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Please Watch Your Language!: The Chronic Problem of Assumption of Risk

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Please Watch Your Language!: The Chronic Problem of Assumption of Risk

Cover Page Footnote

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PLEASE WATCH YOUR LANGUAGE!: THE CHRONIC PROBLEM OF ASSUMPTION OF RISK

Dale L. Moore+

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By the early 1960s, many influential judges and commentators had concluded that implied assumption-of-risk tort doctrines had lost their vitality, as the

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components of assumption of risk that were worth preserving could be subsumed by other areas of negligence law.¹ These scholars argued that such a reconfiguration could, and should, occur.² In the ensuing decades, court decisions followed the path paved by these pioneers by endorsing the abandonment of implied assumption of risk as a stand-alone doctrine.³ These opinions persuasively and logically concluded that assumption of risk has no useful place in American tort law.⁴

Despite this strong support, some appellate judges (and, presumably, the lawyers arguing before them) refuse to abandon the assumption-of-risk doctrine; instead, they confirm the continuing relevance of Associate Justice Felix Frankfurter's 1943 observation:

The phrase "assumption of risk" is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, indiscriminatingly used to express different and sometimes contrary ideas. . . . Plainly enough only mischief could result⁵

This Article discusses the mischief caused by the chronic, uncritical use of the phrase "assumption of risk." Part I provides background and context, featuring reminders of the best analyses of assumption of risk. Part II explains the types of mischief that imprecise analysis spawns, such as poorly reasoned cases that leave unhelpful precedent in their wake. Part III uses pleading rules and the doctrine of informed consent to suggest another way of viewing assumption of risk in the

1. See *Parker v. Redden*, 421 S.W.2d 586, 592 (Ky. 1967) (abandoning the doctrine of assumption of risk and adopting a "reasonableness of conduct" standard for determining negligence cases); *Meistrich v. Casino Arena Attractions, Inc.*, 155 A.2d 90, 95–96 (N.J. 1959) (defining assumption of risk as a "phase of contributory negligence"); *Hartman v. Brigantine*, 129 A.2d 876, 880 (N.J. 1957) (concluding that because "assumption of risk . . . adds little to contributory negligence . . . it [should be] subsumed under [that] defense"); Fleming James, Jr., *Assumption of Risk*, 61 YALE L.J. 141, 168–69 (1952) (declaring that the concept of assumption of risk "should be abolished"); John W. Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5, 14 (1961) (advocating the eradication of the doctrine of assumption of risk).

2. See *Parker*, 421 S.W.2d at 592 (explaining that the distinctions between "assumption of risk and contributory negligence are not significant enough to warrant retaining assumption of risk as a separate doctrine"); *Meistrich*, 155 A.2d at 96 (noting that doctrines of primary and secondary assumption of risk lead to confusion); James, *supra* note 1, at 169 (finding that assumption of risk "adds nothing to modern law except confusion" and is based on outdated policy).

3. See *Knight v. Jewett*, 834 P.2d 696, 701 (Cal. 1992) (concluding that the doctrine of assumption of risk should merge with the doctrine of contributory negligence); *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1243 (Cal. 1975) (holding assumption of risk as "abolished to the extent that it is merely a variant of . . . contributory negligence"); *Blackburn v. Dorta*, 348 So. 2d 287, 292 (Fla. 1977) (finding no distinction between assumption of risk and contributory negligence); *Perez v. McConkey*, 872 S.W.2d 897, 902, 905–06 (Tenn. 1994) (abandoning the doctrine of assumption of risk and focusing on the "reasonableness of a party's conduct").

4. See *supra* note 3.

5. *Tiller v. Atl. Coast Line R.R. Co.*, 318 U.S. 54, 68–69 (1943) (Frankfurter, J., concurring).

hope that judges and lawyers will better understand and use the assumption-of-risk doctrine. Although this Article refers to cases involving express assumption of risk, in which the parties' allocations of risks are stated specifically or reduced to writing,⁶ this Article principally focuses on cases involving implied assumption of risk, in which the parties' allocations of risk are implicit in their conduct.⁷

I. THE TRUTH ABOUT ASSUMPTION OF RISK

A. Characteristics of the Paradigm Negligence Case and Their Implications

To establish a prima facie case for negligence, a plaintiff bears the burdens of pleading, production, and persuasion for each element of negligence: duty, breach of duty, cause in fact, proximate cause, and damages.⁸ On the other hand, a defendant bears the burden of establishing an affirmative defense, such as contributory negligence.⁹ For many years, proof of a plaintiff's contributory negligence constituted a complete defense to a negligence claim.¹⁰ Between a negligent defendant and a negligent plaintiff, common law favored the defendant.¹¹ The common law also favored the defendant in cases in which the plaintiff "assumed the risk" that caused an injury.¹²

In negligence cases decided before the adoption of comparative fault, courts applied two distinguishable assumption-of-risk analyses: primary implied assumption of risk and secondary implied assumption of risk. A court applying the primary implied assumption-of-risk analysis found that a given plaintiff's prima facie case failed to establish the element of duty or breach of duty.¹³ For example, in a lawsuit brought by a letter carrier who fell on the defendant's "wet, slushy . . . full of chicken dirt" premises,¹⁴ the Supreme Court of Missouri found

6. RESTATEMENT (THIRD) OF TORTS § 2 cmt. a (2000) (noting that express assumption of risk is also referred to as a contractual limitation on liability).

7. *Id.* cmt. i (describing implied assumption of risk as "when a plaintiff's conduct demonstrates merely that the plaintiff was aware of the risk and voluntarily confronted it").

8. DAN B. DOBBS, *THE LAW OF TORTS* 269 (2000); David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1674 (2007).

9. JOHN L. DIAMOND, LAWRENCE C. LEVINE & M. STUART MADDEN, *UNDERSTANDING TORTS* 258 n.1 (2d ed. 2000) ("[D]efendants must affirmatively prove a defense and persuasively establish its application to the facts only after a plaintiff has established a prima facie case . . ."); DOBBS, *supra* note 8, at 493 ("[T]he defendant has the burden of producing evidence about defenses like contributory fault and likewise the burden of persuading the trier of fact about what the evidence shows." (footnote omitted)).

10. DIAMOND, LEVINE & MADDEN, *supra* note 9, at 258; DOBBS, *supra* note 8, at 494 (noting that contributory negligence "was a complete bar to the claim" (footnote omitted)).

11. DOBBS, *supra* note 8, at 494 (explaining that under the old rule, a plaintiff who was only slightly negligent was completely barred from any recovery, even if the defendant was grossly negligent).

12. DIAMOND, LEVINE & MADDEN, *supra* note 9, at 258; DOBBS, *supra* note 8, at 535.

13. *See, e.g.,* Paubel v. Hitz, 96 S.W.2d 369, 373-74 (Mo. 1936).

14. *Id.* at 370 (internal quotation marks omitted).

that the risk of “passage over the runway was voluntarily incurred . . . [and therefore the] defendant breached no legal obligation owed [to the] plaintiff.”¹⁵

A court applying the analysis of secondary implied assumption of risk explored the nature and quality of the injured party’s conduct to determine if it was culpable.¹⁶ For example, in a lawsuit brought against a hotel by a guest injured on an unstable walkway, the Supreme Court of Appeals of West Virginia observed that one who knowingly uses a dangerous path could be “barred from a recovery by contributory negligence, or by voluntary assumption of the risk.”¹⁷

Although both of these analyses precluded a finding of liability during the era in which the doctrines of assumption of risk developed, today—an era in which comparative principles reign¹⁸—the two forms of assumption of risk must be distinguished, as each can yield different results.¹⁹ Under the comparative approach to negligence, injured parties whose culpable conduct contributed to their injuries are no longer completely barred from obtaining damages from negligent defendants.²⁰ Instead, the damages awarded to them are reduced to account for their own contributions to their injuries.²¹

15. *Id.* at 374.

16. *See, e.g.*, N.Y. C.P.L.R. 1411 (McKinney 1997) (describing assumption of risk as “culpable conduct attributable” to the injured party). In pre-comparative-fault parlance, courts used language like “knowing,” “voluntary,” and “unreasonable,” rather than “culpable,” to define an injured party’s conduct. *See, e.g.*, *Hunn v. Windsor Hotel Co.*, 193 S.E. 57, 58 (W. Va. 1937) (noting an individual who knows that a passageway is dangerous may be barred from payment). Furthermore, secondary assumption of risk comprised two subcategories: “strict” (or “pure”) secondary implied assumption of risk and “qualified” (or “unreasonable”) secondary implied assumption of risk. *Blackburn v. Dorta*, 348 So. 2d 287, 290–91 (Fla. 1977). Although these two subcategories encompassed distinct behaviors, the characteristic essential to both was the injured party’s *voluntary* encounter with a *known* risk. *Id.* at 291.

In modern times, some still believe an injured party’s knowing and voluntary conduct, regardless of its reasonableness, should be a “complete affirmative defense to a claim of negligence.” *See* John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other “Quaint” Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 349, 349 (2006).

17. *Hunn*, 193 S.E. at 58.

18. DIAMOND, LEVINE & MADDEN, *supra* note 9, at 263 (“In all but four states, contributory negligence has been replaced by some form of comparative negligence.”).

19. *See* *Knight v. Jewett*, 834 P.2d 696, 700 (Cal. 1992) (“With the adoption of comparative fault, . . . it became essential to differentiate between the distinct categories of cases that traditionally had been lumped together under the rubric of assumption of risk.”); *see also infra* Part II.B–C.

20. *Knight*, 834 P.2d at 700.

