenting).
7. The majority held, consistent with much California precedent, that Disney was a common carrier. Gomez, 35 Cal. 4th at 1127.
8. Id. at 1148 (Chin, J., dissenting).
9. Murphy, 166 N.E. at 174.
This article will revisit the history of assumption of risk in California and elsewhere and suggest that the traditional doctrine should be modified and revived, despite the contrary approach of the *Restatement (Third) of Torts*. In the first part of the article, I will describe the ambiguities in the statements of assumption of risk that existed before the adoption of comparative negligence. I will show that *Knight v. Jewett*, which rejected assumption of risk, misinterpreted *Li v. Yellow Cab Co.* in which the California Supreme Court adopted a comparative negligence rule. Moreover, even if the *Knight* case was defensible on its facts, the post-*Knight* cases create serious problems of predictability and judicial authority.

In the concluding part of the article, I will relate assumption of risk to contractual doctrines of assent and implied-in-law contracts. These comparisons will show that assumption of risk, like many other doctrines, should not always require conscious consent. This context helps us better understand the functions of the defense of assumption of risk and demonstrates that it serves many purposes that cannot easily be advanced with other doctrines.

II. ASSUMPTION OF RISK AND COMPARATIVE NEGLIGENCE: *LI, KNIGHT*, AND THEIR SUCCESSORS

This portion of the article will focus on the California courts’ successive approaches to assumption of risk following their adoption of comparative negligence. In *Li v. Yellow Cab Co.*, the California Supreme Court adopted a comparative negligence rule. After *Li, Knight v. Jewett* interpreted *Li* as abolishing consent-based assumption of risk. The *Knight* court reached this conclusion partly because of its interpretation of ambiguous language in *Li* and partly because it believed that a rule based on the intent of the individual against whom the doctrine of assumption of risk was claimed would eliminate certainty for defendants.

In the place of assumption of risk, *Knight* allowed the court to make case-by-case judgments on whether the nature of the activity led to a potential defendant not owing a duty to a potential plaintiff. Although such an approach creates some of the same uncertainties the *Knight* court sought to mitigate, subsequent cases have expanded this idea and have become progressively more strained.

The difficulties involved in the court’s *Knight* approach, combined with the willingness of many of its members to consider factors such as the desirability of

12. Id.
14. Id.
16. See infra at § II.B.3, pp. 11-14 (discussing the problematic aspects of the limitations of duty approach).
encountering a risk, suggest that the time may be ripe for the court to reconsider its apparent rejection of assumption of risk. Moreover, assumption of risk has in the past been a difficult doctrine, with traditional sources, such as the Restatement (Second) of Torts, obscuring its purposes and failing to demonstrate the success of analogous doctrines in parallel areas.

A. Li v. Yellow Cab Company and the Distinction Between Assumption of Risk and Contributory Negligence

In the Li case, the Court adopted pure comparative negligence\textsuperscript{17} and rejected the last clear chance doctrine.\textsuperscript{18} It recognized that “assumption of risk . . . overlaps . . . contributory negligence to some extent and in fact is made up of at least two distinct defenses.”\textsuperscript{19} It then distinguished between different types of cases. Because understanding these differences is critical to understanding the reasoning of courts in subsequent cases, it is worthwhile exploring the court’s treatment of these two issues. The final part of this section of the article will relate Li’s treatment of the issue to the Restatement (Second) of Torts.

1. Assumption of Risk as a Consequence of a Legal Rule Negating a Duty

The first sort of assumption of risk occurs whenever a rule of law negates a duty that would otherwise exist. For example, in a jurisdiction where landowners owe no duty of care to trespassers, the rule of law that landowners owe no duty means that trespassers “assume the risk”—in the sense that they cannot recover from landowners and so bear all the risk of injury.\textsuperscript{20} As this example shows, this form of assumption of risk requires no intent to assume the risk.

The Li Court related this type of situation to the rule of contributory negligence. “[I]n one kind of situation, to wit, where a plaintiff unreasonably undertakes to encounter a specific known risk imposed by a defendant’s negligence, plaintiff’s conduct, although he may encounter that risk in a prudent manner, is in reality a form of contributory negligence. . . .”\textsuperscript{21} In the sort of situation that the Court described, the Court is dealing with an “assumption of risk” that occurs as a consequence of legal

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\textsuperscript{17} Under comparative negligence, negligence is measured in terms of percentage, and any damages allowed are awarded in proportion to amount of negligence attributable to that person. Black’s Law Dictionary with Pronunciations (5th ed., West 1979).
\textsuperscript{18} Li, 13 Cal. 3d at 828-829.
\textsuperscript{19} Id. at 824.
\textsuperscript{20} Restatement (Third) of Torts: Apportionment Of Liability § 3 cmt. d (2000) (“Substantive rules of liability sometimes do not require defendants to exercise reasonable care. This is often done under the rubric of 'no duty' or other nomenclature. For example, owners and occupiers of land sometimes are not required to exercise reasonable care to avoid injuring an undiscovered trespasser. Bystanders are typically not required to exercise reasonable care to rescue someone in peril.”).
\textsuperscript{21} Li, 13 Cal. 3d at 824 (quoting Grey v. Fibreboard Paper Products Co., 63 Cal. 2d 240, 245-246 (1966)).
rules that have nothing to do with voluntarily accepting a known risk. Thus, under the pre-*Li* rule, when the plaintiff unreasonably encountered a risk, the plaintiff assumed the risk, in the sense that the plaintiff could not recover, so that the plaintiff took on the entire risk of the defendant’s careless conduct.

In a comparative negligence world, plaintiffs should no longer be held to have assumed the risk because of their negligence. This is because that sense of assumption of risk was based on a negligence rule of law that said that there was no recovery. Thus, as the *Li* Court correctly concluded, the undoing of the negligence rule of law made this sense of assumption of risk obsolete, as applied to comparative negligence:

> “[C]omparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence.”

Unfortunately, the clarity of this proposition was undermined by the *Li* Court’s quotation of a prior case that includes both elements of knowledge and carelessness in its description of contributory negligence. *Li* stated, “[W]here a plaintiff *unreasonably* undertakes to encounter a specific known risk imposed by a defendant’s negligence, plaintiff’s conduct, although he may encounter that risk in a prudent manner, is in reality a form of contributory negligence.”

The Court’s inclusion of the word “known” is misleading because, with few exceptions, knowing the risk is not an element of contributory negligence. By contrast, in assumption of risk based on consent, knowledge is always a requirement. The inclusion of an element more associated with assumption of risk in a statement dealing with contributory negligence will lead the *Knight* court to confuse the two.

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22. Thus, “‘[w]aiver’ is often inexacty defined as ‘the voluntary relinquishment of a known right.’” *Restatement (Second) of Contracts* § 84 cmt. b (1979). Such a definition is incomplete because the Restatement of Contracts and other authorities also allow rights to be surrendered under other circumstances. See id. at § 150 cmt. e (“A waiver under this Section may be found in a course of performance. Where there are repeated occasions for performance by one party and the other has knowledge of the nature of the performance and opportunity to object, a course of performance accepted or not objected to may be relevant to show the meaning of the contract, or a modification of it, or a waiver.”).


24. *Li*, 13 Cal. 3d at 824 (emphasis added) (quoting *Grey*, 65 Cal. 2d at 245-246).

25. Ordinarily, carelessness is a sufficient departure from standards to make the plaintiff’s conduct contributorily negligent, but in certain circumstances, some authorities require actual awareness of a risk. See *Restatement (Second) of Torts* § 524(2) (1965) (requiring knowledge for a defense of contributory negligence where the defendant’s conduct involved carrying on an abnormally dangerous activity).


