Contributory Negligence and Assumption of Risk--The Case for Their Merger

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I. INTRODUCTION

At common law the plaintiff in a negligence action was barred from recovery when his conduct constituted either contributory negligence or assumption of risk. As a result of the adoption of a comparative negligence statute in Minnesota, contributory negligence no longer completely bars recovery but only reduces recoverable damages. The statute, however, is silent as to assumption of risk. Since the purpose of the statute is to allow a plaintiff to recover part of his damages despite the fact that his conduct fails to meet the reasonable man standard of care, as long as his negligence is less than that of the defendant, and since both contributory negligence and assumption of risk describe unreasonable conduct by the plaintiff, the purpose of the comparative negligence statute would be frustrated if assumption of risk continued to operate as a complete bar to recovery. In a recent case, the Minnesota supreme court recognized this problem and noted that the comparative negligence statute made it necessary to decide whether some types of assumption of risk should be merged with contributory negligence and thus be controlled by the comparative negligence statute. This note will explore the various distinctions between contributory negligence and assumption of risk to determine whether both defenses should be controlled by the comparative negligence statute.

1. MINN. STAT. § 604.01(1) (1969): Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

2. In Parness v. Economics Laboratory, Inc., 284 Minn. 381, 386, 170 N.W.2d 554, 557 (1969), the court made the following observation: However plaintiffs vigorously urge that in this type of case, where the defenses overlap, it is both confusing and unfair to submit them as separate and distinct and that we should follow the New Jersey court and abolish the defense of assumption of risk . . . . While we acknowledge the persuasiveness of plaintiffs' argument, we decline to accept it at this time, as we find no significant prejudice to plaintiffs' rights in the trial of this case and we anticipate that the question will be more meaningfully presented under the recently enacted statute abolishing contributory negligence as a complete defense.
II. DEFINITION AND DEVELOPMENT OF ASSUMPTION OF RISK

Assumption of risk is actually two separate and distinct doctrines: 3 primary and secondary assumption of risk. Primary assumption of risk is not an affirmative defense, but a way of expressing the idea that where the defendant owes no duty to the plaintiff he cannot be negligent. 4 It is a consequence of a voluntary relationship in which the duty owed by one party to another with respect to the risks incident to their relationship is limited. 5 Secondary assumption of risk is a more common doctrine. It is an affirmative defense to an established breach of duty, and may be raised only when the plaintiff has voluntarily encountered a known and appreciated risk. 6

A. PRIMARY ASSUMPTION OF RISK

This doctrine originated in master-servant cases 7 and has subsequently been applied in situations where a voluntary relation-

4. See authorities cited in note 3 supra.
5. Id.
6. Knutson v. Arrigoni Bros., 275 Minn. 408, 413, 147 N.W.2d 561, 565 (1966) (essential elements in assumption of risk are a knowledge of the danger and an intelligent acquiescence in it); Schrader v. Kriesel, 232 Minn. 238, 247, 45 N.W.2d 395, 400 (1950) (assumption of risk involves comprehension that a peril is to be encountered and a willingness to encounter it); RESTATEMENT (SECOND) OF TORTS § 496D (1965) (plaintiff does not assume a risk of harm arising from the defendant’s conduct unless he knows of the existence of the risk and appreciates its unreasonable character); Id. at § 496E (plaintiff does not assume a risk of harm unless he voluntarily accepts the risk).
7. Martin v. Des Moines Edison Light Co., 131 Iowa 724, 732, 106 N.W. 359, 362 (1906) (where master owed no duty, servant assumed risks incident to employment); Farwell v. Boston & Worcester R.R., 45 Mass. 49 (1842) (injury caused by negligence of fellow servant held to be an incidental risk and thus not a breach of duty by the master); Gray v. Commutator Co., 85 Minn. 463, 469, 89 N.W 322, 324 (1902); Ransier v. Minneapolis and St. Louis Ry., 32 Minn. 331, 335, 20 N.W. 332, 334 (1884); Madden v. Minneapolis & St. Louis Ry., 32 Minn. 303, 305, 20 N.W. 317, 318 (1884) (master has duty to use reasonable care and skill to furnish his servants safe and suitable instruments and means to perform their services); Louisiana Ry. & Nav. Co. v. Eldridge, 293 S.W. 901, 903 (Tex. Civ. App. 1927) (where master owed servant no duty, servant assumed the risks as a matter of law); Hutchinson v. Railway Co., 155 Eng. Rep. 150 (1850); Priestley v. Fowler, 150 Eng. Rep. 1030 (1838) (duty of master was to provide for the safety of servant to the best of master’s “judgment, information, and belief” which would relieve master of liability...
ship exists between the parties. Its fundamental elements are: (1) the parties have entered into a voluntary relationship; (2) the plaintiff, by entering into this relationship, assumes the risks incidental to it; (3) the defendant has no duty with respect to these incidental risks—thus if plaintiff's injury arises from an incidental risk, defendant is not negligent because he did not breach a duty; (4) the conduct of plaintiff in encountering the particular risk is not relevant because he assumes the risk as a matter of law when he voluntarily enters into the relationship with the defendant—thus plaintiff assumes the risk even if his conduct is reasonable and even if he does not know or appreciate the particular risk at the time he encounters it. Since primary assumption of risk is not an affirmative defense, plaintiff is required to plead and prove that the risk in question was not one he assumed and that defendant therefore owed him a duty. Questions regarding the application of primary assumption of risk arise where licensees are injured on the defendant's property, or where spectators are injured in baseball parks during games.

to servant for injuries suffered in the course of servant's employment). Subsequent cases ruled that if a master provides a safe place to work, he is relieved of liability.

The reasoning of the above cases is exemplified by the Minnesota court's statement in Madden:

There is no difference as to the duty of the master and the assumption of risk by the servant. . . . In all cases the servant is held to take on himself risks necessarily incident to the employment . . . and in no case does he take on himself risks that arise by reason of neglects on the part of the master.

32 Minn. at 308, 20 N.W. at 318.

8. Modee v. City of Eveleth, 224 Minn. 556, 29 N.W.2d 453 (1947). A hockey spectator was struck by a puck. The lower court granted judgment notwithstanding the verdict, holding that plaintiff had assumed the risk and that defendant was not negligent. That decision was affirmed after the court concluded that the dangers incident to a game of hockey are matters of common knowledge. See also Olson v. Buskey, 220 Minn. 155, 19 N.W.2d 57 (1945) (automobile host and guest); Benjamin v. Nernberg, 102 Pa. Super. 471, 157 A. 10 (1931) (players on a golf course).


10. Sandstrom v. A.A.D. Temple Bldg. Ass'n, 267 Minn. 407, 411, 127 N.W.2d 173, 176 (1964) (reaffirmation of the prevailing view that licensee assumes the risk of defective conditions unknown to the occupier of premises); Mazey v. Loveland, 133 Minn. 210, 158 N.W. 44 (1916) (mere licensee must take premises as he finds them).

