Assumption of Risk in New York: The Time Has Come To Pull the Plug on This Vexatious Doctrine

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ASSUMPTION OF RISK IN NEW YORK: THE TIME HAS COME TO PULL THE PLUG ON THIS VEXATIOUS DOCTRINE

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INTRODUCTION

In 1985, the Court of Appeals of the State of New York ("Court of Appeals") stated that "CPLR 1411 requires diminishment of damages in the case of an implied assumption of risk." In 1986, the Court of Appeals agreed that "the 'doctrine [of assumption of risk] deserves no separate existence... and is simply a confusing way of stating certain no-duty rules." In 2010, the Court of Appeals admitted that its court-created "no duty" analysis as an exception to comparative fault principles "is a highly artificial construct and all that is actually involved is a result-oriented application of a complete bar to recovery," and that "[t]he doctrine of [implied] assumption of risk does not, and cannot, sit comfortably with comparative causation." A person reading these statements of the Court of Appeals might naturally conclude that New York has abrogated the common-law doctrine of implied assumption of risk in favor of a comparative fault system. This, however, is not the case. Implied assumption of risk lives on in New York as a complete bar to recovery, albeit standing on its last leg.

New York Civil Practice Law and Rules ("CPLR") section 1411 provides that "[i]n any action to recover damages for personal injury, injury to property, or wrongful death, the

† J.D., June 2013, St. John's University School of Law. The author would like to thank Vice Dean Emeritus Andrew J. Simons for his guidance.
culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery.° Despite the adoption of CPLR 1411, New York courts have maintained the doctrine of implied assumption of risk as a complete bar to recovery. They do so by labeling certain situations “primary” assumption of risk, thereby reasoning that the legislature intended to exclude primary assumption of risk from CPLR 1411’s scope. Traditionally, the courts have supported this distinction on a principle of “no duty.” Rather than the absolute defense that CPLR 1411 sought to abolish, in a primary assumption of risk situation, the plaintiff’s actions negate any duty owed by the defendant.7

In Trupia v. Lake George Central School District, however, the Court of Appeals rejected this reasoning as unsound and set forth a new justification for upholding primary assumption of risk as a complete bar to recovery: “its utility in ‘facilitat[ing] free and vigorous participation in athletic activities.’”8 After the court’s decision in Trupia, the doctrine of primary assumption of risk now enjoys a very limited scope; it only applies to situations where an injury is sustained while participating in an “athletic [or] recreative activit[y].”9

This Note explores the court’s deviation from CPLR 1411 and focuses on the issues that result from it. In trying to preserve the doctrine of implied assumption of risk, the court has not only deviated from the legislature’s intent, but has promulgated an unclear rule that provides for inconsistent application. Furthermore, the doctrine’s application has become so extremely limited that it fails to serve any significant purpose.

Although New York has a history of being a leader in the development of tort law, New York lags far behind the many states that have abolished the doctrine of implied assumption of risk.10 Many other state courts have recognized the problems

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5 Turcotte, 68 N.Y.2d at 438, 502 N.E.2d at 968, 510 N.Y.S.2d at 53.
7 Id.
8 Id. at 395, 927 N.E.2d at 549, 901 N.Y.S.2d at 129 (alteration in original) (quoting Benitez v. N.Y.C. Bd. of Educ., 73 N.Y.2d 650, 657, 541 N.E.2d 29, 33, 543 N.Y.S.2d 29, 33 (1989)).
9 Id.
10 See infra Part II.A.
that result from maintaining assumption of risk as a complete bar to recovery and have soundly found that "the difficulties of using the term 'assumption of risk' outweigh the benefits."\textsuperscript{11}

This Note urges the Court of Appeals to abolish the unworkable doctrine of assumption of risk once and for all. Part I of this Note gives a general overview of the doctrine of assumption of risk. It explores the theoretical underpinnings behind the doctrine and gives a comprehensive view of assumption of risk as it has developed and been applied in New York. Part II discusses the difficulties the term "assumption of risk" causes throughout the legal system. In addition to discussing some widely-accepted views of the inherent complications of the doctrine, it discusses the specific challenges that arise in the New York context. Finally, Part III advocates the abolition of assumption of risk in New York in its entirety, either by court order or new legislation.

I. ASSUMPTION OF RISK GENERALLY

Assumption of risk is a common law doctrine that developed under a theory of "consent to injury."\textsuperscript{12} At its inception, it was applied to the master-servant context;\textsuperscript{13} however, over time, it has been expanded to cover situations outside of the master-servant relationship. The principle stems from the maxim of "volenti non fit injuria,"\textsuperscript{14} which means that "[o]ne is not legally injured if he has consented to the act complained of or was willing that it should occur."\textsuperscript{15} Traditionally, its effect has been to completely bar the plaintiff's recovery.\textsuperscript{16} This Section discusses the history and development of the assumption of risk.

\textsuperscript{12} BEST ET AL., 1-4 COMPARATIVE NEGLIGENCE LAW AND PRACTICE § 4.30 (rev. ed. 2011).
\textsuperscript{13} Id.; see also Priestly v. Fowler, 150 Eng. Rep. 1030 (Ex. 1837). In Priestly v. Fowler, Charles Priestly was driving his employer's overloaded van in the course of his employment when the van broke down, causing plaintiff to incur various injuries, including a fractured thigh. Priestly, 150 Eng. Rep. 1030; see also Tiller v. Atl. Coast Line R.R. Co., 318 U.S. 54, 58–59 (1943) ("Assumption of risk is a judicially created rule which was developed in response to the general impulse of common law courts at the beginning of this period to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of... the doing of industrialized business.").
\textsuperscript{14} BALLENTINE'S LAW DICTIONARY 1349 (3d ed. 1969).
\textsuperscript{15} Id.
\textsuperscript{16} BEST, supra note 12.
doctrine. Part I.A examines the doctrinal foundations of assumption of risk, as well as the various formulations of the doctrine that have developed over time. Part I.B articulates the doctrine as it has developed in New York courts, paying particular attention to how the courts have adapted the doctrine in light of CPLR 1411 and comparative fault principles.