21. *Id.*; *see* DOBBS, *supra* note 8, at 503–06 (explaining that if a defendant is twenty-five percent culpable, then his or her damages will be reduced by twenty-five percent). The New York statute illustrates “pure” comparative fault:

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

Given the latter twentieth-century evolution of comparative fault, the following summary states the sensible, supportable, and analytically sound conclusions concerning implied assumption of risk: (1) primary implied assumption of risk addresses the validity of the plaintiff's prima facie case, specifically the elements of duty or breach,²² and (2) secondary implied assumption of risk addresses the quality of the injured party's conduct, specifically its reasonableness or lack thereof.²³

These conclusions, however, continue to elude significant numbers of judges and lawyers.²⁴ Thus, the bedevilment and mischievous consequences of which Justice Frankfurter wrote continue despite the curative efforts of some judges and commentators who have thoroughly explained why implied-assumption-of-risk concepts can be subsumed by existing elements of negligence or by the affirmative defense of contributory negligence.²⁵ Ironically, persistent users of assumption-of-risk terminology often fail to either use the terminology properly or provide principled rationales in support of their deviations.²⁶ Indeed, many judicial opinions suggest that rather significant confusion exists with respect to the substantive differences among the various components of implied assumption of risk.²⁷ In the past, this benign analytical confusion produced harmless

N.Y. C.P.L.R. 1411.

22. *Perez v. McKonkey*, 872 S.W.2d 897, 902 (Tenn. 1904) ("Clearly, primary implied assumption of risk is but another way of stating the conclusion that a plaintiff has failed to establish a prima facie case by failing to establish that a duty exists."); *see also Knight v. Jewett*, 834 P.2d 696, 703–04 (Cal. 1992) ("[I]n primary assumption of risk cases—where the defendant owes no duty to protect the plaintiff from a particular risk of harm—a plaintiff who has suffered such harm is not entitled to recover from the defendant, whether the plaintiff's conduct in undertaking the activity was reasonable or unreasonable." (emphasis in original) (internal quotation marks omitted)); *Blackburn v. Dorta*, 348 So. 2d 287, 290 (Fla. 1977) ("The term primary assumption of risk is simply another means of stating that the defendant was not negligent, either because he owed no duty to the plaintiff in the first instance, or because he did not breach the duty owed."); *Meistrich v. Casino Arena Attractions*, 155 A.2d 90, 96 (N.J. 1959) (explaining that primary assumption of risk is not a distinct concept of negligence); *Turcotte v. Fell*, 502 N.E.2d 964, 967–68 (N.Y. 1986) (explaining that the primary assumption-of-risk doctrine relieves the defendant of a duty of care to the plaintiff).

23. *See, e.g., Knight*, 834 P.2d at 704 ("[I]n secondary assumption of risk cases—involving instances in which the defendant has breached the duty of care owed to the plaintiff—the defendant is not entitled to be entirely relieved of liability for an injury proximately caused by such a breach, simply because the plaintiff's conduct in encountering the risk of such an injury was reasonable rather than unreasonable." (emphasis in original) (internal quotation marks omitted)); *Blackburn*, 348 So. 2d at 291 (describing implied secondary assumption of risk in terms of the plaintiff's reasonableness); *see also James, supra* note 1, at 195 (explaining that "[a] plaintiff's unreasonable assumption of risk would constitute contributory negligence on his part" (emphasis in original)).

24. *See infra* notes 58–60 and accompanying text.

25. *See infra* notes 98–108.

26. *See infra* Part II.

27. *See infra* Part II.

error.²⁸ In the modern era of comparative negligence,²⁹ however, the same confusion produces both immediate and long-term harmful error.³⁰

B. Bedeviling the Law

Implied assumption of risk has a long history in American tort law.³¹ Traditionally, negligence law manifested an all-or-nothing philosophy by finding a definitive winner and loser in each negligence case.³² Under this approach, a defendant who made a persuasive argument rooted in assumption of risk became the winner.³³ Thus, whether the plaintiff's assumption of risk was of the primary or the secondary type made no difference to the outcome of a lawsuit;³⁴ a plaintiff who "assumed the risk" in any sense simply lost the case.³⁵

Accordingly, under this traditional approach, imprecision could safely be tolerated, as courts could apply the same assumption-of-risk language to explain the outcomes of factually different cases. One such factual distinction is the preexisting plaintiff-defendant relationship. Parties who had a relationship—such as an employee-employer relationship—before the injury-causing event occurred had the opportunity to shape some actual, even if implicit, understanding about their respective responsibilities.³⁶ By contrast, other cases involved parties who were complete strangers, and therefore did not have such an opportunity.³⁷

28. See *infra* notes 31–35 and accompanying text.

29. This Article uses the terms "comparative responsibility," "comparative fault," and "comparative negligence" interchangeably.

30. See, e.g., *Fagan v. Atnalta, Inc.*, 376 S.E.2d 204, 205–06 (Ga. Ct. App. 1988) (affirming summary judgment for the defendant based on the plaintiff's assumption of risk when he intervened in a bar fight "without being asked").

31. See Eric A. Feldman & Alison Stein, *Assuming the Risk: Tort Law, Policy, and Politics on the Slippery Slopes*, 59 DEPAUL L. REV. 259, 267 (2010) (noting that the assumption-of-risk doctrine was first introduced to U.S. courts in 1859).

32. See DOBBS, *supra* note 8, at 494 (explaining the traditional rule that a plaintiff was barred from relief if he or she committed any degree of negligence).

33. See *id.*

34. See *Knight v. Jewett*, 834 P.2d 696, 700 (Cal. 1992) ("[T]here often was no need [before the comparative-negligence approach] 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.").

35. See DOBBS, *supra* note 8, at 494.

36. See, e.g., *Lamson v. Am. Axe & Tool Co.*, 58 N.E. 585, 585 (Mass. 1900) (denying the plaintiff-employee relief for his injuries because he continued to work despite his knowledge of the dangerous condition and the defendant-employer's failure to fix it); *Farwell v. Bos. & Worcester R.R. Corp.*, 42 Mass. (1 Met.) 49, 57 (1842) ("The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services . . .").

37. See, e.g., *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 174 (N.Y. 1929) (denying recovery to a plaintiff who was injured while on an amusement-park ride); *Gulfway Gen. Hosp. v. Pursley*, 397 S.W.2d 93 (Tex. Ct. App. 1965) (denying the plaintiff relief after she slipped and fell on ice outside a hospital's emergency-room entrance).

Also likely responsible for the indiscriminate use of assumption-of-risk terminology was the irrelevance of a primary or secondary label to the outcome of a case. During its early development, case law exhibited at least three discrete sets of circumstances that fell under the umbrella of assumption of risk: (1) negligence by neither the defendant nor the plaintiff; (2) negligence by both the defendant and the plaintiff; and (3) negligence by either the defendant or the plaintiff. Judges could appropriately use the assumption-of-risk label to characterize a case involving any of these fault configurations despite their underlying differences.

In modern times, however, the luxury of early nineteenth- and twentieth-century imprecision is no longer affordable. In this era of comparative fault, it is critical that courts distinguish between the failure of a plaintiff's prima facie case (primary implied assumption of risk), resulting in a defendant's victory, and a successful affirmative defense based on the plaintiff's culpable conduct (secondary implied assumption of risk), resulting in a reduction of the damages imposed on the defendant.³⁸

In this modern comparative-fault era, some commentators favor including an additional variant³⁹ that would treat an injured party's knowing and voluntary conduct as a "complete affirmative defense to a claim of negligence."⁴⁰ Such a "genuine" assumption of risk would be akin to the concept of consent.⁴¹ Proponents of this variant argue that the concept is appropriate for cases in which a defendant proves "that a particular plaintiff did in fact knowingly and voluntarily undertake to confront a specific, identifiable risk (or set of risks) that stands out from background risks, and that was later realized in the form of an injury to the plaintiff."⁴² The reasonableness (or lack thereof) of the injured party's behavior in confronting the "specific, identifiable risk" would be irrelevant.⁴³

Pursuing the creation of another variant of implied assumption of risk is fraught with difficulties. On a basic level, the language of implied assumption of risk is already distorted by qualifiers and reservations that fail to distinguish among its current categories.⁴⁴ Another and more fundamental difficulty lies in the

38. See *supra* note 19 and accompanying text.

39. Goldberg & Zipursky, *supra* note 16, at 348–50.

40. *Id.* at 349.

41. *Id.* at 344, 349.

42. *Id.* at 344. *But see* Gregory S. Sergienko, *Assumption of Risk as a Defense to Negligence*, 34 W. ST. U. L. REV. 1, 22 (2006) (noting that "some requirement that goes beyond merely knowing and voluntary conduct is necessary, or the doctrines of assumption of risk will bar recovery to those who are aware of the hazard-creating conduct of others . . .").

43. Goldberg & Zipursky, *supra* note 16, at 344.

44. See *Tiller v. Atl. Coast Line R.R. Co.*, 318 U.S. 54, 68–69 (1943) (Frankfurter, J., concurring) (describing the "different and sometimes contradictory ideas" that the phrase "assumption of risk" has been "undiscriminatingly used to express"); *Blackburn v. Dorta*, 348 So. 2d 287, 290 (Fla. 1977) (describing the doctrine of assumption of risk as a "potpourri of labels, concepts,

inconsistency between the defense of a “genuine” assumption of risk, as described by its proponents, and other aspects of modern negligence law.⁴⁵ Such a defense would restore the vitality of the “patent danger rule,” which exonerates the creator of a dangerous condition so long as the danger is sufficiently obvious to give warning.⁴⁶ The exoneration is effective even if the danger can be eliminated or reduced without significantly burdening the defendant.⁴⁷

In addition, the defense of a genuine assumption of risk would defy the “danger invites rescue” doctrine by preventing an injured rescuer’s recovery of damages from a party who negligently placed another in a position of peril.⁴⁸ Recognizing this defense as a complete bar to recovery would revive the concept that a reasonably acting injured party could not recover damages from a negligent defendant simply because his or her reasonable conduct was knowing and voluntary.⁴⁹ Finally, although some courts have recognized the defense of a genuine assumption of risk, they have not defined its scope or explained its rationale; instead, the courts seem to rely on an “I know it when I see it” approach in their reasoning.⁵⁰

definitions, thoughts, and doctrines”); *Meistrich v. Casino Arena Attractions*, 155 A.2d 90, 93 (N.J. 1959) (“Assumption of risk is a term of several meanings.”).