11. Aldes v. Saint Paul Ball Club, Inc., 251 Minn. 440, 48 N.W.2d 94 (1958) (patron assumes the risk of injury from hazards inherent in the sport, but risk of injury from proprietor's negligence is assumed only if the risk is known and appreciated—an example of the application of primary and secondary assumption of risk in the same case); Brisson v.
These cases can be disposed of on the ground that either the defendant owes the plaintiff no duty or that the plaintiff assumes the risk. Whichever analysis is used, the result is the same. This leads to the conclusion that primary assumption of risk serves only to confuse the "no-duty" analysis and therefore should be abolished.\(^2\)

Primary assumption of risk and contributory negligence, however, are clearly separate and distinct doctrines. Unlike contributory negligence, primary assumption of risk is not an affirmative defense asserted by defendant after his negligence has been established; it is used instead to deny negligence itself on the ground that defendant breached no duty to the plaintiff. Primary assumption of risk is also not a measure of the conduct of the plaintiff, as is contributory negligence; instead, it is a measure of defendant's conduct that determines whether the defendant has breached a duty to the plaintiff. Contributory negligence may be invoked as a defense only after it has been established that the defendant was negligent, but primary assumption of risk is applicable only if the defendant has breached no duty and is therefore not negligent.

**B. Secondary Assumption of Risk**

Secondary assumption of risk also originated in master-servant cases\(^3\) and is frequently used today.\(^4\) Unlike primary as-

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12. See, e.g., 2 F. HARPER & F. JAMES, LAW OF TORTS § 21.1 (1956), where the authors state that a "no duty" analysis is more appropriate; this approach is probably correct.

13. Under primary assumption of risk analysis the servant did not assume risks created by the master's negligence. However, if the servant knew and appreciated those risks and voluntarily continued his employment, the servant then assumed those risks created by the master's negligence. Martin v. Des Moines Edison Light Co., 131 Iowa 724, 735, 106 N.W. 359, 363 (1906). See generally Meistrich v. Casino Arena Attractions, 31 N.J. 44, 155 A.2d 90 (1959) (when the master breached his duty to provide a safe place to work by providing defective machinery to his servant, but the servant voluntarily continued his employment with full knowledge and appreciation of the risk created by the master's negligence, it was held that plaintiff had assumed the risk and could not recover); Gray v. Commutator Co., 85 Minn. 463, 89 N.W. 322 (1902); Ran- sier v. Minneapolis & St. Louis Ry., 32 Minn. 331, 20 N.W. 332 (1884); Louisiana Ry. & Nav. Co. v. Eldridge, 293 S.W. 901 (Tex. Civ. App. 1927).

Merger of Defenses

Assumption of risk is an affirmative defense asserted by the defendant after his negligence has been established. The essential element of secondary assumption of risk is that the plaintiff voluntarily chooses to encounter a known and appreciated danger created by the negligence of the defendant. It is similar to contributory negligence in that both are affirmative defenses based on the conduct of the plaintiff and must be asserted by the defendant after his breach of duty has been established. The theoretical distinction between the two defenses is clear: secondary assumption of risk rests upon plaintiff's voluntary consent to take his chances, while contributory negligence rests upon plaintiff's failure to exercise the care of a reasonable man for his own protection. The element of unreasonable conduct essential to a finding of contributory negligence is not necessary to a finding that the plaintiff assumed a risk. This conceptual analysis, however, is misleading in its simplicity. When the plaintiff voluntarily consents to take an unreasonable chance, the conduct by the plaintiff constitutes both assumption of risk and contributory negligence. This fact has been recognized by the Minnesota supreme court. It was also recognized in a major debate in the preparation of Restatement (Second) of Torts over whether assumption of risk should be a separate section or should constitute a part of the contributory negligence section. Dean Prosser de-

(1964); Aldes v. Saint Paul Ball Club, Inc., 251 Minn. 440, 88 N.W.2d 94 (1958) (whether a young boy appreciated the relatively greater danger of being hit by a foul ball in the seat in which he sat held to be a question of fact); Schrader v. Kriesel, 232 Minn. 238, 45 N.W.2d 395 (1950); W. Prosser, Law of Torts § 67 (3d ed. 1964).

16. Id. Although most decisions make no distinction between primary and secondary assumption of risk, the courts should apply the latter only when a duty is breached.
19. In Halpeska v. Callihan Interests, Inc., 371 S.W.2d 388, 378 n.3 (Tex. Sup. Ct. 1963), Justice Greenhill made the following observation: In preparing Restatement of the Law of Torts, Second, the advisers sharply divided. A group mainly of distinguished deans and professors, favored striking the entire chapter of Assumption of Risk. They would use contributory negligence. The group includes Deans Page, Keeton and Wade, and Professors James, Malone, Morris, Seavey, and Thurman. Mr. Eldredge prepared a "dissent" for this group. The group is referred to in the
scribed the two defenses as "intersecting circles, with considerable area in common, where neither excludes the possibility of the other." Although most courts still recognize the defenses as separate, several state courts have recently merged secondary assumption of risk with contributory negligence.

Despite the conceptual distinctions between contributory negligence and secondary assumption of risk it is not clear that the latter has a meaning separate and distinct from the former. The enactment of a comparative negligence statute has made this examination necessary in Minnesota and other states with similar statutes for reasons stated by the authors of the Restatement (Second) of Torts:

There are statutes which make contributory negligence only a partial defense, with the effect of reducing the recoverable damages, which have been construed to leave assumption of risk as a complete defense. It would appear that, unless such a construction is clearly called for, it defeats the intent of the statute in any case where the same conduct constitutes both contributory negligence and assumption of risk, since the purpose of the act would appear to be to reduce the damages in the case of all such negligent conduct, whatever the defense may be called.

Although the existence of the comparative negligence statute underscores the necessity to re-examine the distinctions between the notes of the draft as "The Confederacy." Others including Prosser, Professor Robert Keeton, and Judges Fee, Flood, Traynor, and Goodrich supported the existence of the defense of assumed risk. The distinguished scholars refer to the debate, among themselves, as "The Battle of the Wilderness." The Reporter, Prosser, states in the draft that the American Law Institute voted unanimously to follow the recommendations of the sections on assumption of risk.


21. In Flegner v. Anderson, 375 Mich. 23, 133 N.W.2d 136 (1964), the court commented:

Similarly we have used assumption of risk in still other cases in a sense which closely approximates the concepts involved in the defense of contributory negligence. Some effort has been made to suggest a rational and valid distinction between assumption of risk used in this sense and contributory negligence . . . but such fine distinctions, even if they withstood analysis, which we doubt, have never been made in any of our cases . . . .


22. RESTATEMENT (SECOND) OF TORTS § 496A, comment d at 562 (1965).
defenses, the validity or invalidity of the distinctions does not depend upon the existence of such a statute. In fact, with the exception of Wisconsin, none of the states that have merged the two defenses have a comparative negligence statute. Therefore, the analysis of the distinctions for the most part will be independent of the statutory principles.

III. CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK

The crucial inquiry in determining whether secondary assumption of risk and contributory negligence should remain as distinct doctrines is whether secondary assumption of risk has a meaning independent of contributory negligence. If secondary assumption of risk has no independent application, it should be properly characterized as a special form of contributory negligence and should be governed by the comparative negligence statute in the same manner as contributory negligence, i.e., the defense would only reduce damages and would not completely bar recovery.

