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Does Old Wine Get Better with Age or Turn to Vinegar? Assumption of Risk in a Comparative Fault Era—Andren v. White Rodgers

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COMMENT

DOES OLD WINE GET BETTER WITH AGE OR TURN TO VINEGAR? ASSUMPTION OF RISK IN A COMPARATIVE FAULT ERA—ANDREN V. WHITE RODGERS

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The question of assumption of risk continues to be troublesome. So much has been written on this subject and so much confusion exists that it is an exercise in futility to even try to discuss it.¹

I. INTRODUCTION

Should a plaintiff's voluntary encounter with a known and appreciated risk of injury absolve a product manufacturer of liability for any injuries caused as a result of a defective product? Significant scholarly and judicial resources have been devoted to answering this question over the past fifty years.² Numerous commentators,³ along with

² See, e.g., Knox D. Nunnally & B. Lee Ware, Defenses in Personal Injury Product

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a growing minority of states, favor abolishing assumption of risk as a separate defense in products liability cases. These proponents believe assumption of risk should be treated as a phase of contributory negligence, and comparative fault principles should be applied.

Consistent with this trend, the Minnesota Supreme Court, in Springrose v. Willmore, held that assumption of risk and contributory negligence would be apportioned under the comparative negligence statute. The court, however, distinguished between primary and secondary assumption of risk. While primary assumption of risk,

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4. An increasing number of jurisdictions have merged the assumption of risk doctrine, either judicially or by statute, into the comparative fault doctrine. See, e.g., Blackburn v. Dorta, 348 So.2d 287 ( Fla. 1977):

We find no discernible basis analytically or historically to maintain a distinction between the affirmative defense of contributory negligence and assumption of risk. [Would the fault principles of tort law and comparative negligence be advanced by] a doctrine which would totally bar recovery by one who voluntarily, but reasonably, assumes a known risk while one whose conduct is unreasonable but denominated "contributory negligence" is permitted to recover a proportionate amount of his damages for injury? Certainly not.


5. See supra notes 3-4.

6. 292 Minn. 23, 192 N.W.2d 826 (1971).

7. Id. at 24, 192 N.W.2d at 827 (citing Minn. Stat. § 604.01, subd. 1a (1971)).

8. Id.
express or implied, is a legal conclusion that the defendant owes no duty to protect the plaintiff from harm, secondary assumption of risk is an affirmative defense to an established breach of duty.\textsuperscript{9}

In 1978, the Minnesota Legislature modified the Comparative Fault Act to broaden the scope of plaintiff defenses that are subject to the Act.\textsuperscript{10} Under the Act, primary assumption of risk remains a complete defense.\textsuperscript{11} However, since the adoption of the Act, the distinctions between primary and secondary assumption of risk have become blurred. Today, defenses such as product misuse, contributory negligence, unreasonable failure to avoid an injury, and secondary assumption of risk are compared with the manufacturers' negligence and strict liability in apportioning fault.\textsuperscript{12}

Almost twenty years after the Minnesota Supreme Court and the legislature expressly abolished secondary assumption of risk as a distinct defense, the doctrine is once again operating to relieve defendants of liability where a plaintiff establishes a breach of the defendant's duty of care. In \textit{Andren v. White Rodgers},\textsuperscript{13} the plaintiff was injured when he lit a cigarette near a room filled with liquid propane gas which had leaked from a defective regulator on a gas heater.\textsuperscript{14} The court held as a matter of law that the plaintiff's act of lighting a cigarette—with full knowledge and appreciation of the risk of an explosion—manifested consent to relieve the manufacturer of liability for a defective gas regulator.\textsuperscript{15} The court concluded that the plaintiff had primarily assumed the risk of injury and was barred from recovery.\textsuperscript{16}

This Note will argue that the \textit{Andren} court incorrectly applied a primary assumption of risk analysis in a factual setting that gave rise to a secondary assumption of risk analysis. As a result, \textit{Andren} revived secondary assumption of risk as a complete defense to a manufacturer's established breach of duty. This Note concludes that the appropriate analysis in products liability cases must focus on the scope of the defendant's duty and only later address any defense

\begin{itemize}
\item \textsuperscript{9} Id.
\item \textsuperscript{10} 1978 MINN. LAWS 738.
\item \textsuperscript{11} Under the Comparative Fault Act, "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent or primary assumption of the risk, misuse of a product and unreasonable failure to avoid an injury...\textsuperscript{12} MINN. STAT. § 604.01, subd. 1a (1990).
\item \textsuperscript{13} MINN. STAT. § 604.01, subd. 1a (1990).
\item \textsuperscript{14} 465 N.W.2d 102 (Minn. Ct. App. 1991).
\item \textsuperscript{15} Id. at 104.
\item \textsuperscript{16} Id. at 106 (citations omitted).
\item \textsuperscript{16} Id.
\end{itemize}
based on the plaintiff's conduct. This analysis would promote the underlying goals of the tort system. By first focusing on the product manufacturer's duty, policy goals such as risk spreading and the development of safe products will be advanced. Further, this method of determining liability also precludes a plaintiff from bearing the entire risk of loss where both parties are at fault.

II. HISTORY OF ASSUMPTION OF RISK

In its pure form, assumption of risk is based upon the English common law notion that "to one who is willing no harm is done." Assumption of risk was prevalent at the turn of the century. During this period of rapid economic growth, assumption of risk insulated employers from liability for work-related injuries. At the time, courts "reasoned that since workers were not forced to remain in any given job, they voluntarily placed themselves in danger." The relationship between employer and employee is based upon contract principles. Unlike contributory negligence, which is based upon an objective standard of reasonable conduct, assumption of risk is measured subjectively. Thus, the court inquires into the plaintiff's actual knowledge and appreciation of the danger posed by the employer's negligence and the plaintiff's voluntary choice to assume that risk. These elements are analogous to contract formation doctrines. Because the employee contemplated the risk of injury in "return for a benefit, usually a particular wage rate," he or she was deemed to have consented to the employer's negligent conduct. The assumption of risk doctrine, however, often created harsh and unfair results.

18. Id. at 40.
19. Id. (citations omitted); see also Note, Assumption of Risk and Strict Products Liability, 95 HARV. L. REV. 872, 875-76 (1982). "In theory, employees demanded, and wage levels reflected, compensation commensurate with the extent of risk that employees knowingly assumed. . . . [Thus] potential accident costs were incorporated into the wage rate." Id. at 876 (citations omitted).
21. Id.
22. Id.
23. Id.
24. See Note, supra note 19, at 875.
25. See id. at 876. "The defense of assumption of risk thus manifested a judicial unwillingness to shift losses when a benefit was conferred in exchange for a plaintiff's consent to assume risk." Id. (citations omitted).
26. See Anderson v. H.C. Akelely Lumber Co., 47 Minn. 128, 49 N.W. 664 (1891). The employee in Anderson was injured when the belt on a planing machine
In response, the assumption of risk defense was abolished from the master-servant relationship as state workers' compensation laws were enacted. Under these compensation laws, workers gave up the right to sue employers at common law in exchange for the right, regardless of fault, to receive compensation for work-related injuries. Unable to sue employers, employees began to sue manufacturers for work-related injuries. As the number of products liability cases grew, the assumption of risk defense once again became popular as a means to limit a manufacturer's liability.

broke. The court acknowledged that the employer was negligent in failing to replace or repair a worn belt. \textit{Id.} at 129, 49 N.W. at 664. Even though the employee had reported the worn belt to his foreman, the foreman, after examining the belt, instructed the employee to continue working. Shortly thereafter, the belt broke and injured the employee. \textit{Id.} at 128, 49 N.W. at 664. The court held that the employee had assumed the risk of injury because it "does not appear that any necessity rested upon him to proceed with the use of the machine." \textit{Id.} at 129, 49 N.W. at 665. Moreover, the court inferred that the employee could have repaired the belt himself, "although it was not within the general scope of his duty to repair belts in the mill." \textit{Id.} at 130, 49 N.W. at 665; see also Quick v. Minnesota Iron Co., 47 Minn. 361, 50 N.W. 244 (1891). Quick, a miner, was killed when he was struck by a lift cage while crossing a horizontal shaft. The lift operated silently in a vertical shaft. \textit{Id.} at 363, 50 N.W. at 244. While the employer had excavated a passageway around the vertical shaft in other areas of the mine, the employer failed to provide safe passage around this particular shaft. \textit{Id.} at 362, 50 N.W. at 244. The court held that the employee assumed the risk of being killed by continuing his employment with knowledge of the risk. "Any one of common sense would know that if the cage should come down on him while crossing the shaft it would injure, perhaps kill, him." \textit{Id.} at 363, 50 N.W. at 244-45.

In response to these harsh results, the courts began to modify the assumption of risk doctrine as applied to employment cases. In Greer v. Great N. Ry., 115 Minn. 213, 132 N.W. 6 (1911), the employee's arm was torn from its socket when his hand became caught in an unguarded clutch gear. The district court instructed the jury "that a person, in accepting employment, assumes the danger, usual risks, and perils incident thereto, and also all the risks which he knows, or may in the exercise of reasonable care know, to exist." \textit{Id.} at 217, 132 N.W. at 7. However, the employee did not assume "latent, unknown, or hidden defects, although arising from the master's negligence." \textit{Id.} at 217-18, 132 N.W. at 7. Even though the operation and danger of the gear was apparent, the court found that the employee did not assume the risk of injury because the "machine was complicated, and the danger not necessarily apparent to the ordinary juror." \textit{Id.} at 218, 132 N.W. at 8.

28. \textit{id.} at 42.
29. \textit{id.} at 37. "Employers are generally insulated from employees' tort actions by workers' compensation laws, and workers' compensation payments are generally conceded to be minimal at best." \textit{id.} (citations omitted).
30. Manufacturers and distributors of defective products had traditionally resorted to the concept of \textit{caveat emptor} or lack of privity defense in order to limit their liability. In the early years of products liability litigation, the country freely adopted the notion of \textit{caveat emptor} to reflect the risks of association with free enterprise and the industrial revolution. \textit{See} William L. Prosser, \textit{The Implied Warranty of Merchantable Quality}, 27 MINN. L. REV. 117 (1943); Note, \textit{Plaintiff's Conduct As a Defense to Claims}...
III. Scope of the Manufacturer's Duty

The number of products liability cases grew dramatically during the 1960s and 1970s. In part, this was due to an expanding list of potential theories a plaintiff could assert against a negligent manufacturer. Traditional theories of negligence were redefined to expand a manufacturer's duty, including liability for manufacturing defects, design defects, and the failure to supply warnings and instructions.

In addition to tort theories, the Uniform Commercial Code expanded the number of contract remedies by imposing liability for express warranties, the implied warranty of merchantability, and the implied warranty of fitness for a particular purpose. Further, the UCC eliminated the privity requirement, which prevented the manufacturer from avoiding liability toward remote users and bystanders injured by a defective product.

Finally, the advent of strict liability, based upon section 402A of the Restatement (Second) of Torts, lessened the plaintiff's burden in proving the existence of a defective product. In strict products liability, the knowledge of the dangerous condition of the product is imputed to the defendant as a matter of law.

Against Cigarette Manufacturers, 99 Harv. L. Rev. 809 (1986); see also Fleming James, Jr., Products Liability, 34 Tex. L. Rev. 44 (1955) ("The citadel of privity has crumbled, and today the ordinary tests of duty, negligence and liability are applied widely to the man who supplies a chattel for the use of another.").


34. Id. § 2-314.

35. Id. § 2-315.


37. A manufacturer is liable for physical harm to a consumer or user if the product is sold in a "defective condition unreasonably dangerous." Restatement (Second) of Torts § 402A(1) (1990). In strict liability the focus is on the defective product, while in negligence the focus is on the manufacturer's conduct. Presumably, under strict liability the manufacturer is at fault for selling a defective product even though he has "exercised all reasonable care in the preparation and sale of his product." Id. at § 402A(2)(a).

