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Torts: Playing the Blame Game: The Division of Fault between Negligent Parties in Minnesota—Daly v. McFarland

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TORTS: PLAYING THE BLAME GAME: THE DIVISION OF
FAULT BETWEEN NEGLIGENT PARTIES IN
MINNESOTA—DALY V. MCFARLAND

Robert Cary†

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I. INTRODUCTION

How should a court divide up fault between two negligent parties? Since its early roots in English common law, this seemingly simple question has continuously confused juries, judges, and lawyers alike. The question remains at the heart of three prominent legal doctrines: (1) reconciliation of inconsistent special verdicts, (2) primary assumption of risk, and (3) the application of emergency rule instructions. All three of these doctrines were at issue in the Minnesota Supreme Court’s recent decision in *Daly v. McFarland.* As this note will discuss, all three doctrines serve only to confuse the question of how courts divide fault between negligent parties. If we are ever to provide a consistent answer to this question, the application of all three doctrines in Minnesota must undergo a serious adjustment, if not an altogether abandonment.

This note begins with a historical look at Minnesota cases that lay the foundation for the court’s decision in *Daly.* Then, given this context, the note examines whether the *Daly* decision flows logically from the previous case law. Lastly, it concludes that although the court generally got the decision right, it missed an opportunity to bring clarity to an issue that desperately needs it.

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2. 812 N.W.2d 113 (Minn. 2012).
II. HISTORY

Determining whether the Daly decision was right or wrong depends largely on the historical context of each of the three issues at play. Therefore, before any analysis of Daly can be made, a historical background must be built for each of the three issues involved. Parts A, B, and C of this section examine the origins of contributory negligence. Parts D and E discuss the origins of comparative fault. Part F discusses assumption of risk and Part G discusses the emergency rule.

A. Establishing a Prima Facie Negligence Claim

Before an examination of its history, it is important to understand what a claim of negligence actually entails. Intentional torts involve the intentional harming of a person and thus prohibit specific acts like intentional touching and intentional confinement. Negligence, on the other hand, cannot be neatly categorized by a number of specifically forbidden acts. Instead, negligence entails an actionable harm created by a party’s unreasonably risky conduct. Such a determination cannot be made by simply listing out all conduct deemed unreasonably risky. Instead, courts have developed a general formula for a negligence claim that requires the injured party to establish the following four factors:

1. The tortfeasor owed the injured party a legal duty.
2. The tortfeasor breached that duty by behaving negligently.
3. The injured party suffered actual damage.
4. The tortfeasor’s negligence was an actual and proximate cause of the damage.

The injured party has the burden of proof in establishing all four of these elements, and if the injured party fails to meet any one of them, he will not be able to recover.

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4. Id. Notably, this definition makes no mention of an intent element, which is so central to the intentional harms like assault, trespass, false imprisonment, etc.
5. See Restatement (Second) of Torts § 281 (1965); Dobbs et al., supra note 3, at 108.
B. A Brief History of Negligence as an Independent Tort Action

The general formula for establishing a prima facie negligence claim was not developed in a single landmark decision. Instead, it is the product of a slow development through common law, culminating in the ratification of the Restatement (Second) of Torts § 281. Negligence-based claims originated in England as the public began to recognize the benefit of holding certain agents like carriers, innkeepers, and surgeons to a higher public standard. The arrival of the Industrial Revolution would further spur a recognition of negligence as a separate and independent basis for tort liability. Ultimately, the central question surrounding negligence claims has always involved determining what behavior counts as causing an unreasonable risk of harm.

C. Contributory Negligence as an Affirmative Defense

As stated previously, the injured party bears the burden of proof in establishing the four elements that make up a prima facie case for negligence. If an injured party successfully establishes all four elements, the claim will survive the summary judgment stage and reach the jury. However, establishing a prima facie case does not mean the injured party is entitled to recovery. As often is the case, the injured party may see his recovery reduced or even dismissed if the tortfeasor can mount a successful affirmative defense. Notably, the burden of proof shifts from the injured party to the tortfeasor at this stage. Whereas it previously lay upon the injured party to establish the four factors of negligence, the tortfeasor now bears the burden of proof in establishing the existence of an affirmative defense. Although a number of affirmative defenses exist, the most common is contributory negligence—in which the tortfeasor asserts that the injured party

9. Restatement (Second) of Torts § 281.
10. Dobbs et al., supra note 3, at 251.
11. Id.
12. Id.
13. Local statutes will often create specific defenses relating to particular types of cases. In addition, legislatures may establish "partial" affirmative defenses, such as damage caps. Id.
himself behaved negligently and thus should see a reduction in recovery.\textsuperscript{14} Importantly, the tortfeasor is not claiming that the injured party failed to establish one of the four elements of a negligence claim. Instead, contributory negligence asserts that the injured party should be denied recovery because his own conduct disentitles him from maintaining the action.\textsuperscript{15}

\textbf{D. A Brief History of Comparative Fault}

\textit{1. The Early Days}

In its earliest stages, contributory negligence was viewed as a complete, all-or-nothing defense to an injured party’s claim.\textsuperscript{16} Thus, any finding of contributory negligence at all, no matter how small, would completely bar an injured party from recovery.\textsuperscript{17} Such was the case even when a tortfeasor’s negligence was extreme and the injured party’s negligence was relatively minor.\textsuperscript{18} The earliest forms of contributory negligence were an all-or-nothing game, where a single drop would poison an injured party’s claim, barring him from any recovery whatsoever.

A number of justifications have been put forth for this early conception of contributory negligence. Generally, tort law has employed two goals associated with its construction: (1) the compensation of injured parties, and (2) deterring unsafe conduct.\textsuperscript{19} The early all-or-nothing view of contributory negligence clearly serves the latter of these twin goals. Instead of focusing on the compensation of injuries, early courts seemed more concerned with punishing a plaintiff’s own negligent behavior in an effort to

\textsuperscript{14} See Keeton et al., supra note 7, § 65, at 451 (defining contributory negligence as “[c]onduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection”). A contributory negligence analysis involves essentially the exact same four-element analysis, but instead relating to the injured party’s duty, breach, actual and proximate cause, and damages. See Restatement (Second) of Torts § 463 cmt. b.

\textsuperscript{15} As Prosser elegantly puts it, “In the eyes of the law both parties are at fault; and the defense is one of the plaintiff’s disability, rather than the defendant’s innocence.” Keeton et al., supra note 7, § 65, at 452.

\textsuperscript{16} Dobbs et al., supra note 3, at 253; see, e.g., Butterfield v. Forrester, (1809) 103 Eng. Rep. 926 (K.B.), 11 East 60.

\textsuperscript{17} Dobbs et al., supra note 3, at 253.

\textsuperscript{18} So long as the defendant’s negligence did not rise to the level of a reckless or wanton act. Id.

\textsuperscript{19} See generally id. at 2–20.
deter future conduct. With this motivation in mind, courts conceived that injured parties should come to the courtroom with "clean hands," and failure to do so would result in a complete denial of recovery.

Another justification for the all-or-nothing view of contributory negligence derived from the economic climate of the time. The industrial sector was undergoing a boom in growth, and the courts made a conscious effort to stay out of its way as much as possible. Coupled with an inherent distrust of plaintiff-minded juries, courts recognized that industrial growth would be severely hindered if liabilities got out of control. The all-or-nothing view served as the courts' way of preventing precedent from being introduced that might slow industrial growth. Once again, the emphasis on deterrence rather than compensation was apparent.