A. The Development and Application of Assumption of Risk

What is known generally today as the doctrine of "assumption of risk" has not always been recognized under tort law as a separate defense. Although the First Restatement of Torts recognized principles of consent and voluntary exposure to risk, assumption of risk was not included as a defense. Today, these principles have been melded under the label "assumption of risk" and form the general principle that "[a] plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm."20

Today's assumption of risk doctrine is known for its confusing application. This confusion is shown by the courts, where at least four different definitions for assumption of risk have developed:20

1. In its simplest form, assumption of risk means that the plaintiff has given his express consent to relieve the defendant of an obligation to exercise care for his protection, and agrees to take his chances as to injury from a known or possible risk. The result is that the defendant, who would otherwise be under a

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18 Restatement (First) of Torts §§ 892–93 (1939). At this time, under the defense of consent, "[a] person of full capacity who freely and without fraud or mistake manifest[ed] to another assent to the conduct of the other [was] not entitled to maintain an action of tort for harm resulting from such conduct." Id. § 892. Under the defense of voluntary exposure to risk, "[a] person who kn[ew] that another ha[d] created a danger or [wals doing a dangerous act or that the land or chattels of another [we]re dangerous, and who nevertheless cho[se] to enter upon or to remain within or permit his things to remain within the area of risk [was] not entitled to recover for harm unintentionally caused to him or his things by the other's conduct or by the condition of the premises . . . ." Id. § 893.
19 Restatement (Second) of Torts § 496 A (1965).
20 Id. § 496 A cmt. c.
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duty to exercise such care, is relieved of that responsibility, and is no longer under any duty to protect the plaintiff . . . .

2. A second, and closely related, meaning is that the plaintiff has entered voluntarily into some relation with the defendant which he knows to involve the risk, and so is regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility, and to take his own chances. Thus a spectator entering a baseball park may be regarded as consenting that the players may proceed with the game without taking precautions to protect him from being hit by the ball. Again the legal result is that the defendant is relieved of his duty to the plaintiff . . . .

3. In a third type of situation the plaintiff, aware of a risk created by the negligence of the defendant, proceeds or continues voluntarily to encounter it. For example, an independent contractor who finds that he has been furnished by his employer with a machine which is in dangerous condition, and that the employer, after notice, has failed to repair it or to substitute another, may continue to work with the machine. He may not be negligent in doing so, since his decision may be an entirely reasonable one, because the risk is relatively slight in comparison with the utility of his own conduct; and he may even act with unusual caution because he is aware of the danger. The same policy of the common law which denies recovery to one who expressly consents to accept a risk will, however, prevent his recovery in such a case . . . .

4. To be distinguished from these three situations is the fourth, in which the plaintiff's conduct in voluntarily encountering a known risk is itself unreasonable, and amounts to contributory negligence. There is thus negligence on the part of both plaintiff and defendant; and the plaintiff is barred from recovery, not only by his implied consent to accept the risk, but

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21 In this situation, a plaintiff expressly relieves the defendant of a duty of care. This form of assumption of risk is commonly referred to as "express assumption of risk." Auckenthaler v. Grundmeyer, 877 P.2d 1039, 1041 (Nev. 1994).

22 In this situation, a plaintiff impliedly relieves the defendant of a duty of care. This definition of assumption of risk articulates the "no duty" reasoning of an assumption of risk case, and it is commonly referred to as "primary implied assumption of risk." See id.

23 In this situation, a plaintiff reasonably encounters a risk created by the defendant's negligence. This form of assumption of risk is also commonly referred to as "primary implied assumption of risk." See id. at 1041–42.
also by the policy of the law which refuses to allow him to impose upon the defendant a loss for which his own negligence was in part responsible.\textsuperscript{24}

These four forms of assumption of risk have ultimately been categorized into two main classes—express assumption of risk and implied assumption of risk—and implied assumption of risk is further subcategorized into primary implied assumption of risk and secondary implied assumption of risk.\textsuperscript{25}

Express assumption of risk results when “[a] plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant’s negligent or reckless conduct.”\textsuperscript{26} In such a case, the plaintiff is barred from recovery, unless the agreement can be invalidated “as contrary to public policy.”\textsuperscript{27} Although the most common form of express assumption of risk is by written contract, a writing is not required.\textsuperscript{28}

Implied assumption of risk, on the other hand, results when:

[A] plaintiff who fully understands a risk of harm to himself or his things caused by the defendant’s conduct or by the condition of the defendant’s land or chattels, . . . nevertheless voluntarily chooses to enter or remain, or to permit his things to enter or remain within the area of that risk, under circumstances that manifest his willingness to accept it . . . .\textsuperscript{29}

\textsuperscript{24} \textit{Restatement (Second) of Torts} § 496 A cmt. c (1965) (footnotes added). In this situation, a plaintiff unreasonably encounters a risk created by defendant’s negligence. This form of assumption of risk is commonly referred to as “secondary implied assumption of risk.” See Auckenthaler, 877 P.2d at 1041–42.