Under strict liability there are two principal tests: the consumer expectations test and the risk-utility balancing test. Under the consumer expectations test the court balances the product expectations of an "ordinary consumer" with the knowledge of the community in general. See, e.g., Reed Dickerson, Products Liability: How Good Does a Product Have to Be?, 42 Ind. L.J. 301, 306-14 (1967) (stating that concept is adopted
In response to the growing number of products liability cases, manufacturers began to assert assumption of risk as an affirmative defense.\(^{38}\) The defense was most often asserted by manufacturers in cases based upon negligence since many jurisdictions were hesitant to allow assumption of risk to relieve a defendant of liability in strict products liability cases.\(^{39}\)

**IV. THE ADOPTION OF ASSUMPTION OF RISK IN PRODUCTS LIABILITY CASES**

In 1965, section 402A of the *Restatement (Second) of Torts* helped establish assumption of risk as a defense to a strict products liability action.\(^{40}\) The assumption of risk defense was allowed in strict liability cases "[s]ince the liability with which this Section deals is not based upon negligence of the seller, but is strict liability."\(^{41}\) The *Restatement* defined assumption of risk as "the form of contributory negligence which consists in voluntarily and unreasonably proceeding from § 402A of the *Restatement (Second) of Torts*.

In jurisdictions that apply a pure consumer expectations test, the openness of the product defect precludes recovery in most cases. See Paul D. Rheingold, *What Are the Consumer’s “Reasonable Expectations”?* 22 Bus. Law. 589, 593 (1967).

The second test for determining the existence of a defective product is based upon a risk-utility balancing test. Minnesota has adopted the risk-utility balancing test for design defects. See, e.g., Bilotta v. Kelley Co., 346 N.W.2d 616, 621 (Minn. 1984). This test involves balancing "the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution which would be effective to avoid the harm." *Id.*

38. *See* Rusciano v. State Farm Mut. Auto. Ins. Co., 445 N.W.2d 271 (Minn. Ct. App. 1989) (holding that defense may be raised only when plaintiff has voluntarily chosen to encounter a known and appreciated danger created by the negligence of the defendant); Swagger v. City of Crystal, 379 N.W.2d 183 (Minn. Ct. App. 1985) (distinguishing between primary assumption of risk, which is an affirmative defense that bars plaintiff’s recovery, and secondary assumption of risk which means that plaintiff was guilty of contributory negligence).

39. Because liability was strict, and not based upon fault, some states hold that comparative fault principles do not apply in a strict liability case. *See*, e.g., Strang v. Deere & Co., 796 S.W.2d 908, 914-19 (Mo. Ct. App. 1990). Other courts were hesitant to allow the defense in failure to warn cases. *See* Hardy Cross Dillard & Harris Hart, II, *Product Liability: Directions for Use and the Duty to Warn*, 41 Va. L. Rev. 145, 163 n.59 (1955):

Though these time-honored defenses [contributory negligence and assumption of risk] are frequently invoked to defeat recovery, they are theoretically inapplicable when the defendant’s breach of duty is based on a failure to warn. To allow these defenses is to indulge in circular reasoning, since usually the plaintiff cannot be said to have assumed a risk of which he was ignorant or to have contributed to his own injury when he had no way of reasonably ascertaining that the danger of injury existed.

*Id.* at 163.


41. *Id.*
ing to encounter a known danger."\(^{42}\) This definition of assumption of risk offered little guidance to courts applying the doctrine.

The traditional elements of assumption of risk were subjectively based. The *Restatement*, however, injected an objective standard: the reasonableness of the plaintiff’s conduct in proceeding to encounter a known risk.\(^{43}\) A comment to section 402A provides, "If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery."\(^{44}\) Unfortunately, other comments offer little guidance on the issue of whether a plaintiff who reasonably assumes a risk and is injured should be barred from recovery.\(^{45}\)

With little guidance, courts and commentators attempted to define the role of the assumption of risk defense in products liability cases. The result was a confusing and inconsistent array of results,\(^{46}\) definitions,\(^{47}\) and other permutations of the doctrine.\(^{48}\)

\(^{42}\) Id.

\(^{43}\) See id.

\(^{44}\) Id.

\(^{45}\) At least one jurisdiction has emphasized the need to find that the plaintiff’s assumption of the risk was unreasonable. See Johnson v. Clark Equip. Co., 547 P.2d 132 (Or. 1976). The court in *Johnson* stated:
The reasonableness of any decision to encounter a known danger must depend upon the circumstances surrounding that decision as well as on the relative probability and gravity of the risk incurred. Whenever the jury attempts to ascertain whether a plaintiff’s decision to encounter a known risk was reasonable, it will be necessary for them to consider the conditions which motivated the decision, the pressures which were operating on the plaintiff, and the amount of time which he had to make the decision.

*Id.* at 140.

\(^{46}\) See Parks v. Allis-Chalmers Corp., 289 N.W.2d 456, 460 (Minn. 1979) (holding that there was no assumption of risk where plaintiff manually unclogged corn stalks in a forage harvester since the prior use of the machine had not made plaintiff aware of the dangers of injury); see also Konovsky v. Kraus-Anderson, Inc., 306 Minn. 508, 237 N.W.2d 630 (1976) (finding no assumption of risk where plaintiff was not "aware of the apparently more dangerous [ice] spots which were covered by the film of water"). But see Geis v. Hodgman, 255 Minn. 1, 2, 95 N.W.2d 311, 313 (1959) ("Plaintiff had assumed the risks of falling when she voluntarily walked onto the patch of ice which she admits she saw before she stepped on it.").

\(^{47}\) States have tended to blend and/or adopt one of the following definitions of primary and secondary assumption of risk. Stephanie M. Wildman & John C. Barker, *Time to Abolish Implied Assumption of Risk in California*, 25 S.F. L. REV. 647, 669-70 (1991) (citing Fleming James, Jr., *Assumption of Risk*, 61 YALE L.J. 141 (1952)). Primary assumption of risk was a legal conclusion that the defendant owed no duty to protect the plaintiff from that type of harm. *Id.* Secondary assumption of risk was characterized by the plaintiff’s manifestation to voluntarily encounter a known risk. *Id.* at 670; see also Fleming James, Jr., *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968).

Prosser further divided primary assumption of risk into four categories. The first category was express assumption of risk. In the second category, the plaintiff enters
V. THE DEVELOPMENT OF ASSUMPTION OF RISK IN MINNESOTA

Like other states, assumption of risk involving defective products in Minnesota was first described in the late 1800s and arose out of the master-servant relationship.\textsuperscript{49} The general rule which emerged from those early cases was that the plaintiff assumed risks that were obvious and known but did not assume “latent, unknown, or hidden defects.”\textsuperscript{50} The underlying policy of contributory negligence and assumption of risk was to encourage individuals to use ordinary care to protect themselves from the risk of injury from an open and obvious danger.\textsuperscript{51}

While the defenses of assumption of risk and contributory negligence were abolished in the master-servant relationship as workers' compensation laws were enacted, these defenses remained popular in tort actions. They were frequently cited in cases involving land-into some relationship with the defendant which involves the risk. Typically these cases involve sport participants, where the dangers inherent in the game are assumed by the participant. In the third category, the plaintiff proceeds to voluntarily encounter a known risk, and even when this encounter with the risk is reasonable, the plaintiff's conduct is deemed consent to incur the risk. Finally, the plaintiff's conduct in encountering a known risk is itself unreasonable, and amounts to contributory negligence. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68 (5th ed. 1984).

Keeton identified six different categories of assumption of risk in products liability cases. The different categories were based upon the degree of consent the plaintiff manifested, whether express, implied or imposed as a matter of law from the circumstances of the case. See Products Liability, supra note 2, at 123-30.

States have adopted various bits and pieces from these three main categories. For example, in California, assumption of risk has been abolished as a separate defense, at least to the extent that it is a variant of contributory negligence. Wildman & Barker, supra, at 647. The plaintiff is barred from recovery if he assumed a risk that is reasonable under the circumstances, but is allowed to recover if he assumes an unreasonable risk of injury. Commentators have argued for abolishing this distinction and have urged that assumption of risk, reasonable and unreasonable, be apportioned under the comparative fault scheme. Id. at 671-72.

48. See, e.g., East Penn Mfg. v. Pineda, 578 A.2d 1113, 1119-22 (D.C. 1990) (denying application of experienced user exception where mechanic lacked requisite knowledge of specific risks associated with charging a truck's battery); Keller v. Vermeer Mfg., 360 N.W.2d 502, 504-06 (N.D. 1984) (finding plaintiff's "momentary forgetfulness" of known and appreciated hazard from mechanical baler a defense to contributory negligence in product liability cases); see also Kenneth M. Willner, Note, Failures to Warn and The Sophisticated User Defense, 74 Va. L. Rev. 579, 587 (1988) ("The sophisticated user defense relieves a seller of liability for failing to warn a subsequent user of dangers or defects of which the user is already aware.").)

49. See, e.g., Lally v. Crookston Lumber Co., 82 Minn. 407, 85 N.W. 157 (1901). The court held that an employee assumed the risk of injury despite the fact that his employer failed to provide an adequate guard for a saw. Id.

50. Greer v. Great N. Ry., 115 Minn. 213, 218, 152 N.W. 6, 7 (1911).

51. See, e.g., Muckler v. Buchl, 276 Minn. 490, 499, 150 N.W.2d 689, 695 (1967) ("The law imposes a duty on every person to exercise reasonable care for his own safety and if he fails to do so he is said to be contributorily negligent."
owners, and other cases. Before 1971, a finding of either contributory negligence or assumption of risk was a complete bar to a plaintiff’s recovery. Thus, a fine distinction between the two defenses was unnecessary.

52. See, e.g., Betzold v. Sherwin, 404 N.W.2d 286 (Minn. Ct. App. 1987) (finding no assumption of risk where guest failed to turn on light while walking in house at night and suffered injury in an open stairwell); see also Rieger v. Zackoski, 321 N.W.2d 16 (Minn. 1982) (finding no assumption of risk when spectator leaped infield fence during nonrace period at a racetrack); Adee v. Evanson, 281 N.W.2d 177 (Minn. 1979) (holding that plaintiff had assumed the risk of slipping and falling on icy sidewalk of store); Isler v. Burman, 305 Minn. 288, 232 N.W.2d 818 (1975) (finding no assumption of risk for invitees on church property where church had undertaken duty to make an inspection of the property for dangerous conditions).

53. See, e.g., Meulners v. Hawkes, 299 Minn. 76, 216 N.W.2d 633 (1974) (holding no assumption of risk where plaintiff had no knowledge that car was approaching as she stood in street); Thompson v. Hill, 366 N.W.2d 628 (Minn. Ct. App. 1985) (holding primary assumption of risk did not apply because driver of car owed passenger duty of reasonable care while driving on river ice).

54. See, e.g., Olson v. Hansen, 299 Minn. 39, 216 N.W.2d 124 (1974) (holding primary assumption of risk not applicable where driver of snowmobile owed duty to passenger); Moe v. Steenberg, 275 Minn. 448, 147 N.W.2d 587 (1966) (finding plaintiff assumed risk of falls and collisions with other ice skaters brought about by her own or other skaters’ lack of skill); Hollinbeck v. Downey, 261 Minn. 481, 113 N.W.2d 9 (1962) (holding that golfer had duty to exercise ordinary care to avoid injuring another by driven ball; caddy did not assume risk of injury from ball where no warning was given); see also Donald M. Zupanec, Annotation, Liability of Participant in Team Athletic Competition for Injury to or Death of Another Participant, 77 A.L.R.3d 1300 (1977).

55. See Ganser v. Erickson, 279 Minn. 235, 238, 156 N.W.2d 224, 226 (1968) (holding that where a minor was hit in the eye by an acorn fired from a friend’s slingshot, he had assumed the risk of injury; “To stand in the general line of fire and to do so where the partner is using a weapon and projectile of inherent inaccuracy is specifically to court disaster.”); Hassler v. Simon, 466 N.W.2d 434 (Minn. Ct. App. 1991) (finding no primary assumption of risk where defendant owed participant in “wild cow milking contest” a duty to protect plaintiff from the dangerous propensities of a bolting black angus cow).