Thinking of contributory negligence as an all-or-nothing defense is an antiquated viewpoint in light of modern tort law. In addition to the justifications discussed, the courts' views on contributory negligence were largely due to an inability to come up with a system for apportioning fault. Unlike today, early courts thought that a single, indivisible injury must fall solely on the plaintiff or the defendant. Unfortunately, this would often lead to disproportionately harsh results for injured parties, even when their own negligence was relatively small and the tortfeasor's was quite extreme. If negligence is thought of as a deviation from a

20. KEETON ET AL., supra note 7, § 65, at 453 ("With the gradual change in social viewpoint, such that the compensation of injured persons appears to have become the dominant goal of accident law, the defense of contributory negligence has come to be looked upon with increasing disfavor by the courts . . . ").
21. Id. at 452.
23. Malone, supra note 22, at 158.
24. KEETON ET AL., supra note 7, § 65, at 452 (explaining the reasoning behind the all-or-nothing approach: "[c]hief among these was . . . a desire to keep the liabilities of growing industry within some bounds").
25. Id. at 470.
26. Heil v. Glanding, 42 Pa. 493, 499 (1862) ("The reason why, in cases of mutual concurring negligence, neither party can maintain an action against the other, is . . . that the law cannot measure how much the damage suffered is attributable to the plaintiff's own fault.").
27. KEETON ET AL., supra note 7, § 67, at 468-69 ("The hardship of the doctrine of contributory negligence upon the plaintiff is readily apparent. It places upon one party the entire burden of a loss for which two are, by hypothesis, responsible.").
communal standard of behavior, it makes little sense why a tortfeasor’s negligence, which was just as much a cause of the injury as plaintiff’s, was given so much more leeway. As shown in the following section, this is no longer the case.

2. Contemporary Comparative Fault Systems

The deficiencies of the early all-or-nothing conception of contributory negligence necessitated a different way of looking at fault apportionment. Instead of focusing on deterring a potential plaintiff’s negligence, courts began to focus on remedying an injury in the most just way possible, marking a shift in the twin goals of tort law. Whereas the focus was previously on deterrence, contemporary courts now employ fault-apportionment systems that emphasize compensation.

Instead of playing an all-or-nothing game focused on liability, the courts shifted their attention to dividing damages between the parties at fault. Although courts were initially reluctant to begin dividing up fault, this type of damage apportionment already existed in many civil law and common law jurisdictions outside of the United States. Furthermore, fault apportionment was a common concept in English admiralty law with the adoption of the Brussels Maritime Convention and its provision holding that damages would be divided “in proportion to the degree in which each vessel was at fault.” Eventually, comparative fault would

28. Id. at 469.
29. See id. (“[I]t is quite unlikely that forethought of any legal liability will in fact be in the mind of either party. No one supposes that an automobile driver, as he approaches an intersection, is in fact meditating upon the golden mean of the reasonable person of ordinary prudence, and the possibility of tort damages, whether for himself or for another.” (footnote omitted)); see also Alvis v. Ribar, 421 N.E.2d 886, 893–94 (Ill. 1981).
30. KEETON ET AL., supra note 7, § 67, at 470.
31. Id. (discussing the common reasons for the courts’ reluctance, including judicial inertia, tradition, and a distrust of the unreliability of a jury in determining the division of damages).
32. HENRY WOODS, THE NEGLIGENCE CASE: COMPARATIVE FAULT, § 1:9, at 17 (1978) (including Switzerland, Spain, Portugal, Austria, Germany, France, Philippines, China, Japan, Russia, Poland, and Turkey).
33. England has had a “pure” comparative fault system since 1945. KEETON ET AL., supra note 7, § 67, at 470 n.16.
34. See id. at 471 n.17 (citing Maritime Conventions Act, 1911, 1 & 2 Geo. 5, c. 57, § 1).
35. Id. at 471. Ultimately, American courts would adopt a similar “pure” comparative fault system in maritime law in the 1975. See United States v. Reliable
expand into American jurisprudence in the early to mid-twentieth century.  

\[ \text{a. Pure Comparative Fault Systems} \]

As comparative fault was first getting on its feet, the simplest and most flexible method of dividing damages was the “pure” comparative fault system. In a pure comparative fault jurisdiction, damages are reduced in strict proportion with the injured party’s fault. However much the plaintiff was deemed responsible for the accident would be the exact amount by which his recovery would be reduced. Thus, once a jury determines the percentage of fault for each party, apportioning the damages becomes relatively simple under a pure comparative fault system.

Unfortunately, the pure comparative fault system possesses a major flaw. Because it bases recovery on pure proportionality, it can sometimes permit a severely negligent party to recover against a slightly negligent party, solely because the former suffered more severe injuries. In an effort to avoid this scenario, many jurisdictions have adopted a modified version of the pure comparative system.

\[ \text{b. Modified Comparative Fault} \]

The most common means of apportioning fault, the “modified” comparative fault system is essentially a combination of the all-or-nothing approach and the “pure” comparative fault system. As was done in a pure comparative fault system, both plaintiff and defendant are assigned a percentage of fault. However, if a plaintiff is apportioned over 51% of the fault of the accident, then he will not recover (echoing the complete bar to


36. See KEETON ET AL., supra note 7, § 67, at 471 (pointing out that the first state to adopt a comparative fault act was Mississippi in 1910).
37. DOBBS ET AL., supra note 3, at 254.
39. Such is the case where both parties have suffered injuries due to the other’s negligence. See Bradley v. Appalachian Power Co., 256 S.E.2d 879, 883 (W. Va. 1979) (illustrating how a less-at-fault party may be forced to pay the more-at-fault party under the “pure comparative negligence rule”).
40. See SCHWARTZ, supra note 38, § 3.5, at 73–82.
41. DOBBS ET AL., supra note 3, at 254.
recovery seen in the all-or-nothing system). If the plaintiff is apportioned less than 51%, then his damages are simply reduced proportionally to his fault, just as was done in the pure comparative fault system. In 1969, Minnesota became a modified comparative fault jurisdiction with the ratification of Minnesota Statute section 604.01.

E. Distinguishing Between Fault and Cause Apportionment in Minnesota

The previous sections showed the long evolution of contemporary comparative fault, from the early all-or-nothing method to Minnesota’s adoption of “modified” comparative fault. Having determined how Minnesota arrived at its current system, it is important to discuss how that system actually works. In either contemporary comparative fault system, be it pure or modified, the most important step is the jury’s actual apportionment of fault—that is, the step in which they deem the injured party to be one percentage at fault and the tortfeasor another. Unfortunately, this all-important step is often clouded in confusion, frequently resulting in inconsistent jury verdicts.

42. In a number of states, the threshold percentage is 50% instead of 51%. See, e.g., Moyer Car Rental, Inc. v. Halliburton Co., 610 P.2d 232 (Okla. 1980). This is known as the “equal fault bar” approach because it will completely bar a plaintiff’s recovery if his fault is equal to (or greater than) the defendant’s. See id. The distinction is important. Juries will often resort to a 50-50 apportionment of fault when the case is simply too close to call. If within an “equal fault bar” jurisdiction, a 50-50 division means that the plaintiff is unable to recover. See id. However, if the threshold is upped to 51%, the plaintiff will not be completely barred by a 50-50 apportionment. See id. The following states still use the 50% threshold: Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, North Dakota, Utah, West Virginia, and Wyoming. Keeton et al., supra note 7, § 67, at 473 n.39.

43. Just as the pure comparative fault system possessed a major drawback, so too does the modified system. The flaw occurs when a plaintiff is comparing his negligence to that of multiple defendants. To determine if he is able to recover at all, the plaintiff compares his fault to each individual (remember, he is completely barred from recovery if his fault is greater than that of the defendant). Therefore, defendants are encouraged to join as many parties as possible in order to lower the percentage of fault for each individual defendant. Some states have tried to remedy this problem by implementing a “unit rule” which aggregates the negligence of all the defendants. See Keeton et al., supra note 7, § 67, at 473–74; see also id. § 67, at 474 n.46 (providing examples of the “unit rule” jurisdictions). However, Daly does not involve multiple defendants, requiring no further elaboration.