\textsuperscript{25} \textit{Best, supra} note 12. The Second Restatement articulates express assumption of risk in the first of its definitions. See supra note 21. All other definitions listed in the Second Restatement refer to some form of implied assumption of risk. See supra notes 22–24.

\textsuperscript{26} \textit{Restatement (Second) of Torts} § 496 B (1965).

\textsuperscript{27} \textit{Id.} Examples of situations that may be contrary to public policy are (1) an agreement between an employee and his or her employer regarding injuries sustained during the course of the employee’s employment—because of the uneven bargaining power—and (2) a situation in which the assumption of risk relates to a defendant’s duty of public service—because defendants cannot contract to rid themselves of the obligation to exercise reasonable care. \textit{Id.} § 496 B cmts. e–g.

\textsuperscript{28} \textit{Restatement (Second) of Torts} § 496 B cmt. a (“A non-contractual consent, as in the case of one who rides on a train or enters a place of amusement on a pass, may be sufficient [to qualify as express assumption of risk].”).

\textsuperscript{29} \textit{Restatement (Second) of Torts} § 496 C (1965).
Under this theory, a plaintiff who fully appreciates a risk of harm, yet voluntarily encounters such risk, may be considered to have impliedly consented to the harm-causing conduct of the defendant.\textsuperscript{30}

In an attempt to differentiate the doctrine of implied assumption of risk from the defense of contributory negligence, courts have developed two distinct subcategories of implied assumption of risk—primary implied assumption of risk and secondary implied assumption of risk.\textsuperscript{31} The distinction hinges on the duty of care that the defendant owes to the plaintiff. Primary implied assumption of risk has developed as essentially a “no duty” rule. Under primary implied assumption of risk, the defendant is not negligent because the defendant either “owes no duty of care to the plaintiff or . . . does not breach the duty that was owed.”\textsuperscript{32} Under secondary implied assumption of risk, however, the defendant is negligent, and the plaintiff voluntarily encountered the negligence.\textsuperscript{33} Because of this distinction, plaintiffs must establish primary implied assumption of risk as part of their cases-in-chief, whereas secondary implied assumption of risk is an affirmative defense to be established by the defendant.\textsuperscript{34}

At a time when contributory negligence was prevalent, assumption of risk was criticized for its inability to sit comfortably within a contributory negligence regime.\textsuperscript{35} In fact, most of the confusion that surrounds the doctrine of assumption of risk today is a result of courts grappling to distinguish the two principles.\textsuperscript{36} A plaintiff's conduct may qualify to bar his or her recovery under both assumption of risk and contributory negligence.

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\bibitem{30} W. Page Keeton et al., Prosser and Keeton on the Law of Torts 485 (W. Page Keeton, ed., 5th ed. 1984) (“By entering freely and voluntarily into any relation or situation where the negligence of the defendant is obvious, the plaintiff may be found to accept and consent to it, and to undertake to look out for himself and relieve the defendant of the duty.”). Some courts hold that the plaintiff’s knowledge of the general danger is not enough and require a finding that the plaintiff knew that the specific risk that caused his or her harm was present. \textit{Id.} at 487.
\bibitem{31} \textit{Best, supra} note 12.
\bibitem{33} \textit{Id.} at 1063.
\bibitem{34} \textit{Best, supra} note 12.
\bibitem{35} \textit{See id.}
\bibitem{36} \textit{See id.}
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negligence principles at the same time.\textsuperscript{37} If a plaintiff voluntarily encounters a known risk, and the plaintiff's actions were unreasonable at the same time, both principles apply.\textsuperscript{38} Contributory negligence applies because the plaintiff's conduct fell below the standard of reasonable care, thereby contributing to his or her own injury, and assumption of risk applies because the plaintiff was aware of the risk, yet voluntarily encountered it anyway.\textsuperscript{39} Like assumption of risk, contributory negligence historically acted as a complete bar to recovery.\textsuperscript{40} How one labels the plaintiff's conduct then becomes irrelevant, because either doctrine as applied had the same effect—to completely bar the plaintiff's recovery.\textsuperscript{41}

Although the doctrines tend to overlap, they are not entirely identical, and courts have justified the application of both principles on the basis of the inherent doctrinal differences. While a subjective standard is applied to assumption of risk, "[a]n objective standard [] applie[s] to [the defense of] contributory negligence, and the plaintiff is required to have the knowledge, understanding, and judgment of the standard reasonable man."\textsuperscript{42} Also, contributory negligence is not a defense to reckless conduct, whereas "[a]ssumption of risk operates as a defense against liability not only for negligent conduct, but also for reckless conduct, and conduct for which the defendant is subject to strict liability."\textsuperscript{43}

B. The Development and Application of Assumption of Risk in New York

From assumption of risk's first appearance in New York courts, until the adoption of CPLR 1411 in 1975, the courts did not distinguish between the various forms of assumption of risk. After the adoption of CPLR 1411, however, New York courts—like many other states—developed different categories of assumption of risk to aid in the theory that some forms of assumption of risk are excluded from CPLR 1411's scope. The

\textsuperscript{37} See id.
\textsuperscript{38} See id.
\textsuperscript{39} See id.
\textsuperscript{40} See id.
\textsuperscript{41} Cf. id.
\textsuperscript{42} \textit{RESTATEMENT (SECOND) OF TORTS} § 496 A cmt. d (1965).
\textsuperscript{43} Id.
three categories are "‘express' assumption of risk," "‘primary' assumption of risk," and "implied assumption of risk," and the first two are deemed excluded from CPLR 1411.