56. See, e.g., Guy v. Western Newspaper Union, 236 Minn. 20, 55 N.W.2d 298 (1952) (holding that since plaintiff was contributorily negligent, he could not recover damages from defendant).

57. The definitions of contributory negligence and assumption of risk were often blended together. See, e.g., Parness v. Economics Lab., Inc., 284 Minn. 381, 170 N.W.2d 554 (1969). In Parness, an employee was injured when she slipped and fell in a puddle of soapy water in the kitchen of the café where she worked. In upholding the jury verdict for the employee, the Minnesota Supreme Court stated:

The jury could have justifiably concluded that Mrs. Parness failed to exercise reasonable care in deciding to attempt to walk across the water-covered floor as well as that, after having made the decision to do so, she failed to use reasonable care in the method by which she proceeded. . . . In addition, even if Mrs. Parness’ decision to proceed was not a departure from reasonable conduct, the jury could have found, as plaintiffs appear to concede, that she was contributorily negligent in walking unaided, as she did, or in failing to guard against a fall by availing herself of the support of the arm of her coworker, the dishwasher, or some of the other equipment in the kitchen.
Typically, assumption of risk involved an individual's knowledge and appreciation of a specific risk of injury and a willingness to encounter that risk, whereas contributory negligence involved a departure from the standard of reasonable conduct required under the circumstances. Whatever label was attached, assumption of risk and contributory negligence both involved a weighing of the plaintiff's knowledge, whether imputed or actual, with a reasonable person standard of conduct.

In 1971, the Minnesota Supreme Court abolished the distinction between assumption of risk and contributory negligence. The supreme court acknowledged "the emerging concept that an injured plaintiff's involuntary or otherwise not unreasonable assumption of risk should not exonerate a defendant from his causal negligence." Assumption of risk would now be considered just a "phase of contributory negligence." While these changes were consistent with the adoption of the comparative negligence statute, the court retained the distinction between primary and secondary assumption of risk.

A. Primary Assumption of Risk

Primary assumption of risk falls into two categories: express and implied. Express primary assumption of risk is based upon contract principles and generally occurs when the plaintiff expressly agrees to

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Id. at 384, 170 N.W.2d at 556-57; see also Haessly v. Lotzer, 309 Minn. 498, 245 N.W.2d 841 (1976). In Haessly, the court held that the decedent was negligent in climbing a poorly maintained stairway. However, the court held that a plaintiff cannot assume the risk absent a conscious awareness and voluntary risk of the hazards. Id. at 502, 245 N.W.2d at 844.

58. To avoid the sometimes harsh results of the assumption of risk doctrine, courts began to require the defendant to prove that the plaintiff was fully aware of the nature and degree of risk. See, e.g., Johnson v. Southern Minn. Mach. Sales, Inc., 442 N.W.2d 843 (Minn. Ct. App. 1989). In Johnson, an employee was injured while performing freehand cutting on a power table saw. Id. at 845. The manufacturer had provided a warning against freehand cutting because no mechanical guide is used to move the wood through the cutting blades. Id. at 845-46. The manufacturer argued that the employee had primarily assumed the risk of injury because he knew the dangers of freehand cutting. The court found that he "did not comprehend 'how or in what manner, or the number of ways, that his hand could come into contact with the blade.'" Id. at 848; see also Knutson v. Arrigoni Bros., 275 Minn. 408, 147 N.W.2d 561 (1966). Knutson held that a workman did not assume the risk of falling when he tested the terrazo mud and honestly believed it was solid to the floor. Id. at 414, 147 N.W.2d at 566.

59. See supra note 46.


61. Id.

62. Id. (quoting Hubenette v. Ostby, 213 Minn. 349, 351, 6 N.W.2d 637, 638 (1942)).
relieve the defendant of a duty of care.\textsuperscript{63} Implied primary assumption of risk, on the other hand, relates to whether the defendant has a duty to protect the plaintiff from a risk of harm.\textsuperscript{64} This principle can be expressed in two different ways. In the first form of implied primary assumption of risk, the defendant owes \textit{no duty} to protect the plaintiff from the risk which resulted in the harm.\textsuperscript{65} In the second form, the defendant owes a \textit{limited duty} of care to the plaintiff with respect to certain risks incident to their relationship.\textsuperscript{66}

1. No Duty Analysis

The first form of primary assumption of risk is illustrated by \textit{Rausch v. Julius B. Nelson \& Sons}.\textsuperscript{67} There, the plaintiff was an electrician working for a subcontractor installing electrical wiring for a construction project. Another subcontractor had the task of staining doors before installing them on the job site. After each door was stained, it was placed upright with a top corner touching the wall.\textsuperscript{68} When the electrician arrived, he decided to feed wires from one electrical box to another in the room where the doors were stacked.\textsuperscript{69} The electrician removed two doors which were immediately in front of the electrical box.\textsuperscript{70} He then went into the space between the doors and began to feed wire into the wall.\textsuperscript{71} A second worker was stationed just beyond the stack of doors and waited to pull the wire

\textsuperscript{63} See, e.g., Malecha v. St. Croix Valley Skydiving Club, Inc., 392 N.W.2d 727, 731 (Minn. Ct. App. 1986) (holding that an exculpatory agreement that released skydiving club from liability for acts of negligence was enforceable).

\textsuperscript{64} See \textit{Springrose}, 292 Minn. at 24, 192 N.W.2d at 827; see also \textit{Bakhos v. Driver}, 275 N.W.2d 594 (Minn. 1979). In \textit{Bakhos}, the plaintiff fell from a tree when his co-worker negligently pulled the limb the plaintiff was sawing. The plaintiff did not assume the risk since he did not choose to expose himself to the actions of his co-worker. \textit{Id.} at 595.

\textsuperscript{65} See, e.g., Erickson v. Van Web Equip. Co., 270 Minn. 42, 132 N.W.2d 814 (1964). In \textit{Erickson}, a farmer was injured when his hand was caught under the cable of a hydraulic jack. In the process of unloading corn from a hydraulic lift, the piston began to bind in the cylinder, and momentarily stopped the box from rising. As the farmer leaned over to examine the piston, it suddenly released, trapping his hand. \textit{Id.} at 44-45, 132 N.W.2d at 817. The court found that the defendant had no prior knowledge of the hydraulic lift binding and thus had no duty to warn the farmer. \textit{See id.} at 50-51, 132 N.W.2d at 820-21. The court held that the farmer "alone was solely responsible [for his injuries] and that his contributory fault and assumption of risk appear as a matter of law." \textit{Id.} at 52, 132 N.W.2d at 821.

\textsuperscript{66} See infra notes 79-86 and accompanying text.

\textsuperscript{67} 276 Minn. 12, 149 N.W.2d 1 (1967).

\textsuperscript{68} \textit{Id.} at 14, 149 N.W.2d at 3. A space of about eight inches was left between each door to facilitate the drying of the stain.

\textsuperscript{69} \textit{Id.} at 14-15, 149 N.W.2d at 4. Even though the plaintiff could have waited until the next day when the doors would be removed, he decided to go ahead and work in the midst of the stacked doors.

\textsuperscript{70} \textit{Id.} at 15, 149 N.W.2d at 4.

\textsuperscript{71} \textit{Id.}
out of the wall and through the electrical box on his side. After about ten feet of the wire had been fed, the door adjacent to the second worker began to fall, striking the door next to it, and so on, in a domino fashion, with the result that some forty-three doors fell. The electrician was struck by the last door that fell and was killed instantly.

The electrician alleged that the defendant contractor had a duty to supervise the work and control the acts of the subcontractors. The court, however, found that the defendant did not have general supervision over the work of the subcontractors. The various subcontractors were responsible for the methods and procedures used in completing their work. Thus, the defendant had no duty to supervise or control the way in which the work was completed.

On the issue of duty, the court stated that it was "practically impossible to conceive of anything anyone could have told the decedent about either the situation or the risks incident to it which would not have been patent to the senses in the exercise of common observation by a man of his intelligence and long experience." In the absence of a duty on the part of the defendant, the court held that the plaintiff had primarily assumed the risk of injury.

This case illustrates the principle that primary assumption of risk may arise in cases where there is no duty to protect the plaintiff from the way in which the harm arose. The defendant had no duty to supervise or direct how the work would be done. Thus, the plaintiff had assumed the risk of injury resulting from his own voluntary choice to proceed in the manner in which he did. In other words, the defendant's conduct was not the proximate cause of the accident.

2. Limited Duty Analysis

The second form of primary assumption of risk arises in cases

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72. Id.
73. Id.
74. Id.
75. See id. at 20-21, 149 N.W.2d at 7.
76. Id. at 21, 149 N.W.2d at 7.
77. Id. at 21, 149 N.W.2d at 8.
78. Id. at 21-22, 149 N.W.2d at 8; see also Germann v. F.L. Smithe Mach. Co., 395 N.W.2d 922 (Minn. 1986). In Smithe, the court described the relationship between duty and causation as follows:

In determining whether the duty exists, the court goes to the event causing the damage and looks back to the alleged negligent act. If the connection is too remote to impose liability as a matter of public policy, the courts then hold there is no duty, and consequently no liability. On the other hand, if the consequence is direct and is the type of occurrence that was or should have been reasonably foreseeable, the courts then hold as a matter of law a duty exists.

Id. at 924.
where the defendant has a limited duty of care. Generally, everyone owes a duty to use reasonable care to avoid injuring others.\textsuperscript{79} Under some circumstances, however, one may implicitly agree to relieve another of his or her duty of care. For example, there may be circumstances under which consent to relieve another of the duty of care is sufficiently manifested by conduct. In these cases, implied primary assumption of risk is used to express the notion that, with respect to certain well known and incidental risks attendant to an activity or relationship, the defendant owes a limited duty of care.

A prime example of the limited duty analysis is found in sports participant cases. The decision to participate in a sporting event carries well-known and incidental risks of injury, such as being injured during a football tackle. In order for the game to proceed, the players have implicitly consented to the risk of injury. Another way of expressing this concept is that other players owe no duty to protect an individual from a miscalculated tackle or other risk of injury incident to the sport.\textsuperscript{80}

The law, however, does not assume that an individual consents to risks beyond those contemplated by a reasonable sports participant.\textsuperscript{81} It is consent to encounter the known and obvious risks of injury incident to the activity that the plaintiff is deemed to assume, and not the defendant’s otherwise reckless\textsuperscript{82} or intentional conduct.\textsuperscript{83} The plaintiff’s subjective consent to incur these risks is manifested by his or her voluntary choice to play the sport. Once courts move beyond the context of sporting events, however, the presumptions operating in implied primary assumption of risk may not be appropriate.

\textsuperscript{79} See, e.g., Rue v. Wendland, 226 Minn. 449, 453, 33 N.W.2d 593, 596 (1948) (proposing that a person be required to “exercise his senses” not only for the protection of himself, but also for the protection of others).

\textsuperscript{80} See supra note 54. In addition to sport participants, spectators are generally held to assume risks incident to viewing a sport. See, e.g., Grisim v. Tapemark Charity Pro-Am Golf Tournament, 415 N.W.2d 874, 876 (Minn. 1987) (holding that an amateur golfer had no duty to warn spectator prior to teeing off); Swagger v. City of Crystal, 379 N.W.2d 183, 185 (Minn. Ct. App. 1985) (holding that a patron at a baseball game assumes the risk of injury from thrown or batted balls when they sit in an unprotected area).

\textsuperscript{81} See, e.g., Wagner v. Thomas J. Obert Enter., 396 N.W.2d 223, 226 (Minn. 1986) (holding that the negligent maintenance and supervision of a rollerskating rink is not an inherent risk of the sport itself).

\textsuperscript{82} See, e.g., Seidl v. Trollhausen, Inc., 305 Minn. 506, 509, 232 N.W.2d 236, 240-41 (1975) (holding that being accidentally hit by ski instructors while skiing is not an inherent risk of the sport); Moe v. Steenberg, 275 Minn. 448, 451, 147 N.W.2d 587, 589 (1966) (“The conduct of other skaters may be so reckless or inept as to be wholly unanticipated.”).