27. See infra p. 16 & n. 88.
2. Assumption of Risk as Tacit Consent to a Reduction of Duty

The other sense of "assumption of risk" rests on the idea of agreement or consent. This version of assumption of risk provides the core idea of assumption of risk, which is embodied in the sections of the Restatement (Second) of Torts that deal with assumption of risk\(^2\) and in such decisions as Judge Cardozo's opinion in *Murphy v. Steeplechase Amusement Co.*\(^2\) As the *Li* court observed,

Other kinds of situations within the doctrine of assumption of risk are those, for example, where plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him. Such a situation would not involve contributory negligence, but rather a reduction of defendant's duty of care."... [C]omparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence.\(^3\)

The conclusion that this sense of assumption of risk is based on consent may be obscured somewhat by the use of "is held to agree" instead of "agrees."\(^3\) However, this usage may acknowledge that the traditional doctrine of assumption of risk rests on less than actual agreement.\(^3\)

In distinguishing between an assumption of risk that was based on carelessness coupled with the doctrine of contributory negligence and an assumption of risk that was knowing and voluntary, the *Li* court was entirely consistent with other authorities at the time. As the drafters of the Restatement (Second) of Torts wrote,

In theory, the distinction between the two [assumption of risk and contributory negligence] is that assumption of risk rests upon the voluntary consent of the plaintiff to encounter the risk and take his chances, while contributory negligence rests upon his failure to exercise the care of a reasonable man for his own protection. Where the plaintiff voluntarily consents to take an unreasonable chance, there may obviously be both.\(^3\)

Moreover, a separate doctrine of assumption of risk answers important needs. The case of the modest risks of the amusement park ride, discussed in the opening of the article, provides one example.\(^3\) But the problem of abolishing assumption of risk exists in more serious situations than amusement park rides. Consider this:

Driver was intoxicated and driving a car in North Dakota in late January. The temperature was -40\(^\circ\)F, and the wind was blowing at 40 miles

\(^{28}\) Restatement (Second) of Torts § 496(A)-(G) (1965).
\(^{29}\) Murphy v. Steeplechase Amusement Co., 250 N.Y. 479 (1929).
\(^{30}\) Li, 13 Cal. 3d at 824-825.
\(^{31}\) Id. at 824.
\(^{32}\) See infra § IV at (discussing the differences between contractual consent and actual consent).
\(^{33}\) Restatement (Second) of Torts § 496A cmt. d.
\(^{34}\) See supra n. 6 at 2 (citing Murphy, 250 N.Y. 479).
an hour. Driver saw a car on the side of the road far away from any town. He stopped to render assistance and found an inoperable car and Peter, who was injured, in need of immediate medical assistance, and unable to drive. Driver offered Peter a ride to the hospital. Driver explained that he was drunk, but correctly observed that an ambulance could not arrive for some time. Peter accepted. Driver got into an accident on the way, further injuring Peter.

Under these circumstances, getting into the car is surely reasonable. The situation is life-threatening and allowing the intoxicated driver to drive the car is the only solution. Therefore, Peter has not been contributorily negligent.

On the other hand, allowing assumption of risk to serve as a defense in this situation seems appropriate, even in the absence of an agreement between the parties. Peter has made an intelligent and prudent decision, even in the absence of an ability to recover for damages. Driver received no benefit from taking on the passenger. Moreover, if the parties are informed of the rules, Driver is likely to insist on a binding contract with Peter before transporting him to the hospital. Examples such as this also illustrate why occasional statements that only unreasonable risks can be assumed should be rejected.

B. Knight v. Jewett

The Knight case had to interpret Li in the context of a lawsuit arising out of a touch football game. All members of the Court felt the need to deal with the effect of comparative negligence on assumption of risk. As the plurality wrote,

Prior to the adoption of comparative fault principles of liability, there often was no need to distinguish between the different categories of assumption of risk cases, because if a case fell into either category, the plaintiff’s recovery was totally barred. With the adoption of comparative fault, however, it became essential to differentiate between the distinct categories of cases that traditionally had been lumped together under the rubric of assumption of risk.

There was at least a tacit agreement not to play rough in the football game, but on the very next play following the agreement, the defendant stepped on the plain-

35. See Restatement (Second) of Torts § 496D (“Except where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant’s conduct unless he then knows of the existence of the risk and appreciates its unreasonable character.”) (emphasis added); but see id. at § 496C (the text of the section contains no requirement that the plaintiff appreciate the risks of unreasonable character, and comment g to the section allows for assumption of risk even when “the plaintiff’s conduct may be entirely reasonable under the circumstances”).
36. Knight, 3 Cal. 4th 296.
37. Id. at 304.
38. Id. at 300. The defendant may have objected to this statement of facts. The court stated some of these facts from defendant’s perspective, foreshadowing its conclusion of non-liability, but the case was decided on summary judgment, so the plaintiff’s version of the facts must be taken as correct. Id. at 299.
tiff, eventually causing her loss of a finger. The *Knight* plurality concluded that the parties’ apparent agreement on how to play was irrelevant, because, under the principles as the plurality developed them, the court’s definition of the sport meant that the defendant owed no duty of care to the plaintiff.

The conclusion that the parties owed one another no duty of care, even if they had otherwise agreed, is startling. It is therefore important to understand how the *Knight* justices reasoned.

1. *Knight’s Interpretation of Li*

*Knight*’s lead opinion correctly observed that *Li* decided that assumption of risk, where it was only a species of contributory negligence, should be treated as contributory negligence. *Knight*’s lead opinion is also correct in describing this as a “no duty” rule determined by the court, not the finder of fact.

The *Knight* plurality apparently felt it necessary to determine what *Li* meant when “properly interpreted,” but it did not discuss any interpretations other than the one it adopted. The *Knight* plurality simply said, “*Li* explicitly held that a plaintiff who ‘unreasonably undertakes to encounter a specific known risk imposed by a defendant’s negligence’ is not completely barred from recovery; instead, the recovery of such a plaintiff simply is reduced under comparative fault principles.”

With all possible respect to the *Knight* Court, this statement is simply incorrect. First, *Li* didn’t hold anything with respect to assumption of risk: because assumption of risk was not at issue in *Li*, the statements on this point were entirely dicta.

Second, *Li* only provided the factual material that the *Knight* Court chose to quote, which is contained in the single quotes, the plaintiff “unreasonably undertakes to encounter a specific known risk imposed by a defendant’s negligence.” *Li* did not supply the conclusion, that a plaintiff “. . . is not completely barred from recovery; instead, the recovery of such a plaintiff simply is reduced under comparative fault principles.” That conclusion was solely the work of the *Knight* Court. *Li* concluded only that it was a case of contributory negligence.

39. *Knight*, 3 Cal. 4th at 300-301.
40. An ambiguity about the role of the various opinions in the *Knight* case makes it difficult to identify what views, if any, represent the views of the court as a whole. The lead opinion was written by George, J., 3 Cal. 4th at 299, with Lucas, C. J., and Arabian, J., concurring, *id.* at 321. Justice Mosk “concur[red] generally” with part II of the plurality opinion, which explained the plurality’s “no duty” approach, but did not join in that opinion. *Id.* (Mosk, J, concurring and dissenting).
41. *Id.* at 321.
42. *Id.* at 306.
43. *Id.* at 308.
44. *Id.*
45. *Id.* at 311 (citing *Li*, 13 Cal. 3d at 824 (internal citations omitted).
46. *Knight*, 3 Cal. 4th at 311 (citing *Li*, 13 Cal. 3d at 824).
47. *Knight*, 3 Cal. 4th at 311.
48. *Id.* If *Li* had really explicitly held that, the court could have quoted *Li*’s conclusion. It did not; it only quoted *Li*’s statement of the facts.
49. *Li*, 13 Cal. 3d at 824.
To reason as it did, the lead opinion in Knight seems to have inferred, from Li's stating that the hypothetical showed contributory negligence, that the hypothetical could not involve assumption of risk. But that inference is incorrect. In a given fact pattern, assumption of risk and contributory negligence can both be present.\(^5\)

In fairness to the authors of the Knight plurality opinion, the Li court wrote in a way that encouraged misinterpretation by including “known risk”, which is necessary for an assumption of risk finding but not for negligence, in a statement dealing with the plaintiff’s negligence. Interestingly, the drafters of the Restatement had the same problem. In Restatement (Second) of Torts § 496D, they wrote, “Except where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant’s conduct unless he then knows of the existence of the risk and appreciates its unreasonable character.”\(^5\)

Because the Li decision does not imply Knight, comparative negligence and assumption of risk can co-exist in a given jurisdiction.\(^5\) We must therefore examine more carefully what persuaded the Knight court to abolish assumption of risk.