The concept of apportionment of fault in New York stems from the Court of Appeals's decision in Dole v. Dow Chemical Company. In Dole, the decedent was exposed to poisonous methyl bromide, an insect control fumigant, when he was ordered to clean a bin that was recently fumigated with the chemical. This exposure resulted in decedent's death. The Dole court, for the first time in New York, held that liability can be apportioned among tortfeasors. With this decision, New York became the third state to judicially adopt some part of the doctrine of comparative negligence—at least among joint tortfeasors.

Notwithstanding the Court of Appeals's decision in Dole, in Codling v. Paglia, the court declined to extend the concept of comparative negligence to a plaintiff's contributory fault. As a

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47 Id. at 146, 282 N.E.2d at 290, 331 N.Y.S.2d at 385.

48 Id. at 148–49, 282 N.E.2d at 292, 331 N.Y.S.2d at 387 ("The conclusion reached is that where a third party is found to have been responsible for a part, but not all, of the negligence for which a defendant is cast in damages, the responsibility for that part is recoverable by the prime defendant against the third party. To reach that end there must necessarily be an apportionment of responsibility in negligence between those parties.").


51 Id. at 344–45, 298 N.E.2d at 630, 345 N.Y.S.2d 471–72 ("Nor do we now apply the principles articulated in Dole ... for an apportionment of responsibility .... We recognize that the doctrine of contributory negligence has been the target of mounting adverse criticism. Indeed we have been critical. With full awareness that the doctrine was of judicial rather than legislative origin, we are nonetheless not prepared at this time to substitute some formula of comparative negligence. In our opinion this is a topic now more appropriate for legislative address.") (citations omitted).
result, shortly thereafter the legislature enacted CPLR 1411, which provides:

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

The bill “equate[d] the defenses of contributory negligence and assumption of risk by providing that neither sh[ould] continue to serve as a complete defense in actions to which [CPLR 1411] applies.” At the time of its enactment, the statute was consistent with New York precedent; Cardozo once wrote that there “is a borderland where the concept of contributory negligence merges almost imperceptibly into that of acceptance of a risk. Very often the difference is chiefly one of terminology.”

In response to CPLR 1411, New York courts formed the separate categories of assumption of risk, the terminology of which permeates through the assumption of risk opinions of today. In *Turcotte v. Fell*, the Court of Appeals established what it calls “primary assumption of risk.” In *Turcotte*, Ronald J. Turcotte was propelled off of his horse after the horse tripped and fell during a horse race. Plaintiff suffered severe injuries including paraplegia. To avoid the application of CPLR 1411 to Turcotte’s case, the court adopted the category of “primary” assumption of risk, and explained that assumption of risk in the

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52 N.Y. C.P.L.R. § 1411 (McKinney 2012). An earlier comparative negligence bill was rejected in 1974 because the “bill would have barred plaintiff’s recovery if he were found to be more than fifty percent negligent.” Thirteenth Annual Report of the Judicial Conference on the CPLR, supra note 45, at 238–39 (1976). Instead, the legislature decided on CPLR 1411 in its current form, which provides for a “pure” comparative negligence standard. Id. at 239.


57 Id. at 438, 502 N.E.2d at 968, 510 N.Y.S.2d at 53.

58 Id. at 438, 502 N.E.2d at 968, 510 N.Y.S.2d at 53.

59 Id.
context of sporting events, such as the horse race involved in *Turcotte*, does not fall within the statute. Under a primary assumption of risk analysis:

Plaintiff's "consent" is not constructive consent; it is actual consent implied from the act of the electing to participate in the activity. When thus analyzed and applied, assumption of risk is not an absolute defense but a measure of the defendant's duty of care and thus survives the enactment of the comparative fault statute.

After the court's decision in *Turcotte*, New York courts began to apply the doctrine of primary assumption of risk as an exception to CPLR 1411. New York courts have generally applied primary assumption of risk to sporting activities; however, they have also found the doctrine of primary assumption of risk to apply outside of the sporting context.

Under this "no duty" analysis, participants in sporting events "may be held to have consented . . . to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation." Defendant's duty, therefore, "is a duty to exercise care to make the conditions as safe as they

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60 Id. at 438–39, 502 N.E.2d at 968, 510 N.Y.S.2d at 53. However, the *Turcotte* court limited primary assumption of risk's application to cases of negligence, holding that assumption of risk does not act as a bar to recovery when defendant's conduct is reckless or intentional. Id. at 439, 502 N.E.2d at 968, 510 N.Y.S.2d at 53.

61 Id. (citations omitted).


63 See, e.g., Olesen v. Sweiger, 139 A.D.2d 964, 965–66, 527 N.Y.S.2d 935, 936–37 (4th Dep't 1988) (holding that primary assumption of risk applied when a fifteen-year-old plaintiff was given a permanent wave at a beauty trade show that resulted in physical and psychological injuries, including hair loss and severe scalp burns); Powell v. Metro. Entm't Co., 195 Misc. 2d 847, 850, 762 N.Y.S.2d 782, 784 (Sup. Ct. N.Y. Cnty. 2003) (applying primary assumption of risk to a case where loud music at a John Fogerty concert caused damage to plaintiff's left ear); Marshall v. Tanoury, 157 Misc. 2d 303, 304, 596 N.Y.S.2d 333, 334 (Sup. Ct. Oneida Cnty. 1993) (finding that primary assumption of risk applied in the context of a car accident).