\textsuperscript{83} See generally David J. Stephenson, Competitive Sports Torts, 19 Colo. Law. 2457 (1990) (discussing liability for intentional and reckless conduct in sports).
The mere fact that an individual has undertaken a volitional act is not sufficient by itself to demonstrate that the act was truly voluntary. In the case of defective products, for example, one who has no choice but to use a product that presents an unreasonable risk of injury in order to obtain its advertised benefits, is not making the same kind of voluntary choice as participants in a sporting event.

In sport participant cases, the player's objective and subjective consent to incur the risk is manifested by the willingness to play the game. Presumably, one may forgo the opportunity to play the game and avoid the risk of injury altogether. Likewise, a plaintiff injured by a defective product arguably could have chosen to avoid the risk of injury altogether by deciding not to purchase the product. But this reasoning ignores the marketing forces behind a manufacturer's product as well as the public policy that imposes the duty on product manufacturers to make safe products. Moreover, while a sports

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84. See Products Liability, supra note 2, at 133. Keeton differentiates assumption of risk by consensual elements and categories of assumption of risk. His categories ranged from express consent, the first form, to imposed assumption of risk, a legal conclusion that the defendant did not owe a duty of care toward the plaintiff. Id. at 123-30. "[T]he doctrine of assumption of risk continues to commend itself if (a) it is limited to cases in which either objectively consensual assumption of risk or an even more consensual form can be proved and (b) it is duly qualified to exclude cases of duress." Id. at 152-53.

The voluntariness of the plaintiff's conduct has been an important theme in Minnesota cases applying the assumption of risk doctrine. See Peterson v. W.T. Rawleigh Co., 274 Minn. 495, 144 N.W.2d 555 (1966). "Where the dilemma is created by defendant's tortious conduct, a plaintiff is not necessarily guilty of assuming a risk encountered under compulsion which leaves him with no reasonable alternatives." Id. at 498, 144 N.W.2d at 558-59.

85. See Products Liability, supra note 2, at 143. The crucial fact, under this form of the doctrine [of objectively manifested consent to risk] is that the plaintiff has manifested that his state of mind is one of full appreciation of the risk and willingness to encounter it. . . . On the other hand, the fact that the risk is one he should appreciate does not establish either contributory negligence (since it may happen that his encountering the known risk is reasonable) or consent to risk (since it may happen that he neither manifests nor secretly holds the state of mind of full appreciation and willingness to encounter the risk). Similarly, the fact the risk is "obvious" falls short of establishing plaintiff's consent to risk, unless "obvious" means that the evidence is such that no reasonable jury could make [a different finding].

Id.

86. See John E. Montgomery & David G. Owen, Reflections on the Theory and Administration of Strict Tort Liability for Defective Products, 27 S.C. L. Rev. 803 (1976). The authors suggest the following policy reasons for imposing strict liability on product manufacturers:

(1) Manufacturers convey to the public a general sense of product quality through the use of mass advertising and merchandising practices, causing consumers to rely for their protection upon the skill and expertise of the manufacturing community.

(2) Consumers no longer have the ability to protect themselves adequately from defective products due to the vast number and complexity of
participant can readily anticipate and protect against the risk of injury during a game, a product consumer may be unable to anticipate the nature and seriousness of the risk or take adequate precautions to guard against product hazards. Other factors also distinguish the relationship between the product manufacturer, the consumer, and the sport participant in primary assumption of risk cases.

a. The Nature of the Defendant's Conduct

Cases that justify a plaintiff's liability based on the plaintiff's voluntary choice to assume risk unfairly ignore the defendant's voluntary conduct. The manufacturer has also made a "conscious choice to sell products with certain calculable risks and inevitable accidents costs." Thus, a manufacturer's "choice" to impose a risk cannot be given less weight than a plaintiff's choice to assume a risk. Unlike the plaintiff in sport participant cases, the plaintiff in products liability cases may have little choice to forgo the product's benefits without incurring the added risk.

b. The Relationship Between the Plaintiff and Defendant

Another distinction lies in the historical development of the assumption of risk doctrine from contract law to employment law. For example, the modern development of assumption of risk theory

| products which must be "consumed" in order to function in modern society. |
| (3) Sellers are often in a better position than consumers to identify the potential product risks, to determine the acceptable levels of such risks, and to confine the risks within those levels. |
| (4) A majority of product accidents not caused by product abuse are probably attributable to the negligent acts or omissions of manufacturers ... or marketing process, yet the difficulties of discovering and proving this negligence are often practicably insurmountable. |
| (6) Sellers almost invariably are in a better position than consumers to absorb or spread the costs of product accidents. |

Id. at 809.

87. Note, supra note 19, at 888-89. The concept of fault runs throughout product liability law. In strict liability cases, the manufacturer's fault stems from failure to discover the defect before placing the product on the market. In negligence cases, the manufacturer's fault is based upon the failure to detect manufacturing flaws, place adequate warnings to protect potential users, and the failure to use reasonable care in designing the product. Further, If both the plaintiff's and the defendant's conscious choices are responsible for the resulting injury and if the relative quality of the knowledge that each possesses to inform his choice is not relevant to the application of the assumption of risk defense, it is hard to see why the plaintiff's choice to assume the risk is weightier in fairness terms than the defendant's choice to impose it.

Id. at 889 (citations omitted).

88. Id.

89. See supra note 82.
arose out of the employment context and reflected certain economic notions about the willingness of employees to trade a wage in exchange for certain well-known and incidental risks of injury attendant to their employment. This bargain-based justification for assumption of risk is not appropriate when applied in modern day products liability cases. Frequently, the consumer has no way to discover the magnitude of the risk before the product is purchased. Furthermore, if a risk is later discovered, the consumer cannot renegotiate the price of the product.

c. Manufacturer Is in the Best Position to Control Product Risks

The risk of injury from a defective product is more easily minimized by the product manufacturer. A legal rule which requires product manufacturers to pay for the social costs of injuries proximately caused by their defective products is both economically reasonable and conducive to public policy. Thus, implied primary assumption of risk in products liability cases may inefficiently shift

90. See Note, supra note 19, at 880.
91. The Minnesota Supreme Court, in early cases, used assumption of risk elements to bar a plaintiff's recovery, despite the fact that the product defect was not obvious until the product was used. In Magnuson v. Rupp Mfg., 285 Minn. 32, 171 N.W.2d 201 (1969), the plaintiff was injured by an exposed sparkplug on a snowmobile. The sparkplug was located near the position of the rider's knee during operation of the machine. In one of the first cases to discuss the application of strict liability, the court stated that in strict product liability cases, under § 402A of the Restatement (Second) of Torts, the "awareness" of the defect was a factor in determining whether the product was in a dangerous condition beyond the "normal public expectation of the danger." Id. at 39-40, 171 N.W.2d at 208.

The fact that the plaintiff was aware of the location of the sparkplug and that "[h]e knew the likelihood of injury and its probable seriousness . . . not only negat[es] any claim of defect, but certainly takes this snowmobile out of the category of being unreasonably dangerous." Id. at 42, 171 N.W.2d at 208. These elements are analogous to those found in the assumption of risk defense.

92. See Note, supra note 19, at 880.

[T]he assumption of risk defense could only be justified by the trading-over-risk rationale if the law were to focus on the plaintiff's knowledge of the risk at the time he bought the product. Under strict products liability, however, the crucial legal inquiry is whether the plaintiff knew of the danger at the time of his injury.

Id.

93. In addition to public policy considerations for imposing liability on product manufacturers, at least one author has suggested an economic approach. See Richard Posner, A Theory of Negligence, 1 J. LEGAL STUD. 29, 32-36 (1972). In discussing Learned Hand's formula for negligence (i.e. liability depends on whether the burden or cost of precautions to avoid the injury is less than the probability of the injury occurring times the severity of the injury), Posner suggests, "If the cost of safety measures or of curtailment—whichever cost is lower—exceeds the benefit in accident avoidance to be gained by incurring that cost, society would be better off, in economic terms, to forgo accident prevention." Id. at 32.
accident costs from the manufacturer to the plaintiff. In contrast, secondary assumption of risk, like contributory negligence, more accurately reflects the goals and incentives of the tort system in allocating the risk of loss in products liability cases.

B. Secondary Assumption of Risk

Secondary assumption of risk is the better reasoned approach in products liability cases for several reasons. First, under a pure comparative fault scheme, secondary assumption of risk, like contributory negligence, provides efficient incentives for manufacturers and consumers to reduce accident costs. When precaution for reducing the likelihood and severity of an accident is bilateral—that is, both parties can take precautions to reduce the probability of an accident—secondary assumption of risk encourages manufacturers to reduce product-related harms and consumers to use due care.

94. See Note, supra note 19, at 882-87. The author undertakes an economic efficiency analysis of the assumption of risk defense and concludes that implied primary assumption of risk creates inefficient incentives for product manufacturers to reduce accident costs. See also Bilotta v. Kelley Co., 346 N.W.2d 616 (Minn. 1984). In Bilotta, the manufacturer urged the court to adopt a rule where a manufacturer's offer of safety devices shifts risk of loss to the purchaser if the purchaser chooses to use the product without safety devices. The manufacturer argued this rule would encourage the purchase of safety devices. Id. at 624. The court rejected this risk shifting approach and held that a manufacturer may not "delegate its duty to design a reasonably safe product." Id.; see also Johnson v. Southern Minn. Mach. Sales, Inc., 442 N.W.2d 843 (Minn. Ct. App. 1989) (faulting manufacturer for not attaching safety guard where it was foreseeable that plaintiff would attempt freehand cutting with the saw).

95. See Note, supra note 19, at 884. The author argues that assumption of risk is "inefficient as a method of inducing cost-justified behavior by the plaintiff because, in determining whether to bar recovery, the defense in its classical form does not consider the plaintiff's level of care." Id. The author concludes that "the objective of inducing due care would be achieved more efficiently by the contributory negligence defense." Id. Minnesota has adopted a similar approach through its contributory fault statutes. See MINN. STAT. §§ 604.01-.02 (1990). Minnesota's approach suggests that a claimant's voluntary and unreasonable use of a product with a known defect or condition merely reduces the claimant's damages, instead of totally barring a recovery. See also Model Uniform Product Liability Act, 44 Fed. Reg. 67,714 (1979).

96. Under a pure comparative fault scheme, the parties share the damages in proportion that their negligence contributed to the accident. In Minnesota, the plaintiff is barred from recovery if his or her share of the fault is 51% or greater than the defendant's. MINN. STAT. § 604.01 (Supp. 1992).

97. In economic terms, this is called the moral hazard problem. This problem arises when the behavior of an individual changes after the purchase of insurance so that the probability of a loss increases. The availability of insurance creates an adverse incentive on the part of the plaintiff to shift the risk of loss onto the insurer. ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 65-66 (1988).

This same problem, in theory, applies to product manufacturers and consumers. Under strict liability, the manufacturer provides insurance to consumers for injuries proximately caused by a defective product, regardless of the manufacturer's fault. In
Second, secondary assumption of risk is an affirmative defense to an established breach of duty owed by the defendant to the plaintiff. By focusing on the duty analysis first, the court may avoid the tendency to place greater emphasis on the plaintiff’s conduct, merely because his or her conduct occurred later in time than the defendant’s.98

Minnesota courts that focus on the plaintiff’s conduct first have a tendency to place the responsibility for risk avoidance on the plaintiff.99 This method of analysis is analogous to the “last clear chance” doctrine.100 Similarly, assumption of risk is a risk avoidance rule that shifts the accident cost from the defendant to the plaintiff, depending on which “party was in a better position to make the cost-benefit analysis, irrespective of the other’s negligence.”101 Thus, assumption of risk, like the last clear chance doctrine, is a legal conclusion which does little to explain why one party should bear the accident.

98. See, e.g., Schroeder v. Jesco, Inc., 296 Minn. 447, 209 N.W.2d 414 (1973). In Schroeder, the plaintiff, a construction worker, was injured by falling lumber accidentally knocked down the stairwell by another worker. Because there was an alternative stairwell that the plaintiff could have taken, the court held that he assumed the risk of injury by voluntarily exposing himself to the risk of falling timber. Id. at 453, 209 N.W.2d at 419. “It is inconceivable that reasonable men would have to conclude that, plaintiff, an experienced construction worker who knew that timber would sometimes be dropped from one floor to another at construction sites, did not know and appreciate the risk of falling objects inherent in working under construction in progress.” Id. at 452, 209 N.W.2d at 418. In essence, the court held that the plaintiff voluntarily consented to be injured by the negligence of the other employee merely because he was aware of the potential for falling timber and did not take an alternative route. The court did not address the duty of reasonable care which the other workers owed the plaintiff.