45. For a discussion of modern negligence cases see *infra* Part II.B–C.

46. See DAVID G. OWEN, PRODUCTS LIABILITY LAW § 10.2, at 623–24 (2005) (discussing the rise of the patent-danger rule, with particular emphasis on *Campo v. Scofield*, 95 N.E.2d 802 (N.Y. 1950), *overruled by* *Micallef v. Miehle Co.*, 348 N.E.2d 571, 576–77 (N.Y. 1976), and the subsequent fall of the rule in cases other than those involving alleged failures to warn). In *Campo*, the New York Court of Appeals dismissed a case against a machine manufacturer based on the plaintiff’s failure to prove a latent defect in a machine that “so badly injured [his hands] that they required amputation.” *Id.* § 10.2, at 623; see also *Campo*, 95 N.E.2d at 804. The Court of Appeals of New York later adopted a more liberal approach to the patent-danger rule taken in other jurisdictions and stated “*Campo* suffers from its rigidity in precluding recovery whenever it is demonstrated that the defect was patent. Its unwavering view produces harsh results Apace with advanced technology, a relaxation of the *Campo* stringency is advisable.” *Micallef*, 348 N.E.2d at 576–77.

47. See OWEN, *supra* note 46, § 10.2, at 623.

48. See *Wagner v. Int’l Ry. Co.*, 133 N.E. 437, 437–38 (N.Y. 1921) (noting that a defendant is liable to an injured child as well as “the parent who plunges to its aid”). *But see* *Eckert v. Long Island R.R. Co.*, 43 N.Y. 502, 506–08 (N.Y. 1871) (Allen, J., dissenting) (arguing that a man injured while acting gratuitously to rescue a child must “take the consequences of his act”).

49. *Blackburn v. Dorta* provides a compelling hypothetical example of knowing and voluntary conduct that could be either reasonable or unreasonable. In this example, a man arrives at his apartment building to discover that his landlord’s negligent actions had set the building on fire. 348 So. 2d at 291. Aware of the risk involved, the man rushes into the burning building to retrieve his child. *Id.* The man acts knowingly and voluntarily, but also reasonably given the objective of his risky behavior. *Id.* Had the object of his rescue been his favorite fedora, however, his conduct would have been not only knowing and voluntary, but also “clearly . . . unreasonable.” *Id.* The application of the genuine assumption of risk defense treats both situations the same, resulting in an unattractive lack of uniformity in tort law. *Id.*

50. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (declining to define obscenity, but asserting “I know it when I see it”).

Therefore, as articulated in sound judicial opinions⁵¹ and in the well-reasoned analyses of influential commentators,⁵² primary implied assumption of risk relates to the adequacy of a plaintiff's prima facie case, specifically the duty and breach elements;⁵³ secondary implied assumption of risk deals with the reasonableness of an injured party's conduct.⁵⁴ Accordingly, primary assumption of risk survives as a complete defense to liability despite the adoption of comparative fault.⁵⁵ This survival does not depend on some special or mysterious status, however. Rather, primary assumption of risk is a complete defense because it precludes a finding of *any* liability, just as a plaintiff's failure to establish causation precludes a finding of liability in virtually all negligence cases.⁵⁶ By contrast, secondary assumption of risk's essential equivalence to contributory negligence has caused it to lose its status as a complete defense to liability in the era of comparative fault.⁵⁷

The unfortunate instinct that the term "assumption of risk" engenders is to leap immediately to a judgment about the injured party's thoughts or conduct without first considering whether the defendant breached a duty of care or acted reasonably. A more orderly analysis, which is essential for achieving consistent results when comparative fault applies, distinguishes between a fatal flaw in the plaintiff's prima facie case and an affirmative defense based on the injured party's culpable conduct. The discussions in post-comparative-fault cases, however, have revealed the unfortunate fact that some courts persist in using the

51. See *supra* notes 1, 3.

52. See, e.g., DOBBS, *supra* note 8, at 539 ("The reasons for barring the plaintiff entirely can now be divorced from the old law and terminology of assumed risk and can be stated as cases of no duty or no negligence. The cases themselves, however, remain."); MARSHALL S. SHAPO, PRINCIPLES OF TORT LAW 212 (3d ed. 2010) ("Under the approach advocated here, the first question the court should ask is whether the defendant fell below the standard of care the law prescribes for the activity at issue. Only if the answer to that question is yes, for if the defendant was not negligent the action will proceed no further, the court will ask whether the plaintiff fell below the standard prescribed for the plaintiff's activity. Ordinarily, if she did not, she will win outright. If she did, then her action will be barred or her recovery will be reduced under comparative negligence." (footnote omitted)); James, *supra* note 1, at 185–88 ("The [implied assumption of risk] doctrine . . . is simply a confusing way of stating certain no-duty rules or, where there has been a breach of duty toward the plaintiff, simply one kind of contributory negligence.").

53. See *supra* note 22 and accompanying text.

54. See *supra* note 23 and accompanying text.

55. *Turcotte v. Fell*, 502 N.E.2d 964, 968 (N.Y. 1986); see also *Knight v. Jewett*, 834 P.2d 696, 703 (Cal. 1992) (acknowledging that the primary assumption of risk doctrine "continues to operate as a complete bar to the plaintiff's recovery"); DOBBS, *supra* note 8, at 539.

56. See DOBBS, *supra* note 8, at 539. The exceptions involve judicial reallocation or modification of the cause-in-fact burden in special situations. See, e.g., *Sindell v. Abbott Labs.*, 607 P.2d 924, 936–37 (Cal. 1980) (holding all of the defendant-drug manufacturers liable for the plaintiff's injuries under a market-share liability analysis, despite the plaintiff's inability to identify exactly which manufacturer produced the injury-causing drug); *Summers v. Tice*, 199 P.2d 1, 4 (Cal. 1948) (shifting the burden of proof to the co-defendants when both were negligent, but only one caused the injury, and the plaintiff was unable to identify which of the two was responsible).

57. See *Knight*, 834 P.2d at 704–05; *Perez v. McConkey*, 872 S.W.2d 897, 900 (Tenn. 1994).

terminology of assumption of risk imprecisely.⁵⁸ This practice creates the potential for the “mischief” that Justice Frankfurter so aptly predicted.⁵⁹

II. THE MISCHIEF: OVERINCLUSIVENESS, MISTREATMENT, AND LACK OF CLARITY

Imprecise analyses of assumption of risk in judicial opinions cause at least three kinds of mischief: (1) overly inclusive definitions of primary implied assumption of risk, which result in the misapplication of that doctrine; (2) treatment of primary implied assumption of risk as an affirmative defense, rather than a failure of the prima facie case; and (3) conclusory references to an unspecified “assumption of risk” as significant or even decisive. Moreover, careless language pervades these opinions, revealing either ignorance of or indifference to the analytical nuances particularly important in cases that set precedent for trial courts.⁶⁰

A. The Most Significant Mischief: An Overly Inclusive Definition and Consequent Misapplication of Primary Implied Assumption of Risk

1. Primary Implied Assumption of Risk Defined and Distinguished

Primary assumption of risk is appropriately invoked when an activity’s inherent risk manifests itself.⁶¹ For example, a football player who was tackled and injured experienced a risk inherent in playing football. A figure skater who fell and broke her leg while performing a challenging maneuver experienced a risk inherent in ice skating.⁶² Such risks are neither created nor exacerbated by negligence; they simply exist. As a result, neither the football player nor the skater would be able to establish a prima facie case of negligence. Their situations are classic examples of primary implied assumption of risk and mirror the plaintiffs’ experiences in the paradigm pre-comparative-fault cases, *Murphy v.*

58. See *Sy v. Kopet*, 795 N.Y.S.2d 75, 75 (N.Y. App. Div. 2005); *Morgan v. State*, 685 N.E.2d 202, 207 (N.Y. App. Div. 1997).

59. *Tiller v. Atl. Coastline R.R. Co.*, 318 U.S. 54, 69 (1943) (Frankfurter, J., concurring).

60. See, e.g., *Pelzer v. Transel Elevator & Elec., Inc.*, 839 N.Y.S.2d 84, 86 (N.Y. App. Div. 2007) (“Extensive and unrestricted application of the doctrine of primary assumption of the risk to tort cases generally represents a throwback to the former doctrine of contributory negligence, wherein a plaintiff’s own negligence barred recovery from the defendant.”); *Sy*, 795 N.Y.S.2d at 76 (stating that the primary assumption of risk doctrine precludes plaintiff’s recovery when the evidence exhibited the plaintiff’s negligence while climbing through a window, not the absence of a duty to the plaintiff).

61. See *DOBBS*, *supra* note 8, at 540 (discussing a defendant’s lack of duty when a plaintiff consents to risky activities).