2. **Knight’s Rejection of Consent**

Aside from Knight’s misreading of Li, the court advanced two reasons in favor of rejecting assumption of risk. The court perceived reliance on consent to be “fictitious”:

The implied consent rationale rests on a legal fiction that is untenable, at least as applied to conduct that represents a breach of the defendant’s duty of care to the plaintiff. It may be accurate to suggest that an individual who voluntarily engages in a potentially dangerous activity or sport “consents to” or “agrees to assume” the risks inherent in the activity or sport itself, such as the risks posed to a snow skier by moguls on a ski slope or the risks posed to a water skier by wind-whipped waves on a lake. But it is thoroughly unrealistic to suggest that, by engaging in a potentially dangerous activity or sport, an individual consents to (or agrees to excuse) a breach of duty by others that increases the risks inevitably posed by the activity or sport itself, even

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50. **Restatement (Second) of Torts** § 496A cmt. d (“In theory the distinction between the two is that assumption of risk rests upon the voluntary consent of the plaintiff to encounter the risk and take his chances, while contributory negligence rests upon his failure to exercise the care of a reasonable man for his own protection. Where the plaintiff voluntarily consents to take an unreasonable chance, there may obviously be both.”) (emphasis added); see also id. at § 496C cmt. g.

51. Id. at § 496D (emphasis added). This statement in the text of a rule is especially remarkable when one realizes that in id. at § 496A cmt. d, the drafters carefully distinguished between assumption of risk and contributory negligence and noted that “assumption of risk rests upon the voluntary consent of the plaintiff,” not upon his taking an “unreasonable chance.”

52. Some jurisdictions have come to the same conclusions, see *Effect of Adoption of Comparative Negligence Rules on Assumption of Risk*, 16 A.L.R. 4th 700, § 3(a) (2004), although others have held that comparative negligence leads to the abolition of assumption of risk, see id. § 3(b). Other jurisdictions have also concluded that “secondary assumption of risk is a type of contributory negligence.” *Halpern v. Wheeldon*, 890 P.2d 562, 565 (Wyo. 1995) (citing Cathy Hansen & Steve Duerr, *Recreational Injuries & Inherent Risks: Wyoming’s Recreation Safety Act*, 28 Land & Water L. Rev. 149, 156 (1993)).
where the participating individual is aware of the possibility that such misconduct may occur.\textsuperscript{53}

It is unclear why this constitutes a reasonable objection to the consent-based approach. This quotation suggests that under the implied-consent approach, one consents to risks inherent in the sport, and not to heightened risks created by others’ carelessness. That seems both reasonable and consistent with the plurality’s approach.

[Furthermore], the dissenting opinion’s claim that the category of cases in which the assumption of risk doctrine operates to bar a plaintiff’s cause of action after \textit{Li} properly should be gauged on the basis of an implied consent analysis, rather than on the duty analysis we have described above, is, in our view, untenable for another reason. In support of its implied consent theory, the dissenting opinion relies on a number of pre-\textit{Li} cases, which arose in the “secondary assumption of risk” context, and which held that, in such a context, application of the assumption of risk doctrine was dependent on proof that the particular plaintiff \textit{subjectively} knew, rather than simply should have known, of both the \textit{existence} and \textit{magnitude} of the \textit{specific} risk of harm imposed by the defendant’s negligence. Consequently, as the dissenting opinion acknowledges, were its implied consent theory to govern application of the assumption of risk doctrine in the sports setting, the basic liability of a defendant who engages in a sport would depend on variable factors that the defendant frequently would have no way of ascertaining (for example, the particular plaintiff’s subjective knowledge and expectations), rather than on the nature of the sport itself. As a result, there would be drastic disparities in the manner in which the law would treat defendants who engaged in precisely the same conduct, based on the often unknown, subjective expectations of the particular plaintiff who happened to be injured by the defendant’s conduct.\textsuperscript{54}

The plurality’s observations are not beyond criticism.

One flaw is that the argument is inconsistent. As the opinion observes, because the test turns on what individuals think and know, it is not entirely predictable to a defendant. For these same reasons, it is not fictitious, but turns on the real-world fact of the state of mind of the plaintiff. Thus, the argument that the consent-based approach yields results unpredictable to the defendant does not jibe with the claim that consent is a fiction.

In addition, the opinion’s reliance on the goal of predictability does not explain its result. First, in many respects, the opinion actually increases unpredictability. The plurality denied a recovery to the \textit{Knight} plaintiff despite the agreement of the parties, based on the court’s view of what was required by the sport itself. Subsequent cases showed that this was hardly a result of the freakish facts of \textit{Knight}. \textit{Cheong}\textsuperscript{55}

\textsuperscript{53} \textit{Knight}, 3 Cal. 4th at 311.

\textsuperscript{54} \textit{Id.} at 312-313 (emphasis in the original) (citing \textit{Vierra}, 60 Cal.2d at 271; \textit{Prescott}, 42 Cal. 2d at 161-162).

\textsuperscript{55} \textit{Cheong}, 16 Cal. 4th 1063.
and *Ford*, successor cases to *Knight*, denied liability under the no-duty rule, although in both of those cases, the harm to the plaintiff did not stem from inherent risk and the defendant did not rely on the plaintiff’s consent.

Second, the plurality’s reliance on predictability does not explain why it is so concerned with clarity to the defendant. Only overwhelming weight to that factor and slighting of clarity to the plaintiff could justify the plurality’s willingness to reject the actual agreement present in *Knight*.

Although the rejection of a consent-based approach is flawed, its dissatisfaction with a consent-based approach reflects several important insights. First, because in many cases of assumption of risk, the parties will not have thought about the consequences of an injury, a theory based on actual consent relies on a fiction. Second, the *Knight* opinion correctly recognized that past decisions of the California Courts of Appeals negating an assumption of risk defense where a risk was reasonably encountered were incorrect. These decisions of the Courts of Appeal, by neglecting the idea of consent implied by conduct or circumstances, went down a wrong path.

The last part of this article suggests an approach that addresses the California Supreme Court’s concerns about a rule based on actual consent. Briefly, a theory of assumption of risk based on the existence of either implied consent or benefit would meet many of the court’s objections, while avoiding the unpredictability of the court’s own analysis. However, before explaining this approach, we need to turn to the “no-duty rule” that the court developed as an alternative to assumption of risk.

3. The Adoption of a No-Duty Rule

The *Knight* plurality’s misreading of *Li* as rejecting traditional assumption of risk precluded using that doctrine as a defense in many situations, such as athletic competitions, where a no-liability result seemed intuitively correct. This misreading therefore generated pressure for an alternative way of achieving a no-liability result. The route the opinion chose was to extend an existing area in which assumption of risk reflected a conclusion that the defendant had no duty to the plaintiff.

To understand *Knight*’s extension of the “no duty” rule, it is important to understand the rule’s origins. As the *Knight* opinion correctly observed, the “no duty” rule represented a legal conclusion of the court. As such, the “no duty” rule is implicit in any rule limiting someone’s obligations.
Historically, the “no duty” rule represented a result based on an analysis of other legal principles that had an independent existence, such as contributory negligence, the limited duties of landowners to trespassers, and landlord-tenant law. It is easy to see how such situations could be described as involving an assumption of risk. For example, in a jurisdiction where landowners owe no duty of care to a trespasser, the trespasser—even the inadvertent trespasser—cannot recover for carelessness of the landowner. In such a situation, the trespasser can be said to have assumed the risk that the landowner’s carelessness will cause him injury, because he cannot shift the loss onto the landowner.

In this historical “no duty” approach, the conclusion of an assumption of risk is a consequence of the plaintiff’s conduct, which follows despite the absence of an agreement to assume the risk, and even despite the plaintiff’s lack of knowledge that he was trespassing. This aspect to the approach must have represented an attraction to the *Knight* authors, because it was consistent with their rejection of consent as a basis for assumption of risk.

The historical approach to the absence of a duty differed in an important way from the *Knight* plurality’s approach to the rule. The past cases that reached a conclusion that the absence of a duty led to an assumption of risk tied the absence of a duty to a pre-existing and definite principle of law. For example, the *Li* court discussed the duties of plaintiffs to take care for themselves, and the example of assumption of risk through trespass relies on the assumed rule that property owners owe no duty to trespassers.