64 *Turcotte*, 68 N.Y.2d at 439, 502 N.E.2d at 968, 510 N.Y.S.2d at 53.
appear to be. If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty. Unlike some other states, in New York the plaintiff need not "foresee[] the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results."

This "no duty" analysis had been consistently applied by New York courts to support its primary assumption of risk exception to CPLR 1411 until Trupia v. Lake George Central School District. In Trupia, Luke Anthony Trupia, the almost twelve-year-old plaintiff, was injured while attending a summer program hosted by defendant on its premises. While attempting to slide down a banister, the plaintiff fell and sustained serious injuries. The lower court denied defendants' motion to amend their answer to include assumption of risk. In affirming the trial court's denial of defendants' motion, the court revisited the doctrine of primary assumption of risk as it had promulgated in Turcotte and questioned the doctrine's validity under the Turcotte "no duty" analysis. Finding that the "[t]he doctrine of assumption of risk does not, and cannot, sit comfortably with comparative causation," the court set forth a new rationale for excepting primary assumption of risk from CPLR 1411's scope: "for its utility in 'facilitat[ing] free and vigorous participation in athletic activities,'" The court stated that it "ha[d] not applied the [primary assumption of risk] doctrine outside of [the] limited context [of athletic and recreative activities] and . . . its application must be closely circumscribed if it is not seriously to undermine and displace the principles of comparative causation." The court recognized "that athletic and

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65 Id. (emphasis added).
68 Id. at 393–94, 927 N.E.2d at 548, 901 N.Y.S.2d at 128.
69 Id. at 393, 927 N.E.2d at 548, 901 N.Y.S.2d at 128.
70 Id. at 394, 927 N.E.2d at 548, 901 N.Y.S.2d at 128.
71 Id. at 395, 927 N.E.2d at 548–49, 901 N.Y.S.2d at 128–29.
72 Id. at 395, 927 N.E.2d at 549, 901 N.Y.S.2d at 129 (alteration in original) (quoting Benitez v. N.Y.C. Bd. of Educ., 73 N.Y.2d 650, 657, 541 N.E.2d 29, 33, 543 N.Y.S.2d 29, 33 (1989)).
73 Id. But see supra note 63.
74 Trupia, 14 N.Y.3d at 395, 927 N.E.2d at 549, 901 N.Y.S.2d at 129.
recreative activities possess enormous social value" and that primary assumption of risk as a bar to recovery can "preserve these beneficial pursuits as against the prohibitive liability to which they would otherwise give rise."75

The Court of Appeals was unclear about which athletic and recreative activities are protected by assumption of risk.76 It did, however, explain that the prior analysis, in which a person "consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation,"77 is no longer viable.78

II. THE INHERENT PROBLEMS WITH ASSUMPTION OF RISK

The doctrine of implied assumption of risk has enjoyed extreme disfavor among scholars. It has been referred to as "an awkward blood kin of contributory negligence,"79 "a second cousin to the doctrine of consent,"80 an "unfortunate form of words,"81 and "a hazardous legal tool."82 Although the adoption of comparative fault regimes has amplified this disfavor, it has always existed. In fact, there was significant debate among the advisors of the Second Restatement surrounding the adoption of assumption of risk as its own distinct doctrine.83 Ultimately, the

75 Id. The court found that primary assumption of risk did not apply to the "horseplay" of sliding down a banister. Id. at 396, 927 N.E.2d at 549, 901 N.Y.S.2d at 129. In making this decision, it stated that "[a]llowing the defense [to the plaintiff's case] here would have particularly unfortunate consequences. Little would remain of an educational institution's obligation adequately to supervise the children in its charge if school children could generally be deemed to have consented in advance to risks of their misconduct." Id. at 396, 927 N.E.2d at 549–50, 901 N.Y.S.2d at 129–30 (citation omitted).

76 See infra Part II.B.


78 Trupia, 14 N.Y.3d at 395, 927 N.E.2d at 549, 901 N.Y.S.2d at 129.


80 Id.

81 HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS 320 (3d ed. 2007).


83 Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368, 378 n.3 (Tex. 1963) ("In preparing Restatement of the Law of Torts, Second, the advisers sharply divided. A group mainly of distinguished deans and professors, favored striking the entire chapter of Assumption of Risk. They would use contributory negligence. The group includes Deans Page Keeton and Wade, and Professors James, Malone, Morris, Seavey and Thurman. Mr. Eldredge prepared a 'dissent' for this group. The group is
American Law Institute included assumption of risk in the Second Restatement, resulting in the confusion that exists today. In Part II.A, below, this Note explains the disfavor that surrounds the doctrine of assumption of risk and the difficulties that arise from the assumption of risk terminology. Part II.B sets forth New York's precarious use of the term assumption of risk and the New York-specific context that makes the doctrine's use particularly troublesome.