62. Numerous other activities, such as skiing, horseback riding, and walking in a busy street, carry inherent risks. For a recent and comprehensive discussion of the plethora of cases brought by injured skiers, see *Feldman & Stein*, *supra* note 31, at 271–77.

Steeplechase Amusement Co.,⁶³ *Paubel v. Hitz*,⁶⁴ and *Gulfway General Hospital v. Pursley*.⁶⁵

a. *Murphy v. Steeplechase Amusement Co.: The Risk of “The Flopper”*

James Murphy fractured his kneecap on a Coney Island attraction called “The Flopper,” a name that bespoke the challenge it presented to riders.⁶⁶ The Flopper apparently had been functioning normally, with its riders “tumbling about the belt to the merriment of onlookers.”⁶⁷ The mechanism had been “transmitt[ing] smoothly,” with no evidence of electric surges or interruptions.⁶⁸ Based on these facts, then-Chief Judge Benjamin Cardozo explained that the operator of the ride did not breach the duty of care owed to Murphy.⁶⁹ The court’s lack of reliance on, or indeed any reference to, the reasonableness of Murphy’s conduct indicates a reliance on primary, rather than secondary, assumption of risk.⁷⁰ As the flopping that Murphy experienced was the very point of the ride, Murphy’s decision to participate would have been unreasonable only if *all* riders’ decisions were unreasonable.⁷¹ Moreover, the defendant would have been subject to liability only if the attraction was so dangerous that merely making it available to patrons was unreasonable.⁷²

b. *Paubel v. Hitz: The Risk of a Feces-Laden Walkway*

Edward Paubel, a letter carrier, slipped and fell on chicken manure while delivering mail to a patron on his route.⁷³ The court found that the sufficiently

63. 166 N.E. 173 (N.Y. 1929).

64. 96 S.W.2d 369 (Mo. 1936).

65. 397 S.W.2d 93 (Tex. App. 1965).

66. *Murphy*, 166 N.E. at 173–74.

67. *Id.* at 174.

68. *Id.* The court found evidence

that power was transmitted smoothly, and could not be transmitted otherwise. If the movement was spasmodic, it was an unexplained and, it seems, an inexplicable departure from the normal workings of the mechanism. An aberration so extraordinary, if it is to lay the basis for a verdict, should rest on something firmer than a mere descriptive epithet, a summary of the sensations of a tense and crowded moment.

Id. (citations omitted).

69. *Id.*

70. *Id.* at 173–75. Before *Murphy*, New York courts allowed recovery for those who knowingly, voluntarily, and *reasonably* exposed themselves to the risks created by another’s negligence. See, e.g., *Wagner v. Int’l Ry. Co.*, 133 N.E. 437, 437–38 (N.Y. 1921) (granting a new trial to determine if the injured plaintiff acted with “reason fitted and proportioned to the time and the event”); *Eckert v. The Long Island R.R. Co.*, 43 N.Y. 502, 505–06 (1871).

71. *Murphy*, 166 N.E. at 174.

72. See *id.* (“A different case would be here if the dangers inherent . . . were obscure.”). For a more critical view of Judge Cardozo’s opinion, see generally Kenneth W. Simons, *Murphy v. Steeplechase Amusement Co.: While the Timorous Stay at Home, the Adventurous Ride the Flopper*, in *TORTS STORIES* 179 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

73. *Paubel v. Hitz*, 96 S.W.2d 369, 370 (Mo. 1936).

apparent chicken manure on the walkway “was not only obviously but actually known and appreciated by the plaintiff.”⁷⁴ Accordingly, Paubel could not establish the element of breach.⁷⁵ Paubel’s testimony did not provide a basis for the defense of secondary implied assumption of risk because he spoke in detail about the care he took while walking down the pathway.⁷⁶ That statement about walking carefully also displayed his subjective awareness of the risk presented by walking on the chicken manure.⁷⁷

c. *Gulfway General Hospital v. Pursley: The Risk of an Icy Walkway*

Similarly, after Mrs. Pursley noticed that ice had accumulated on the defendant-hospital’s emergency entrance walkway, she nonetheless began to walk along it and fell.⁷⁸ Here again, the court found that the danger gave warning of itself, preventing Mrs. Pursley from establishing a prima facie case of negligence against the hospital.⁷⁹ Like James Murphy and Edward Paubel, Mrs. Pursley did not act unreasonably; she merely tried to obtain medical treatment for her severed fingertip.⁸⁰

2. *The Distortion of Primary Implied Assumption of Risk: Misapplication of the English Language*

Regrettable misstatements about primary assumption of risk appear in cases with precedential value, in which they distort negligence law and create the potential for irrational decisions.⁸¹

The origins of these problematic statements are ambiguous, and only a few are readily identifiable. For example, although purporting to apply precedent from

74. *Id.* at 373–74.

75. *Id.* at 374.

76. *Id.* at 370–73.

77. *Id.* at 370. Paubel explained that he had been “wearing a pair of Dr. Sawyer’s high shoes, practically new, with rubber heels.” *Id.*

78. *Gulfway Gen. Hosp. v. Pursley*, 397 S.W.2d 93, 93 (Tex. App. 1965). Pursley testified that “the porch was open, and it was light there, where you could see the ice.” *Id.* (internal quotation marks omitted).

79. *Id.* at 93–94.

80. *Id.* at 93.

81. See, e.g., *Trupia v. Lake George Cent. Sch. Dist.*, 875 N.Y.S.2d 298, 300 (N.Y. App. Div. 2009), *aff’d*, 927 N.E.2d 547 (N.Y. 2010) (“Extensive and unrestricted application of the doctrine of primary assumption of the risk to tort cases generally represents a throwback to the former doctrine of contributory negligence, wherein a plaintiff’s own negligence barred recovery from the defendant.” (quoting *Pelzer v. Transel Elevator & Electric, Inc.*, 839 N.Y.S.2d 84, 86 (N.Y. App. Div. 2007))); *Cotty v. Town of Southampton*, 880 N.Y.S.2d 656, 660 (N.Y. App. Div. 2009) (expressing concern about absolving from liability those who “negligently creat[e] risks that might be considered inherent in such leisure activities”); see also *Shin v. Ahn*, 165 P.3d 581, 582 (Cal. 2007) (“[C]areless conduct by coparticipants is an *inherent risk* in many sports, and . . . holding participants liable for resulting injuries would discourage vigorous competition.” (emphasis added)); *Kelly v. McCarrick*, 841 A.2d 869, 877–78, 881, 886 (Md. Ct. Spec. App. 2004) (using the terms “negligent,” “inherent,” and “incidental” interchangeably while discussing risks assumed).

the Ohio Supreme Court, Ohio's intermediate appellate courts have applied the so-called principle that negligence is a risk *inherent* in certain recreational activities.⁸² This proposition is rife with problems, with the most patent being its misuse of the terms "inherent" and "recreational."

The term "inherent" refers to a characteristic that is an innate, permanent, or essential attribute.⁸³ Parachute jumping, for example, carries a number of inherent risks. Each jumper is exposed to the possibility of an ill-placed landing, which could cause an injury. On the other hand, each jumper is not exposed to the risk of injury resulting from a carelessly packed parachute. Contrasted with a faulty landing, this risk is neither a permanent nor an essential attribute of the activity; rather, the carelessly packed parachute enhances the risks beyond those inherent in the activity.⁸⁴

Moreover, judicial reliance on the proposition that inherent risks exist in certain recreational activities produces overbroad and poorly justified applications, such as the failure to distinguish clearly between participants and spectators. In addition, the term "recreational" is permitted to encompass an exceedingly broad range of activities. To illustrate, the Ohio Supreme Court considered chair-building to be within the scope of a recreational activity.⁸⁵ Questioning the majority's definition of "recreational," the dissenting judge asked, "What's next . . . mowing the lawn, draining the septic tank, or digging a ditch?"⁸⁶

B. Characterizing Primary Assumption of Risk as an Affirmative Defense

It is axiomatic that when a plaintiff cannot establish an element of the prima facie case, he or she loses. The plaintiff's claim is subject to dismissal without regard to the merits of any affirmative defenses, such as contributory negligence. Because a court's finding of primary implied assumption of risk means that the

82. See *Curtis v. Schmid*, 2008-Ohio-5239, ¶54, No. 07 CAE 11 0065, 2008 Ohio App. LEXIS 4391, at *12 (Ohio Ct. App. Oct. 3, 2008) ("[S]ome risks [including the risk of negligence] are so inherent in an activity that the risks cannot be eliminated."); *Lykins v. Fun Spot Trampolines*, 172 Ohio App. 3d 226, 236–37, 2007-Ohio-1800, ¶¶ 28–36, 874 N.E.2d 811, 819–20 (Ohio Ct. App. 2007) (questioning whether the plaintiff assumed an inherent risk of injury when jumping on a trampoline).

The Ohio Supreme Court's odd use of assumption of risk terminology engenders additional confusion. In *Gallagher v. Cleveland Browns Football Co.*, the court (1) treated the term "implied assumption of risk" as referring only to secondary implied assumption of risk, an affirmative defense that the defendant must plead and prove; (2) stated that "primary assumption of risk is technically not an affirmative defense, as it directly attacks the duty element of a prima facie negligence case;" and (3) found that the defendants waived the "defense" of primary assumption of risk by not raising it in a timely manner and presenting evidence to support it. 659 N.E.2d 1232, 1237 n.3, 1239 (Ohio 1996).

83. THE OXFORD DICTIONARY AND THESAURUS: AMERICAN EDITION 767 (1996).

84. In varying ways, other state courts have committed the same analytical error. See *supra* note 82.

85. *Gentry v. Craycraft*, 101 Ohio St. 3d 141, 142–43, 2004-Ohio-379, ¶ 6, 802 N.E.2d 1116, 1118 (Ohio 2004) (precluding liability because the defendants' conduct was neither intentional nor reckless).