A. THE REASONABLE ASSUMPTION OF RISK

The Restatement (Second) of Torts takes the position that secondary assumption of risk may include reasonable conduct by the plaintiff. The key element of secondary assumption of risk is that the plaintiff must voluntarily encounter a known and appreciated danger; the reasonableness of his conduct is seemingly irrelevant. Since by definition contributory negligence includes only unreasonable conduct, it would appear that secondary assumption of risk has a meaning independent of contributory negligence in cases where the plaintiff's assumption of a risk was reasonable. Despite this logical analysis, there are no cases to support its application. Although in some cases involving primary assumption of risk the courts have held that reasonable conduct barred recovery, no case involving secondary assump-

23. Section 496C defines assumption of risk and annotates the definition with comment g at 572: [T]he 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.


25. See note 17 supra.

26. Stober v. Embry, 243 Ky. 117, 47 S.W.2d 921 (1932); Scanlon v.
tion of risk has been found in which reasonable conduct has barred recovery. There are only occasional dicta that secondary assumption of risk is applicable even though the plaintiff has exercised reasonable care; 27 and apparently in all the cases involving the doctrine the conduct of the plaintiff has been unreasonable. 28

In addition, the effectiveness of a reasonable secondary assumption of risk as a bar to recovery has been challenged by at least one leading commentator 29 and several courts. 30 These authorities take the position that a reasonable secondary assumption of risk is a conceptual and practical impossibility, so that in fact the doctrine’s application is limited to situations where the plaintiff has acted unreasonably. This, of course, is the same conduct that gives rise to the defense of contributory negligence.

27. Some courts, including the Minnesota supreme court, have implicitly supported the Restatement position in dicta stating that assumption of risk is distinguishable from contributory negligence because it includes reasonable conduct or that only an unreasonable assumption of risk is a form of contributory negligence. The implication is that there may be a reasonable assumption of risk. See generally Donald v. Moses, 254 Minn. 186, 196, 94 N.W.2d 255, 260 (1959); Schrader v. Kriesei, 232 Minn. 238, 247, 45 N.W.2d 395, 400 (1950); Landrum v. Roddy, 143 Neb. 934, 946, 12 N.W.2d 82, 89 (1943). But see Knutson v. Arrigoni Bros., 275 Minn. 408, 413, 147 N.W.2d 561, 566 (1966), where the court stated that “[i]t is difficult to see how assumption of risk does not involve a departure from reasonable conduct . . . .”


29. James, Assumption of Risk: Unhappy Reincarnation, 78 YALE L.J. 185 (1968). This excellent analysis strongly attacks the Restatement position that a reasonable assumption of risk should bar recovery.

30. Some courts have explicitly stated that only unreasonable conduct by the plaintiff will bar recovery if the doctrine of secondary assumption of risk is applied. Fawcett v. Irby, 92 Idaho 48, 436 P.2d 714 (1968); Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90 (1959). Such reasoning has led these courts to merge secondary assumption of risk with contributory negligence.
The view of these authorities is preferable for several reasons. First, it is doubtful whether there can be a secondary assumption of risk that is both reasonable and voluntary; and since secondary assumption of risk requires voluntary conduct, the doctrine is not applicable where conduct is involuntary. According to the Restatement, the plaintiff's conduct is not voluntary when defendant's tortious conduct has left him no reasonable alternative in attempting to avoid harm to himself, to avoid harm to another or to exercise a right or privilege that the defendant has no right to deny him. In this situation his decision to encounter the risk is also likely to be reasonable because all the alternatives are unreasonable. The cases cited by the Restatement further support this proposition. It is doubtful, therefore, that there can be a secondary assumption of risk that is both reasonable and voluntary.

31. Section 496E. Comment c at 577 states: The plaintiff's acceptance of the risk is not to be regarded as voluntary where the defendant's tortious conduct has forced upon him a choice of courses of conduct, which leaves him no reasonable alternative to taking his chances. A defendant who by his own wrong, has compelled the plaintiff to choose between two evils cannot be permitted to say that the plaintiff is barred from recovery because he has made the choice. Therefore, where the defendant is under a duty to the plaintiff, and his breach of duty compels the plaintiff to encounter the particular risk in order to avert other harm to himself, his acceptance of the risk is not voluntary, and he is not barred from recovery. The same is true where the plaintiff is forced to make such a choice in order to avert harm to a third person. It is true likewise where the plaintiff is compelled to accept the risk in order to exercise or protect a right or privilege, of which the defendant has no privilege to deprive him. The existence of an alternative course of conduct which would avert the harm, or protect the right or privilege, does not make the plaintiff's choice voluntary, if the alternative is one which he cannot reasonably be required to accept.

See also Donald v. Moses, 254 Minn. 186, 94 N.W.2d 255 (1959), where the court noted that for an assumption of risk to be voluntary there must be a reasonable alternative.

32. Brandt v. Thompson, 252 S.W.2d 339 (Mo. 1952). Plaintiff suffered injuries when she fell in a poorly lighted stairway in a building owned by the defendant. She used the steps because the elevator would not stop on her floor due to its overcrowded condition. The court held that the plaintiff acted reasonably and that she did not assume the risk because her actions were involuntary. See also LeRoy Fibre Co. v. Chicago, Milwaukee, & St. Paul Ry., 232 U.S. 340 (1914); Donald v. Moses, 254 Minn. 186, 94 N.W.2d 255 (1959); English v. Amidon, 72 N.H. 301, 56 A. 548 (1902); Eckert v. Long Island R.R., 43 N.Y. 502 (1871).

33. In the first illustration A negligently set a fire which burned towards B's house. In order to save his house B attempted to extinguish the fire, although he knew that there was a risk he might be burned in doing so. In the second illustration, railroad A negligently failed to give warning of its train's approach to a crossing and endangered B, a blind
Second, although the *Restatement* takes the position that there may be a reasonable secondary assumption of risk, the cases it cites in support of this point are inconclusive. The cases involve situations in which either primary, not secondary, assumption of risk was at issue, or cases in which the conduct of the plaintiff was in fact unreasonable. There are significant differences between primary and secondary assumption of risk which make any analogy between them on the question of reasonable conduct barring recovery incorrect. In primary assumption of risk the conduct of the plaintiff in encountering the particular risk is irrelevant because he has already assumed the risk as an incident of his relationship with the defendant, whereas in secondary assumption of risk that conduct must be carefully examined. Moreover, in primary assumption of risk the defendant has breached no duty and is not negligent. It is therefore logical to allow reasonable conduct to bar recovery, because the choice is between two non-negligent parties. The loss falls on the plaintiff because he voluntarily entered into a relationship involving that risk. Such an analysis of secondary assumption of risk, in which the negligence of the defendant is es-

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man who was about to cross. Bystander C, in a reasonable effort to save B, rushed out to the tracks and pushed B out of danger; C was struck and injured by the train. In both of these illustrations the *Restatement* concludes that the plaintiff should not be barred from recovery because his decision to encounter a known risk was not voluntary. Since the utility of his conduct outweighed the risk involved in both illustrations, the plaintiff acted reasonably, but his decision to act was not voluntary so he cannot be barred from recovery by the assumption of risk doctrine.