A. The Inscrutable Terminology of the Doctrine

One of the inherent problems with the doctrine of assumption of risk is the ambiguity that surrounds its terminology. This issue was most eloquently articulated by Justice Frankfurter in his concurring opinion in \textit{Tiller v. Atlantic Coast Line Railroad Co.}: "The phrase 'assumption of risk' is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas."\textsuperscript{84} Courts use the term "assumption of risk" in four different senses, and rarely clarify which form of assumption of risk they are referring to.\textsuperscript{85} Simply saying "assumption of risk," as courts often do, does

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  \item \textsuperscript{84} \textit{Tiller}, 318 U.S. at 68 (Frankfurter, J., concurring).
  \item \textsuperscript{85} \textit{Restatement (Second) of Torts} § 496 A cmt. c (1965).
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not provide for clarity in application of the law.\textsuperscript{66} It is believed that the term “assumption of risk” “adds nothing to modern [tort] law except confusion.”\textsuperscript{67}

In addition to the ambiguous nature of the doctrine, assumption of risk duplicates co-existing tort principles. Opponents of assumption of risk point out that the same result can be reached by analyzing the facts under comparative negligence, lack of duty, and consent principles.\textsuperscript{68} It is argued that “the difference in the no-duty cases is essentially a semantic one, that courts often prefer the language of assumption of risk, and that all of us should learn to be bilingual.”\textsuperscript{69}

These problems and the controversy surrounding the doctrine of assumption of risk have led judiciaries and legislatures to abolish the doctrine of assumption of risk.\textsuperscript{70} Of

\textsuperscript{66} For example, in \textit{Rutter v. Northeastern Beaver County School District}, the court said, generally, that the issues presented by “assumption of risk” should be limited to negligence and contributory negligence, essentially abolishing the doctrine of “assumption of risk.” 437 A.2d 1198, 1209 (Pa. 1981). But see \textit{Carrender v. Fitterer}, where the same court distinguished the case before it and held that some form of assumption of risk did still apply. 469 A.2d 120, 125 n.6 (Pa. 1983) (“The reasoning of this opinion is consistent with the opinion of Mr. Justice Flaherty in \textit{Rutter}, which specifically noted that a holding that a risk has been assumed is in many cases tantamount to a determination that, as a matter of law, the defendant owed the plaintiff no duty.”).

\textsuperscript{67} \textit{HARPER ET AL., supra} note 81.

\textsuperscript{68} Wade, \textit{supra} note 83, at 14; see also \textit{KEETON ET AL., supra} note 30, at 493 (“The argument is that assumption of risk serves no purpose which is not fully taken care of by the other doctrines[] [and] that it adds only duplication leading to confusion . . . .”).

\textsuperscript{69} James, \textit{supra} note 17, at 195.

\textsuperscript{70} Various comparative negligence statutes have expressly abolished assumption of risk as a complete bar to recovery. \textit{See, e.g., OR. REV. STAT. ANN. § 31.620} (West 2012) (“The doctrine of implied assumption of the risk is abolished.”); \textit{Wentz v. Deseth}, 221 N.W.2d 101, 104–05 (N.D. 1974) (“By the 1973 legislation, Section 9-10-06, N.D.C.C., was amended and re-enacted by omitting therefrom the exception reading ‘except so far as the latter, willfully or by want of ordinary care, has brought the injury upon himself.’ This is the language upon which assumption of risk was based. Now that this language has been deleted from the statute, the affirmative defenses of assumption of risk and contributory negligence no longer are the law of North Dakota, and negligence cases now are governed by the doctrine of comparative negligence.”) (citations omitted). Courts have also abolished all or part of the doctrine without direction from the legislature. \textit{See, e.g., Li v. Yellow Cab Co. of Cal.}, 532 P.2d 1226, 1242 (Cal. 1975) (“[A]ssumption of risk (insofar as [it] is but a variant of contributory negligence) is to be subsumed under the general process of assessing liability in proportion to fault . . . .”); \textit{Wilson v. Gordon}, 354 A.2d 398, 402, 403 (Me. 1976) (“While it is true that 14 M.R.S.A. s 156 does not specifically abolish the defense of assumption of the risk, in most cases the apportionment of fault which the statute is designed to effectuate obviates the need
course, the existence of fifty states leads to fifty different tort laws, and the states have abrogated the defense of assumption of risk in varying degrees. Most courts have abolished implied assumption of risk in its secondary form and have held that secondary implied assumption of risk is subsumed by contributory or comparative negligence principles. Increasingly, however, courts are taking initiative to abolish implied assumption of risk in its entirety. New Jersey was the first state to do so in *McGrath v. American Cyanamid Co.* After originally abolishing secondary implied assumption of risk in *Meistrich v. Casino Arena Attractions, Inc.*, in *McGrath*, the Supreme Court of New Jersey—in a rather frustrated tone—abolished implied assumption of risk all together. The court explained that "the term 'assumption of risk' is so apt to create mist that it is better banished from the scene." The court went on to warn that it "hope[d it had] heard the last of it" and instructed the lower courts to "stay with 'negligence' and

for and alleviates much of the harshness of that common law doctrine...[T]he doctrine of voluntary assumption of the risk is no longer viable...".

91 *See, e.g., Frelick v. Homeopathic Hosp. Ass'n of Del., 150 A.2d 17, 19 (Del. Super. Ct. 1959) ("In this type of case, where a risk has been created by defendant's breach of duty toward the plaintiff, the problem of voluntary assumption of risk overlaps the contributory negligence problem, or rather, is a phase of that problem. I shall, therefore, treat the defenses presented as only one defense, namely, contributory negligence."); Bulatao v. Kauai Motors, Ltd., 406 P.2d 887, 895 (Haw. 1965) ("There being no distinguishing feature whereby the defense of assumption of risk has a different application... from the defense of contributory negligence, we join the growing number of courts which decline to permit reliance on both of these defenses where one would serve."); Rosenau v. City of Estherville, 199 N.W.2d 125, 133 (Iowa 1972) ("We thus abolish assumption of risk as a separate defense in all cases in which contributory negligence is now available as a defense."); Springrose v. Willmore, 192 N.W.2d 826, 827 (Minn. 1971) ("The doctrine of [secondary] implied assumption of risk must, in our view, be recast as an aspect of contributory negligence, meaning that the plaintiff's assumption of risk must be not only voluntary but, under all the circumstances, unreasonable.").*


93 *Meistrich v. Casino Arena Attractions, Inc., 155 A.2d 90, 96 (N.J. 1959) ("We are satisfied there is no reason to charge assumption of the risk in its sectionary [sic] sense as something distinct from contributory negligence, and hence that there the thought is projected in that aspect, the terminology of assumption of risk should not be used.").