86. *Id.* at 1120 (Pfeifer, J., dissenting).

plaintiff failed to establish his or her prima facie case, the labeling of primary implied assumption of risk as an affirmative defense unduly complicates case analysis, creating both substantive and procedural confusion. For example, in a relatively recent case, the New York Court of Appeals denied the defendants' request to amend their answer to assert the "affirmative defense" of primary assumption of risk.⁸⁷ In their original answer to the complaint, however, the defendants denied the plaintiff's allegations of negligence, thereby raising the issue of primary assumption of risk,⁸⁸ which should have obviated the need to amend the complaint.⁸⁹ But the New York courts failed to point out that the issue had indeed been raised in a timely manner and instead gave credence to the idea that primary implied assumption is an affirmative defense.⁹⁰

Courts' treatment of primary assumption of risk as an affirmative defense might be justifiable if they were to acknowledge that such a treatment changes the rules by requiring defendants to disprove an element of the prima facie case. Instead, courts perpetuate the fiction of the "[j]udicially created affirmative defense whereby a defendant owes no duty,"⁹¹ a clearly confused explanation, as a finding of "no duty" constitutes a failed prima facie case of negligence.

Additionally, some courts provide overbroad generalizations of primary assumption of risk even though narrower comments would be more fitting. For example, in a relatively recent opinion, one court stated that "[t]he doctrine of primary [implied] assumption of risk relieved the defendants of any duty of care that they may have owed the plaintiff."⁹² This is an exemplary instance of an

87. *Trupia v. Lake George Cent. Sch. Dis.* 927 N.E.2d 547, 548 (N.Y. 2010); *see also* *McGrath v. Shenendehowa Cent. Sch. Dist.*, 906 N.Y.S.2d 399, 400 (N.Y. App. Div. 2010) (characterizing a primary-implied-assumption-of-risk argument as an affirmative defense).

88. *See generally* Answer, *Trupia*, 927 N.E.2d 547 (No. 42646/02) (denying allegations of negligence and asserting affirmative defenses, including assumption of risk).

89. *See generally* Amended Answer, *Trupia*, 927 N.E.2d 547 (No. 42646/02).

90. *See Trupia*, 927 N.E.2d at 548. In addition, the court commingled primary and secondary assumption of risk, and used the unmodified term "assumption of risk" without qualification. *Id.* at 548–50.

91. *Hague v. Summit Acres Skilled Nursing & Rehab.*, 2010-Ohio-6404, ¶36, No. 09 NO 364, 2010 WL 5545386, at *7 (Ohio Ct. App. Dec. 17, 2010). *Armstrong v. Washington* is another example, in which an inmate filed a negligence suit against the Washington Department of Corrections for supplying her with sports shoes that were too large, which caused her to fall and injure herself. No. 62506-3-I, 2009 Wash. App. LEXIS 2414, at *1–2 (Wash. Ct. App. Sept. 21, 2009). The trial court granted the state's motion for summary judgment, and the appellate court affirmed on the basis of "implied primary assumption of risk" by the plaintiff. *Id.* at *3, *9. The court treated primary assumption of risk as an affirmative defense, yet described it as "really a principle of no duty, or no negligence, and so *denies the existence of the underlying action.*" *Id.* at *9 (emphasis added) (quoting *Tincani v. Inland Empire Zoological Soc'y*, 875 P.2d 621, 633 (Wash. 1994)). Moreover, the court appeared to rely as much on the inmate's lack of regard for her own safety as it did on an absence of negligence by the defendant. *See id.* at *6, *8 (discussing the inmate's awareness of the risk and her decision to "continue exercising in the oversized shoes anyway").

92. *Sy v. Kopet*, 795 N.Y.S.2d 75, 76 (N.Y. App. Div. 2005).

overinclusive, inaccurate statement of the law, and it is particularly obvious, as the parties maintained a landlord-tenant relationship.⁹³

C. The Failure to Distinguish Between the Categories of Assumption of Risk

In addition to the foregoing potential confusion created by mischaracterizing primary assumption of risk, other negative consequences stem from imprecise and inaccurate labels. Under the comparative, rather than all-or-nothing, approach in modern negligence law,⁹⁴ only secondary implied assumption of risk, unreasonable conduct by the injured party, is an affirmative defense to the defendant's unreasonable conduct.⁹⁵ On the other hand, primary implied assumption of risk remains a complete defense to a negligence action and results in a defendant's successful denial of any liability.⁹⁶

Accordingly, even though a court may reach a defensible result, it may do so by using sloppy diction in stating that a plaintiff "assumed the risk" of injury.⁹⁷ For example, in *Davis v. Kellenberg Memorial High School*, the court found that the plaintiff "assumed the risk inherent of injury in horseplay" when a concrete bench toppled and fell on his foot.⁹⁸ The "horseplay" involved several students, who stood on the bench and shifted their weight to make it rock.⁹⁹ The bench indeed rocked, and it landed on the foot of one rocker.¹⁰⁰ A more responsible and orderly analysis would have inquired whether a breach occurred, and then most likely would have found that the plaintiff had failed to establish a prima facie case.

In *Davis*, the sloppy analysis was harmless because the defendant was not held liable.¹⁰¹ Not all cases, however, are decided rightly when analyzed incorrectly.

93. *Id.*

94. *See supra* notes 18–19 and accompanying text.

95. *See Knight v. Jewett*, 834 P.2d 696, 704 (Cal. 1992).

96. *See* DIAMOND, LEVINE, & MADDEN, *supra* note 9, at 226 n.1; DOBBS, *supra* note 8, at 494.

97. *McGrath v. Shenendehowa Cent. Sch. Dist.*, 906 N.Y.S.2d 399, 400 (N.Y. App. Div. 2010) (failing to distinguish between primary and secondary assumption of risk and treating a defense that could only have been the former as an "affirmative defense").

98. 725 N.Y.S.2d 588, 588 (N.Y. App. Div. 2001).

99. *Id.* at 588.

100. *Id.*

101. *Id.* Similarly, the trial judge in *Spencer v. Wal-Mart Stores East, LP*, instructed the jury that an open and obvious danger gives notice of itself, thereby discharging the defendant-landowner's duty to an invitee. 930 A.2d 881, 884 (Del. 2007). The Delaware Supreme Court, however, explained its affirmance on the basis of a "secondary assumption of risk" by the plaintiff and failed to address whether the defendant was negligent in the first place. *Id.* at 885–86. This inconsistency is also evidenced in *Koutoufaris v. Dilk*, in which the court goes back and forth between a correct and a confused understanding of the distinctions between primary and secondary assumption of risk. 604 A.2d 390, 397–98 (Del. 1992). The court first states that "primary assumption of risk involves the express consent to relieve the defendant of any obligation of care while secondary assumption consists of voluntarily encountering a known unreasonable risk which is out of proportion to the advantage gained," and it later confuses the two doctrines by stating, "Where the assumption of risk is of the primary type . . . a plaintiff's conduct *might well* constitute a complete bar to recover[y] . . .

In *Fagan v. Atnalta, Inc.*, the Georgia Court of Appeals affirmed summary judgment for the defendant based on the plaintiff's "assumption of risk," but gave no indication whether the defendant had been negligent or the plaintiff had been contributorily negligent.¹⁰² In *Fagan*, a bar patron aided bar employees as they attempted to fend off a belligerent customer, thereby preventing injury to the employees but becoming the substitute victim of the customer's hostility.¹⁰³ The court, however, neglected to answer the plaintiff's contention that the defendant-bar owner had been negligent, and instead immediately characterized the plaintiff's conduct as an "assumption of risk."¹⁰⁴ If, in fact, the assumption of risk was primary, then the defendant did not negligently place anyone in a position of peril, and the danger-invites-rescue doctrine would not apply.¹⁰⁵ If the defendant was negligent, however, the assumption of risk could only have been secondary, which requires an assessment of the plaintiff's reasonableness.¹⁰⁶ Thus, the court's opinion was inadequate and poorly analyzed, and it likely reached the wrong result.

Even in cases that use the appropriate terminology, the mistake the *Fagan* court demonstrated—bypassing an inquiry into the defendant's negligence and quickly resorting to a discussion of the plaintiff's conduct—produces a truncated analysis.

For example, in *Lamandia-Cochi v. Tulloch*, a thirteen-year-old plaintiff sought to recover damages for injuries sustained from sliding down a handrail adjacent to the defendant's porch steps.¹⁰⁷ In its analysis, the appellate court bypassed any discussion of the defendant's negligence by merely concluding that the plaintiff assumed the risk that "the handrail might bend or shift beneath him."¹⁰⁸ Does this conclusion signify that the defendant was not negligent toward the plaintiff, or that the plaintiff failed to exercise reasonable care for his own safety? A better-reasoned analysis would have acknowledged the absence of any need to discuss the plaintiff's conduct after finding that the defendant did not owe or breach a duty to the plaintiff.

even in a comparative negligence jurisdiction." *Id.* at 398 (emphasis added). By focusing both primary and secondary assumption of risk inquiries on the injured party's conduct, the court wrongly fused two distinct concepts.

102. See 376 S.E.2d 204, 205–06 (Ga. Ct. App. 1988).

103. *Id.* at 204–05.

104. *Id.* at 205.

105. See *supra* note 48 and accompanying text.

106. See *supra* note 23 and accompanying text.

107. 759 N.Y.S.2d 411, 411 (N.Y. App. Div. 2003).