99. See Tews v. Husqvarna, Inc., 390 N.W.2d 363, 368 (Minn. Ct. App. 1986). In selecting a chain saw without a chain brake, the plaintiff in Tews primarily assumed the risk. The court did not discuss the defendant’s duty to incorporate known safety features.

100. See Fleming James, Jr., Last Clear Chance: A Transitional Doctrine, 47 Yale L.J. 704, 704 (1938). The last clear chance doctrine stated the rule that a plaintiff, though negligent, could recover from a defendant who had the last clear chance to avoid injuring him. “When an accident happens through the combined negligence of two persons, he alone is liable to the other who had the last opportunity of avoiding the accident by reasonable care.” Id. at 708 (citation omitted).

costs irrespective of the other party's negligence. In contrast, courts that examine the manufacturer's duty first must explain why the defendant's duty did not encompass that particular risk of injury.

Finally, the duty analysis under secondary assumption of risk allows the court to compare the nature of the plaintiff's duty with the nature of the defendant's duty. In some cases, the duty of the manufacturer may not be relieved by the plaintiff's subsequent conduct. For example, the New Jersey Supreme Court, in Suter v. San Angelo Foundry & Machinery, held that workers injured while doing their assigned work cannot be found to have assumed the risk. The court stated, "The imposition of a duty on the manufacturer to make the machine safe to operate... means that the law does not accept the employee's ability to take care of himself as an adequate safeguard of interests which society seeks to protect."

Other courts have followed this reasoning and limited the use of assumption of risk defenses in the employment context. While Minnesota has not expressly adopted this view, recent decisions have indicated a willingness to consider voluntariness in the employment context. Outside of the employment context, the knowledge and

102. From an economic perspective, assumption of risk in cases involving defective products is often "justified under modern theories as a method of permitting consumers to trade on their preferences for risk: in exchange for lower prices..." Note, supra note 19, at 877. However, in the product context, the consumer often does not discover the risk until after the product is purchased. In the early assumption of risk cases, "the continuing nature of the employment relationship made it possible to argue that an employee's continued willingness to work after discovering the... risk constituted a contractual acceptance of the danger—a bargain that tort law should not upset." Id. at 880. This same justification is not supported in modern product liability cases.

103. See supra notes 46-48.

104. The use of assumption of risk in the employment context has often been supported by an economic efficiency argument.

The theory is that risk avoidance is enhanced if workers know that they must bear the economic brunt of workplace injury. This proposition is not founded in workplace reality. Psychologically, a worker does not face the daily demands of a job undergirded by the comfort of knowing that a jury may compensate him or her years later for a disabling injury. For most, the risk avoidance instinct is predicated on the avoidance of pain rather than cost. That accidents still frequently occur, despite an almost universal aversion to pain, shows that the risk avoidance argument for denying recovery has little logical basis.

North, supra note 17, at 48 (citation omitted).


106. Id. at 148.


108. See, e.g., Bilotta v. Kelley Co., 346 N.W.2d 616, 624-25 (Minn. 1984) (holding
voluntariness aspects of the assumption of risk defense have proven to be difficult to apply, particularly in products liability cases.109

VI. THE RATIONALE UNDERLYING THE ASSUMPTION OF RISK DEFENSE IN PRODUCTS LIABILITY CASES

The rationale underlying secondary assumption of risk is often stated in terms of "consent" to relieve the defendant of an established duty of care.110 The term "consent" in assumption of risk cases is loosely related to contract notions of mutual assent. Noticeably lacking, however, are the benefits of mutual negotiation over terms routinely present under contract law.111 The supposed pro-

that manufacturer has duty to install safety equipment and the manufacturer may not "leave safety to the haphazard conduct of the ultimate purchaser"); Johnson v. Southern Minn. Mach. Sales, Inc., 442 N.W.2d 843, 848 (Minn. Ct. App. 1989) (holding that where worker was injured while misusing a saw in the manner instructed by his foreman, the worker did not primarily assume risk of injury).

109. See, e.g., Rinehart v. International Playtex, Inc., 688 F. Supp. 475, 479 (S.D. Ind. 1988). In Rinehart, the court refused to grant summary judgment on the issue of assumption of risk where a plaintiff was aware of the risk of toxic shock. The court stated:

[Defendants offer no explanation of what was unreasonable about plaintiff's subsequent use of the product, unless defendants mean to imply that after having read the warning, it was unreasonable for plaintiff to use defendants' tampons at all. If so, one wonders as to the reasonableness of defendants in advertising and selling such a product.

Id. at 479.

110. In the typical consent or assumption of risk situation, the plaintiff is presented with three choices: 1) not engaging in the activity, and not obtaining the benefit; 2) engaging in the activity and encountering a tortiously created risk, and also obtaining a benefit; 3) engaging in the activity and not encountering that risk, and also obtaining the benefit. Assumption of the risk should only operate when the plaintiff is presented with the third option. Kenneth Simons, Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference, 67 B.U. L. REV. 213, 220 (1987).

Nevertheless, many courts ignore the plaintiff's preferred choice to purchase a product without the risk of injury. In Tews v. Husqvarna, Inc., 390 N.W.2d 363 (Minn. Ct. App. 1986), the consumer was injured when the chain saw he was using kicked back, connecting with his arm. The consumer alleged that the saw was defective since it did not have a chain brake. At the time the consumer purchased the product no chain brake was available for this particular model. The court held that the consumer had primarily assumed the risk of injury by selecting a model without a chain brake. Id. at 368. However, the court never discussed whether the nature of the risk was foreseeable by the product manufacturer or whether the manufacturer had a duty to design a chain saw with a brake.

111. See generally John Diamond, Assumption of Risk After Comparative Negligence: Integrating Contract Theory Into Tort Doctrine, 52 Ohio St. L.J. 717 (1991). The author argues:

Contract principles rely on individual negotiations in the marketplace and enforce actual promises. It is obviously inappropriate to make up an agreement that did not exist in fact and to justify enforcement because there was an "agreement." It also seems dangerous to manipulate contract law by enforcing a perceived implied contract when basic contract law would be
tections under assumption of risk are related to the detailed requirements of the doctrine.

In Minnesota, the defendant has the burden to show that the plaintiff (1) had knowledge of the risk, (2) appreciated the nature and degree of the risk, and (3) voluntarily chose to encounter the risk.\(^{112}\) Under these circumstances, the plaintiff is deemed to have consented to a tortiously created risk, thereby relieving the defendant of liability.\(^{113}\) This presumes that the elements of assumption of risk are sufficient to justify risk shifting regardless of fairness or other considerations, such as the defendant's ability to control the risk.\(^{114}\) In the case of a defective product, the defendant may be in the best position to avoid the risk of injury.\(^{115}\) Moreover, the plaintiff may not have made an informed or truly voluntary choice to incur the added risk in order to receive the product's benefits,\(^{116}\) yet the plaintiff will be deemed to have assumed these risks.\(^{117}\)

\(^{112}\) See, e.g., Evanson v. Jerowski, 308 Minn. 113, 118, 241 N.W.2d 636, 640 (1976).

\(^{113}\) The application of implied assumption of risk may be justified under contract notions of consent, i.e., sport participant cases and also the so-called "fireman's" rule. See Diamond, supra note 111, at 743.

A professional may, for example, be compensated in advance for the risk of encountering negligently created hazards. A legal doctrine that discourages reasoned and bargained for exchanges disrupts a market attempting to efficiently control those risks. There is little value in discouraging the employment of professionals to contain and limit the dangers from prior negligence. Similarly, the right to attend or participate in an athletic event can involve a bargained for reduction in the standard of care expected by participants. In theory, the reduction in protection is exchanged for a reduced cost of participation.

\(^{114}\) See, e.g., Fick v. Wolfinger, 293 Minn. 483, 198 N.W.2d 146 (1972) (holding that a farmhand injured by a power takeoff on a tractor did not assume the risk, even though he was aware of the risk of the unsafe machinery, because the employer had duty to protect the servant from danger).

\(^{115}\) See Products Liability, supra note 2, at 152. "If capacity to bear and distribute risk were substituted for fault as the basis for liability in tort law, assumption of risk would lose nearly all its power to command a following." Id.

\(^{116}\) The necessity of a voluntary assumption of risk is supported by § 496E(2) of the Restatement (Second) of Torts:

(2) The plaintiff's acceptance of a risk in not voluntary if the defendant's tortious conduct has left him no reasonable alternative course of conduct in order to
   (a) avert harm to himself or another, or
   (b) exercise or protect a right or privilege of which the defendant has no right to deprive him.

\(^{117}\) In traditional assumption of risk situations, those not involving a defective product, the plaintiff is presented with only two choices. The plaintiff can chose to proceed in the face of the risk, or the plaintiff can chose an alternative course of
In part, the continuing viability of the assumption of risk doctrine lies in the historical tenets of our fault-based tort system. First, it is difficult to ignore the plaintiff's own conduct in causing his or her injuries. In contributory negligence cases, the knowledge and understanding of a fictitious reasonable person is imputed to the plaintiff. Thus, his or her conduct appears less culpable than that of the plaintiff in assumption of risk cases.

In assumption of risk cases, the plaintiff is aware of the risk of injury and presumably weighed the utility of encountering the risk in order to achieve some benefit from the activity or product. Courts are hesitant to shift the risk of injury from a plaintiff, who presumably could have avoided the risk of injury, to a defendant whose liability is based upon strict liability or expanded duty notions, which impose liability for all foreseeable risks arising from the defendant's negligent conduct.

Another reason courts are hesitant to shift the risk of loss from a plaintiff to a defendant is the voluntariness of the plaintiff's decision to encounter the risk. A central thesis in our society, embodied in the definition of assumption of risk, is the notion that personal autonomy should be given priority. If the plaintiff's conduct does not harm others, and the risk and nature of the harm was fully appreciated and voluntarily encountered, then the law should not interfere by shielding the individual from the consequences of her decision. However, as noted above, the assumptions and rationales underlying secondary assumption of risk may not be appropriate in all situations involving defective products.

In many cases, the goals and policies behind imposing liability on product manufacturers are frustrated by the assumption of risk defense. For example, the patent product defect rule and the as-conduct in order to obtain the desired goal. For example, in Donald v. Moses, 254 Minn. 186, 94 N.W.2d 255 (1959), a pedestrian was injured when he slipped and fell on an accumulation of snow and ice on the defendant's sidewalk. The court held that the pedestrian could not assume the risk where there was no evidence "showing alternative routes which were safer than the route selected by the plaintiff." Id. at 196, 94 N.W.2d at 262. Unfortunately, the majority of courts have failed to address the issue of alternative choices in product liability cases.


119. See Products Liability, supra note 2, at 149. Other authors suggest that assumption of risk "is, and always has been, a kind of plaintiff's strict liability," because it examines factors relevant to whether the plaintiff was the cheapest cost-avoider. Guido Calabresi & Jon T. Hirschoff, Toward a Test for Strict Liability in Torts, 81 YALE L.J. 1055, 1065 (1972).

120. Minnesota law has yet to decide whether the plaintiff has a duty to inspect or guard against latent product defects. See, e.g., MINNESOTA PRACTICE, JURY INSTRUCTION GUIDES JIG 130 (Minn. Distr. Judges Ass'n 3d ed. 1986); see also Williams v.
umption of risk doctrine conflict with the manufacturer's duty to warn of product dangers, to prevent foreseeable product misuse, and to develop safety devices. Four recent Minnesota decisions illustrate the difficulty of applying the traditional assumption of risk analysis in products liability cases involving patent product defects.