34. See note 23 supra.
37. Morton v. California Sports Car Club, 163 Cal. App. 2d 685, 329 P.2d 987 (1958); Mountain p. Wheatley, 106 Cal. App. 2d 333, 234 P.2d 1031 (1951); Bohnsack v. Driftmeier, 243 Iowa 383, 52 N.W.2d 79 (1952). In these cases the conduct of the plaintiff was clearly unreasonable. In three other cases cited by the *Restatement* no assumption of risk was found at all and therefore the cases cannot be said to support a finding that a reasonable secondary assumption of risk bars recovery. Everett v. Goodwin, 201 N.C. 754, 161 S.E. 316 (1931); Slotnick v. Cooley, 166 Tenn. 373, 61 S.W.2d 462 (1933); Alexander v. Wrenn, 159 Va. 486, 164 S.E. 715 (1932).
38. See text accompanying notes 3-21 supra.
established, would not be correct. This idea was well-expressed by the New Jersey court in Meistrich v. Casino Arena Attractions, Inc.: 39

Although it would be technically accurate with respect to assumption of risk in its primary sense to say that plaintiff assumed the risk of non-negligent injury even though he was free of fault, the same instruction, if given where assumption of risk in its secondary sense is in issue, would lead to the exculpation of a negligent defendant upon the erroneous notion that a plaintiff assumed the risk of that negligence even though he was free of blame. 40

Cases applying this doctrine of primary assumption of risk therefore should not be used to support the proposition that a reasonable secondary assumption of risk should bar recovery. Since the cases cited by the Restatement are of this type, or are cases in which the conduct of the plaintiff was unreasonable, these authorities do not support the proposition that reasonable conduct may constitute secondary assumption of risk.

Third, it is unjustifiable from a policy viewpoint to allow reasonable conduct to bar recovery in a state that has recently enacted a comparative negligence statute. The effect of allowing reasonable conduct to bar recovery from a negligent defendant is to punish reasonable conduct. Several courts in states without comparative negligence statutes recently have recognized that only unreasonable conduct by the plaintiff should bar his recovery once the negligence of the defendant has been established. 41 In Bulatao v. Kauai Motors 42 the court declined to transplant into areas other than master-servant relationships the secondary assumption of risk doctrine “that one who knew (or should have known) of a negligently created risk is barred even though free of fault, i.e., even though a reasonably prudent man would have incurred the risk despite that knowledge.” 43 This logic is even more compelling in a state where comparative negligence principles allow even a plaintiff whose conduct is unreasonable to recover as long as his negligence is less than that of the defendant. It would be inconsistent with this loss distribution system to deny a reasonable plaintiff recovery solely because his conduct can be labeled as assumption of risk. Therefore, it appears un-

40. Id. at 50, 155 A.2d at 94.
42. 49 Hawaii 1, 406 P.2d 887 (1965).
43. Id. at 14-15, 406 P.2d at 894.
justifiable to allow a reasonable secondary assumption of risk to bar recovery in Minnesota.

The argument that secondary assumption of risk has a meaning independent of contributory negligence because it includes reasonable conduct of the plaintiff is thus without basis. If secondary assumption of risk bars recovery only when plaintiff's conduct is unreasonable, then contributory negligence and assumption of risk are merely two ways of describing the same conduct, and secondary assumption of risk is merely a form of contributory negligence. As a result, there is little doubt that it should fall within the scope of the comparative negligence statute. The key question then becomes whether the plaintiff exercised reasonable care. If he did, he should be allowed to recover; if he did not, the comparative negligence statute should be applicable and his recovery diminished in proportion to his own negligence.

B. MINNESOTA DECISIONS

Minnesota decisions construing the doctrines of contributory negligence and secondary assumption of risk are inconclusive, reflecting the general state of confusion elsewhere. There is substantial authority in Minnesota to support the proposition that an unreasonable secondary assumption of risk is merely a form of contributory negligence. In *Hubenette v. Ostby* the court made the following observation:

In the ordinary personal injury action, where plaintiff puts himself in a position to encounter known hazards which the ordinarily prudent person would not do, he assumes the risk of injury therefrom. Such assumption of risk is but a phase of contributory negligence and is properly included within the scope of that term.

Lest that and similar opinions be construed as merging the two defenses, the court made it clear in *Schrader v. Kriesel* that it believed there were important differences between the two defenses:

44. Schrader v. Kriesel, 232 Minn. 238, 247, 45 N.W.2d 395, 400 (1966); Standaffer v. First National Bank, 243 Minn. 442, 68 N.W. 2d 362 (1955); Swenson v. Slawik, 236 Minn. 403, 410, 53 N.W.2d 107, 111 (1952); Johnson v. Evanski, 221 Minn. 323, 22 N.W.2d 213 (1946); Schreopfer v. City of Sleepy Eye, 215 Minn. 525, 532, 10 N.W.2d 398, 402 (1943) (instruction on contributory negligence held to include assumption of risk within its scope).

45. 213 Minn. 349, 6 N.W.2d 637 (1942).

46. Id. at 350, 6 N.W.2d at 638.

47. 232 Minn. 238, 45 N.W.2d 395 (1950).
Material distinctions do exist between contributory negligence and assumption of risk. There is often, as here, a regrettable tendency to blur these distinctions, and we wish to make it clear that those cases in which this court has held assumption of risk to be a phase of contributory negligence are not to be construed as merging the two defenses.

The court, however, went on to admit that when a secondary assumption of risk is unreasonable, it does become a phase of contributory negligence.

One distinction occasionally mentioned by Minnesota courts is that secondary assumption of risk is a subjective test requiring actual knowledge of the danger while contributory negligence is an objective test requiring the knowledge of a reasonable man. This distinction is susceptible to two arguments. First, it is more conceptual than real. This fact has been recognized by several courts and commentators and was particularly well-expressed by one writer:

Such a distinction is not particularly helpful. How is the trier of fact to distinguish between subjective and objective knowledge? Unless the plaintiff admits that he knew of and appreciated the risk, the only way for the jury to decide whether or not he did is to consider the facts of the case and credibility of witnesses. The jury cannot consider these circumstances from the plaintiff's subjective point of view, but rather must view these circumstances objectively in retrospect. Viewing these circumstances retrospectively, it is unlikely that the jury would be able to distinguish between what the plaintiff actually knew and what he should have known.