108. *Id.* (citations omitted); see also *Armstrong v. Washington*, No. 62506-3-I, 2009 Wash. App. LEXIS 2414, at *5 (Wash. Ct. App. Sept. 21, 2009) (treating primary implied assumption of risk as an affirmative defense).

III. ELIMINATING THE MISCHIEF: USING THE PLEADINGS AND THE LAW OF INFORMED CONSENT

Two lines of reasoning may ameliorate the mischief. One uses the pleadings to emphasize the two distinct defensive arguments, and the other parallels the analysis in an informed-consent case. These analyses complement each other and allow one to form a clear picture of implied assumption of risk.

A. *From the Perspective of the Pleadings*

In an answer to a complaint, the defendant must respond to each of the plaintiff's allegations and plead any affirmative defenses.¹⁰⁹ Therefore, the defendant's answer may deny that any negligence occurred by stating that no duty existed or that a duty was not breached. Such a denial gives notice of a forthcoming argument of primary implied assumption of risk. In another part of the answer, the defendant can plead contributory negligence as an affirmative defense.¹¹⁰ This "BUT" defense is independent of the defendant's position on the plaintiff's allegations of negligence.¹¹¹ It may be coupled with an admission of negligence ("Yes, but . . ."), a denial of negligence ("No, but . . ."), or an uncertain response ("Maybe, but . . ."). The defendant's position on the plaintiff's contributory negligence is, in the parlance of assumption of risk, an argument of secondary implied assumption of risk.

Denying negligence and pleading contributory negligence are independent actions. If a defendant admitted negligence allegations, for example, he or she could still plead the affirmative defense of the injured party's culpable conduct. Additionally, a defendant who denies a plaintiff's allegations of negligence should, if appropriate, take the "belt-and-suspenders" approach—pleading any available affirmative defenses, including contributory negligence.¹¹² Using the pleadings to compare discrete defensive arguments in the answer illustrates the distinctions between them and highlights the significance of their success or failure to the outcome of the lawsuit.

1. *Primary Assumption of Risk: A Failure of the Prima Facie Case*

Commentators and influential state courts agree that a finding of primary implied assumption of risk is analytically equivalent to a finding that the defendant either did not owe or did not breach a duty of care to the plaintiff.¹¹³ That is, a finding of primary implied assumption of risk means that the plaintiff failed to establish a prima facie case against the defendant. Generally, the

109. FED. R. CIV. P. 8.

110. *See id.*

111. *See supra* notes 22–23 and accompanying text.

112. *See United States v. Carona*, 630 F.3d 917, 927 (9th Cir. 2011) ("The term 'belt and suspenders' is sometimes used to describe the common tendency of lawyers to use redundant terms to make sure that every possibility is covered.")

113. *See supra* notes 1–3, 52.

defendant challenges the plaintiff's prima facie case at the pleading stage by denying the pertinent allegations in the plaintiff's complaint.¹¹⁴

Despite the obvious association between a substantive denial of liability and the procedural vehicle for providing notice of that denial, many intermediate appellate and state court judges frequently label and treat primary implied assumption of risk as an affirmative defense.¹¹⁵ Such mischaracterizations produce weak legal rulings that encourage defense attorneys and trial judges to focus on the injured party's conduct prematurely, without first analyzing the bases for a finding that the defendant acted unreasonably.

2. Secondary Assumption of Risk: An Affirmative Defense

The defendant must raise and bear the burden of proof on the issue whether an injured party's conduct was culpable and caused his or her injury.¹¹⁶ Accordingly, pleading the injured party's culpable conduct is properly placed in the affirmative-defenses section of the defendant's answer,¹¹⁷ rather than the portion that admits or denies the allegations.¹¹⁸ The distinction between, and coexistence of, this approach and a denial of the allegations is demonstrated in numerous cases, one of which is *Micallef v. Miehle*.¹¹⁹ In *Micallef*, the plaintiff sued a machine-manufacturing company for negligently causing him an on-the-job injury while he was operating a high-speed, photo-offset printing press.¹²⁰ The plaintiff's actions exposed him to the obvious danger that his hand could be drawn into the "nip point" of the machine, which had no safety guard to protect his hand.¹²¹ In its defense, the Miehle Company invoked the patent-danger rule: "the manufacturer of a machine . . . dangerous because of the way in which it functions, and patently so, owes to those who use it a duty merely to make it free from latent defects and concealed dangers."¹²² The New York Court of Appeals took the opportunity presented by this case to reassess the validity of the patent-danger rule in negligence cases and decided to hold that a manufacturer's obligation should be based on the reasonableness of the risk created, rather than

114. FED. R. CIV. P. 8(h)(2). The defendant should deny the allegations, rather than label the challenge as a counterclaim or affirmative defense, because the burdens of production and persuasion usually accompany the burden of pleading. *See id.* at 8(a).

115. *See, e.g.,* Hague v. Summit Acres Skilled Nursing & Rehab., No. 09 NO 364, 2010 WL 5545386, at *7 (Ohio Ct. App. Dec. 17, 2010); Albritton v. Kiddie, Inc., 591 N.E.2d 781, 782 (Ohio Ct. App. 1990) (naming assumption of risk as an affirmative defense).

116. *See* FED. R. CIV. P. 8(c); SHUBHA GOSH, ACING TORT LAW 123 (2009) ("In establishing the defense of contributory negligence, a defendant has to show that the plaintiff's conduct was unreasonable and that the unreasonable conduct caused the injury.").

117. FED. R. CIV. P. 8(c).

118. *Id.* at 8(b).

119. 348 N.E.2d 571, 573 (N.Y. 1976).

120. *Id.* Plaintiff tried to remove a foreign object or a "hickie" from the press, which was causing imperfections in the printed pages. *Id.*

121. *Id.*

122. *Id.* at 575 (quoting Campo v. Scofield, 95 N.E.2d 802, 803 (N.Y. 1950)).

its obviousness.¹²³ This decision made evidence of feasible safety measures relevant to the defendant's lack of care in designing the machine; previously, such evidence was irrelevant due to the reliance on the patent-danger doctrine.¹²⁴

Using this new test, the court noted the evidence of at least three safeguards that would have protected Micallef, none of which would have impaired the utility of the machine, and thus exhibited the defendant's negligent design.¹²⁵ The court allowed the negligent-design claim to go forward, rendering the obviousness of the danger a mere factor to be considered when assessing an injured party's culpable conduct.¹²⁶ Based on this ruling, a defendant in the Miehle Company's position can both deny liability on the basis of an absence of negligence, rather than on the presence of an obvious danger, and assert an affirmative defense based on the culpability of the operator's conduct in exposing himself to an open and obvious danger.¹²⁷

B. From the Perspective of Informed Consent

A second approach views cases involving primary assumption of risk through the lens of informed-consent analysis.¹²⁸ Informed consent to medical treatment is a *primary* assumption of risk. That is, the patient who consents to a medical procedure after receiving legally adequate information accepts the possibility that risks inherent to the diagnostic or treatment procedure may materialize.¹²⁹ The risks, then, are inherent in the activity when it is performed according to the professional standard of care and do not amount to malpractice or negligence by the healthcare provider.¹³⁰

During my career as a registered nurse, I cared for a patient whose case exemplifies the link between informed consent and primary assumption of risk.

123. *Id.* at 577 (“[W]e hold that a manufacturer is obligated to exercise that degree of care in his plan or design so as to avoid any unreasonable risk of harm to anyone who is likely to be exposed to the danger when the product is used in the manner for which the product was intended . . . as well as an unintended yet reasonably foreseeable use.” (citations omitted)).

124. *Id.* at 576–77.

125. *Id.* at 574 (discussing the testimony of engineer Samuel Aidlin).

126. *Id.*

127. *See id.* at 578. The comparative-fault statute, which became effective the year before the *Micallef* decision, provides that “culpable” conduct by the injured party calls for a reduction in the award of damages. *See* N.Y. C.P.L.R. 1411 (McKinney 1997 & Supp. 2011).

128. The term “consent” often finds its way into the discussion of assumption of risk through the old adage *volenti non fit injuria*, which means, “to a willing person it is not a wrong.” BLACK’S LAW DICTIONARY 1710 (9th ed. 2009). This familiar refrain is used in various court opinions. *See, e.g.*, Paubel v. Hitz, 96 S.W.2d 369, 374 (Mo. 1936); Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 174 (N.Y. 1929). Courts and commentators use the term “voluntary,” which implies “consensual,” in defining and discussing assumption of risk. *See, e.g.* DIAMOND, LEVINE & MADDEN, *supra* note 9, at 268.

129. *See supra* notes 61–65 and accompanying text.

130. *See* Canterbury v. Spence, 464 F.2d 772, 785 (D.C. Cir. 1972) (“[T]he standard measuring performance of that duty by physicians, as by others, is conduct which is reasonable under the circumstances.” (footnote omitted)).

The patient, to whom I will refer as “Susan,” was a young woman with congenital heart disease who underwent a surgical replacement of her aortic valve. She consented to the surgery after being fully informed of its inherent risks, including brain damage and death. The rest of her story is as follows.