44. Minn. Stat. § 604.01 (2012).

45. See supra Part II.A–D.
The confusion seen in the apportionment step often comes from not being fully clear on the distinction between cause and fault. Although it may be subtle, the distinction becomes apparent by understanding one key notion: a party will never be legally responsible for an act, no matter how severely negligent, if the act causes no actual harm. In other words, a party will not be liable if there is no direct cause. For example, a person driving 70 miles per hour through a residential neighborhood, but does not hit anything, will not be liable for negligence because he was not a direct cause of any harm. Causation is binary; it either exists or it does not. If it does, and the jury determines that a party was a direct cause, the jury can then apportion that party the percentage of fault of the accident. Therefore, it is inconsistent for a jury to rule a party to not be a direct cause of an accident, and then apportion that same party a percentage of fault for the accident. Unfortunately, this distinction is a difficult concept to grasp and can often lead to inconsistent jury verdicts, much like the one seen in Daly.

With the 1951 enactment of Rule 49.01 of the Minnesota Rules of Civil Procedure, Minnesota introduced special verdict forms to jury trials. In negligence cases, special verdict forms are often the primary way of getting the jury to assign percentages of fault to each party. Although it is logically inconsistent to do so, it is an unfortunate reality that juries will sometimes apportion fault to a party who they have already determined not to have been a direct cause of the accident. Evolving from a series of cases responding to this very scenario, Minnesota courts have developed a two-step protocol for dealing with inconsistent special verdicts: (1) if possible, the court should reconcile the inconsistent answers; (2)
if reconciliation is not possible, then the court should either have the jury deliberate further or issue a new trial.

When faced with an inconsistent special verdict form, Minnesota courts will first look to reconcile the inconsistent answers if it is at all possible to do so. Such was the case in *Reese v. Henke*, in which the Minnesota Supreme Court held that, as a matter of law, it was its duty to reconcile the verdict. In doing so, the court held that the special jury verdict should be liberally construed in order to maintain the true intent of the jury. Furthermore, the *Reese* court held that reconciling special verdict answers must be done such that a reasonable person could only interpret the inconsistent answers in one way. The important takeaway from *Reese* is that courts will first try to reconcile inconsistent answers in order to maintain the jury’s intent.

If the inconsistent answers can simply not be reconciled, then the court will likely either send the jury back for further deliberation or order a new trial. The option to resubmit the case to the jury was established by the 1975 ruling in *Peterson v. Haule*. There, the jury returned a special verdict finding that both defendants were negligent, but neither was a direct cause of the accident. Despite this determination, the verdict later evidence and its fair inferences.

53. *Peterson v. Haule*, 304 Minn. 160, 174–75, 230 N.W.2d 51, 60 (1975) (“[T]he trial judge could either have ordered a new trial or sent the jury back for further deliberations.”).

54. *Meinke v. Lewandowski*, 306 Minn. 406, 412, 237 N.W.2d 387, 391 (1975) (recognizing that ordering a new trial is a legitimate course of action when faced with inconsistent answers to special verdict interrogatories).

55. 277 Minn. 151, 152, 152 N.W.2d 63, 64–65 (1967). Plaintiff in *Reese* was a passenger in a car that was involved in an accident with a truck. *Id.* Plaintiff sued the drivers of both vehicles for negligence. *Id.* The jury returned a special verdict form indicating that both defendants were negligent, but the driver of the car did not directly cause the accident. *Id.* at 155, 152 N.W.2d at 66. The truck driver argued that this verdict was inconsistent.

56. *Id.* at 156, 152 N.W.2d at 67.

57. *Id.* at 155, 152 N.W.2d at 66.

58. *Id.* Ultimately, the *Reese* court reconciled the special verdict form by holding that a reasonable person could only interpret the answers to mean that both defendants were direct causes of the accident and therefore liable to the plaintiff. *Id.* at 156, 152 N.W.2d at 67.


60. 304 Minn. 160, 230 N.W.2d 51 (1975). Plaintiff, a ten-year-old girl, was injured when she walked into a restaurant’s glass door, causing the glass pane to fall on top of her. *Id.* at 161, 230 N.W.2d at 53.

61. *Id.* at 163–65, 230 N.W.2d at 54.
apportioned liability to both defendants.62 The jury admitted that they had trouble understanding some of the questions, prompting the trial judge to revise and resubmit the questions for further deliberation.63 As a result, the jury subsequently returned a consistent special verdict form, finding that the defendants were in fact direct causes of the plaintiff’s injuries.64 Upon appeal, the Minnesota Supreme Court affirmed that the trial court’s response to the inconsistent answers was both legitimate and the ideal course of action given the circumstances.65

The third option is to simply order a new trial. In Meinke v. Lewandowski,67 the Minnesota Supreme Court exercised this option after the trial judge had improperly reconciled an inconsistent special verdict.68 While the Meinke court affirmed that ordering a new trial was a legitimate option, it stressed that it was the least preferable of the three.69 In fact, the only reason the court elected to order a new trial was because the trial court, having been presented with the inconsistent answers, improperly directed the jury to change specific responses in order to make the special verdict consistent.70 However, having passed the trial court stage,71

62. Id. at 164–65, 230 N.W.2d at 54.
63. Id. at 165, 230 N.W.2d at 55.
64. Id. at 166, 230 N.W.2d at 55.
65. Id.
66. Id. at 175, 230 N.W.2d at 60 (“[T]he trial judge could either have ordered a new trial or sent the jury back for further deliberations . . . . [T]he course selected by the trial court was the appropriate one under the circumstances of this case also. It was clearly shown by its answers to the special interrogatories and its questions to the court that the jury was considerably confused as to direct cause. To enter judgment for defendants in such a case would be to ignore the realities of the situation. The trial judge should consider the surrounding circumstances in disregarding the inconsistent answers of the jury and in sending them back for further deliberations.”).
67. 306 Minn. 406, 237 N.W.2d 387 (1975). Meinke again involved a plaintiff who was a passenger in a vehicle, which was involved in a car accident. Plaintiff sued both drivers. The jury returned a special verdict indicating that only one defendant was a direct cause of the accident but later apportioned liability to both. Id. at 407–08, 237 N.W.2d at 389.
68. Id. at 414, 237 N.W.2d at 393.
69. Id. at 412, 237 N.W.2d at 391 (“[I]t has been recognized that the trial judge, when confronted with this problem, may (1) render judgment against the party having the burden of proof; (2) order a new trial; or (3) send the jury back for further deliberations. We believe the interests of justice and economy are ordinarily best served by the third alternative.” (citation omitted)).
70. Id. at 414, 237 N.W.2d at 392. This was an obvious abuse of discretion, a problem that would not have existed if the trial court had instead simply reiterated the notions of direct cause and fault and sent the jury back for further
ordering a new trial is sometimes the only recourse available to an appellate court.

Until this point, this note has focused on the origins of contributory negligence and comparative fault. The discussion will now shift to the second issue in *Daly*: primary assumption of risk.

**F. A Brief History of Assumption of Risk**

Just as contributory negligence is an affirmative defense, so too is assumption of risk. Just like contributory negligence, an assumption of risk defense only comes into play after the injured party has established a prima facie negligence claim. Since contributory negligence and assumption of risk were both originally viewed as complete bars to recovery, the tortfeasor would traditionally raise either one or the other, or both. As both would completely prevent the plaintiff from being awarded any damages, it really made no practical difference what the defense was called. Unfortunately, this often led to a misunderstanding regarding the distinction between the two and commonly caused the two defenses to be confused with one another.

The key distinction between an assumption of risk defense and contributory negligence is consent. Essentially, assumption of risk means that the injured party gave his consent to relieve the tortfeasor of any duty of reasonable care and essentially took his chances in encountering a known danger. This consent can be express or implied, but it must be given by a plaintiff who (1) had knowledge of the risk, (2) appreciated the danger of the risk, and deliberation. As the Minnesota Supreme Court stated, “the trial judge must take care not to interfere with the jury’s role as the sole determiner of the issues presented to it.” Id. at 412, 237 N.W.2d at 392.