94 196 A.2d 238.

95 *See id. at 240–41.

96 *Id.*
'contributory negligence.' Since the court's decision in *McGrath*, the growing trend is to abolish all forms of implied assumption of risk.

B. The Tortuous Path of the Doctrine in New York

Assumption of risk in New York has become a rather convoluted doctrine. Not only does it completely frustrate the legislature's purpose in passing CPLR 1411, but the courts are inconsistent in their reasoning for supporting its retention. Despite these facts, the courts thus far remain insistent on applying the doctrine, and it is the current reality in New York that this unpredictable and expendable doctrine lives on.

CPLR 1411 provides that "assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable

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97 *Id.* at 241.

98 See, e.g., Leavitt v. Gillaspie, 443 P.2d 61, 68 (Alaska 1968) ("As a matter of policy we disapprove of a concept which could result in a situation where an accident victim, even though not contributorily at fault, could be barred from recovery because he knew or should have known of a negligently created risk. The just concept should be whether a reasonably prudent man in the exercise of due care would have incurred the risk despite that knowledge, and if so, whether he would have conducted himself in the manner in which the plaintiff acted in the light of all the circumstances, including the appreciated risk. This means that only the traditional notions of negligence and contributory negligence should govern cases such as we have here and that the defense of assumption of risk should not be a defense and should not be used."); Blackburn v. Dorta, 348 So. 2d 287, 291 (Fla. 1977) ("It is apparent that no useful purpose is served by retaining terminology which expresses the thought embodied in primary assumption of risk. This branch (or trunk) of the tree of assumption of risk is subsumed in the principle of negligence itself."); Fawcett v. Irby, 436 P.2d 714, 722 (Idaho 1968) ("I recommend the complete banishment of the assumption of risk doctrine in Idaho. Instead, let us uniformly apply the better understood and more easily explainable principles of 'negligence' and 'contributory negligence."); Parker v. Redden, 421 S.W.2d 586, 592 (Ky. 1967) ("[W]e think that the pure assumption of risk doctrine, under which the plaintiff is barred even though he acted reasonably, should not [sic] longer be recognized or applied, because reasonableness of conduct should be the basic consideration in all negligence cases."); Auckenthaler v. Grundmeyer, 877 P.2d 1039, 1042 (Nev. 1994) ("We perceive no valid reason for leaving primary implied assumption of risk intact. In virtually every instance, including the injured spectator, liability can be analyzed in the context of the conduct of the actor and the injured party, weighed against a standard of care dictated by the circumstances."); Rutter v. Ne. Beaver Cnty Sch. Dist., 437 A.2d 1198, 1209 (Pa. 1981) ("We agree that the difficulties of using the term 'assumption of risk' outweigh the benefits. The issues should be limited to negligence and contributory negligence.").
conduct which caused the damages. According to the courts, primary assumption of risk as it is applied in New York goes against the legislative intent in passing CPLR 1411.

The Thirteenth Annual Report of the Judicial Conference to the Legislature on the Civil Practice and Law Rules acknowledged that the "no duty" analysis established by the courts "undermines the purpose of [CPLR 1411]—to permit partial recovery in cases in which the conduct of each party is culpable." In passing CPLR 1411, the legislature "expected that the courts [would] treat assumption of risk as a form of culpable conduct under [CPLR 1411]." This is shown by the use of "culpable conduct" language in the statute instead of "negligent conduct." The legislature, in using the "culpable conduct" terminology, intended for the article to apply even in cases where a party is found to have acted reasonably.

In addition, primary assumption of risk as applied by New York courts—under both the previously applied "no duty" analysis and the current "facilitat[ing] free and vigorous participation in athletic activities" analysis—overlaps with a negligence analysis. Although the court employs the assumption of risk terminology, the court is really asking if a defendant had a duty, or, as the Court of Appeals stated, "whether the conditions caused by the defendants' negligence were 'unique and created a dangerous condition over and above the usual dangers that are inherent in the sport.' Whether the plaintiff knew of the danger and voluntarily encountered it does not change the fact that defendant did or did not have a duty to protect against the danger it created. If the defendant had no duty to guard against a particular risk, negligence has not been established, disregarding the need for the assumption of risk defense.

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101 Id.
102 See id. at 240.
104 Id. at 395, 927 N.E.2d at 549, 901 N.Y.S.2d at 129 (quoting Benitez v. N.Y.C. Bd. of Educ., 73 N.Y.2d 650, 657, 541 N.E.2d 29, 33, 543 N.Y.S.2d 29, 33 (1989)).
106 It should be noted that as part of the "no duty" construct, the New York courts have explained that the doctrine is no longer an absolute defense; however,
Now that the Court of Appeals has rejected the "no duty" analysis and supports its retention of the doctrine because of its "utility in facilitating free and vigorous participation in athletic activities," the court's rationale is no longer sound. Because the court failed to define what constitutes a "sport or recreative activity," this policy-driven rule is more likely to produce result-oriented decisions on what constitutes a "sport or recreative activity" and to reflect the preference of the judges deciding the case. Judge Smith, in pointing out the shortcomings of the majority's decision, advised against making such "sweeping pronouncements in a case that does not require it, while ignoring the questions those sweeping pronouncements raise."  