If as a practical matter, the distinction between what the plain-

48. Id. at 248, 45 N.W.2d at 400.
49. Id.
50. Parness v. Economics Laboratory, Inc., 284 Minn. 381, 170 N.W.2d 554 (1969) (referring to assumption of risk as a subjective test and contributory negligence as an objective test); Knutson v. Arrigoni Bros., 275 Minn. 408, 413, 147 N.W.2d 561, 565 (1966) (assumption of risk may be invoked only where it appears that the hazard is known to the actor or so plainly observable that he is charged with knowledge of it); Swenson v. Slawik, 236 Minn. 403, 410, 53 N.W.2d 107, 111 (1952) (contributory negligence is not established unless a reasonably prudent person in the exercise of ordinary care would know that use of premises with defective condition would be dangerous); Schrader v. Kriese, 232 Minn. 238, 247, 45 N.W.2d 395, 400 (1950) (knowledge and appreciation of the danger are indispensable to assumption of risk); Rase v. Minneapolis, St. Paul and S.Ste. Marie Ry., 107 Minn. 260, 267, 120 N.W. 360, 364 (1909) (doctrine of assumption of risk rests on intelligent acquiescence with knowledge of the danger and appreciation of the risks).
tiff knew and what he should have known is virtually impossible
to draw, it is certainly of no value as a method of distinguishing
between the two doctrines.

A second argument against this subjective-objective distinc-
tion is that it does not provide a distinction between secondary as-
sumption of risk and contributory negligence. The plaintiff must
have knowledge of the risk before his subsequent conduct in en-
countering it can be considered unreasonable. The subjective test
(assumption of risk) requires that the plaintiff have actual knowl-
edge of the risk, while the objective test (contributory negli-
gence) requires that he be charged with the knowledge of a rea-
sonable man in addition to the knowledge he actually had. Under
any circumstances where it could be determined that the plaintiff
had actual knowledge of the risk, any inquiry as to what knowl-
dge he should have had as a reasonable man is not necessary.
The result of actual knowledge is that any unreasonable conduct
subsequent to encountering the risk may be either contributory
negligence or secondary assumption of risk. On the other hand, if
it is found that plaintiff did not have actual knowledge of the
risk, then inquiry as to what knowledge he should have had is
is relevant. If it is found that he should have had knowledge of
the risk, then his subsequent unreasonable decision to encounter
it is only contributory negligence; it cannot be secondary as-
sumption of risk, because he did not have actual knowledge of the
danger. The conclusion from the above reasoning is that when
the jury can find assumption of risk, it can also find contributory
negligence, even though the reverse is not true. Since contribu-
tory negligence can be found wherever assumption of risk can be
found, the subjective-objective distinction does not give sec-
ondary assumption of risk any meaning independent of contributory
negligence.

A number of Minnesota cases support this conclusion. In
Parness v. Economics Laboratory, Inc., the court held that if the
jury found plaintiff had assumed the risk from a subjective view-
point, it must then also find the plaintiff contributorily negligent.

53. Knutson v. Arrigoni Bros. 275 Minn. 408, 413, 147 N.W.2d 561,
565 (1966) (contributory negligence but not assumption of risk allowed
to go to the jury because it was found that plaintiff did not have knowl-
dge of the danger); Erickson v. Quarstad, 270 Minn. 42, 132 N.W.2d 814
(1964) (both contributory negligence and assumption of risk found as a
matter of law); Swenson v. Slawik, 236 Minn. 408, 410, 53 N.W.2d 107, 111
(1952).

54. 284 Minn. 381, 170 N.W.2d 554 (1969).
On the other hand, the court held that the jury could find that even though the plaintiff did not assume the risk she could be contributorily negligent. Thus the Minnesota court has recognized that the subjective-objective distinction provides no basis for an argument that secondary assumption of risk has a meaning independent of contributory negligence, but only that contributory negligence may exist in some circumstances where the stricter subjective standards of secondary assumption of risk are not met.

The Minnesota supreme court has drawn another distinction in frequent statements to the effect that secondary assumption of risk differs from contributory negligence by being the exercise of an intelligent choice. The thrust of this argument is that contributory negligence is careless conduct while secondary assumption of risk is voluntary conduct. For the most part this argument is an assertion that assumption of risk includes reasonable conduct by the plaintiff and is, therefore, independent of contributory negligence. This argument has been discussed above, and it is of little utility in establishing an independent meaning for assumption of risk. When the decision to encounter a risk is an unreasonable one, it is careless despite the fact that it may be voluntary. Voluntary conduct may clearly be classified as careless when the risk would not have been taken by a reasonably prudent man. Therefore, this distinction, as well as the subjective-objective distinction, provides only that voluntary, unreasonable conduct by the plaintiff may be labeled as assumption of risk as well as contributory negligence.

Several Minnesota cases follow this analysis. In Schroepfer v. City of Sleepy Eye, the plaintiff's decedent was electrocuted by high tension wires. Defendant contended that the plaintiff was contributorily negligent and had assumed the risk, because he knew the wires were dangerous and yet deliberately placed his hand on them. The court held that both assumption of risk and contributory negligence could go to the jury under the same instruction, because the substance of the contributory negligence instruction also covered assumption of risk. In Standafer v.

56. See text accompanying notes 23-43 supra.
57. 215 Minn. 525, 10 N.W.2d 398 (1943).
58. Id. at 53, 10 N.W.2d at 403. The instruction reads as follows:
If a person recklessly exposes himself to known or imminent
First National Bank\textsuperscript{59} the decedent knew of an open elevator shaft but walked backward and fell into it. After stating that assumption of risk is the exercise of an intelligent choice and that contributory negligence is based on carelessness, the court allowed both issues to go to the jury, because it was not certain either that the decedent had the requisite knowledge or that he had acted unreasonably. In Wright v. City of St. Cloud\textsuperscript{60} plaintiff was injured when she fell on an icy sidewalk. The court found that she recognized the dangerous condition of the walk but voluntarily chose to walk on it, and barred recovery because of her contributory negligence, but noted that assumption of risk was also applicable.\textsuperscript{61} It is apparent therefore, that the voluntary-careless distinction does not give assumption of risk a meaning independent from contributory negligence, either because voluntary but unreasonable conduct constitutes contributory negligence, or because that distinction, as well as secondary assumption of risk, demonstrates only that when careless conduct is voluntary it may also be labeled secondary assumption of risk.

Development of the assumption of risk doctrine in Minnesota has been essentially an adjunct to contributory negligence. Many cases, including those which make the above distinctions, have indicated that an unreasonable assumption of risk is merely a form of contributory negligence.\textsuperscript{62} The distinctions the court has drawn are inadequate because they fail to give secondary assumption of risk any meaning independent of contributory negligence. Instead, they demonstrate only that contributory negligence is a broader concept than secondary assumption of risk, and the court has consistently found that conduct by a plaintiff may constitute either contributory negligence or secondary assumption of risk.\textsuperscript{63}

danger, unnecessarily, in a manner that a person of ordinary care would not do under the circumstances, he assumes the risk of such danger and is guilty of contributory negligence and cannot recover for any injuries sustained by him under such circumstances, and the same rule applies if some other person brings suit for his death.

\textsuperscript{59} 243 Minn. 442, 68 N.W.2d 362 (1955).

\textsuperscript{60} 54 Minn. 94, 55 N.W.819 (1893).

\textsuperscript{61} Id. at 98, 55 N.W. at 821.