71. And thus any chance to simply resubmit the questions to the jury for further deliberation.


73. As will be discussed *infra* Part II.F.2, this is a traditional view of assumption of risk and is not how it is currently done in Minnesota courts.


75. *See* Michael K. Steenson, *The Role of Primary Assumption of Risk in Civil Litigation in Minnesota*, 30 WM. MITCHELL L. REV. 115, 124 (2003) (“The term ‘primary assumption of risk’ had not yet been utilized for analytical purposes, in part because there was no clear need to distinguish between those categories of assumption of risk due to the fact that both were complete bars.”).


77. *See KEETON ET AL.,* *supra* note 7, § 68, at 481.
(3) voluntarily accepted the risk. However, this does not mean that any plaintiff who voluntarily encounters a known risk is necessarily consenting to the tortfeasor’s negligence. Prosser and Keeton’sjaywalker perfectly elucidates this point:

A pedestrian who walks across the street in the middle of a block, through a stream of traffic travelling at excessive speed, cannot by any stretch of the imagination be found to consent that the drivers shall not use care to watch for him and avoid running him down. On the contrary, he is insisting that they shall. This is contributory negligence pure and simple; it is not assumption of risk.

In Prosser and Keeton’s scenario, although the jaywalker will likely be found contributorily negligent and thus see his damages reduced, he will not be completely barred from recovery by an assumption of risk defense.

Early assumption of risk cases were born out of the master-servant relationship. Notably, the employer-employee relationship is based in subjective contract law, rather than the reasonable-conduct standard, an objective concept, which underlies tort principle. In the employment context, assumption of risk was used to bar recovery for employees who were injured while performing a dangerous job. It was thought that employees assumed the risks of an employer’s negligence in exchange for wages and benefits—again, reiterating the contract-based conception of the parties’ relationship. Unfortunately, this line of reasoning would often lead to disproportionately harsh results for a number of employees.

78. RESTATEMENT (SECOND) OF TORTS § 496C (1965).
79. KEETON ET AL., supra note 7, § 68, at 485.
80. Id.
83. See Steenson, supra note 75, at 117–24 (discussing the origins of primary assumption of risk in Minnesota as it relates to the duties an employer owes an employee).
84. Bray, supra note 82, at 1144; see also Steenson, supra note 75, at 125 (“The operation of assumption of risk in the master-servant context was rationalized on the basis that the servant contracted for the master’s immunity in return for the payment of wages.”).
85. Bray, supra note 82, at 1144 n.26 (citing Anderson v. H.C. Akeley Lumber Co., 47 Minn. 128, 49 N.W. 664 (1891). In Anderson, Plaintiff was injured when the belt on a planing machine broke. 47 Minn. 128, 49 N.W. 664. Plaintiff had
Interestingly enough, English common law, from which assumption of risk is derived, was quick to acknowledge the economic pressure of workers under threat of losing their jobs.\footnote{86} Accordingly, English courts were wary of the assertion that an employee voluntarily accepts the risks simply by being employed.\footnote{87} American courts were much slower in arriving at this notion, and a number of courts upheld assumption of risk defenses even when the plaintiff was injured under a direct command of an employer threatening to terminate employment if the injured party had acted otherwise.\footnote{88} Fortunately, this line of reasoning was largely abandoned with the passage of workers’ compensation acts.\footnote{89}

1. The Effect of Comparative Fault Reformation on Assumption of Risk

As stated previously, assumption of risk and contributory negligence were at one time thought of as one in the same.\footnote{90} This would drastically change with the widespread adoption of comparative fault statutes that took place in the mid to late twentieth century.\footnote{91} Minnesota adopted its own system of modified comparative fault with the 1969 passage of Minnesota Statute section 604.01,\footnote{92} which, like many other jurisdictions, barred significant consequences to Minnesota’s conception of assumption of risk. Contributory negligence was no longer a complete bar, and

reported the worn belt to his foreman, who told plaintiff to continue working. \textit{Id.} The court acknowledged that the employer was negligent in failing to replace or repair a worn belt. \textit{Id.} at 130, 49 N.W. at 604. However, the court held that plaintiff had assumed the risk because it “does not appear that any necessity rested upon him to proceed with the use of the machine,” and plaintiff 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.

\footnote{86. See KEETON ET AL., supra note 7, § 68, at 491 n.16 (listing cases that recognize the economic pressure of workers under threat of loss of employment).

\footnote{87. \textit{Id.} at 491.}

\footnote{88. \textit{See, e.g.,} Dougherty v. W. Superior Iron & Steel Co., 60 N.W. 274 (Wis. 1894).}

\footnote{89. \textit{See} Bray, supra note 82, at 1149–50 (stating that assumption of risk was eventually removed from the master-servant relationship with the enactment of workers’ compensation laws but remained popular in other tort actions like negligence claims).}

\footnote{90. \textit{See supra} note 72–76 and accompanying text.}


\footnote{92. MINN. STAT. § 604.01 (2010).}
courts were suddenly faced with a need to clarify how assumption of risk and comparative fault differed. A number of jurisdictions held that assumption of risk should either be abandoned altogether or merged with their respective comparative fault systems. Other jurisdictions, including Minnesota, have chosen to distinguish between various forms of assumption of risk and employed a number of different terms to describe the distinction, such as “express” versus “implied,” or “reasonable” versus “unreasonable.” Minnesota has chosen to distinguish between “primary” assumption of risk and “secondary” assumption of risk. Secondary assumption of risk is essentially another way of referring to the contributory negligence defense and will not be further discussed here.

2. Minnesota’s Confusing Conception of Primary Assumption of Risk

As subtle as it may seem, primary assumption of risk is actually a much different concept than the traditional assumption of risk defense. The key difference is that primary assumption of risk is not an affirmative defense at all. Instead, primary assumption of risk relates to the issue of whether the plaintiff was actually owed a duty in the first place. Thus, it is not an affirmative defense, but rather a means of negating a plaintiff’s prima facie claim. The basic elements of primary assumption of risk remain the same: (1) knowledge of the risk, (2) appreciation of the danger, and (3)
If successful, primary assumption of risk will relieve the tortfeasor of any duty to the injured party, thereby completely barring any recovery. In Minnesota, the seminal case discussing primary assumption of risk is *Springrose v. Willimore*. Taking place just two years after the enactment of section 604.01, the *Springrose* court sought to clarify the role of assumption of risk given Minnesota’s recent adoption of modified comparative fault. In doing so, the court established the “primary” and “secondary” assumption of risk distinction:

Assumption of risk has been conceptually distinguished according to its primary or secondary character. Primary assumption of risk, express or implied, relates to the initial issue of whether a defendant was negligent at all—that is, whether the defendant had any duty to protect the plaintiff from a risk of harm. It is not, therefore, an affirmative defense.

Furthermore, the *Springrose* opinion limited the types of scenarios in which the implied primary assumption of risk should apply, citing “landowner-licensee” and “inherently dangerous sporting event” cases as illustrative.