Similarly, *Ratcliff v. San Diego Baseball Club,* which *Knight*’s plurality cited approvingly, in fact provides an additional example of a situation in which a no-duty result follows from pre-existing rules. *Ratcliff* discussed the negligence of the stadium owner, not any independent knowing and voluntary consent. Thus, the assumption of risk there was solely of the type that occurs as a consequence of other law. If the stadium owner were not negligent, the plaintiff does not recover; in that sense, the plaintiff game-goer assumed the risk of injury under those circumstances.

Unlike these prior cases involving no duty, the *Knight* opinion freed itself and subsequent courts from any reliance on defined, pre-existing rules of law that limited duties. Thus, the *Knight* opinion expanded the “no duty” rule to cover situations where the court thinks it appropriate without reference to other rules of law. This allows the court to make ad hoc decisions creating or rejecting a duty.

The *Knight* opinion did attempt to set some standards limiting the court’s discretion. According to *Knight*, the absence of duty turns on “the nature of the activity or sport in which the defendant is engaged and the relationship of the defendant and

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63. *Li,* 13 Cal. 3d at 824.
the plaintiff to that activity or sport.”\(^{67}\) The nature of the sport is important because, as the \textit{Knight} opinion said, the no-duty rule was confined to risks that were “an integral part of the sport itself.”\(^{68}\) Moreover, the opinion continued, “defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.”\(^{69}\)

Unfortunately, this standard is too indeterminate to provide predictability or to constrain a court’s discretion in creating legal rules. Part of the problem is that defendants \textit{do} owe a duty with respect to some inherent risks. As the \textit{Knight} opinion observed, although “inherent in the act of driving is the risk that he or she will be injured by the negligent driving of another,”\(^{70}\) one driver does not excuse the other’s negligence by driving.

Similarly, although a patient who undergoes elective surgery is aware that inherent in such an operation is the risk of injury in the event the surgeon is negligent, the patient, by voluntarily encountering such a risk, does not ‘impliedly consent’ to negligently inflicted injury or ‘impliedly agree’ to excuse the surgeon from a normal duty of care.\(^{71}\)

\textit{Knight}’s progeny demonstrate the difficulties in applying the principle that only inherent risks are not associated with duties. The companion case of \textit{Ford v. Gouin}, involving a waterskiing collision in which the boat piloted the skier into a low-hanging branch, itself represented a considerable extension of the \textit{Knight} facts.\(^{72}\) Although moguls are, as \textit{Knight} itself suggests, inherent or desirable risks of snow skiing,\(^{73}\) running into branches is not an inherent or desirable risk of water-skiing.

\textit{Cheong v. Antablin}, which involved a collision between two snow skiers, represents a considerable extension of the principle, because skiers aren’t supposed to run into each other.\(^{74}\) This risk is inherent only in the sense that it is practically inevitable, not that it is desirable. This case is therefore difficult to distinguish from the pleasure driver or the surgical patient. \textit{Cheong} is also difficult to reconcile with \textit{Knight}’s statement that “defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.”\(^{75}\)

The court did not provide a principled basis for deciding these cases, and several possibilities can be ruled out. It cannot be the riskiness of the activity; skiing and playing touch football are probably substantially less risky than driving or heart surgery.

\[^{67}\] \textit{Knight}, 3 Cal. 4th at 309.
\[^{68}\] \textit{Id.} at 315.
\[^{69}\] \textit{Id.} at 316.
\[^{70}\] \textit{Id.} at 311.
\[^{71}\] \textit{Id.} at 312.
\[^{72}\] \textit{Ford}, 3 Cal. 4th at 345.
\[^{73}\] \textit{Knight}, 3 Cal. 4th at 311.
\[^{74}\] \textit{Cheong}, 16 Cal. 4th at 1069.
\[^{75}\] \textit{Knight}, 3 Cal. 4th at 316.
Nor should we treat the court as silently having decided that some activities are more meritorious than others, and that those who engage in the meritorious activities should be protected against the doctrine of assumption of risk. There would be at least three problems with the court's doing such a thing. First, at a simple factual level, skiing and boating are commercially important. It would be unfortunate if the courts were to take it upon themselves to discourage such activities.

Second, such an approach would be inconsistent with the usual rule that negligence requires only due care in how one does an activity and does not judge whether an activity should be engaged in at all. It may be respectfully suggested that courts are not the appropriate body to make these value judgments.\(^76\)

Finally, even were the court to believe that it could properly discourage "low-value" activities, the Coase theorem suggests that such an approach will not work.\(^77\) Although it may be discouraging careful plaintiffs from engaging in such activities, its no-liability rule lets careless defendants escape the consequences of their conduct and thereby encourages it. Thus, the most obvious effect of its rule for skiing will be to discourage careful people from engaging in skiing, because they will be denied a recovery, and to encourage careless people to engage in skiing, because they will be provided immunity from suits.

Because the Court has not established a principle and because it is difficult to discern one from its cases, there is a great deal of uncertainty in the law. In the very recent case of *John B. v. Superior Court*, the California Supreme Court rejected efforts to limit duties to one's sexual partners without addressing its no-duty line of cases.\(^78\) The Court has not yet had to address attempts to apply its no-duty approach to cases involving commuting skiers or commuting boaters,\(^79\) people being towed by cars, people riding in trailers, or even passengers in cars.

As to passengers in cars, the California Supreme Court has held that host-guest automobile rules relieving the driver of responsibility for negligence causing his passenger injury are unconstitutional.\(^80\) That seems precisely analogous to the case of skiers. Thus, California has adopted in one context a rule of non-liability that it has ruled unconstitutional in another.

In the face of all the difficulties of the no-duty approach, it may respectfully be suggested that even traditional assumption of risk is fairer, clearer, and more predict-

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76. *Cf. Koos v. Roth*, 652 P.2d 1255, 1261 (Ore. 1982) (Linde, J.) ("Utility and value often are subjective and controversial. They will be judged differently by those who profit from an activity and those who are endangered by it, and between one locality and another.").


79. The practical impact of California law will be limited in maritime cases. Admiralty law provides a separate avenue for recovery, and one suspects that on facts similar to those of *Ford*, the plaintiffs will use federal admiralty law, which will control an accident like this. *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 206 (1971) (quoting *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 60 (1914) ("maritime law was thought to reach 'every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters . . . '.").

As I hope the previous part of the article has shown, California’s adoption of a no-duty rule in place of assumption of risk poses some problems. At the same time, the court has identified some difficulties with traditional assumption of risk analysis. The task of this portion of the article is to set forth the implications of traditional assumption of risk analysis and to create a framework for a better doctrine of assumption of risk.

A. Assumption of Risk Before Comparative Negligence

Under the Restatement (Second) of Torts § 496C, the elements of implied assumption of risk exists when a potential plaintiff “[1] fully understands a risk of harm . . . and [2] who nevertheless voluntarily chooses to enter or remain, or to permit his things to enter or remain within the area of that risk, [3] under circumstances that manifest his willingness to accept it.”

California courts have had a similar, but not identical, understanding. In her Knight dissent, Justice Kennard said without contradiction,

In California, the affirmative defense of assumption of risk has traditionally been defined as the voluntary acceptance of a specific, known and appreciated risk that is or may have been caused or contributed to by the negligence of another. Assumption of risk may be proved either by the plaintiff’s spoken or written words (express assumption of risk), or by inference from the plaintiff’s conduct (implied assumption of risk). Whether the plaintiff knew and appreciated the specific risk, and voluntarily chose to encounter it, has generally been a jury question.

Because the elements of “full understanding” (from the Restatement) and a “known and appreciated risk” (from the California cases) are largely the same, both California and the Restatement require the defendant to show that the plaintiff made a knowing and voluntary choice to prevail on an assumption of risk defense. The Cali-
fornia cases do posit a requirement of specificity. However, specificity in this context means an understanding of the specific magnitude of the risk, so that it largely duplicates the Restatement’s requirement of full understanding. The California cases omit the Restatement’s requirement of “circumstances that manifest [the plaintiff’s] willingness to accept [the risk].”

First, we consider the elements of understanding and voluntariness together, because these are shared by the case law in California and the Restatement. Then, we turn to the problems that those elements leave unsolved. Finally, we take up the difficult issues of what the Restatement’s third requirement, manifestation of willingness to accept a risk, means.