\textsuperscript{62} In Knutson v. Arrigoni Bros., 275 Minn. 408, 411, 147 N.W.2d 561, 565 (1966), the court notes that assumption of risk involves a departure from reasonable conduct and in that limited sense it may be a phase of contributory negligence. \textit{See also} Standafer v. First National Bank, 243 Minn. 442, 448, 68 N.W.2d 362, 365 (1955); Schrader v. Kriesel, 232 Minn. 238, 247, 45 N.W.2d 395, 400 (1950).

\textsuperscript{63} Parness v. Economics Laboratory, Inc., 284 Minn. 381, 170 N.W.2d 554 (1969); Erickson v. Quarstad, 270 Minn. 42, 132 N.W.2d 815 (1964);
C. Secondary Assumption of Risk Should Be Eliminated

It is apparent from the above analysis that secondary assumption of risk is a duplication of contributory negligence and should not be recognized as a separate defense. A leading commentator has advocated this course, and several courts have recently chosen to follow it. The case which apparently initiated this trend is *Meistrich v. Casino Arena Attractions, Inc.* There the New Jersey court examined the historical origins of the doctrine and concluded that secondary assumption of risk was never intended to bar recovery if the conduct of the plaintiff was reasonable. Since secondary assumption of risk then would bar recovery only when plaintiff’s conduct was unreasonable, the court came to this conclusion:

Hence we think it clear that assumption of risk in its secondary sense is a mere phase of contributory negligence, the total issue being whether a reasonably prudent man in the exercise of due care (a) would have incurred the known risk and (b) if he would, whether such a person in the light of all the circumstances including the appreciated risk could have conducted himself in the manner in which plaintiff acted.

In *Flegner v. Anderson*, a thorough and well-reasoned opinion, the Michigan supreme court examined the historical roots of assumption of risk. It noted several cases where assumption of risk had been applied to relieve a defendant of liability on the theory that the plaintiff assumed the risk of injuries from the defendant’s negligent acts. The Michigan court commented that these cases confused assumption of risk with contributory negligence when there was no need to engraft concepts of assumption of risk on to contributory negligence, and held that assumption of risk is of “no utility in barring recovery where the defendant has been found to have negligently breached a duty owed to the

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Standafer v. First Nat’l Bank, 243 Minn. 442, 68 N.W.2d 362 (1944); Schroepfer v. City of Sleepy Eye, 215 Minn. 525, 10 N.W.2d 398 (1943).

64. James, supra note 29; 2 F. HARPER & F. JAMES, LAW OF TORTS § 21.8 (1956).

65. 31 N.J. 44, 155 A.2d 90 (1959). The *Meistrich* case was subsequently reaffirmed in McGrath v. American Cyanamid Co., 41 N.J. 272, 196 A.2d 238 (1963). After reviewing *Meistrich* the court concluded with this admonition:

Experience... indicates the term “assumption of risk” is so apt to create mist that it is better banished from the scene. We hope we have heard the last of it. Henceforth let us stay with “negligence” and “contributory negligence.”

66. 31 N.J. at 50, 155 A.2d at 94.

67. Id. at 54, 155 A.2d at 95.

68. 375 Mich. 23, 133 N.W.2d 136 (1965).

69. Id. at 45, 133 N.W.2d at 147.
plaintiff." In *Siragusa v. Swedish Hospital* the Washington court held that if an employer breaches his duty of furnishing his employees with a safe place to work, an employee is not barred from recovery merely because he was aware of the dangerous condition. If the employee's voluntary exposure to the risk was unreasonable, he would be barred from recovery because of contributory negligence and not because of secondary assumption of risk. The rationale of the *Siragusa* opinion is that reasonable conduct by the plaintiff should not bar recovery even though it amounts to secondary assumption of risk. Courts in Delaware, Hawaii, Idaho, Kentucky, Maryland and Oregon have also chosen to eliminate secondary assumption of risk.

The argument against secondary assumption of risk is reinforced by a comparative negligence statute. Formerly it did not matter in practice whether the particular conduct of the plaintiff was labeled as secondary assumption of risk or contributory negligence because both were complete bars to recovery; but under a comparative negligence statute, if plaintiff's conduct constitutes both contributory negligence and secondary assump-

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70. Id. at 56, 133 N.W.2d at 153.
71. 60 Wash. 2d 310, 373 P.2d 767 (1962).
72. Frelick v. Homeopathic Hospital Ass'n, 51 Del. 568, 150 A.2d 17 (1959). The court held that when risk is created by defendant's breach of duty to the plaintiff, the problem of voluntary, secondary assumption of risk is an included portion of contributory negligence such that the two defenses should be considered as one.
73. Bulatao v. Kauai Motors, Ltd., 49 Hawaii 1, 406 P.2d 887 (1965). The court refused to use the secondary assumption of risk doctrine to bar recovery where the plaintiff had acted reasonably. It concluded that since there is no distinguishing feature whereby it would have a different application from contributory negligence, there was no need to invoke both defenses where one was sufficient.
74. Fawcett v. Irby, 92 Idaho 48, 436 P.2d 714 (1968). The court held that since secondary assumption of risk bars recovery only when the conduct of the plaintiff is unreasonable, the defense should be abolished and merged with contributory negligence.
75. Parker v. Redden, 421 S.W.2d 586 (Ky. 1967). The court noted that "qualified" assumption of risk bars recovery only when plaintiff's conduct is unreasonable and then stated that the distinctions between secondary assumption of risk and contributory negligence are not significant enough to warrant retaining assumption of risk as a separate doctrine.
77. Ritter v. Beals, 225 Ore. 504, 358 P.2d 1080 (1961). After stating that everything in connection with the plaintiff's conduct can be submitted on a pleading of contributory negligence, the court appropriately noted that only confusion is added when secondary assumption of risk is introduced.
tion of risk, the defendant can circumvent the statute entirely by asserting the assumption of risk defense in jurisdictions where assumption of risk remains separate from contributory negligence. This approach would defeat the statutory purpose altogether by disallowing even partial recovery to a plaintiff whose negligence is less than that of the defendant. This anomalous result can be avoided only by recognizing that secondary assumption of risk is essentially only a narrow form of contributory negligence and should be merged with it.

IV. THE WISCONSIN EXAMPLE

A. THE RELATIONSHIP BETWEEN THE TWO STATUTES

In 1931 Wisconsin adopted a comparative negligence statute similar to Minnesota's. It is therefore instructive to compare the two statutes and to examine the Wisconsin decisions construing its application to secondary assumption of risk.