The cases immediately following *Springrose* reiterated the relationship between primary assumption of risk and the duty

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100. *Restatement (Second) of Torts* § 496(C) (1965).
102. 292 Minn. 23, 192 N.W.2d 826 (1971). *Springrose* involved a plaintiff who was injured in an accident after riding in a car with knowledge that the driver was inexperienced and was drag-racing other cars. *Id.* at 26–27, 192 N.W.2d at 828–29.
103. *Id.* at 24–25, 192 N.W.2d at 827 (“The practical and most important impact of this decision is to mandate that, like any other form of contributory negligence, assumption of risk must be apportioned under our comparative negligence statute . . . .”).
104. *Id.* at 24, 192 N.W.2d at 827.
105. *Id.;* Steenson, *supra* note 75, at 131 (“The most important point of the court’s discussion of primary assumption of risk is that it has limited reach . . . .”).
106. *Springrose*, 292 Minn. at 24, 192 N.W.2d at 827; *see also* Daly v. McFarland, 812 N.W.2d 115, 116 (Minn. 2012) (citing Grisim v. TapeMark Charity Pro-Am Golf Tournament, 415 N.W.2d 874, 876 (Minn. 1987)) (relieving amateur golfers of duty of care towards spectators); Rieger v. Zackoski, 321 N.W.2d 16, 23–24 (Minn. 1982) (relieving duty of care towards patrons at the track during a sanctioned auto race); Moe v. Steenberg, 275 Minn. 448, 450, 147 N.W.2d 587, 589 (1966) (relieving defendant of duty of care in ice skating collisions); Moddec v. City of Eveleth, 224 Minn. 556, 563, 29 N.W.2d 453, 457 (1947) (barring claims by spectators at a hockey game).
question. Initially, Minnesota courts completely couched the primary assumption of risk analysis within the duty question. Primary assumption of risk was viewed as one of many elements in determining whether the injured party was owed a duty. Therefore, if a duty did exist, primary assumption of risk, by definition, would be inapplicable. This methodology will be referred to as a non-sequential analysis.

Such was the case until a recent pair of Minnesota Supreme Court rulings started to examine primary assumption of risk completely independent from the duty question. Instead of viewing primary assumption of risk as a contributing factor in determining the duty question, the court removed primary

107. An illustrative case is Bakhos v. Driver, which involved a plaintiff who fell from a tree while attempting to remove a branch with a power saw. 275 N.W.2d 594 (Minn. 1979). At trial, the jury ruled the defendant was 60% negligent when he pulled on a rope attached to the limb the plaintiff was sawing. Id. at 595. The jury then held that the plaintiff assumed the risk and entered judgment for the defendant. Id. The Minnesota Supreme Court reversed, and held that, as a matter of law, the evidence showed that the plaintiff had not assumed the risk and remanded to the trial court for entry of judgment in favor the plaintiff according to the 60%/40% apportionment. Id. Defendant’s negligence was ruled to be both the cause of the accident and could not have been foreseen by the plaintiff. Id. Therefore, even though the plaintiff did ultimately choose to ascend the tree, “he did not voluntarily choose to expose himself to the risk of the negligent actions of the defendant which caused the fall.” Id. Because this duty still existed as at the time of the fall, it cannot be said that the plaintiff had assumed the risk. Id. The Bakhos opinion serves as a clear indication that, at the time, the court viewed primary assumption of risk to be linked to the duty issue in an almost symbiotic manner—because the plaintiff lacked the three elements of assumption of risk, the defendant’s general duty of reasonable care still existed, thereby making primary assumption of risk inapplicable. Id.

108. Steenson, supra note 75, at 138 (“[P]rimary assumption of risk in the cases it might reach are in effect cases involving the defendant’s duty to the plaintiff.”).

109. Id. at 142–43 (referencing Springrose, “prior supreme court decisions appear to view primary assumption of risk as an integral part of the duty determination”).

110. Two years after the decision in Bakhos, the Minnesota Supreme Court once again visited the link between primary assumption of risk and duty in Ipsen v. Noren. 308 N.W.2d 812 (1981). There, the court held that primary assumption of risk did not bar plaintiff’s recovery from injuries sustained when his motorbike collided with a pickup truck. Id. at 815–16. The court followed reasoning from both Springrose and Prosser to conclude that plaintiff never consented to relieve the defendants of their duty to act reasonably, thereby making primary assumption of risk inapplicable. Id. at 815–16; see also Steenson, supra note 75, at 138 (“The important point is that primary assumption of risk is inapplicable where the defendant owes a duty to the plaintiff.”).

111. See Baber v. Dill, 551 N.W.2d 493 (Minn. 1995); see also Louis v. Louis, 636 N.W.2d 314 (Minn. 2001).
assumption of risk from the duty question altogether. Under the new methodology, the existence of a duty must first be established before any discussion of primary assumption of risk can take place. The court’s reasoning was as follows: (1) primary assumption of risk serves to relieve a defendant of his or her duty to the plaintiff; (2) if the defendant owes no duty in the first place then there is nothing of which to relieve; and (3) therefore, any subsequent discussion of primary assumption of risk is pointless. This conception of primary assumption of risk will be referred to as the sequential method.

Until this point, this note has focused on the origins of contributory negligence, comparative fault, and primary assumption of risk. The discussion will now shift to the final issue in Daly: emergency rule instruction.

G. Emergency Rule Instruction

Minnesota courts have dealt with the emergency doctrine as far back as 1879. The pivotal case, however, is the 1935 decision in Johnson v. Townsend, in which the court laid out the modern expression of the emergency doctrine:

[O]ne suddenly confronted by a peril, through no fault of his own, who, in the attempt to escape, does not choose the best or safest way, should not be held negligent because of such choice, unless it was so hazardous that the ordinarily prudent person would not have made it under similar conditions.

The Johnson definition of the emergency rule was reaffirmed in Byrns v. St. Louis County as well as in a number of additional cases.

112. Baber, 531 N.W.2d at 495.
113. Id. (“Before a court considers assumption of risk, it should first determine whether the defendant owed a duty to the plaintiff. If no duty exists there is no need to determine whether a person assumed the risk thus relieving the defendant of the duty.”).
114. “Relieving” is meant in the sense that no duty exists. Steenson, supra note 75, at 138 (“It is important to note that in these cases when the court speaks in terms of ‘relieving’ a defendant of liability, it is concluding that the defendant owes no duty to the plaintiff under certain circumstances.”).
115. Baber, 531 N.W.2d at 495.
117. 195 Minn. 107, 110, 261 N.W. 859, 861 (1935).
118. 295 N.W.2d 517 (Minn. 1980).
119. 4 Michael K. Steenson & Peter B. Knapp, Minnesota Practice: Jury
Whereas Johnson laid out the general rule of the emergency doctrine, a number of cases focus on its individual elements. In Gran v. Dasovic, the Minnesota Supreme Court granted emergency rule instructions precisely because the defendant driver’s encounter with an ice patch was deemed “sudden.” In Gran, the slope of the road and its deceptively dry condition were key to ruling that the ice patch effectively came out of nowhere. The district court in Daly would use similar reasoning to find that a “sudden peril” in a snowmobiling case would be something akin to a deer jumping into the road.

In addition to the “suddenness” element, the emergency doctrine requires that the peril must not be caused by the party requesting the instructions. This element was discussed in Thielbar v. Juenke, in which a school bus in the middle of an intersection was ruled to not constitute “sudden peril.” Such was the case because the bus was in plain sight; the tortfeasor had entered the intersection at excessive speed and made no attempt to avoid a collision. Recognizing that it would be unfair to allow the defendant to be advantaged by its application, the court held that the emergency rule “cannot be . . . invoked by a party who has brought the emergency upon himself or who has failed in the application of due care to avoid it.”

Instruction Guides—Civil § 25.16 (5th ed. 2012) (listing a number of cases reaffirming the Johnson court’s description of the emergency rule).

120. Although there are a number of different elements to the emergency doctrine, only those pertinent to the Daly decision will be examined.
122. Id.
123. Daly v. McFarland, 812 N.W.2d 113, 124 (Minn. 2012) (discussing how in declining to give emergency rule instructions, the district court likened an emergency in this situation to a deer jumping in the middle of the road).
124. Steenson & Knapp, supra note 119 (“This rule cannot be invoked by one who, through his own fault, created the emergency.” (citing Mathews v. Mills, 288 Minn. 16, 24, 178 N.W.2d 841, 846 (1970); Kachman v. Blosberg, 251 Minn. 224, 235, 87 N.W.2d 687, 695–96 (1958)).
125. 291 Minn. 129, 133–34, 189 N.W.2d 493, 496–97 (1971); see also Kachman v. Blosberg, 251 Minn. 224, 235, 87 N.W.2d 687, 695 (1958) (establishing that before emergency instructions can be given, there must be a finding that the peril in question was not brought about by the party requesting the instruction).
126. Thielbar, 291 Minn. at 134, 189 N.W.2d at 497.
127. Id. (quoting Kachman, 251 Minn. at 235, 87 N.W.2d at 696).
In January 2007, Christopher Daly, Zachary McFarland, Neil Forsberg, and Jeff Engelkes were riding their snowmobiles four abreast as they crossed a bean field near Engelkes’s engine repair shop. Approaching a ditch at the end of the field, Daly slowed down and McFarland began to pass him. In doing so, McFarland’s snowmobile hit a snow drift and vaulted into the air. Trying to avoid injury, McFarland pushed the snowmobile away from his body and into Daly’s path. Unable to avoid it, Daly collided with McFarland’s airborne snowmobile and suffered injuries when he was thrown from his own snowmobile.