1. Knowing and Voluntary Acceptance

The element of full understanding set forth in Restatement (Second) of Torts § 496C receives elaboration in section 496D of the Restatement. It is clear that the test is entirely subjective. Thus, mere negligent failure to understand a risk does not create the basis for an acceptance of a risk. So, a person from Sweden who had never seen a baseball game and who knew nothing about the game does not assume the risk of being hit by a fly ball, although someone familiar with baseball does.

Although the principle of subjective understanding is clear, the actual statement of the rule in the Restatement (Second) of Torts § 496D confusingly incorporates an element of the “unreasonable character” of the risk. The rule states, “[e]xcept where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant’s conduct unless he then knows of the existence of the risk and appreciates its unreasonable character.” (Although prior California law did not incorporate a requirement that the risk be unreasonable, it may be that this language from the Restatement contributed to the confusing language in Li, which Knight took up, that combined requirements of knowing and careless conduct.)

That suggests—although the general provision on assumption risk has no such requirement—that unless the risk is unreasonable, it cannot be assumed. That surely

83. Knight, 3 Cal. 4th at 326 (Kennard, J., dissenting) (citing Hook v. Point Montara Fire Protection Dist. 213 Cal. App. 2d 96, 101 (1963)) (“The normal risks inherent in everyday life, such as the chance that one who uses a public highway will be injured by the negligence of another motorist, are not subject to the defense, however, because they are general rather than specific risks.”).
84. See Vierra, 60 Cal. 2d at 271 (discussing “many cases holding that actual knowledge of the particular risk and its magnitude are essential”).
85. RESTATEMENT (SECOND) OF TORTS § 496D cmt. c.
86. Id. at § 496C illus. 4 & 5. Although Knight’s analysis of Ratcliff, 27 Cal. App. 2d 733, rejects this view, see Knight, 3 Cal. 4th at 318 (discussing Ratcliff), the Ratcliff case itself indicates that it was dealing only with what duties the stadium owner owed. See supra p. 3 & n. 61.
87. RESTATEMENT (SECOND) OF TORTS § 496D (emphasis added). The Restatement is not entirely consistent on this point. Elsewhere in describing assumption of risk, it states that “the plaintiff’s conduct may be entirely reasonable under the circumstances; or it may be unreasonable, and so subject him also to the defense of contributory negligence.” Id. at § 496C cmt. g (emphasis added).
88. See supra p. 9 & n. 51.
89. See RESTATEMENT (SECOND) OF TORTS § 496D.
is wrong. Consider the hypothetical of Driver and Peter, in which Peter has smashed his own car and needed immediate medical attention and, therefore, agreed to let a drunk driver take him to the hospital, because he has no alternative.90

The element of voluntariness set forth in Restatement (Second) of Torts § 496C receives elaboration in the Restatement's § 496E. A choice is voluntary if the choice imposes little burden on the plaintiff or if the burden does not result from the defendant's conduct. Thus, the courts have found that a guest who sued her mother-in-law after she slipped and fell on wet stairs at the mother-in-law's mobile home voluntarily assumed the risk, because her ability to use the dry front stairs made her use of the back stairs a free choice.91

A choice can be voluntary even if it is a choice among unattractive options. According to the Restatement, a choice between bleeding where one is and accepting a car with bad brakes is voluntary.92 This strongly suggests voluntariness in the hypothetical of Peter and Driver.93 But, a choice is not voluntary where the defendant's tortious conduct limits plaintiff's choices.94

2. Manifestation of Willingness

Consider, in the following situation, whether Professor Paul should be considered to have assumed the risk:

Professor Paul is attending a scholarly discussion of torts professors, who are hashing out some hitherto-obscure details of intentional infliction of emotional distress. The discussion, fueled by numerous cups of espresso and other non-intoxicating liquids, continues until 2 a.m. The bars in Carbondale, where the discussion takes place, close at 2 a.m. Paul, then teaching in Carbondale, understands that it is risky to drive home when the bars let out, because all those who have been drinking until closing time are then on the roads. Nonetheless, he drives home, driving with complete care. He is injured in a collision with an intoxicated driver.

If the only elements of assumption of risk were knowledge and a voluntary encounter, Paul would have to be denied recovery. He knows about the risks and he could have stayed and waited for the drunk drivers to clear themselves from the road.

Perhaps a difference is made by the third element in the Restatement (Second) of Torts' definition of assumption of risk, § 496C's requirement that the plaintiff's

90. See supra p. 7.
92. RESTATEMENT (SECOND) OF TORTS § 496E cmt. b.
93. See id. at § 496C; see also supra p. 7 (describing the Peter and Driver hypothetical).
94. Id. at § 496E cmt. c. This situation is similar to the rule that would exist in contractual duress cases. See RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1979) ("If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.").
conduct be “under circumstances that manifest his willingness to accept [the risk].”95 The manifestation requirement is elaborated in comment h to section 496C, “Manifestation of acceptance.”96 According to the comment, “[i]mplied consent is consent which exists in fact, but is manifested by conduct rather than by words.”97

The Restatement’s comments on manifestation suggest that Professor Paul can recover. The Restatement says that someone dashing out into traffic “certainly does not manifest consent that they shall be relieved of the obligation of care for his safety. This is merely contributory negligence, and not assumption of risk.”98

Unfortunately, the Restatement does not explain why this conduct is not a manifestation of consent. Moreover, two apparently similar cases are treated as assumption of risk. Where the plaintiff approaches an illegal fireworks show to watch the show and is injured, he may be found to have assumed the risk.99 Similarly, a plaintiff who approaches a fight to watch it and is negligently injured by one of the participants may also be found to have assumed the risk.100

Nor does the Restatement explain whether the function of a “manifestation” is evidentiary or communicative. In the context of contract, manifestation is important, because one contracting party should not be charged with obligations that the other party has not communicated. However, there is no need for acceptance in the context of assumption of risk because a party’s assumption of risk confers a benefit on the person creating the risk. Furthermore, in the case of the fireworks show or the fight, it appears unlikely that there is actual communication of the consent to the potential defendant. For example, there is no suggestion in the Restatement that the result in the case of the brawl or the fireworks would differ if the defendant did not realize that the plaintiff had approached the scene.

If this is so, and communication is not the function of the manifestation requirement, then perhaps the function of the manifestation requirement is evidentiary. But if the function is evidentiary, the Restatement’s insistence on conduct, instead of an after-the-fact statement that one accepted the risk, is mysterious.

It may be that, in including a “manifestation” element in § 496C,101 the drafters of the Restatement (Second) of Torts were attempting to satisfy the claims of potential defendants who had relied on apparent consent. Unfortunately, the drafters undermined their position by defining “[i]mplied consent [as] consent which exists in fact, but is manifested by conduct rather than by words.”102 As I shall show later in the

95. RESTATEMENT (SECOND) OF TORTS § 496C.
96. By contrast, the other two elements of the implied assumption of risk foreshadowed in section 496C, full understanding and voluntary choice, each have their own separate sections of the Restatement. See id. at §§ 496D, 496E, respectively.
97. Id. at § 496C cmt. h.
98. Id. at § 496C cmt. h.
99. Id. at § 496C illus. 1.
100. Id. at § 496C illus. 2.
101. RESTATEMENT (SECOND) OF TORTS § 496C.
102. Id. at § 496C cmt. h.
article, molding assumption of risk into a coherent doctrine requires allowing acceptance of a risk to occur in different ways.

3. **Concluding Thoughts**

The doctrine of assumption of risk was originally articulated before the adoption of comparative fault. As has been observed, "[p]rior to the adoption of comparative fault principles of liability, there often was no need to distinguish between the different categories of assumption of risk cases, because if a case fell into either category, the plaintiff's recovery was totally barred."\(^{103}\) The relatively small effect of classifying something as an assumption of risk may explain a lack of clarity in drafting.

At its most basic level, the drafters of the approaches to assumption of risk seem to have vacillated between an approach focusing on consent and an approach that did not require an agreement. The Restatement's description of implied consent as "consent which exists in fact, but is manifested by conduct rather than by words"\(^{104}\) certainly points to a reliance on agreement.