Susan’s valve-replacement surgery required her heart to be motionless while the surgeon removed and replaced her diseased valve.¹³¹ Accordingly, the surgeon connected her to a cardiopulmonary bypass machine that took over her heart and lung functions, allowing her heart to be stopped.¹³² Catheters in Susan’s veins drained blood from her body, which circulated through the bypass machine to be oxygenated; then, the bypass machine pumped the newly oxygenated blood back into Susan’s body through an aortic catheter placed just above the surgical site.¹³³ At the time of Susan’s surgery, these procedures were routinely used during valve replacements.¹³⁴

After replacing Susan’s diseased valve, the surgeon made successful use of electrical stimulation to restart her heart.¹³⁵ At that point, Susan no longer needed the bypass machine to support her circulation. Her heart and lungs had satisfactorily resumed functioning, and the staff expected Susan to leave the operating room in good condition. At this time, about one liter of Susan’s blood remained in the reservoir of the bypass machine. Standards of care directed that a patient’s own blood should be reinfused before giving that patient a transfusion of a donor’s blood;¹³⁶ therefore, the surgeon instructed the perfusionist operating the bypass machine to continue reinfusing Susan’s blood into her body. The perfusionist complied, and ran the bypass machine to give Susan a transfusion of her own blood through the aortic catheter.

Soon after, something or someone distracted the perfusionist, causing the perfusionist not to notice when the reservoir became empty and allowed a large air bubble to enter the perfusion catheter.¹³⁷ The surgeon, concentrating on finishing the surgery, did not see the air bubble until a deadly portion had already passed into Susan’s aorta. Noticing this, the surgeon clamped the catheter, but he was too late.

Due to massive brain damage as a result of the air embolism, and, pursuant to neurological criteria, Susan was pronounced dead shortly after she was transferred to the intensive-care unit post-surgery.

131. See H. Newland Oldham, Jr., *Congenital Aortic Stenosis*, in 1 TEXTBOOK OF SURGERY 2261, 2268 (David C. Sabiston ed., 13th ed. 1986) (discussing surgical treatment for ventricular obstructions).

132. See *id.*

133. See *id.*

134. See *id.*

135. James K. Kirklin & John W. Kirklin, *Cardiopulmonary Bypass for Cardiac Surgery*, in TEXTBOOK OF SURGERY, *supra* note 131, at 2455, 2467 (discussing the “rewarming” after a cardiopulmonary bypass).

136. See *id.*

137. Modern technology should have greatly reduced the likelihood of this sort of accident.

As noted, Susan consented to this surgery and understood that some people who undergo aortic-valve replacement sustain brain damage or die under even the best circumstances.¹³⁸ Nonetheless, a but-for causal connection undoubtedly existed between the surgery and Susan's death. Would Susan's consent preclude a finding of liability against the potentially responsible parties in this case, even though the results she suffered were among those expressly identified to her before she consented? Clearly, the answer is "no," as this set of circumstances falls outside the scope of Susan's primary assumption of risk. She *consented to the surgery* with knowledge of the risks inherent in a medical procedure performed according to the standard of care. She did not, however, *consent to suffer brain damage and death*. The injection of an air embolism into Susan's circulation—caused by the staff's inattention to the cardiopulmonary bypass machine—is simply not among the risks inherent in the activity.

Under other circumstances, however, the same outcome might well have been encompassed by Susan's primary assumption of risk. Consider this variation in the facts: Susan's brain damage and death resulted from a blood clot that entered her circulatory system after it broke away from her diseased aortic valve before the surgeon could remove and replace it. Like the air bubble, the circulating blood clot would have been an embolism. Unlike the air bubble, the blood clot would not have been created or dislodged because of negligence. The outcome in this variation, then, represents the materialization of a risk inherent in the activity. In this variation, Susan's "primary assumption of risk" would preclude evidence of a breach (or negligence), and thus she would fail to establish a prima facie case.

C. Using the Pleadings and the Law of Informed Consent

Susan's case and its variation illustrate the connection between the doctrines of informed consent and primary implied assumption of risk. One must simply remember the basics: (1) a primary implied assumption of risk encompasses only the risks inherent in the particular activity, does not include risks created or exacerbated by negligence, and signifies a plaintiff's failure to make out a prima facie case; (2) a plaintiff's secondary implied assumption of risk signifies that she has failed to exercise reasonable care for her own safety, which produced the injury in conjunction with the defendant's negligence, and is considered only if the plaintiff establishes a prima facie case; and (3) separate analyses are required for (a) cases involving a defendant's lack of negligence, and (b) cases in which both the defendant and the plaintiff were negligent, as a defendant should prevail in the former and should share costs with the plaintiff in the latter.

In *Paubel v. Hitz*, the chicken-manure case previously discussed, Paubel lost his negligence suit because he could not establish the breach element of his prima

138. *Heart Valve Surgery*, MEDLINEPLUS, <http://www.nlm.nih.gov/medlineplus/ency/article/002954.htm> (last visited Sept. 18, 2011).

facie case.¹³⁹ Hitz's argument of Paubel's primary assumption of risk would be raised as a denial in the answer to Paubel's negligence allegations. If the presence of the chicken manure gave warning of itself, and if providing a warning of the dangerous condition would discharge the defendant's obligation of reasonable care, then breach could not be established and, therefore, the prima facie case also could not be established. If reasonable minds could differ regarding the behavior that the standard of reasonable care required of the defendant (such as making a more frequent effort to clean the runway, which would reduce the risk), however, then the plaintiff would have established a prima facie case. Now, in the latter case, the defendant would be well advised to anticipate the possibility of the plaintiff establishing a prima facie case by pleading contributory negligence in the affirmative-defense portion of the answer.

In *Evans v. Johns Hopkins University*, the court affirmed summary judgment for the defendant based on an unspecified form of assumption of risk.¹⁴⁰ The plaintiff, Evans, undertook to produce monoacetone glucose in a laboratory at Johns Hopkins University, where he was a graduate student.¹⁴¹ To accomplish this task, Evans synthesized acetone, a volatile and flammable substance, and glucose.¹⁴² While Evans was working on this project, the ingredients exploded and burned Evans's body.¹⁴³ Evans sued Johns Hopkins and alleged that the university negligently failed to supply "the particular laboratory in which [he] was working with 'any ordinary or reasonable safety measures or precautions or devices necessary and proper for the purpose of quenching, controlling and extinguishing chemical explosions and fires.'"¹⁴⁴

The court held that "the plaintiff is barred by the defense of assumption of risk,"¹⁴⁵ and did not rule on any other substantive issues.¹⁴⁶ If the case were to be analyzed using the model suggested here, however, the defendant would be well-advised to take the belt-and-suspenders approach. First, the defendant would be advised to deny the allegations of negligence in the answer to the complaint. As in *Paubel*, the court in this case might find in favor of the defendant as a matter of law. On the other hand, it is possible that the plaintiff could produce sufficient evidence of negligence to require the jury to decide: whether the defendant adhered to industry customs concerning laboratory safety, whether an applicable statute or regulation established a laboratory safety standard, and

139. 96 S.W.2d 369, 374 (Mo. 1936).

140. 167 A.2d 591, 592, 595 (Md. 1961).

141. *Id.* at 592.

142. *Id.*

143. *Id.*

144. *Id.* at 593.

145. *Id.* at 594.

146. *Id.* ("[W]e do not find it necessary to pass on the question of contributory negligence.").

whether a Hand-Formula¹⁴⁷ analysis would suggest a conclusion about the burdens and benefits of greater investments in safety. Appropriate research into these questions might unearth a basis for reasonable minds to differ on the issue of breach.

Based on these possibilities, the University should include contributory negligence allegations in the affirmative defense portion of its answer. Perhaps the plaintiff was or should have been aware of the volatility and flammability of acetone as well as the availability of other laboratories equipped with the fire-quenching equipment that his laboratory lacked. A jury could certainly conclude that reasonable care for his own safety required the plaintiff to act more cautiously, and therefore, he could be found contributorily negligent.

D. *The Noncompliant Patient/Client: A Final “Textbook” Case*

In the healthcare industry, noncompliant patients are those who fail to heed the advice of medical professionals. The term encompasses behavior ranging from refusing treatment due to a religious belief,¹⁴⁸ to ordinary contributory negligence,¹⁴⁹ to downright obnoxiousness.¹⁵⁰

In *Shorter v. Drury*, for example, Doreen Shorter underwent a dilation and curettage (D&C) procedure to evacuate her uterus after her fetus died naturally in utero.¹⁵¹ Before the D&C, Shorter informed her physician that her religious beliefs precluded her from consenting to the administration of blood or blood products.¹⁵² Profuse internal bleeding after the D&C prompted Shorter’s return to the operating room for exploratory surgery, which revealed that her physician had caused severe lacerations of her uterus.¹⁵³ Surgical repair proved ineffective, however, and Shorter died due to loss of blood.¹⁵⁴

147. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (“[I]f the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL.”).

148. See *In re Osborne*, 294 A.2d (D.C. 1972) (discussing a patient’s refusal to accept a blood transfusion due to religious beliefs); *Jefferson v. Griffin Spalding Cnty. Hosp. Auth.*, 274 S.E.2d 457, 459 (Ga. 1981) (noting a woman’s refusal of a cesarean section due to religious beliefs).

149. See, e.g., *Striff v. Luke Med. Practitioners, Inc.*, 2010-Ohio-6261, ¶ 61, No. 1-10-15, 2010 Ohio App. LEXIS 5439, at *35–36 (Ohio Ct. App. Dec. 20, 2010) (describing alleged noncompliance based on the patient’s failure to quit smoking despite a physician’s advice to do so).

150. See, e.g., *Payton v. Weaver*, 182 Cal. Rptr. 225, 227 (Cal. Ct. App. 1982) (discussing the physician’s refusal to continue dialysis treatment for a patient who was “persistent[ly] uncooperative and antisocial” over a three-year course of treatment and “persistent[ly] refus[ed] to adhere to reasonable constraints of hemodialysis, the dietary schedules and medical prescriptions . . . [and] the use of barbiturates and other illicit drugs”).