A. The Death of the Latent-Patent Danger Rule


In general, there is no duty to warn of obvious dangers. However what constitutes an obvious danger varies with the type of product. See, e.g., Todalen v. United States Chem. Co., 424 N.W.2d 73 (Minn. Ct. App. 1988) (holding that chemical manufacturer had a duty to warn that chemical was caustic in dry state, even though employee knew that chemical was caustic when mixed with water); Balder v. Haley, 390 N.W.2d 855 (Minn. Ct. App. 1988) (holding that valve manufacturer had duty to warn of risk of explosion from removing or misusing a gas control valve), *rev'd on other grounds*, 399 N.W.2d 77 (Minn. 1987); Huber v. Niagara Mach. & Tool Works, 430 N.W.2d 465 (Minn. 1988) (holding that manufacturer had duty to warn punch press operator to keep hands clear where it was not foreseeable that employer would remove it), *rev'g* 417 N.W.2d 740 (Minn. Ct. App. 1988) (holding that manufacturer had duty to warn punch press operators); see also East Penn Mfg. Co. v. Pineda, 578 A.2d 1113 (D.C. 1990) (holding that battery manufacturer had duty to warn of hazard even though mechanic was familiar with risks of charging battery).


See E.W. Bliss Co. v. Marco Mfg., 258 Cal. Rptr. 783 (Cal. Ct. App. 1989) (holding that employer had a duty to equip press with a point of operation guard, even though the danger was obvious).

See *Holm v. Sponco Mfg., Inc.*, 324 N.W.2d 207 (Minn. 1982) (rejecting latent-patent danger rule and instead applying a balancing test); Halvorson v. American Hoist & Derrick, 307 Minn. 48, 240 N.W.2d 303 (1976) (holding that manufacturer was not negligent for failure to install safety devices when risk of electrocution was obvious and known by all employees involved); Jonathan v. Kvaal, 403 N.W.2d 256 (Minn. Ct. App. 1987) (holding that latent-patent defect rule no longer relieves manufacturer of liability); McCormick v. Custom Pools, Inc., 376 N.W.2d 471 (Minn. Ct. App. 1985) (holding that swimmer's awareness of risks of diving into shallow water in swimming pool precluded placing liability on manufacturer); see also Joseph F. Chase & Mark M. Walbran, *Plaintiffs Peril: Primary Assumption of Risk, MINN. TRIAL LAW.*, Summer 1989, at 21 (discussing the expansion of primary assumption of risk and the latent-patent danger rule).

307 Minn. 48, 240 N.W.2d 303 (Minn. 1976).
power line. The crane was lowering a metal screed to the pavement when the screed began to sway back and forth. In an effort to stabilize the screed, the plaintiff grabbed the screed with both hands. At that time the lifting cable attached to the crane came in contact with a power line running next to the road, and the employee was severely injured. The employee alleged that the addition of certain safety devices, such as a warning device or insulation in the hook, would have prevented the accident.

The court held that the manufacturer had no duty to install safety devices on the crane since the risk of injury was open and obvious and fully appreciated by all the employees involved. In effect, the employee had assumed the risk of injury from a patent product defect. Six years later, the Minnesota Supreme Court overruled Halverson in Holm v. Sponco Manufacturing.

In Holm, an electrician’s assistant was injured when a crane he was operating came into contact with a high voltage power line. The assistant acknowledged that he knew of the danger of electrocution from contact with the wire and that he was familiar with warning decals on the crane which warned against the specific hazard which caused his injury. The assistant alleged that the addition of certain safety devices, such as a warning device or insulation of the crane, would have prevented the accident. The court held that the obviousness of the danger is only one factor to be balanced in determining whether the plaintiff used the degree of care required under the circumstances.

In addition, the court found the patent danger rule “inconsistent with the underlying policy rationale supporting the strict products liability doctrine.” The patent danger rule “encourages manufacturers to be outrageous in their design, to eliminate safety devices, and to produce dangerous products at the consumer’s expense.”

126. Id. at 50, 240 N.W.2d at 304.
127. Id.
128. Id.
129. Id.
130. Id. at 50, 240 N.W.2d at 305.
131. Id. at 57, 240 N.W.2d at 308. The plaintiff testified that he knew power lines could be dangerous. He testified further that he usually checked for power lines along the road and he knew about the risk of electrocution if the crane came into contact with a power line. Id. at 51, 240 N.W.2d at 305.
132. Holm v. Sponco Mfg., 324 N.W.2d 207 (Minn. 1982).
133. Id. at 208.
134. Id.
135. Id. at 209.
136. Id. at 213.
137. Id. In approving the doctrine of strict liability, the court stated, “not only is the manufacturer in a better position than a consumer to bear economic loss and to redistribute it via the cost of his product, but he is also better able to appreciate and minimize the risk of injury through the production of safer goods.” Id.
and to make hazards obvious."

Further, the court stated that the latent-patent danger rule "swallows up the assumption of risk defense" and circumvents Minnesota's Comparative Fault Act.

**B. The Latent-Patent Danger Rule Reincarnated**

Only three years after *Holm*, the latent-patent danger rule was once again reincarnated in the guise of an assumption of risk analysis. In *McCormick v. Custom Pools, Inc.*, a swimmer was injured when he dove into a below-ground pool and struck his head on the bottom. The swimmer alleged that the pool was not properly marked and lacked warnings about diving into the shallow end. The swimmer was experienced and had used the pool approximately ten times before he was injured. The court held that the swimmer's awareness of the risk precluded any claim that the admitted failure to warn was the cause of the injuries. In a strict product liability claim, the plaintiff "must not be aware of the defect in order to recover."

Two years later, on nearly identical facts, the same court, in *Jonathan v. Kvaal*, implicitly overruled the decision in *McCormick*. A tenant was injured when he made a surface dive into his

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138. *Id.* (quoting Auburn Mach. Works Co. v. Jones, 366 So. 2d 1167, 1170 ( Fla. 1979)).

139. *Id.* Prior to the adoption of the Comparative Fault Act, a finding of assumption of risk or contributory negligence produced harsh results. See Lally v. Crookston Lumber Co., 82 Minn. 407, 85 N.W. 157 (1901) (holding that an employee voluntarily assumed risk of injury when he operated defective saw).

140. 376 N.W.2d 471 (Minn. Ct. App. 1985).

141. *Id.* at 472. The accident rendered the swimmer a quadrapalegic.

142. *Id.* at 473.

143. *Id.* at 472. The facts indicate the swimmer intended to dive into the shallow end by performing a "body surf dive." See *id.* at 473.

144. *Id.* at 476. The court recognized that the swimming pool industry is more aware of the risks inherent in shallow water diving than is the general public. In *McCormick*, however, the swimmer was not the general public, but rather an individual fully aware of the risks involved. *Id.* Cf. *Corbin v. Coleco Indus.*, 748 F.2d 411, 418-19 (7th Cir. 1984) (holding pool manufacturer liable for lack of warning when an average swimmer who had never swam in an above-ground pool attempted a shallow dive and was injured).


146. 403 N.W.2d 256 (Minn. Ct. App. 1987).

147. See *id.* at 261-62. The tenant in *Kvaal* had swum in his landlord's pool approximately 10 times, had previously performed surface dives, and had nearly twenty years of swimming experience. *Id.* at 258. Additionally, the tenant was aware of the depth markers and the sign warning against diving. *Id.* Unlike *McCormick*, however, the dive resulting in injury occurred at night while the tenant was intoxicated. *Id.* In distinguishing *McCormick*, the court considered relevant that the tenant believed he was only "a fair swimmer" and that the pool was an above-ground variety. *Id.* at 261.
landlord's vinyl lined, above-ground pool. A closely divided court held that once the defendant acknowledged the existence of a duty and a breach of that duty, the obviousness of the product defect would not relieve a product manufacturer of liability. Rather, the obviousness of the defect is only one factor to be considered in determining whether the product was unreasonably dangerous and whether the plaintiff used the degree of care required under the circumstances.

VII. THE BLURRING OF PRIMARY AND SECONDARY ASSUMPTION OF RISK

The assumption of risk doctrine has proved to be troublesome in other contexts as well. The duty of landowners, for example, traditionally depended upon the classification of the land entrant. Under the traditional doctrine, there was generally no obligation to protect the land entrant against dangers which were open and obvious. This open and obvious danger rule was sometimes treated as a type of contributory negligence or assumption of the risk. In Peterson v. Balach, the court abolished the distinction between licensees and invitees. "Rather than place the entrant (invitee or licensee) within a rigid classification, the new rule will impose the duty of reasonable care on both the landowner and entrant."

In Armstrong v. Mailand, the court defined the landowner's duty

148. Id. at 258.
149. See id. at 260. The trial court granted summary judgment in favor of the pool manufacturer and pool owner, finding that the tenant's injuries arose exclusively because of his own negligence. Id. at 258. On appeal, the manufacturer conceded a duty owed and a subsequent breach for purposes of summary judgment. Id. at 260.
150. See id. at 261. Rather than focusing on the plaintiff's knowledge of the risk, the court of appeals held that a manufacturer is required to exercise reasonable care so as to avoid any unreasonable risk of harm. To determine if reasonable care existed, the court applied a balancing test previously adopted by the Minnesota Supreme Court in Holm v. Sponco Mfg., 324 N.W.2d 207, 212 (Minn. 1982). Factors to be balanced include "the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution which would be effective to avoid the harm." See id. at 261 (quoting Micallef v. Miehle Co., 348 N.E.2d 571, 577-78 (N.Y. 1976)).
152. Id.
153. Id.
154. 294 Minn. 161, 199 N.W.2d 639 (1972).
155. Id. at 173, 199 N.W.2d at 647. The court explained that the licensee or invitee classification was no longer controlling, but rather one element to consider in determining a landowner's liability. Id.
156. Id.
157. 284 N.W.2d 343 (Minn. 1979).
of care with regard to firefighters. In this case, firefighters were called to fight a fire which developed as a result of an allegedly defective gas valve on an 11,000 gallon petroleum storage tank. The tank exploded and killed three firefighters. A wrongful death action was subsequently brought against the landowner.

The court relied upon Springrose to conclude that "primary assumption of risk is still available to relieve a defendant of his duty to plaintiff." The court went on to explain that a fireman "assumes, in a primary sense, all risks incident to his firefighting activities except for hidden risks which are known by the landowner." In an attempt to further define this concept, the court stated "that landowners owe firemen a duty of reasonable care, except to the extent firemen primarily assume the risk."

This circular and confused language can only mean that, as a matter of public policy, firefighters are deemed to assume those risks incident to their public duty to fight fires, whether those risks are created by the landowner's negligence or a manufacturer's defective product. While this rule was subsequently abolished by the state legislature, the notion that primary assumption of risk could relieve a defendant of a preexisting duty of care was readily adopted.

In Goodwin v. Legionville School Safety Patrol Training Center, Inc., the court expanded the proposition advanced in Mailand. In Goodwin, the plaintiff volunteered to assist a non-profit organization in roofing some dormitories at Legionville. She was subsequently injured when she fell from the roof. In analyzing this case, the court first articulated the rule expressed in Peterson that "a possessor of land owes to an entrant . . . a duty to exercise reasonable care for

159. Id. at 345-47.
160. Id. The firefighter also sought to recover against the provider of the LP gas and the manufacturer and installer of the LP gas equipment. Id. at 347.
161. Id. at 349.
162. Id. The firefighter's deaths were a result of a boiling liquid expanding vapor explosion (BLEVE), and evidence indicated that the firefighters had received training in combatting such an explosion. Id. at 347. The court determined that a BLEVE was a reasonably apparent danger in fighting a LP gas fire. See id. at 352-53. Thus, an improperly operated release valve only increased the risk of a BLEVE, but did not affect a firefighter's reasonable anticipation of a BLEVE. Id. at 353.
165. 422 N.W.2d 46 (Minn. Ct. App. 1988).
166. Id. at 47-48.
167. Id. at 48. The volunteers were told to "bring their own hammers and to wear rubber-soled shoes if they were going to help with roofing." Id.
her safety."  

168 Then, however, the court departed from traditional duty analysis. Rather than expressly stating the scope of the duty owed to the plaintiff, the court concluded that the plaintiff had primarily assumed the risk of injury because she "chose to encounter a well-known incidental [sic] risk of roofing; slipping and falling off the roof."  