If this were so, however, one would expect the rule to require actual consent. Instead, the rule requires "circumstances that manifest [the plaintiff's] willingness to accept" the risk.\(^{105}\) Moreover, a comment says, "[b]y voluntarily electing to proceed, with knowledge of the risk, in a manner which will expose him to it, [the plaintiff] manifests his willingness to accept it."\(^{106}\) This implies that "manifestation" is the consequence of the informed and voluntary encounter, rather than a third element. Moreover, if an actual agreement were intended, one would expect that one could write a simple provision requiring such agreement, as § 496B does for express agreements, rather than suffer the complexities of §§ 496C through 496E.

An additional complication is the inconsistency over whether the encounter of the risk must be unreasonable. As one part of the Restatement observed, "[e]xcept where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character."\(^{107}\) This approach has its counterpart in Li's description of a situation involving assumption of risk as having a plaintiff who "unreasonably undertakes to encounter a specific known risk imposed by a defendant's negligence."\(^{108}\)

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103. *E.g.* Knight, 3 Cal. 4th at 305.
104. *Restate ment (Second) of Torts* § 496C cmt. h.
105. *Id.* at § 496C.
106. *Id.* at § 496C cmt. b.
107. *Restatement (Second) of Torts* § 496D (emphasis added). The Restatement is not entirely consistent on this point. Elsewhere in describing assumption of risk, it states that "the plaintiff's conduct may be entirely reasonable under the circumstances; or it may be unreasonable, and so subject him also to the defense of contributory negligence." *Id.* at § 496C cmt. g (emphasis added).
108. *Li*, 13 Cal. 3d at 824 (quoting *Grey*, 65 Cal. 2d at 245-246). This portion of *Li* was quoted by *Knight* and formed a basis for its misinterpretation of the rule on when assumption of risk was subsumed into comparative negligence. *See Knight*, 3 Cal. 4th at 311.
On the other hand, Restatement (Second) of Torts § 496C\textsuperscript{109} does not require an appreciation of unreasonable character, and comment g of that section allows for assumption of risk even when "the plaintiff's conduct is entirely reasonable under the circumstances."\textsuperscript{110} Moreover, other parts of the Restatement allow assumption of risk to exist under circumstances, such as a need for immediate medical attention, that tend to negative a claim that the plaintiff's decision was unreasonable.\textsuperscript{111}

These many inconsistencies and confusions make the Restatement (Second) of Torts an inadequate authority for analyzing assumption of risk cases. The adoption of the Restatement (Third) of Torts: Apportionment of Liability in 2000 provided an occasion for defining an underlying purpose for the rule and editing out the inconsistencies. Perhaps daunted by the task, the drafters chose instead to abolish the doctrine of assumption of risk. The next section of this article examines their work.

B. Assumption of Risk Under the Restatement (Third) of Torts: Apportionment of Liability

Under the Restatement (Third) of Torts: Apportionment of Liability § 2, assumption of risk is solely contractual, and what the Second Restatement had called "implied assumption of risk" in section 496C is abolished.\textsuperscript{112} Thus, without a contract, there is no assumption of risk, although the plaintiff's careless encounter of a risk may still be negligence.\textsuperscript{113}

This approach has the benefit of abolishing the confused manifestation test.\textsuperscript{114} It therefore provides a rationale for the result of no assumption of risk when one dashes out into the street.\textsuperscript{115} It also obviates the need to take a position on whether only unreasonable risks may be assumed.\textsuperscript{116}

The disadvantage of this approach is that it mishandles situations in which non-liability is a desirable result, but a contract is impossible or implausible. A contract can be impossible because a party lacks contractual capacity, such of a minority,\textsuperscript{117} because of a temporary incapacity from an accident,\textsuperscript{118} because of intoxicated.\textsuperscript{119} A contract is implausible between parties who are not thinking about the need to have

\textsuperscript{109} RESTATEMENT (SECOND) OF TORTS § 465C.
\textsuperscript{110} Id. at § 465C cmt. g.
\textsuperscript{111} Id. at § 496E illus. 1.
\textsuperscript{112} RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. i.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} RESTATEMENT (SECOND) OF TORTS § 496C cmt. h.
\textsuperscript{116} Id.
\textsuperscript{117} Compare id. at § 496D ("Except where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character.") with id. at § 496C (the text of the section contains no requirement that the plaintiff appreciate the risks of unreasonable character, and comment g to the section allows for assumption of risk even when "the plaintiff's conduct is entirely reasonable under the circumstances").
\textsuperscript{118} E.g. RESTATEMENT (SECOND) OF CONTRACTS § 14.
\textsuperscript{119} For example, consider Peter in our hypothetical mentioned above. If the car accident left him temporarily dazed, he would be deemed temporarily incapacitated.
\textsuperscript{119} Id. at § 16.
an agreement, or who do not know of one another’s existence, or who are unable to communicate with each other.\textsuperscript{120} The \textit{Restatement (Third) of Torts} does not attempt to explain what is wrong or unwise with the examples the previous Restatement used to illustrate assumption of risk, such as approaching an illegal fireworks display\textsuperscript{121} or a fight.\textsuperscript{122}

By abolishing all non-contractual assumption of risk, the \textit{Restatement (Third)} has made a more radical change than its drafters may have realized.\textsuperscript{123} The requirements of contractual capacity, consideration, or other formalities may prevent formation of a contract,\textsuperscript{124} although the expression of consent and the full information that the consenting party had would amount to a valid assumption of risk under the \textit{Restatement (Second) of Torts}.

The comments attempt to compensate for the under-inclusiveness of the text. Under \textit{Restatement (Third)} \S 2 comment f, anything that would be a defense to an intentional tort will also be treated as an assumption of risk.\textsuperscript{125} Although this is unobjectionable, it addresses neither the problems raised by the Peter v. Driver hypothetical,\textsuperscript{126} not those raised by the illustrations to the \textit{Restatement (Second) of Torts}.\textsuperscript{127}

\textit{Restatement (Third)} \S 2 comment j attempts to compensate for under-inclusiveness by observing that "knowledge of a risk may support a conclusion, based on other liability-limiting doctrines, that the defendant is not liable. These liability-limiting doctrines sometimes are called ‘no duty’ or ‘limited duty’ rules."\textsuperscript{128} This, of course, is the California approach. Like the lead opinion in \textit{Knight},\textsuperscript{129} the comment provides no advice on how to delineate the areas in which no duty exists.

Unfortunately, as the California court’s approach shows, the “no duty” cases provide little predictability or fairness. This is not, of course, a result of some peculiar failing of the California courts, but the result of asking courts to make standardless judgments. Courts elsewhere can be expected to do no better.

\begin{footnotes}
\item[120.] \textit{E.g. Restatement (Second) of Contracts} \S 17.
\item[121.] \textit{Restatement (Second) of Torts} \S 496C illus. 1.
\item[122.] \textit{Id.} at \S 496C illus. 2.
\item[123.] \textit{See Knight}, 3 Cal. 4th at 321-322 (Mosk, J., joined by Panelli, J., concurring and dissenting) (California’s approach, which seems only to bar implied assumption of risk, may therefore be much less radical).
\item[124.] \textit{Supra} nn. 117-120 and accompanying text.
\item[125.] \textit{Restatement (Third) of Torts: Apportionment of Liability} \S 2 cmt. f.
\item[126.] \textit{See supra} at 7.
\item[127.] \textit{Restatement (Second) of Torts} \S 496B cmt. c illus. 1-2.
\item[128.] \textit{Restatement (Third) of Torts: Apportionment of Liability} \S 2 cmt. j. \textit{See also id.} at \S 2 illus. 1-2.
\item[129.] \textit{Knight}, 3 Cal. 4th 296.
\end{footnotes}
IV. REVIVING AND REVISING ASSUMPTION OF RISK: THE PROBLEM OF CONSENT

A. Introduction

I hope the foregoing discussion and cases like the amusement park rides that Judge Cardozo dealt with in Murphy v. Steeplechase Amusement Co. and the hypothetical of Peter v. Driver demonstrate that assumption of risk serves a useful purpose. Thus, although some authorities have suggested that assumption of risk should be abolished, abolition creates more problems than it solves, because it leaves the legal system without a tool for addressing a situation where a party gives informed consent to a risk under circumstances that do not amount to a contract.