Daly sued McFarland for injuries sustained as a result of the accident, claiming that McFarland was negligent in not adjusting his speed to deal with drifts. Responding to five questions listed on a special verdict form, a unanimous jury found that both Daly and McFarland were negligent, but Daly’s negligence was not a direct cause of the accident. However, the jury then proceeded to allocate 30% of the fault of the accident to Daly. Despite this inconsistency, the district court entered judgment for Daly in the amount of $442,633.50, the full amount of damages. McFarland moved for a new trial based on three alleged errors: (1) failure to instruct the jury on the primary assumption of risk doctrine, (2) failure to instruct the jury on the emergency rule, and (3) an improper reconciliation of the jury’s special verdict form answers.

128. Daly, 812 N.W.2d at 117.
129. Id.
130. Id. Daly testified that McFarland’s snowmobile “just shot straight up in the air.” Id. at 118.
131. Id. at 117.
132. Id.
133. See MINN. STAT. § 84.87, subdiv. 2(1) (2010) (making it illegal to operate a snowmobile at a rate of speed greater than reasonable or proper given the circumstances).
134. Daly admitted that at the time of the crash, he was wearing headphones and listening to music. Daly, 812 N.W.2d at 118.
135. Id.
136. Id.
138. Daly, 812 N.W.2d at 119. It should be noted that the author has decided to focus this case note solely on the court’s application of the primary assumption of risk doctrine and the emergency rule instructions, as these are the issues most pertinent to tort law. Whether the district court abused its discretion in
The district court denied the motion in its entirety and the court of appeals affirmed.\footnote{Daly, 2011 WL 206193.}

After granting certiorari, the Minnesota Supreme Court affirmed in part, reversed in part, and remanded.\footnote{Daly, 812 N.W.2d at 127.} The court affirmed the decision to deny both the primary assumption of risk\footnote{Id. at 119–22.} and the emergency rule instructions.\footnote{Id. at 122–24.} However, it was also found that the district court abused its discretion in reconciling the inconsistent answers to the special verdict form.\footnote{Id. at 124–27.} For the court, it was irreconcilable that Daly be both not causally negligent and apportioned 30% of the fault for the accident.\footnote{Id. at 126 (“[T]he jury answered one question by concluding that Daly was not causally negligent, and then concluded \textit{in the very next question} . . . that Daly was causally negligent for 30\% of the accident. These answers are directly contradictory and not subject to reconciliation.”).} The court reasoned that the jury believed McFarland to be either 70% or 100% at fault, and therefore remanded to the district court with instructions to enter a remittitur allowing Daly to choose between $309,843.45 in damages or a new trial.\footnote{Id. at 127.}

\section*{IV. Analysis}

The previous sections of this note were designed to build the appropriate historical background of the three issues involved in \textit{Daly}. Having done so, this note now turns to whether the court’s decision in \textit{Daly} was appropriate in light of that historical context. As will be shown, although the court ultimately got the \textit{Daly} decision right, it missed a key chance to rid Minnesota of some confusing legal doctrines.

reconciling the answers to the special verdict form is a question best saved for the civil procedure realm.
\footnote{Daly, 2011 WL 206193.}
\footnote{Daly, 812 N.W.2d at 127.}
\footnote{Id. at 119–22.}
\footnote{Id. at 122–24.}
\footnote{Id. at 124–27.}
\footnote{Id. at 126 (“[T]he jury answered one question by concluding that Daly was not causally negligent, and then concluded \textit{in the very next question} . . . that Daly was causally negligent for 30\% of the accident. These answers are directly contradictory and not subject to reconciliation.”).}
\footnote{Id. at 127.} It is necessary to note the dissent of Justice Anderson, who disagrees with the majority’s assessment that the special verdict answers are irreconcilable. Given the broad discretion trial courts typically have in reconciling answers, Justice Anderson believes the district court’s interpretation is plausible, thereby freeing the district court of any abuse of discretion charge. \textit{Id.} at 127–30 (Anderson, J., dissenting).
A. The Response to the Inconsistent Special Verdict Answers Was Appropriate

The court’s issuance of a remittitur was generally appropriate given the circumstances. Although it is not considered one of the three responses courts typically utilize, the issuance of a remittitur has been established as a viable course of action in Minnesota. Ultimately, the remittitur was a creative solution to the trial court’s abuse of discretion.

Ideally, the trial court should have elected to clarify the distinction between fault and cause apportionment and resubmit the special verdict to the jury for further deliberation. Although it is true that answers to special verdict forms should be liberally construed, the purpose of doing so is to maintain the true intent of the jury. Minnesota case law has shown over and over again that juries are often confused on the distinction between cause and fault apportionment. When faced with inconsistent answers, the best way of maintaining the jury’s intent is to first clarify the confusion and then allow further deliberation. Whether it is conceivable that Question 5 in the special verdict form was simply superfluous should not matter. What matters is that the responses accurately reflect the intention of the jury, which can be easily attained by clarifying the confusion and resubmitting the special verdict form.

Obviously, the Minnesota Supreme Court is not in a position to simply resubmit questions to a jury. However, the remittitur offers a nice compromise between the remaining options of reconciling the answers or ordering a new trial. Although the answers to the special verdict form were directly inconsistent, it is clear that the jury believed McFarland was either 70% or 100% responsible.

146. Again, the three options are: reconciliation, resubmission, or the ordering of a new trial. See supra notes 52-54 and accompanying text.
147. See Prodgroski v. Kerwin, 147 Minn. 103, 179 N.W. 679 (1920).
148. Reese v. Henke, 277 Minn. 151, 155, 152 N.W.2d 63, 66 (1967) (“[I]t is necessary to keep in mind that the verdict is to be liberally construed to give effect to the intention of the jury and to harmonize answers to interrogatories if it is possible to do so.”).
149. See generally supra Part II.E.
150. The dissent argues that the district court is in the best position to know the jury’s true intent when answering the special verdict form. Daly, 812 N.W.2d at 129 (Anderson, J., dissenting). This argument seems to overlook the option of simply asking the jury to clarify what its intent was, instead of attempting to reconcile inconsistent answers in an effort to reflect what the district court thought the jury’s intent was.
responsible for the accident. Issuing a remittitur gives Daly, the beneficiary of the trial court’s decision, the choice of accepting lesser damages and avoiding the costs of a new trial. Or, if Daly so chooses, he can follow the traditional course of action and implement a new trial. Although its issuance is not a traditional option for dealing with inconsistent jury verdicts, a remittitur is a well-established remedy in other areas of Minnesota case law. This seems a creative and fair compromise given the circumstances.

Going forward, trial courts should be especially aware of the confusing nature of fault apportionment. When faced with inconsistent answers to interrogatories, trial judges should be hesitant to reconcile the answers without attempting to clarify and resubmit to the jury. Trial judges can also be proactive by ensuring that the questions on special verdict forms are framed such that the apportionment questions are only answered if direct cause has first been established. By clearing up confusion at the trial level, trial judges can preserve judicial economy and ensure that special verdict forms reflect the true intention of the jury.