151. 695 P.2d 116, 118 (Wash. 1985). This procedure prevents infection when a woman’s uterus “fails to discharge” a fetus that died of natural causes. *Id.*

152. *Shorter*, 695 P.2d at 118–19.

153. *Id.* at 119.

154. *Id.*

In the subsequent wrongful-death lawsuit pursued by Shorter's husband, the jury found that Dr. Drury's negligence in lacerating Shorter's uterus proximately caused her death.¹⁵⁵ The jury assigned seventy-five percent of the fault, however, to Shorter's refusal to accept transfusions and her consequent assumption of the risk that she could bleed to death.¹⁵⁶ The trial judge entered a judgment on the jury verdict and awarded twenty-five percent of the total compensatory damages.¹⁵⁷

Affirming the judgment on appeal, the Washington Supreme Court discussed the competing arguments concerning Shorter's assumption of risk.¹⁵⁸ Although Shorter assumed the risk of bleeding to death, the court concluded that she did not assume the risk of the physician's negligence.¹⁵⁹ But the court's distinctions on these points do not make sense. Had there not been negligence, the profuse bleeding that caused Shorter's death would not have occurred. The ordinary bleeding that may have occurred as an inherent risk of the procedure did not cause this lethal loss of blood; rather, severe uterine lacerations, which are not among the procedure's inherent risks, led to her death.

As a matter of law, Shorter's case and the aortic-valve replacement case discussed earlier are very similar. By refusing blood transfusions, Shorter accepted the consequences of forgoing any transfusions necessitated by the manifestation of risks inherent in the D&C procedure. She did not, however, accept the consequences of negligence in the performance of the D&C, including consequences that called for administering blood or blood products—such as the uterine lacerations. Just as Susan's consent to undergo an aortic-valve replacement after being informed of the risks inherent in that procedure did not constitute consent to experience brain damage or death, Shorter's informed consent to undergo the D&C did not constitute consent to exsanguination caused by severe lacerations to her uterus.

In affirming the "split the difference" judgment entered by the trial court, the Washington Supreme Court did not address these problematic issues.¹⁶⁰ But if one analyzes *Shorter* according to the model suggested in this Article, one reaches a result that is more faithful to the court's statements than the court's own conclusion turned out to be. If Shorter's physician submitted an answer that denied the allegations of malpractice, the question of primary implied assumption

155. *Id.*

156. *Id.*

157. *Id.* (awarding the plaintiff \$103,000 out of the \$412,000 in damages).

158. *Id.* at 121, 124 (addressing the plaintiff's argument that submitting "the issue of assumption of the risk to the jury violated the free exercise clause of the First Amendment").

159. *Id.* at 123–24. The court explained that "[w]hile Mrs. Shorter accepted the consequences resulting from a refusal to receive a blood transfusion, she did not accept the consequences of Dr. Drury's negligence which was, as the jury found, a proximate cause of Mrs. Shorter's death." *Id.* at 121. In this case, Dr. Drury's negligence caused the need for a blood transfusion—the two cannot be separated.

160. *See id.* at 124.

of risk would have become an issue for the jury to resolve by determining whether the physician's actions constituted malpractice and caused Shorter's death. The court's discussion does not make evident whether this occurred or if the answer pled the affirmative defense of Shorter's contributory negligence (secondary implied assumption of risk). The court bypasses these points by relying on the express assumption it found embodied in Shorter's written refusal to accept blood transfusions.¹⁶¹ At the same time, the court rejects the notion that Shorter's refusal is tantamount to absolving her physician completely of responsibility for the consequences of his negligent conduct.¹⁶² Moreover, the court did not mention the possibility that Shorter's physician committed a separate act of malpractice by failing to at least seek a judicial order overriding Shorter's refusal when she was in extremis.¹⁶³

161. *Id.* at 123.

162. *See id.* at 121–24 (discussing the physician's comparative negligence).

163. *See id.* Before and after 1979, the year Shorter died, courts decided numerous cases in which physicians sought such judicial orders. *See Stamford Hosp. v. Vega*, 674 A.2d 821, 824–25 (Conn. 1996) (finding that the “trial court’s order permitting the hospital to transfuse [the patient] against her will violated her common law right of bodily self-determination”); *In re Dubreuil*, 629 So. 2d 819, 820 (Fla. 1993) (quashing the lower court’s decision that a “woman who chose not to receive a blood transfusion for religious reasons could be compelled to do so to receive medical treatment because her death would cause the abandonment of four minor children”); *Pub. Health Trust of Dade Co. v. Wons*, 541 So. 2d 96, 97 (Fla. 1989) (ruling that “a competent adult has a lawful right to refuse a blood transfusion without which she may well die”); *In re Brown*, 689 N.E.2d 397, 400 (Ill. App. Ct. 1997) (finding that the trial court erred when it appointed a temporary custodian for the patient’s fetus, who was able to consent to a blood transfusion on the mother’s behalf); *Norwood Hosp. v. Munoz*, 564 N.E.2d 1017, 1025 (Mass. 1991) (reversing the lower court’s ruling, which authorized blood transfusions despite the patient’s refusal); *Mercy Hosp., Inc. v. Jackson*, 510 A.2d 562, 565 (Md. 1986) (“In considering the various interests at stake when a hospital patient declines a medically indicated blood transfusion, any decision must take into account the factual circumstances in which the asserted rights come into play. A ruling on the merits of this case could be so easily distinguished by future litigants that it would afford little guidance to trial judges or parties.”); *In re Brown*, 478 So. 2d 1033, 1040–41 (Miss. 1985) (finding the state’s interest in preserving life of eyewitness to crime not sufficiently compelling to override the eyewitness’s right to refuse blood transfusions); *John F. Kennedy Mem’l Hosp. v. Heston*, 279 A.2d 670, 671 (N.J. 1971) (discussing a Jehovah’s Witness’s refusal to undergo a blood transfusion), *overruled by In re Conroy*, 486 A.2d 1209, 1224 (N.J. 1985); *Fosmire v. Nicoleau*, 551 N.E.2d 77, 84 (N.Y. 1990) (affirming the appellate court’s ruling vacating an ex parte order to override a patient’s refusal of blood transfusions); *In re Winthrop Univ. Hosp.*, 490 N.Y.S.2d 996, 996 (N.Y. App. Term 1985) (granting hospital’s application for an order directing that an unwilling patient be given blood transfusions if necessary to save her life); *In re Jamaica Hosp.*, 491 N.Y.S.2d 898, 900 (N.Y. App. Term 1985) (appointing a physician as the special guardian of a patient’s unborn child and ordering him to administer blood transfusions necessary to save the child’s life); *Powell v. Columbian Presbyterian Med. Ctr.*, 267 N.Y.S.2d 450, 450–51 (N.Y. App. Term 1965) (discussing an order allowing physicians to use their discretion to administer transfusions necessary to save the life of refusing patient); *Crouse Irving Mem’l Hosp., Inc. v. Paddock*, 485 N.Y.S.2d 443, 446 (N.Y. Sup. Ct. 1985) (authorizing patient’s physicians to use blood transfusions despite the patient’s refusal); *In re Melideo*, 390 N.Y.S.2d 523, 524 (N.Y. Sup. Ct. 1976) (upholding the right of a competent non-impregnated woman to refuse a potentially life-saving blood transfusion); *In re Duran*, 769 A.2d 497, 499–500 (Pa. Super. Ct. 2001) (holding that Pennsylvania common law protects a patient’s right to refuse blood transfusions and that “the trial court erred when

In sum, whether Shorter's assumption of risk was express or implied, it was a *primary* assumption of risk. She accepted risks inherent in the performance of a D&C, which did not include malpractice. Arguing that her physician might have been able to rescue her from the consequences of his malpractice by violating her religious beliefs—or seeking a court's blessing to ignore her wishes—does not justify a result that, in essence, blames the victim rather than the malpractitioner. It is one thing to demand that a person who refuses treatment accept the consequences of the refusal. It is quite another to essentially disregard the reason that the refused treatment was necessary in the first place.

IV. CONCLUSION

The ability to make adroit, effective, and yet ingenuous use of language serves lawyers well. Language corrupted by careless, ignorant, or otherwise imprecise usage harms legal reasoning and analysis. Judges especially need to watch their language, for they not only control the present, but also influence the future. The burden to say what they mean and to mean what they say may be onerous—but it is necessary. Being attentive to doctrine and procedure should enable judges to eliminate the mischief that otherwise results from uncritical use of words. At present, however, a significant component of modern case law on assumption of risk perpetuates the confusion and mischief that arise from inconsistent use of terms and imprecise analysis of facts and precedent.

It is possible to create a new rule that precludes the recovery of damages from a negligent defendant because of conduct by the injured party that is knowing and voluntary—even if it is reasonable. This rule may be desirable, but it must be called something other than assumption of risk. In the meantime, judges who find it necessary to rely on assumption-of-risk concepts must better understand, more succinctly state, and consistently apply those principles. The “I know it when I see it” approach to assumption-of-risk analysis does not serve the interests of litigants or the law.

it appointed an emergency guardian to abridge this right”); *In re Dell*, 1 Pa. D. & C.3d 655, 656 (Pa. Ct. Comm. Pleas 1975) (discussing a court order that authorized emergency transfusion to an unwilling patient). When an action becomes customary among the members of a profession, it is incorporated into the standard of care for that profession, and courts generally defer to such professional customs to identify standards of reasonable care. DIAMOND, LEVINE & MADDEN, *supra* note 9, at 104 (“Because of the specialized skill and training needed to be a doctor . . . courts defer to the expertise of the profession to determine the appropriate standard of care.” (footnote omitted)).