At the same time, some requirement that goes beyond merely knowing and voluntary conduct is necessary, or the doctrine of assumption of risk will bar recovery to those who are aware of the hazard-creating conduct of others and do not wish to give up their pre-existing right to do as they wish. The example of Professor Paul, who goes into the streets of Carbondale knowing of the heightened risk posed by drunken college students, is apposite here.

Unfortunately, relying on actual consent is problematic. The California Supreme Court erred in suggesting that consent was a fiction in the Knight case, because that case had facts that surely negatived consent. Nonetheless, in many cases, potential plaintiffs will not have thought about what legal rules should govern in case the unhoped-for bad result occurs, so no conscious consent or withholding of consent will exist. Furthermore, in many of those cases, such as the situation in Peter v. Driver, a conclusion of non-liability makes sense.

Thus, the true problem is not that consent is a fiction, but that a requirement of consent is inconsistent with the function that we want the doctrine of assumption of risk to perform. One basis for the doctrine is preservation of autonomy, so that when one agrees to something, they're stuck with it. A second basis for the doctrine is to prevent people from voluntarily doing something that induces others to act and then holding them liable for the act. A third basis for the doctrine is to support the actions of people who incur risks helping others, who may not be able to provide or withhold consent.

Contract law faces the same difficulties, and it has evolved a three-fold basis for obligation: assent, implied-in-fact agreement, and implied-in-law agreement. Although contract law responds to somewhat different concerns, those ideas offer a help-

130. Murphy, 250 N.Y. 479.
131. See supra at 7.
132. Knight, 3 Cal. 4th at 321-322 (Mosk, J., joined by Panelli, J., concurring and dissenting).
133. See supra at 17.
134. Knight, 3 Cal. 4th at 300.
135. See supra at 7.
ful analogy here. In the following sections of the article, I will develop the idea of actual consent, apparent consent, and legally implied consent.

Let me foreshadow these terms, so I can explain their relationship. Actual consent is largely self-explanatory, although it needs to be distinguished from contractual consent. Apparent consent is based on voluntarily conduct inducing reliance on the part of the person creating the risk or on conduct voluntarily exposing oneself to a risk, coupled with benefits from the risk-creating activity. Legally implied consent exists for a person not in a position to consent or act voluntarily, but for whom the benefits of a course of action that a third party wishes to undertake are so evident that they obviously outweigh the risk.

These three types of consent form a hierarchy. If there is actual consent, the court need not evaluate apparent consent. Ambiguity about whether a situation is so urgent that it justifies unilateral action is irrelevant in the face of actual or apparent rejection of consent.

B. Actual Consent

As Justice Kennard later observed, “the defense is a specific application of the maxim that one ‘who consents to an act is not wronged by it.’”136 In everyday terms, this means that someone who says, “Do that!” cannot sue when “that” (whatever it is) injures the person who says it. For this reason, actual consent—when fully informed and voluntary, as required by traditional assumption of risk doctrine—is and should be sufficient to support a defense of assumption of risk.

The importance of having a doctrine of assumption of risk is emphasized by the differences between contractual consent and actual consent in the context of assumption of risk. A consent that would be valid in the context of a contract may not be valid in the context of assumption of risk, and vice versa. For this reason, the Restatement (Third) of Torts is somewhat misleading when it refers to contractual assumption of risk as the successor to express assumption of risk.137

First, consent in assumption of risk requires knowledge of the risk being assumed. Whether the case involves what the Restatement (Second) of Torts refers to as “implied assumption of risk”138 or an express assumption of risk, both require a subjective understanding of the risk.139

137. Restatement (Third) of Torts: Apportionment of Liability § 2 cmt. a. Cf. Restatement (Second) of Torts § 496B cmt. a (applying assumption of risk to a “A plaintiff who by contract or otherwise expressly agrees to accept a risk”) (emphasis added). In addition to the differences noted in the text, non-contractual express assumption of risk does not require consideration. Id.
138. Restatement (Second) of Torts § 496C (heading).
139. See id. at § 496A cmt. d, para. 3 (using “subjective understanding” to describe the common elements for all forms of assumption of risk); id. at § 496B cmt. C (requiring “the terms were in fact brought home to [the plaintiff] and understood by him, before it can be found that he has accepted them”); id. at § 496B cmt. D (requiring that the “terms were intended by both parties to apply to the particular conduct of the defendant which has caused the harm”).
Contract law, which provides the relevant standard under the *Restatement (Third) of Torts: Apportionment of Liability*\(^{140}\) and *Knight*,\(^{141}\) does not require those contractually accepting a risk to know the terms to which they are agreeing or the nature of the risk.\(^{142}\) Ameliorating the problem of being bound by unread contracts are provisions in both the Second and Third Restatements of Tort that limit the effectiveness of purported contracts. In the common case of post-contract receipts, a disclaimer purporting to limit a defendant’s duty may be invalid because assent, an element of contractual consent, may be lacking.\(^{143}\) A purported contractual consent may be invalid because it violates principles of law intended to protect people from their own limits in judgment, whether those principles are expressed in a requirement of clear statement and full disclosure\(^{144}\) or in an absolute prohibition.\(^{145}\)

The requirement that the person giving consent be fully informed is an appropriate addition to the laxer requirements of contract law. The formalities and traditions associated with contracts, especially those in writing, provide some warning to people entering into them that they are giving up rights that they may not understand. Moreover, because consent to a risk creates no duty on the part of the person consenting, it may be withdrawn at any time, limiting the burden on the person giving consent. Contractual agreements, by contrast, create duties, and there is a remedy for the breach of those duties.

Second, there is no requirement that consent in assumption of risk be communicated to the person creating the risk, while contractual consents must be made with reference to one another and reasonable efforts must be made to communicate an acceptance.\(^{146}\) A person benefiting from the doctrine of assumption of risk does not have a duty imposed upon him by the acceptance, and so he has no need for notice of the acceptance.

In practice, notice will be unfeasible in many circumstances, so the absence of a requirement of notice is particularly important. Consider a situation in which a government is liable under local law for un-repaired streets. The government posts a sign saying that a street is in disrepair and that people traveling on it do so at their own risk. A person who reads the sign, accepts the risk and proceeds, has assumed the risk, regardless of whether he communicates that consent to the government. In other situa-

\(^{140}\) *Restatement (Third) of Torts: Apportionment of Liability* § 2.

\(^{141}\) *Knight*, 3 Cal. 4th at 308 n. 4. Although California’s *Knight* decision might be seen as rejecting an agreement between the parties—binding because it was supported by consideration (one party’s forbearance from playing in exchange for the other party’s continuing in the game)—such an interpretation was never suggested by the *Knight* opinions.


\(^{143}\) *Restatement (Second) of Torts* § 496B cmts. c, d, & e.

\(^{144}\) *Restatement (Third) of Torts: Apportionment of Liability* § 2 cmt. d.

\(^{145}\) Id. at § 2 cmt. e.

\(^{146}\) See e.g. *Restatement (Second) of Contracts* § 23.
Assumption of Risk As a Defense to Negligence

In order to determine whether a claim of assumption of risk is viable, the number of people accepting a risk precludes practical individual communication of the acceptance to the person imposing the risk.  

Third, actual consent in the context of assumption of risk is merely consent that the defendant may do the act. The non-liability of the defendant follows by legal implication. By contrast, contractual consent, with its greater formalities, often requires an express statement that the defendant is not liable.

C. Acceptance of a Risk Through Voluntary Conduct

Although actual consent should be a valid method of assuming a risk, requiring actual consent, which seems to be the position of the Restatement (Second) of Torts, is inconsistent with other areas of law, in which acceptance is recognized based on much less than actual consent. The California Supreme Court's frustration with consent in Knight can most productively be seen as a recognition of the limitation of a doctrine of actual consent. In this section of the article, I suggest that a defendant's reliance on apparent consent or the plaintiff's receipt of a benefit from a voluntarily encountered risk should be sufficient for assumption of risk.

1. Reliance by the Party Creating the Risk

One respect in which an alternative for actual consent is needed is where an actor relies on apparent consent. Requiring actual consent is inconsistent with closely related areas of law, including contracts and intentional torts, which protect those relying on apparent consent.