169 As to those risks, the court concluded the respondent had no duty to protect the plaintiff.  

170 At the same time, the court quoted Mailand for the proposition that primary assumption of risk "refers to the concept that an appellant's actions can, in fact, negate a duty owed by a respondent."  

171 The use of this language is confusing in light of the court's earlier conclusion that the defendant owed no duty to protect the plaintiff from slipping and falling off the roof.  

172 Having applied the label of primary assumption of risk to the plaintiff's conduct, the court avoided the issue of secondary assumption of risk and contributory fault altogether. Perhaps the most unfortunate result of Goodwin, however, was the adoption of this confused language and analysis of primary assumption of risk in Andren v. White Rodgers Co., the most recent Minnesota case to apply assumption of risk in a products liability case.  

VIII. THE FACTS IN ANDREN  

The plaintiff owned a lake cabin which was heated by a space heater using liquid propane (LP) gas.  

173 The plaintiff bought the space heater in used condition and installed it himself.  

174 While he had no formal training in LP gas appliances, he had installed over 100 LP gas heaters.  

175 The heater worked without difficulty for several winters.  

176 In the winter of 1985, the plaintiff went to check on the cabin. When he entered the basement he noticed the smell of LP gas. As he
went further down into the basement the smell grew stronger. The plaintiff knew that LP gas could explode if exposed to a spark or an open flame, so he decided to open the basement windows to air the room out. Unable to open the windows, he decided to get a screwdriver from the car. At the top of the basement stairs, just as he left the basement, he lit a cigarette. The LP gas exploded and he was severely burned.

The plaintiff claimed a defective regulator valve had caused the LP gas to leak. He alleged strict liability, breach of warranty and negligence. For purposes of summary judgment, the manufacturer of the regulator in the gas heater admitted the valve was defective.

The stated issue before the court was whether "primary assumption of the risk can be a bar to recovery in a product liability case." The court held as a matter of law that the plaintiff’s act of lighting a cigarette in a room in which he smelled LP gas was primary assumption of the risk which relieved the defendants of liability for an allegedly defective valve. The plaintiff’s "volitional act [of lighting the cigarette] constituted consent to relieve respondents of their duty to protect Andren from harm." 

IX. ANALYSIS OF THE COURT’S HOLDING

The court began its analysis by stating the traditional definition of primary and secondary assumption of risk. Primary assumption of risk arises "[w]here parties have voluntarily entered a relationship in which plaintiff assumes well-known, incidental risks. As to those risks, the defendant has no duty to protect the plaintiff." In secondary assumption of risk, the plaintiff’s conduct "is a type of contributory negligence where the plaintiff voluntarily encounters a known and appreciated hazard created by the defendant without relieving the defendant of his duty of care with respect to such hazard." Having stated the traditional definition of primary and secondary assumption of risk, the court went on to blur the distinctions between them.

177. *Id.* Plaintiff believed that the pilot light on the heater had blown out, and therefore had sent his daughter upstairs to find matches to later use to light the heater. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 106.

184. *Id.*

185. *Id.* at 104 (quoting Olson v. Hansen, 299 Minn. 39, 44, 216 N.W.2d 124, 127 (1974)).

186. *Id.* (quoting Armstrong v. Mailand, 284 N.W.2d 343, 349 (Minn. 1979)).
Relying on the language in *Goodwin*, the court stated that "primary assumption of the risk relieves a defendant of liability when the plaintiff knows and appreciates a danger, yet voluntarily chooses to chance the risk."\(^{187}\) This language is problematic because primary assumption of risk does not "relieve" a defendant of a pre-existing duty. Rather, the defendant *owes no duty* with regard to the well-known risks incident to the activity. Presumably, the defendant in *Goodwin* had no affirmative duty to provide safety equipment, and as a matter of law, the plaintiff primarily assumed the risk of falling off the roof.

In contrast, the defendant in *Andren* owed the plaintiff an established duty of care to protect him from the risk of a dangerously defective product. Moreover, the risk of an explosion from a defective gas regulator was the very risk of harm the defendant’s duty was meant to protect against. Thus, the facts in *Andren* do not support a *no-duty* analysis of implied primary assumption of risk.

Nor do the facts support a *limited duty* analysis under the implied primary assumption of risk doctrine. The court relied upon the *Armstrong* "manifestation" test to conclude that the plaintiff’s "volitional act [of lighting a cigarette] constituted consent to relieve respondents of their duty to protect Andren from harm."\(^{188}\) The manifestation of consent alluded to in *Armstrong*, however, was the volitional act of pursuing an inherently dangerous career in firefighting and not the careless act of lighting a cigarette. The habitual act of lighting a cigarette is not a reliable test of the plaintiff’s subjective state of mind with regard to consent in relieving the defendant of his duty of care.

Moreover, *Andren* injected the patent danger rule into the analysis of the assumption of risk doctrine. The court quoted *Prosser and Kee- ton on Torts*, stating, "By voluntarily entering into a situation where the defendant’s negligence is obvious, the plaintiff accepts and consents to it and agrees ‘to undertake to look out for himself and relieve the defendant of the duty.’"\(^{189}\) The supreme court, in *Holm v. Sponco Mfg.*\(^{190}\), expressly rejected the obviousness of the product defect as a determinative factor in products liability cases. If the manufacturer is relieved of liability for a patent product defect, it "shifts the entire economic loss to the injured party, notwithstanding the fact that the manufacturer was, to some degree, at fault."\(^{191}\)

According to *Holm* and *Jonathan*, in products liability cases, the

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187. *Id.* at 105.
188. *Id.* at 106.
189. *Id.* at 105 (quoting *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 68, at 485 (5th ed. 1984)).
190. 324 N.W.2d 207 (Minn. 1982).
191. *Id.* at 213.
openness and obviousness of the danger is only one factor to be balanced in determining whether the plaintiff exercised that degree of care necessary under the circumstances. Perhaps to avoid this conclusion, the Andren court added that "primary assumption of the risk involves subjective and volitional elements which are beyond the scope of the latent-patent danger rule." The court never explains what these "volitional elements" might include.

As noted above, the latent-danger rule is just another way of expressing the rationale underlying the doctrine of assumption of risk. If the court meant to suggest that, under the patent danger rule, the defendant need not show that the plaintiff specifically understood the risk of injury from the product defect, this analysis is not supported by the facts in Holm or Jonathan.

In Holm and Jonathan, the plaintiffs were specifically aware of the risk from the product defect. Yet their "volitional" acts of operating a crane and diving head first into a pool were only a factor to be balanced in determining whether they used the degree of care re-

192. Andren, 465 N.W.2d at 105.
193. See supra notes 118-124 and accompanying text.
194. See, e.g., Weatherby v. Honda Motor Co., 393 S.E.2d 64 (Ga. Ct. App. 1990). In Weatherby, the plaintiff was injured when gas splashed from an open gas tank onto his motorcycle and ignited. Id. at 65. The court reaffirmed the open and obvious danger rule and stated that a product is not unreasonably dangerous to users if the "absence of a safety device is open and obvious." Id. The court went on to say:

Care should be taken to distinguish between the "open and obvious rule" and the affirmative defenses of contributory and comparative negligence and assumption of the risk. Although the rationale of the "open and obvious rule" is similar to that of these affirmative defenses, there are important substantive distinctions between them. In determining, under the "open and obvious rule," whether the peril from which an injury results is latent or patent, the decision is made on the basis of an objective view of the product, and the subjective perceptions of the user or injured party are irrelevant.

.... Actual knowledge by the user of the danger posed by a product is not necessary in order to invoke the "open and obvious rule."
Id. at 66-67. This definition of the patent danger rule does not include "volitional" elements beyond the assumption of risk doctrine. Moreover, it is difficult to see how the plaintiff's decision to use the motorcycle without a gas cap could be deemed to be anything other than an unreasonable assumption of risk or contributory negligence.

195. In Holm, the plaintiff had operated the crane over 2,000 times in a period of three years. Holm v. Sponco Mfg., 324 N.W.2d 207, 209 (Minn. 1982). The plaintiff was also aware of the tendency of the ladder to drift after the power was discontinued. Id. He also knew that the ladder was not insulated and that he "could be electrocuted if he or the ladder came in contact with an electrical line." Id.

In Jonathan v. Kvaal, 403 N.W.2d 256 (Minn. Ct. App. 1987), the pool contained a specific warning against jumping and diving into the shallow end of the pool. Jonathan, 403 N.W.2d at 258. The plaintiff had used the pool at least 10 times before the date of the accident. Id. The plaintiff knew about the danger of diving in a shallow pool, and on the night of the accident had consumed "an unknown quantity of strong beer." Id.
quired under the circumstances. In light of these decisions, it is difficult to argue that the habitual act of lighting a cigarette involves "subjective and volitional" conduct beyond the scope of the latent-patent danger rule. The act of operating a crane or diving into a pool involves volitional elements more deliberate than those of the plaintiff in *Andren*. Thus, the facts in *Andren* provide only questionable support for a primary assumption of risk analysis.

In refuting a secondary assumption of risk analysis, the *Andren* court stated, "The manifestations of acceptance and consent dictate whether primary or secondary assumption of the risk is applicable in a given case."196 The adoption of this "manifestation" test is problematic for several reasons. First, the test does little to distinguish between primary and secondary assumption of risk. Under the court's analysis, the elements of primary and secondary assumption of risk are identical. If this is true, then why should the defendant be relieved of liability under primary, but not secondary, assumption of risk? The answer lies not in some notion of consent, but rather in the scope of the defendant's duty of care. If the defendant had a duty to prevent the risk of injury from a defective valve, then secondary assumption of risk should be applied. If the court determines the defendant had no duty to guard against that product defect, or the way in which the harm arose, then primary assumption of risk should be applied. This distinction is consistent with the definition adopted by the Minnesota Supreme Court in *Springrose v. Williams*,197 the majority of Minnesota products liability cases,198 and the policies underlying comparative fault.199

*Andren*’s analysis is also troublesome in another respect. The court adopted a minimal threshold for supporting the "manifestation" of consent needed to absolve a defendant of liability. In sport participant cases, the subjective intent to incur the added risk of injury can be objectively verified by the willingness to play the game. Thus, the danger of inferring consent where none actually exists is minimal. In contrast, under the *Andren* "manifestation" test, virtually any act

196. *Andren*, 465 N.W.2d 102, 105 (Minn. Ct. App. 1991) (citing Armstrong v. Mailand, 284 N.W.2d 343, 351 (Minn. 1979)).

197. 292 Minn. 23, 192 N.W.2d 826 (1971).

198. *See supra* notes 99-106 and accompanying text; *see also* Law v. Superior Court, 755 P.2d 1135 (Ariz. 1988) (rejecting the patent danger rule, obviousness of defect goes to duty and comparative fault); Ward v. K Mart Corp., 554 N.E.2d 223, 228 (Ill. 1990) ("invoking such relative and imprecise characterizations as 'known' or 'obvious' is certainly no adequate substitute for assessing the scope of the defendant's duty under the circumstances"); Socorro v. New Orleans, 579 So. 2d 931, 941 (La. 1991) (rejecting "attempts to define the defendant's initial duty in terms of the plaintiff's actual knowledge").

199. *See supra* notes 7-9 and accompanying text.
could be held to satisfy the court's implied primary assumption of risk analysis.

The court found that Andren's act of lighting a cigarette manifested "consent to relieve [the manufacturers] of their duty to protect Andren from harm." However, it is doubtful that Andren's act of lighting the cigarette was ever intended to release the manufacturer from a duty of care. As the dissent noted, Andren "would never have consented to self combustion." Arguably, Andren's conduct may have been unreasonable in light of his knowledge concerning the risk of injury from an explosion. Nonetheless, Andren's failure to use reasonable care for his own safety is related primarily to his contributory negligence and not to his subjective state of mind with regard to consent in relieving the manufacturer of its duty of care toward him. In this case, Andren's unreasonable assumption of risk in its secondary form should have been apportioned under the Comparative Fault Act.