The operative part of the Minnesota comparative negligence statute concerning contributory negligence is a verbatim copy of the Wisconsin statute. Legislative history is sparse, but a memorandum to the senate counsel from his assistant while the statute was in its formative stages clearly indicates that the Minnesota statute was adopted from Wisconsin. A presumption...
tion is thereby raised that Minnesota adopted the Wisconsin statute with the construction placed on it by the courts of that state at the time of the adoption.\textnormal{\textsuperscript{85}}

B. THE WISCONSIN INTERPRETATION

Wisconsin has always limited the application of assumption of risk to cases in which there is at least a "consensual" relationship,\textnormal{\textsuperscript{86}} i.e., a relationship entered into voluntarily by both parties.\textnormal{\textsuperscript{87}} Thus the doctrine of assumption of risk in Wisconsin has no application to actions between strangers, and its primary application has been in automobile guest cases. Both primary and secondary assumption of risk doctrines have been applied depending upon the particular circumstances of each case. In automobile guest cases the host owes a duty to the guest to use ordinary care not to increase the dangers inherent in the condition of the car or as a result of theskill or judgment of the host driver.\textnormal{\textsuperscript{88}} In \cite{Cleary v. Eckardt},\textnormal{\textsuperscript{80}} the court indicated that the host need exercise only the skill he actually possessed and that if he conscientiously exercised his best skill he violated no duty to the guest even though his skill was less than that of a reasonably prudent man.\textnormal{\textsuperscript{90}} Thus the guest was forced to assume the risk of travel

\footnotesize{\textsuperscript{85} Nicollet Nat'l Bank v. City Bank, 38 Minn. 85, 88, 35 N.W. 577, 579 (1887) where the Minnesota supreme court enunciated the following canon of statutory construction:
It is a well-recognized principle that where a statute, the construction of which has been judicially determined, has been adopted into the statute law of another state, a presumption arises . . . that the legislature adopted the statute with that settled construction.
This principle has since been reaffirmed in Minnesota Baptist Conv. v. Pillsbury Acad., 246 Minn. 46, 76 N.W.2d 286 (1955). The relationship between the two comparative negligence statutes was discussed in Olson v. Hartwig, 288 Minn. 375, 180 N.W.2d 870 (1970), where the Minnesota court concluded that the Wisconsin statute had been adopted in Minnesota as it had been construed by the Wisconsin supreme court prior to its adoption.
\textnormal{\textsuperscript{86}} Schiro v. Oriental Realty Co., 272 Wis. 537, 76 N.W.2d 355 (1956).
\textnormal{\textsuperscript{87}} Switzer v. Weiner, 230 Wis. 509, 284 N.W. 509 (1939).
\textnormal{\textsuperscript{88}} Wheeler v. Rural Mut. Cas. Ins. Co., 261 Wis. 528, 53 N.W.2d 190 (1952); Haugen v. Wittkopf, 242 Wis. 276, 278, 7 N.W.2d 886, 887 (1943); O'Shea v. Lavoy, 176 Wis. 456, 185 N.W. 525 (1921).
\textnormal{\textsuperscript{89}} 191 Wis. 114, 210 N.W. 267 (1926).
\textnormal{\textsuperscript{90}} \textit{Id.} at 118, 210 N.W. at 269.
arising from the personal habits of the driver, although this rule was later qualified by the requirement that the guest have knowledge of those personal characteristics. When the doctrine of secondary assumption of risk was applied in Wisconsin the courts required, in addition to a consensual relationship, that the plaintiff have knowledge of the particular danger involved and make a voluntary decision to encounter it.

The rule of these cases, however, was made obsolete by the decision in McConville v. State Farm Mutual Automobile Ins. Co. In that case the jury found that the defendant had been negligent and the plaintiff contributorily negligent. The lower court held that recovery was completely barred, however, because it was found that plaintiff had assumed the risk of defendant’s negligent operation of the motor vehicle. The Wisconsin supreme court reversed and adopted the following rules of law:

1. The driver of an automobile owes his guest the same duty of ordinary care that he owes to others;
2. A guest’s assumption of risk, heretofore implied from his willingness to proceed in the face of a known hazard, is no longer a defense separate from contributory negligence;
3. If a guest’s exposure of himself to a particular hazard be unreasonable and a failure to exercise ordinary care for his own safety, such conduct is negligence, and is subject to the comparative negligence statute.

When he [the guest] accepts the invitation and enters the automobile does he not accept the car in the condition in which it exists and such skill as may be possessed on the part of the driver? That there is a great variation in the degree of skill possessed by those who assume to drive cars is well known. Not all who drive automobiles by any manner of means can be said to be expert drivers. The danger thus assumed is that the danger should not be increased and to which the host should add no new danger. If the host driving the car conscientiously exercised the skill possessed by him does the guest have a right to demand any more? Does the guest have a right to demand of the host a degree of skill for the security of the guest which the host is utterly unable to exercise for his own protection? It would seem that the statement of this question carried with it its own answer, and that the same consideration which compels the guest to accept the car in the condition in which he finds it also compels him to be content with the honest and conscientious exercise of such skill as the host or driver may have attained.

91. Forecki v. Kohlberg, 237 Wis. 67, 295 N.W. 7 (1941).
92. Topel v. Correz, 273 Wis. 611, 79 N.W.2d 253 (1956); Muhlenbeck v. Fitchett, 270 Wis. 373, 71 N.W.2d 293 (1955); Egan v. Wege, 260 Wis. 118, 50 N.W.2d 457 (1951); Scory v. Lafave, 215 Wis. 21, 254 N.W. 643 (1934); Biersach v. Wechselberg, 206 Wis. 113, 238 N.W. 905 (1931).
93. 15 Wis. 2d 374, 113 N.W.2d 14 (1962).
94. Id. at 378, 113 N.W.2d at 16.
The court stated that if the guest's willingness to proceed in the face of a known hazard is reasonable, such acquiescence would constitute no defense.\textsuperscript{95} Implied consent derived from plaintiff's acquiescence in defendant's negligence was deemed to be no longer satisfactory as a basis for retaining the doctrine of assumption of risk.\textsuperscript{96} The court noted that a limitation on the duty a host owes his guest is no longer consistent with sound public policy in an age when modern, powerful vehicles are capable of inflicting serious injury.\textsuperscript{97}

Subsequent Wisconsin decisions have applied and expanded the McConville rule. In \textit{Colson v. Rule},\textsuperscript{98} a farm laborer sued his employer after a scaffolding on which he was standing collapsed. The evidence indicated that his employer had told him that the scaffolding was unsafe. The court applied the McConville rule and determined that the employee had been contributorily negligent. It observed that:

Another reason for changing the existing rule is the difficulty in drawing a dividing line between assumption of risk and contributory negligence. . . . The attempted distinction between assumption of risk and contributory negligence is highly technical and in many fact situations it is difficult for the trial courts to distinguish between the two. Yet, if assumption of risk is an absolute defense under the comparative negligence statute, while contributory negligence is not, it is essential that trial courts attempt to define the same in instructing juries where assumption of risk is pleaded as a defense.\textsuperscript{99}

Thus the McConville rule was extended to situations other than automobile guest cases. That the rule is to be applied in all situations where alleged assumption of risk arises by implication was made clear in \textit{Gilson v. Drees Brothers},\textsuperscript{100} where the court stated:

The policy reasons which prompted the court to abrogate the doctrine of assumption of risk as an absolute defense in those cases [McConville and Colson] do not apply with comparable clarity in the instant case. However, it is our opinion that greater fairness will result if the claimed negligence of [the plaintiff] is couched in terms of contributory negligence rather than assumption of risk. This will be true whenever the alleged assumption of risk arises by implication, as here, as opposed to an express assumption of a known risk. This would serve to extend the rule adopted in the McConville and Colson cases to all situations involving the tacit assumption of risk.\textsuperscript{101}

\textsuperscript{95} Id. at 379, 113 N.W.2d at 17.
\textsuperscript{96} Id.
\textsuperscript{97} Id. at 382, 113 N.W.2d at 19.
\textsuperscript{98} 15 Wis. 2d 387, 113 N.W.2d 21 (1962).
\textsuperscript{99} Id. at 390, 113 N.W.2d at 22.
\textsuperscript{100} 19 Wis. 2d 252, 120 N.W.2d 63 (1963).
\textsuperscript{101} Id. at 258, 120 N.W.2d at 67.
It appears, therefore, that secondary assumption of risk in Wisconsin is dead.