B. Primary Assumption of Risk

1. The Denial of Primary Assumption of Risk in Daly Was Appropriate

The Minnesota Supreme Court’s decision to not apply primary assumption of risk doctrine to Daly fits logically in the continuum.

151 Id. at 127 (majority opinion).
152 See, e.g., Runia v. Marguth Agency, Inc., 437 N.W.2d 45 (Minn. 1989) (upholding the validity of remittiturs in Minnesota); Podgroski, 147 Minn. at 104, 179 N.W. at 680 (“[T]his court may grant a new trial for excessive or inadequate damages and make it conditional upon the party against whom the motion is directed consenting to a reduction or an increase of the verdict.”).
153 Furthermore, it would seem particularly unfair to force Daly to undergo a new trial even if he would rather take reduced damages and avoid further legal fees and time commitment. In actuality, Daly did elect to accept the reduced damages.
154 See Meinke v. Lewandowski, 306 Minn. 406, 410, 237 N.W.2d 387, 390 (1975) (“Either as a preface to the comparative negligence question in the special verdict or in the court’s instructions . . . the jury should be told the previous answers or findings which make necessary an answer to the comparative negligence question.” (quoting Orwick v. Belshan, 304 Minn. 338, 345, 231 N.W.2d 90, 95 (1975))).
155 Especially considering that an abuse of discretion will inevitably lead to an order for a new trial.
of Minnesota case law.\textsuperscript{156} As previously stated, the Minnesota Supreme Court has applied two different approaches to primary assumption of risk.\textsuperscript{157} Initially, the court conceived of primary assumption of risk as a factor in the duty question. Recently, however, the court has employed a sequential analysis: analyzing duty independently before primary assumption of risk is even allowed to enter the discussion.

Under either methodology, primary assumption of risk is inapplicable to \textit{Daly}. According to Minnesota Statute section 84.87, subdivision 2, McFarland owes Daly a duty of due care to operate his snowmobile in a reasonable manner given the conditions and the speed at which they are traveling.\textsuperscript{158} The existence of this duty immediately rules out primary assumption of risk under a non-sequential analysis.\textsuperscript{159} Under the more recent sequential analysis, the existence of this duty would allow a discussion of primary assumption of risk to take place. However, it clearly cannot be said that Daly, simply by participating in the ride, (1) had knowledge of the risk, (2) appreciated its danger, and (3) voluntarily accepted the risks. McFarland himself testified that in his twenty years of snowmobiling, he has never had a snowdrift react the way this one did.\textsuperscript{160} This statement indicates that neither party was aware of this type of snowdrift, nor did they appreciate the risks it posed. Clearly, it cannot be said that by simply participating, Daly was consenting to the risk of McFarland negligently running into the snowdrift, having it throw his vehicle in the air, and come crashing down into Daly’s path.

2. \textit{A Flawed System}

As the previous analysis has shown, primary assumption of risk in Minnesota is confusing, convoluted, and in need of reform. The very fact that two methodologies exist shows how unclear primary assumption of risk can be.\textsuperscript{161} Before a discussion of its three factors

\begin{itemize}
\item \textsuperscript{156} See Carpenter v. Mattison, 300 Minn. 275, 219 N.W.2d 625 (1974); Olson v. Hansen, 299 Minn. 39, 216 N.W.2d 124 (1974).
\item \textsuperscript{157} See supra Part II.F.2.
\item \textsuperscript{158} MINN. STAT. § 84.87, subdiv. 2 (2012).
\item \textsuperscript{159} Steenson, supra note 75, at 138 (“The important point is that primary assumption of risk is inapplicable where the defendant owes a duty to the plaintiff.”).
\item \textsuperscript{160} Daly v. McFarland, 812 N.W.2d 113, 118 (Minn. 2012).
\item \textsuperscript{161} See Baber v. Dill, 551 N.W.2d 493, 495 (Minn. 1995). Notably, the statement, “If no duty exists, then no primary assumption of risk exists,” is logically
\end{itemize}
even takes place, it is unclear where or how primary assumption of risk relates to the duty issue.

The biggest problem with Minnesota’s conception of primary assumption of risk is that it appears to be in direct contradiction with the motivation behind the move toward comparative fault. As stated previously, the move away from all-or-nothing contributory negligence signaled a change in emphasis in tort goals: shifting from deterring negligent action to focusing on compensating injury. Minnesota’s primary assumption of risk system echoes of the deterrent-based systems of the past. The problem lies in the multiple opportunities the tortfeasor has to cut down the injured party’s recovery. Ultimately, a tortfeasor will have three chances to reduce his liability. First, he can argue that no duty existed. If that fails, he can go on to argue that the injured party primarily assumed the risk. But if a primary assumption of risk analysis is supposed to take place independently from the duty issue, as it is supposed to under Minnesota’s adoption of the sequential analysis, where is the assumption of risk analysis supposed to happen? Does it once again come in as an affirmative defense? But what about Springrose’s comments that primary assumption of risk is explicitly not an affirmative defense?

But even at the tortfeasor’s failure to show primary assumption of risk, he is still afforded one more whack at the injured party’s claim—he can always fall back on comparative fault in order to reduce his damages. The injured party’s claim is forced to survive a equivalent (via contrapositive) to the statement: “If primary assumption of risk does exist, then a duty does exist.” Ultimately, this equivocation may not be particularly useful given the point of a sequential analysis is to look first at duty before moving to primary assumption of risk discussion. However, it does show the stark difference between a sequential analysis (where we said “if primary assumption of risk exists, then a duty does exist”) and a non-sequential analysis (where we said “if primary assumption of risk exists, then a duty does not exist”). Although the Baber court deemed it “elementary” that the sequential analysis is the correct methodology, this comparison shows how drastic a change the Baber opinion truly was.

162. This is especially the case with the strict sequential system.
163. See generally Louis v. Louis, 636 N.W.2d 314 (Minn. 2001); Baber, 531 N.W.2d 493.
164. Springrose v. Willmore, 292 Minn. 23, 24, 192 N.W.2d 826, 827 (1971) (“Primary assumption of risk, express or implied, relates to the initial issue of whether a defendant was negligent at all—that is, whether the defendant had any duty to protect the plaintiff from a risk of harm. It is not, therefore, an affirmative defense.”).
three-part attack in order to be entitled to any recovery. This is unreasonable. The move from the all-or-nothing contributory negligence system to the comparative fault system was motivated by a conscious shift from an approach based on deterrence to an approach based on compensation. But Minnesota’s current system so heavily favors the tortfeasor that it harkens back to a deterrence-based approach to dividing up fault—an approach that was heavily flawed for placing too much of the burden on a single party for a loss that was caused by two. In order to more accurately reflect the compensatory motivation behind contemporary fault apportionment, the sequential approach to primary assumption of risk must be abandoned. Instead, Minnesota courts should either clearly limit primary assumption of risk to the non-sequential approach seen in Springrose or join other jurisdictions in abandoning primary assumption of risk in favor of sole reliance on the comparative fault doctrine.