Despite this conclusion, the court focused on Andren's lack of due care for his own safety as the determinative factor in apportioning fault. "Andren had a choice to avoid the danger by not smoking, yet he voluntarily chose to light the cigarette." The court may have been expressing the notion that a product manufacturer is not an insurer for all injuries proximately caused by a defective product. Therefore, the duty of a manufacturer may be limited. However, the primary assumption of risk doctrine, as noted above, is a blunt tool for assessing fault and shifts the risk of loss in products liability cases to the plaintiff.

A better approach is to use the traditional duty analysis for limiting a manufacturer's liability. Under the traditional duty analysis, the court controls the scope of the defendant's duty of care by balancing the relevant policies and social objectives in imposing liability on product manufacturers. This approach fosters the development of products liability law and reflects a reasoned basis for imposing fault based on the plaintiff's and the defendant's conduct.

200. 465 N.W.2d at 106.
201. Id. (Norton, J., dissenting). The dissent argued that primary assumption of risk was inapplicable because "Andren never agreed to relieve defendants of their duty to protect him." Id.
202. Unfortunately, Andren did not discuss the nature of liquid propane (LP) gas, or the plaintiff's specific knowledge about the risk of an explosion with LP gas. LP gas, unlike natural gas, is heavier than air and collects in low places. See VIII THE NEW ENCYCLOPAEDIA BRITANNICA, MICROPAEDIA 239-40 (1981). The plaintiff had installed over 100 LP gas heaters and was aware of the storage tank's capacity. Thus, he may have reasonably assumed that lighting a cigarette at the top of the basement stairs would not create a risk of explosion.
203. Id. at 105.
204. See supra Part V.B.
Under the traditional duty analysis, a product manufacturer may be held liable if the product in some way creates the necessity for the plaintiff's subsequent conduct. 205 This focus should be contrasted with assumption of risk cases, where the relevant inquiry is the plaintiff's subjective manifestation of consent and not the defendant's duty of care. 206 Thus, by focusing on the plaintiff's fault, Andren ignored the very reason for imposing liability on a product manufacturer. Moreover, this approach eliminates the manufacturer's contribution in creating risk and displaces the notion of comparative fault.

An example illustrates the inequities of applying the assumption of risk doctrine without critically examining the doctrine's risk shifting effect. Assume the facts in Andren, except that a third party was sitting at the kitchen table when the explosion occurred. The third party could bring a claim against both Andren and the defendant manufacturer for injuries caused as a result of their negligence. Under established principles of joint and several liability, fault would be apportioned among the defendants. The manufacturer could not shift the entire risk of loss to Andren since both parties would be causally at fault. 207 If this is the case, it is difficult to see why Andren's conduct, standing alone, creates a different result.

The same conclusion is reached under third-party indemnity principles as well. 208 Under the facts of Andren, the manufacturer could not "shift the entire loss from one culpable wrongdoer to another." 209 Under the principles of joint liability and indemnity, all

205. See, e.g., Anderson v. Northwestern Elec. Coop., 760 P.2d 188 (Okla. 1988) (holding there was no assumption of the risk, as a matter of law, where a truck driver crawled into a truck, which had come into contact with electric wires, in an effort to shut off a propane tank and avoid an explosion); Wallace v. Owens-Illinois, Inc., 389 S.E.2d 155 (S.C. Ct. App. 1989) (holding that an intervening act does not break the chain of causation if it is a normal response to the situation created by the original wrongful act).

206. See supra Part V.A.

207. See Michael K. Steenson, Joint and Several Liability Minnesota Style, 15 WM. MITCHELL L. REV. 969 (1989). "The rule of joint and several liability results in the imposition of liability on multiple defendants whose fault combined to cause a single, indivisible injury or damage to the plaintiff." Id. at 969.

208. There are only five situations where indemnity is allowed between joint tortfeasors: (1) where the one seeking indemnity has only a derivative or vicarious liability in relation to the other tortfeasor, (2) where the one seeking indemnity has incurred liability by action at the direction, in the interest of, and in reliance upon the one sought to be charged, (3) where the one seeking indemnity is liable because of a breach of duty owed to him by the other tortfeasor, (4) where the one seeking indemnity has incurred liability only because of failure, even through neglect, to discover or prevent the misconduct of the other tortfeasor, and (5) where there is an express contact between the parties to shift the risk of loss. Frey v. Montgomery Ward & Co., 258 N.W.2d 782, 788 (Minn. 1977).

tortfeasors must "accept responsibility for damages commensurate
with their own relative culpability."210 Nor could the manufacturer
shift the risk of loss by asserting that Andren's conduct was a super-
seding and intervening cause of the accident.211

In light of the above analysis, the unfairness inherent in Andren's
use of the primary assumption of risk doctrine is apparent. Why
should primary assumption of risk operate to "relieve" the defend-
ant of his causal share of fault when the defendant is unable to do so
under either a joint tortfeasor, indemnity, or superseding cause anal-
ysis? The Comparative Fault Act also supports the notion that even
unreasonable assumption of risk should not necessarily bar recov-
ery.212 Even under the latent-patent danger rule, the plaintiff's
knowledge and appreciation of the product risks are only two factors
to be balanced in determining whether the plaintiff used the degree
of care required under the circumstances.213 By focusing on a plaint-
iff's conduct instead of a defendant's duty of care, Andren placed
the full risk of loss on Andren, despite the fact that the manufacturer was

to the decision in Tolbert, a negligent tortfeasor could seek indemnity from a co-def-
endant if the "party seeking indemnity was merely 'passive' or 'secondary' as con-
trasted with the 'active' or 'primary' negligence of the other tortfeasor." Id.

210. Id.

211. See Ruberg v. Skelly Oil Co., 297 N.W.2d 746, 750 (Minn. 1980). In order for
Andren's conduct to be a superseding cause of the accident, four elements must be
satisfied: (1) the harmful effect of the plaintiff's conduct must occur after the defend-
ant's negligence, (2) the harmful result must not have been brought about by the
original negligence, (3) the plaintiff's conduct must actively work to bring about a
result which would not have occurred from the defendant's negligence, and (4) it
must not have been reasonably foreseeable by the original wrongdoer. Id. In Andren,
at least one element, number three, has not been satisfied.

Moreover, under the Comparative Fault Act, "all independent and concurrent
causes of an accident may be apportioned on a percentage basis." Omnetics, Inc. v.
Radiant Technology Corp., 440 N.W.2d 177, 182 (Minn. Ct. App. 1989) (interpreting
MINN. STAT. § 604.01 (1990)). In Andren, both Andren's and the manufacturer's
conduct were independent and concurrent causes of the accident. The manufacturer
was negligent in placing the risk before Andren, and Andren was negligent in failing
to guard against a known and appreciated risk of injury. Andren, 465 N.W.2d 102

212. MINN. STAT. § 604.01, subd. 1a (1990). See, e.g., Brooks v. Dietz, 545 P.2d
1104 (Kan. 1976) (holding that a furnace repairman could not be contributorily neg-
ligent as a matter of law when he re-entered basement to search for gas leak without
shutting off main gas valve); Newland v. City of Winfield, 289 P. 402 (Kan. 1930)
(plaintiff was not contributorily negligent as a matter of law when he searched for gas
leak with lighted match); Louisville Gas Co. v. Fry, 145 S.W. 748 (Ky. 1912) ("It is
not contributory negligence, as a matter of law, to enter the basement of a home
where gas is perceptibly escaping, or to search for the location of the leak with a
light.").

that swimmer's knowledge of the danger in use of pool is only one factor in deter-
mining liability).
to some degree at fault.214

If the Andren court was troubled by the potential scope of the manufacturer’s liability, it should have applied a traditional duty analysis to limit the manufacturer’s liability without placing an undue emphasis on the consumer’s conduct or distorting the implied primary assumption of risk doctrine.215 A manufacturer’s duty could be limited to all foreseeable ways in which the product creates an unreasonable risk of injury, but not to all injuries proximately caused by a defective product. In other words, the manufacturer may have a duty to foresee the way in which the product will be used and to protect the consumer from certain foreseeable uses and abuses. This notion is readily demonstrated in cases involving defective products in the workplace,216 products which encourage hazardous repairs or maintenance,217 and foreseeable product misuse cases.218

214. See, e.g., Francis H. Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14 (1906) (arguing that all cases of assumption of risk are explainable on the grounds that either defendant owed no duty to the plaintiff or that the plaintiff was contributorily negligent).

215. The state of the art defense may relieve a defendant of liability under either the risk-utility or consumer expectations test. The state of the art defense relieves a manufacturer of liability if the product defect was unknown or unknowable at the time the product was marketed. The asbestos and cigarette cases are two examples. See Gary C. Robb, *A Practical Approach to Use of State of the Art Evidence in Strict Products Liability Cases*, 77 NW. U. L. REV. 1, 4-5 (1982); see also MINN. STAT. § 604.03 (1990) which provides:

In any action for the recovery of damages for personal injury, death or property damage arising out of the manufacture, sale, use or consumption of a product, it is a defense to a claim against a . . . manufacturer . . . that the injury was sustained following the expiration of the ordinary useful life of the product.

The useful life of a product is not necessarily the life inherent in the product, but is the period during which with reasonable safety the product should be useful to the user.

Id. at subds. 1, 2.

216. See, e.g., Calmes v. Goodyear Tire & Rubber Co., 575 N.E.2d 416, 421 (Ohio 1991) (finding a worker’s unreasonable assembly of a tire rim was not a defense to a strict product liability claim); Ingram v. Caterpillar Mach. Corp., 535 So. 2d 723 (La. 1988) (holding that an operator’s “careless” use of a forklift did not constitute conduct outside of normal use and, therefore, did not absolve manufacturer of liability for failure to warn).

217. See, e.g., Germann v. F.L. Smithe Mach. Co., 395 N.W.2d 922, 924 (Minn. 1986) (holding that manufacturer had a duty to warn where the design of a safety bar on a hydraulic press required its removal for maintenance); Crispin v. Volkswagenwerk AG, 591 A.2d 966, 978 (N.J. Super. Ct. App. Div. 1991) (finding motorist was not comparatively negligent in failing to wear seat belt, when manufacturer breached duty to warn of special need to wear belt because seat was designed to collapse upon impact).

218. See, e.g., Johnson v. Southern Minn. Mach. Sales, 442 N.W.2d 843 (Minn. Ct. App. 1989) (finding that manufacturer breached duty to avoid the risk of harm to worker’s unintended, yet reasonably foreseeable, use of the table saw for freehand cutting); Huber v. Niagara Mach. & Tool Works, 417 N.W.2d 740, 743 (Minn. Ct.
The application of the duty analysis in products liability cases will assist the court in defining the scope of the manufacturer’s duty to provide safe products. The court may decide, for example, that the risk of an explosion from lighting a cigarette, an act with little utility and not in response to some necessity created by the defendant’s product, is judicially outside of the scope of the defendant’s duty of care. In this manner, the policies underlying products liability law and the notions underlying the Comparative Fault Act could be achieved without shifting the entire risk of loss on the plaintiff.

X. CONCLUSION

The court may have found primary assumption of risk an attractive doctrine because a court may decide as a matter of law that the defendant is absolved of liability. However, the Comparative Fault Act and the policies underlying products liability are best served if primary assumption of risk is reserved for those cases in which the plaintiff’s consent to incur the risk is manifest and certain. In view of the relationship between a product manufacturer and a consumer, it will be a rare case in which the plaintiff’s conduct is sufficiently manifest and certain to justify the application of the implied primary assumption of risk doctrine.

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App. 1988) (holding that a duty to warn arises if a manufacturer anticipates that an operator might use a machine in a manner which increases risk), rev’d, 430 N.W.2d 465 (Minn. 1988).

219. In the alternative, the court could have found that no reasonable jury would have apportioned Andren’s fault less than the manufacturer’s fault. In Minnesota, if the plaintiff’s fault in causing the accident is found to be 51% or more, they are barred from recovery. See MINN. STAT. § 604.01, subd. 1 (1990). “Contributory fault does not bar recovery in an action by any person . . . if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed must be diminished in proportion to the amount of fault attributable to the person recovering.” Id.