It is likely, however, that primary assumption of risk and, certainly, express assumption of risk\(^\text{102}\) remain. *McConville, Colson* and *Gilson* all involved secondary assumption of risk, in which defendant’s negligence was established and plaintiff’s assumption of risk was implied from his willingness to proceed in the face of a known danger. The above language in *Colson* and *Gilson*\(^\text{103}\) indicates that the Wisconsin court eliminated secondary assumption of risk only when it was a measure of plaintiff’s conduct and when it overlapped contributory negligence. This result will obtain only when the secondary assumption of risk doctrine is applied. Although *McConville* did discuss the duty of host to guest, it did so only to eliminate the outmoded idea promulgated in *Cleary v. Eckhardt*\(^\text{104}\) that the duty of the host to his guest was less than reasonable care, and this abrogation was effected for policy reasons peculiar to the automobile host-guest relationship. Certainly the purpose of such language was not to extend the duty of baseball park owners or persons in possession of premises. Therefore, the status of the doctrine of assumption of risk in Wisconsin is similar to its position in other states which recently have chosen to remove secondary assumption of risk as a bar to recovery for negligently caused damages.\(^\text{105}\) Undoubtedly, the existence of a comparative negligence statute was a significant influence.

As emphasized earlier, Minnesota presumptively adopted the Wisconsin comparative negligence statute as construed by the courts prior to its adoption in Minnesota.\(^\text{106}\) Since it is clear that the Wisconsin courts have interpreted the Wisconsin statute to in-

\(^\text{102}\) Express assumption of risk is a form of primary assumption of risk. Express assumption occurs when two parties contractually agree to limit the duties and liabilities of one party, e.g., an innkeeper contractually agrees with his guest that he is not liable for lost or stolen items.

\(^\text{103}\) See text accompanying notes 99 & 101 supra.

\(^\text{104}\) See note 90 supra.


\(^\text{106}\) See text accompanying notes 86-90 supra.
clude secondary assumption of risk within its scope, this interpretation should be followed by the Minnesota courts.

V. OTHER STATES WITH COMPARATIVE NEGLIGENCE STATUTES

Seven other states besides Minnesota and Wisconsin have comparative negligence statutes. The comparative negligence statutes of those states, however, are not verbatim copies of the Wisconsin statute, nor is there any indication that Minnesota intended to adopt any of them. As a result the interpretations of those statutes are not as relevant as the interpretation of the Wisconsin statute. Nonetheless, it is desirable to determine whether those states have interpreted their statutes so as to include the secondary assumption of risk doctrine within their scope.

Most of the statutes are sufficiently recent that the courts have not yet faced this issue. In Mississippi, however, the supreme court has allowed assumption of risk to continue as a defense separate from contributory negligence. In Saxton v. Rose, plaintiff's intestate was killed while riding as a passenger in defendant's truck. The evidence indicated that the defendant was intoxicated. Plaintiff was denied recovery because the decedent was held to have assumed the risk when he voluntarily rode with the defendant knowing that defendant was intoxicated. The court distinguished this case from an earlier one which held similar conduct by the plaintiff to be contributory negligence on the basis that in Saxton the passenger did not actively participate in procuring the defendant to drive recklessly. The opinion went on to note that the common law doctrine of assumption of risk is in "full force" in Mississippi. There was no direct reference to the comparative negligence statute.

The reasoning and result in this case, perhaps more than in any other, emphasize the injustice of allowing assumption of risk to continue as a complete bar to recovery after the adoption of a comparative negligence statute. Apparently the rule in Mississippi now is that one who sits passively while the defendant drives recklessly is completely barred from recovery because he has assumed the risk, while one who actively encourages the de-

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108. 201 Miss. 814, 29 So. 2d 646 (1947).
110. Saxton v. Rose, 201 Miss. 814, 823, 29 So. 2d 646, 649 (1947).
defendant's reckless conduct may be granted partial recovery because he is contributorily negligent. A more anomalous result could not be reached.

The Nebraska court, at least by implication, has discussed the effect its comparative negligence statute should have on assumption of risk. In *Landrum v. Roddy*, the plaintiff was injured as a result of defendant's negligent driving. Plaintiff knew that defendant had been drinking and had several opportunities to leave the car after she had gained that knowledge. It would seem that those facts presented a classic case of secondary assumption of risk since the plaintiff had voluntarily chosen to encounter a known danger. Nonetheless, the court refused to characterize plaintiff's conduct as such and labeled it contributory negligence, which gave her the benefit of the comparative negligence statute. Although this result suggests a merger of the two defenses, the court emphasized throughout the decision that there were distinctions between the two defenses despite the fact that they often overlap. The distinction in this case of deliberateness as opposed to carelessness implies that plaintiff's conduct may be labeled as secondary assumption of risk. Nonetheless, the court chose to label it contributory negligence. The vitality of secondary assumption of risk as a defense in Nebraska is therefore unclear.

VI. CONCLUSION

Contributory negligence and secondary assumption of risk are both affirmative defenses based on the conduct of the plaintiff. The Minnesota comparative negligence statute disposes of contributory negligence, but is silent as to assumption of risk. Since secondary assumption of risk has little meaning or application independent of contributory negligence, it should be considered a special form of contributory negligence and should thus fall within the scope of the statute. The major premise underlying the theory that secondary assumption of risk is separate and distinct from contributory negligence is that it includes reasonable conduct by the plaintiff. This argument is not persuasive since it results from a misreading of the historical origins of assumption of risk, fails to acknowledge that a reasonable decision to encounter a known risk is often involuntary and is inconsistent with the fault system of loss distribution in that it denies recovery to a plaintiff who acted reasonably even though the

111. 143 Neb. 934, 12 N.W.2d 82 (1943).
fault of the defendant is established. If assumption of risk bars recovery only when the conduct of the defendant is unreasonable, then it has no meaning independent of contributory negligence. Since that defense is also available any time the conduct of the plaintiff is unreasonable, it should be abolished as an independent defense. Due to the enactment of the comparative negligence statute, it would be inequitable to allow plaintiff's conduct merely to reduce recovery if the asserted defense is contributory negligence, but completely bar recovery if assumption of risk is asserted. Wisconsin has recognized this inequity and chosen to merge assumption of risk with contributory negligence, so that such conduct falls within the scope of the statute. Minnesota should do the same.