3. Snowmobiling Does Not Qualify Under Springrose’s Purposefully Narrow Application of Primary Assumption of Risk

In an important point of the Springrose opinion, the court sought to strictly limit the types of scenarios to which primary assumption of risk would apply. Specifically, the court makes mention of “licensees upon another’s property” and “patrons of

165. Steenson, supra note 75, at 147 (“The defendant would have two opportunities to persuade the court and the jury that the plaintiff should not be entitled to recover, and then still rely on the fallback position that the plaintiff was contributorily negligent, assuming adverse findings on the duty and breach and primary assumption of risk issues.”).
166. See supra Part II.D.2.
167. See Keeton et al., supra note 7, § 67, at 468–69.
168. See, e.g., McGrath v. Am. Cyanamid Co., 196 A.2d 238, 240–41 (N.J. 1963); see also Murray v. Ramada Inns, Inc., 521 So.2d 1123, 1130 (La. 1988) (citing Henry Woods, Comparative Fault, §§ 6.1–6.8. (2d ed. 1987) (“[S]ixteen states have totally abolished the defense, and seventeen more have eliminated the use of assumption of risk terminology in all cases except those involving express or contractual consent by the plaintiff . . . . [A]ssumption of the risk now appears to be passing from the scene in most common law jurisdictions.”)).
169. See Steenson, supra note 75, at 130, 159 (arguing that the “most important point of the court’s discussion of primary assumption of risk [in Springrose] is that it has limited reach” and that “[t]he Eighth Circuit is right in its observation that the supreme court has narrowed the application of the [primary assumption of risk] doctrine”).
inherently dangerous sporting events” as illustrative scenarios to which primary assumption of risk might apply.\textsuperscript{171} Despite this limited application, McFarland contends that riding a snowmobile qualifies as an “abnormally dangerous sporting activity.”\textsuperscript{172} The Minnesota Supreme Court has twice rejected this classification.\textsuperscript{173} The court’s explicit unwillingness to go along with McFarland’s classification, combined with the emphasis placed on stare decisis,\textsuperscript{174} made McFarland’s task too formidable to overcome.\textsuperscript{175}

4. A Dangerous Precedent

The previous sections have discussed how the court’s denial of primary assumption of risk was appropriate given Minnesota case law. The analysis was backward-looking and sought guidance through a historical examination. The Daly decision, however, is also appropriate when applying a forward-looking analysis. Had the court ruled that snowmobiling did constitute an “abnormally dangerous sporting activity,” the door would be open for primary assumption of risk to creep into areas not intended by the narrowly focused Springrose opinion. If primary assumption of risk can be raised in a snowmobiling case, how long until it is seen in a motorcycle case? Automobiles?\textsuperscript{176} Suddenly, in any case involving a car crash, the defendant driver will simply assert that the plaintiff, by choosing to get behind the wheel, assumed the risk of getting into an accident. Now, no driver will be liable because primary assumption of risk absolves the defendant of any duty and thereby

\begin{footnotesize}
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\item[171.] Id. at 24–25, 192 N.W.2d at 827.
\item[172.] Daly v. McFarland, 812 N.W.2d 113, 121 (Minn. 2012).
\item[174.] State v. Martin, 773 N.W.2d 89, 98 (Minn. 2009) (noting that due to the principle of stare decisis, the court will “require a ‘compelling reason’ before a decision will be overruled”).
\item[175.] Furthermore, because evidence is viewed in a light most favorable to Daly, the court would accept Daly’s claim that snowmobiles are equally or more safe today than they were when Olson and Carpenter were decided. Therefore, the court’s car analogy still holds true. See Daly, 812 N.W.2d at 121.
\item[176.] Some may be quick to point out that tortfeasors in this scenario would owe a statutory duty to the injured party, much in the same way McFarland did in Daly. Even if this is the case, under a sequential analysis, in which duty is examined independent of primary assumption of risk, the injured party’s claim may still be barred.
\end{enumerate}
\end{footnotesize}
acts as a complete bar to plaintiff’s claim. Ruling that snowmobiling constitutes an inherently dangerous sporting activity would be a dangerous precedent to set.

C. The Emergency Rule Should Not Be Applied to Daly and Should Be Abandoned in Minnesota

In following the definition of the emergency rule, as laid out in Johnson, the court correctly denied McFarland’s request for emergency rule instructions. However, as the Daly case exhibits, emergency rule instructions are more cumbersome than beneficial. Although the decision to deny an emergency rule instruction was correct, the court simply did not go far enough.

Given the Johnson definition of the emergency rule, the court correctly denied its instruction because of a lack of two elements: (1) the peril encountered was not sudden, and (2) the peril encountered was created by McFarland’s own doing. This is not a case of a deer jumping into the middle of the road. First, as the court notes, great credence is placed on the suddenness element of the emergency rule. It is unclear how encountering a snowdrift could constitute a sudden emergency. McFarland himself testified that snowdrifts are a common occurrence when snowmobiling. Although it may not have been visible, encountering a commonplace snowdrift is not akin to a sudden emergency requiring the type of instinctive reaction typically seen in emergency rule cases. Additionally, as opposed to the “deer jumping in the road” example, any peril presented to McFarland was the result of his own driving, thereby precluding him from

178. See Jeffrey F. Ghent, Annotation, Modern Status of Sudden Emergency Doctrine, 10 A.L.R. 5th § 3[a]–[b], at 680 (1993) (presenting many jurisdictions that have abandoned the doctrine because of its habit of confusing the jury).
179. Johnon, 195 Minn. at 110, 261 N.W. at 861.
180. The district court stated that an emergency in the Daly situation would have to be something akin to a deer jumping out in the middle of the road. Daly, 812 N.W.2d. at 123.
181. Id. (“The essential requirement underlying the emergency rule is confrontation of a sudden peril requiring an instinctive reaction.”).
182. Id. at 123–24 (referencing McFarland’s testimony that snowdrifts can be described as a normal hazard of snowmobiling).
183. McFarland testified that he never saw the drift as hazardous before he hit it. Id. at 118. It remains unclear if this means he did not see it at all.
184. For instance, consider the district court’s example of a deer jumping onto the road.
requesting emergency rule instructions.185 Because (1) the peril resulted from McFarland’s own actions, and (2) there was no “suddenness” to the supposed emergency, the court correctly declined emergency rule instructions.

Although the court was accurate in its denial, it is disappointing that it did not put an end to the emergency rule altogether. At best, the emergency rule is designed to recognize that an emergency situation may cause a reasonable person to act incorrectly but not negligently.186 However, the granting of emergency rule instructions too often confuses the jury into thinking that a general duty of due care analysis is inapplicable to an emergency situation.187 Furthermore, emergency instructions are already encompassed in the general standard of due care.188 The sudden peril of an emergency should simply be one of the circumstances that the jury may consider in determining how a reasonable person would have behaved in the same or similar circumstances. Because any potential benefit (and arguably no benefit when considered to be already encompassed in the general standard of due care) is outweighed by the propensity for confusion, the emergency rule doctrine should be dismissed. Minnesota should join the number of other states that have altogether dismissed the emergency rule as a viable legal theory.189

V. CONCLUSION

Generally, the Minnesota Supreme Court got Daly right. The ordering of a remittitur was a creative solution to the abuse of

185. Daly, 812 N.W.2d. at 124.
187. Ghent, supra note 178, § 3[a] (“Even the wording of a well-drawn instruction intimates that ordinary rules of negligence do not apply to the circumstances constituting the claimed sudden emergency . . . .”); see also Irby, supra note 186, at 833 (discussing Wiles v. Webb, 946 S.W.2d 685, 686 (Ark. 1997), in which the court ruled that emergency rule instructions were “inherently confusing”).
188. See Lyons v. Midnight Sun Transp. Servs., Inc., 928 P.2d 1202, 1206 (Alaska 1996) (“We believe that the sudden emergency instruction is a generally useless appendage to the law of negligence. With or without an emergency, the standard of care . . . is still that of a reasonable person under the circumstances.”).
189. See Ghent, supra note 178, §§ 3–4 (listing a number of jurisdictions that have either completely abandoned the emergency rule or have heavily restricted its use).
discretion issue and provided the court with another option when faced with inconsistent special verdicts in the future. Primary assumption of risk was inapplicable to *Daly* and rightly remained limited in its application, as intended by the *Springrose* definition. The emergency rule was also inapplicable due to a lack of suddenness and the fact that the “emergency” was brought on by McFarland himself.

Despite being correct in its decision to apply neither primary assumption of risk nor the emergency rule, the Minnesota Supreme Court simply did not go far enough. The *Daly* case provided the court with a unique opportunity to bring clarity to two legal doctrines that have only provided confusion. Unfortunately, the court chose to allow both doctrines to linger on.