Although the underlying principle of contract law is consensual duties, contract law does not require actual consent based on a voluntary and fully informed decision. For example, one signing a contract is ordinarily bound to the terms in it, regardless of the person's actual knowledge of the terms, so that the contracting party is bound despite an absence of actual intent. Moreover, a contract can exist based on a "manifestation of assent," even though the party "does not in fact assent."

Similarly, consent to an intentional tort can be found from conduct, regardless of a plaintiff's unexpressed wishes. In the famous case of O'Brien v. Cunard S.S.

147. Restatement (Second) of Torts § 496C illus. 1, 2 (assumption of risk by spectators observing fireworks and a fight, respectively).
148. Id. at § 496B cmt. a ("Ordinarily such an agreement takes the form of a contract, which provides that the defendant is under no obligation to protect the plaintiff, and shall not be liable to him for the consequences of conduct which would otherwise be tortious.").
149. Id. at § 496C cmt. h ("Implied consent is consent which exists in fact, but is manifested by conduct rather than by words.").
150. E.g. Restatement (Second) of Contracts § 157 cmt. b & illus. 4.
151. E.g. id. at § 19(3).
152. Under the Restatement (Third) of Torts, if something would be valid as consent to an intentional tort, it would also function as an assumption of risk. Restatement (Third) of Torts: Apportionment of Liability § 2 comment f. Thus, cases where such consent exists would be adequately addressed under the Restatement (Third) of Torts. In other words, the point here is that decisions
a physician was vaccinating people so that they could avoid being quarantined on arrival in America. The plaintiff did not have the scar usually resulting from vaccination, and the physician told her that she would need to be vaccinated again to avoid quarantine. She held up her arm, was vaccinated, and sued for battery. The court observed, "[i]f the plaintiff’s behavior was such as to indicate consent on her part, [the defendant’s physician] was justified in his act, whatever her unexpressed feelings may have been. In determining whether she consented, he could be guided only by her overt acts and the manifestations of her feelings.

Like the areas of contract law and consent to intentional torts, assumption of risk needs to protect reasonable reliance on apparent consent. For example, reliance can be present where a potential defendant allows someone to enter property when the person would be excluded if he expressed a desire to sue for the foreseeable adverse result. This explains the result in the cases involving intentionally rough amusement park rides, such as the recent California decision in Gomez and Cardozo’s opinion in Murphy v. Steeplechase Amuse. Co. In such cases, the claim for reliance is especially strong, because the risk is the very reason that the plaintiff goes on the ride.

Reliance also explains other cases where the party has the right to exclude those who do not actually agree. Thus, in the celebrated case of Lamson v. Am. Ax & Tool Co., Chief Justice Holmes allowed the defense of assumption of risk because the plaintiff knew of the risk, but an additional fact evident from the opinion favoring the defense is that the defendant did not have to allow the employee to continue in his employment.

2. Benefit from Encountering the Risk

Even in circumstances where the defendant does not change his conduct, assumption of risk should be found when: someone voluntarily acts in a way that exposes him or her to a risk they can avoid without burden to themselves, they are fully informed about the risk, and they received a benefit from encountering the risk. This is so whether they consciously consent or not.

This proposed doctrine explains a variety of results that existing doctrine leaves unclear or unexplained. In the hypothetical situation in which the plaintiff approached the defendants’ illegal fireworks for a better view, the benefit to the plaintiff from the defendants’ conduct explains the conclusion of assumption of risk when a

accepting "consent" as a defense to intentional torts, without actual consent, establish a general principle that actual consent is unnecessary for a defense to liability for merely careless conduct.

154. Id. at 273-274.
155. Id. at 274.
156. Id.
157. Id. at 273.
158. Gomez, 35 Cal. 4th 1125.
159. Murphy, 250 N.Y. 479.
160. 177 Mass. 144 (1900).
161. Id. at 145.
defective firework injures the plaintiff. Benefit to the plaintiff from approaching a fight to watch also explains the similar result when the plaintiff is negligently injured by one of the participants.

Conversely, the absence of benefit to Professor Paul from the drunk drivers explains why we do not treat Professor Paul’s going into the street as a manifestation, despite his knowledge of the risk and the option to delay his trip or leave slightly earlier and avoid the risk entirely.

Although a benefit rule has little or no support in the cases, that may be because as first advanced, it has been a rule that limits liability only if the choice offered to the plaintiff is one that reflects his full preferences. That takes no account of the need to provide incentives and fair treatment for people who cannot provide such a full preference, whether through prior misconduct —such as Driver’s— or for other reasons. Nor did the model represent a hierarchy of methods for consenting.

Although Lamson and Murphy also raise the issue of reliance because of the defendants’ right to exclude, the conclusion of assumption of risk in those cases derives added force from the benefit the plaintiffs received from doing their job and from going on the amusement park ride, respectively. Although the principle for allowing assumption of risk is an individual choice by the plaintiff that creates a reasonable reliance by the defendant, the reliance is more likely to be reasonable where the nature of the activity confers a benefit on the plaintiff. Thus, in O’Brien, the surgeon’s claim of reasonable reliance on the patient’s apparent consent to the vaccination was stronger by virtue of the benefits conferred by vaccination—avoidance of quarantine and protection against disease.

D. Legally Implied Assumption of Risk

Just as the analogy of contract law suggests that assumption of risk can be based on less than actual consent, implied-in-law consent is appropriate under some circumstances in assumption risk for the same reason that courts evolved implied-in-law consent in quasi contract cases. Although there is no authority for having the consent necessary for assumption of risk in the absence of voluntary acts on the part of the person assuming the risk, this is a reasonable extension of the doctrine of assumption of risk.

In a quasi contract, courts allow recovery where the nature of the need is such that a reasonable person would want the services rendered, even though he or she is incapable of giving or withholding consent. Thus, in the case of medical care, emer-
gencies create an implied consent to medical care for battery.\textsuperscript{168} Indeed, the precedent for an implied consent is so strong that, in an emergency, an unconscious person will ordinarily be held to have given consent to an operation and even implied to have agreed to pay for it, even though the operation does not lead to a beneficial result.\textsuperscript{169}

The purpose of the rule in quasi contract is to encourage people to render assistance. The same purpose requires a similar doctrine to be applied in assumption of risk.

Consider again the hypothetical Peter v. Driver,\textsuperscript{170} but modified so that Peter is unconscious and Driver correctly sees this as a situation in which Peter needs to get to a hospital immediately and so loads him into the car. As in the original hypothetical, Driver gets into an accident, exacerbating Peter's injuries. Traditional assumption of risk does not exist in this situation. There is no knowledge, no voluntariness, and no actual receipt of information on the part of Peter.

Nonetheless, the strong evidence of benefit here justifies assumption of risk in the absence of evidence. Although the voluntary consent of Peter is absent, Driver should still win if a court believes that fairness to Driver and the desire not to deter Driver from rendering assistance requires that result.

\section{V. Conclusion}

Assumption of risk serves a purpose that no other doctrine can address. However, the oldest authorities developing the doctrine were often careless in defining assumption of risk and distinguishing it from the treatment of plaintiff's negligence. Such carelessness was understandable, in view of the similar results that the doctrines had before the adoption of comparative negligence. Unfortunately, careless language in the subsequent cases developing the doctrine of assumption of risk in the comparative negligence world has led many courts to abolish the doctrine instead of clarifying it.

Fortunately, in common law areas such as assumption of risk, many jurisdictions will be able to re-examine their approach in an appropriate case. Certainly, \textit{Li}'s rejection of the long-held interpretation of the California Civil Code as embodying contributory negligence shows that the California Supreme Court regards itself as free to adopt a better course, even for precedents based on statutes. The court, therefore, may properly regard itself as free to reject \textit{Knight} and adopt a more coherent analysis.

\textsuperscript{168} \textit{Mohr v. Williams}, 95 Minn. 261, 269 (1905) (dictum). Although the authority is old, the case is still cited with approval. \textit{E.g. Thor v. Superior Court}, 5 Cal. 4th 725 (1993).

\textsuperscript{169} \textit{See Cotnam v. Wisdom}, 83 Ark. 601 (1907).

\textsuperscript{170} \textit{See supra} p. 7.