The vagueness of the court's language in *Trupia* has quickly led to confusion, as is shown by the lower courts' inconsistent application of the *Trupia* holding. In particular, the courts tend to disagree on what constitutes a sport or recreative activity. One court held that assumption of risk applied when an infant plaintiff was injured during a kickball game at a youth program, while another court held that assumption of risk did not apply in a case where plaintiff was injured while participating in a running drill at volleyball practice. Both volleyball and kickball are seemingly classifiable as sports, yet the courts came to different decisions in each instance. As to what constitutes a recreative activity, in *Smith v. City of New York*, the court held that playing on monkey bars on a playground is exactly the type of "recreative" activity the court in *Trupia* deemed "worthy of protection," but in *Walker v. City of New York*, the court found that playing tag on a playground did
not constitute a recreative activity under *Trupia*. Both activities are regular activities that take place on every playground, yet one was found to fall under *Trupia* and the other was found inconsistent with *Trupia*'s reasoning. In *Ashbourne v. City of New York*, while concurring that rollerblading was in fact "an activity one could consider to be recreational and risky," the court held that assumption of risk did not apply to this particular recreative activity because plaintiff was not participating in an "organized sporting event" and that a defendant could not invoke the doctrine of primary assumption of risk to leisurely activities, such as rollerblading and jogging, that take place on a public sidewalk. This blatant inconsistency in the New York courts tends to suggest that the judges are not applying the objective standard set forth by the Court of Appeals, but rather their own subjective beliefs of what activities "possess enormous social value" and are deemed "worthy of [assumption of risk] protection."

The court's attempt to justify the continued application of assumption of risk under CPLR 1411 has proven unsuccessful thus far, and the court has yet to offer any useful analysis for the doctrine. Some courts tend to base their decisions solely on the abstract policy reasoning set forth in *Trupia*, rather than determining whether the defendant had a duty to protect the plaintiff from the risk in the first place, effectively removing the duty analysis from negligence cases. Other courts seem to reject this policy analysis and continue to apply the old precedent on this topic, finding that plaintiff's actions signify consent. This remnant of the "no duty" analysis is what the *Trupia* court

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114 Id. at 966-67, 918 N.Y.S.2d at 776.
115 82 A.D.3d 461, 918 N.Y.S.2d 88 (1st Dep't 2011).
116 Id. at 463, 918 N.Y.S.2d at 90.
117 Id.
118 Id. The requirement that the sport be part of an organized sporting event was not discussed in *Trupia*. See generally *Trupia v. Lake George Cent. Sch. Dist.*, 14 N.Y.3d 392, 927 N.E.2d 547, 901 N.Y.S.2d 127 (2010).
119 See *Trupia*, 14 N.Y.3d at 395, 396, 927 N.E.2d at 549, 901 N.Y.S.2d at 129.
deemed "a renaissance of contributory negligence replete with all its common-law potency [and] precisely what [CPLR 1411] was enacted to avoid."\textsuperscript{121}

III. PROPOSED SOLUTIONS

It is clear that "the difficulties of using the term 'assumption of risk' outweigh the benefits."\textsuperscript{122} Because of the difficulties in applying the doctrine, the inconsistencies that result from it, and the legislature's intent in passing CPLR 1411, the doctrine should be abolished in its entirety. This Section proposes two feasible approaches to abolish the doctrine of assumption of risk. The ideal outlet for abolishment at this time is through a judicial order. Accordingly, Part III.A advocates for the Court of Appeals to abolish the doctrine and reverse its precedent upholding this intolerable doctrine. Part III.B advances an option for the legislature to overturn the court's precedent and abolish assumption of risk on its own terms.

A. Abolish the Doctrine by Judicial Fiat

The Court of Appeals has already recognized that "[t]he doctrine of assumption of risk does not, and cannot, sit comfortably with comparative causation."\textsuperscript{123} The court even emphasized that it does not want to "undermine and displace the principles of comparative causation that the Legislature has deemed applicable to 'any action to recover damages for personal injury, injury to property, or wrongful death.'"\textsuperscript{124} Because the court's precedent on assumption of risk "undermine[s] and displace[s] the principles of comparative causation," it should be abolished.\textsuperscript{125}

The original reasons for upholding the doctrine of assumption of risk as a distinct defense are no longer compelling. The doctrine used to be distinguishable from contributory negligence in two ways: Assumption of risk was a broader doctrine that not only applied to negligent conduct, but also to reckless conduct and strict liability as well, and an assumption of risk analysis applied a subjective standard, rather than the

\textsuperscript{121} Trupia, 14 N.Y.3d at 395, 927 N.E.2d at 549, 901 N.Y.S.2d at 129.
\textsuperscript{123} Trupia, 14 N.Y.3d at 395, 927 N.E.2d at 549, 901 N.Y.S.2d at 129.
\textsuperscript{124} Id. at 395–96, 927 N.E.2d at 549, 901 N.Y.S.2d at 129 (citations omitted).
\textsuperscript{125} Id. at 395, 927 N.E.2d at 549, 901 N.Y.S.2d at 129.
objective standard of the reasonable person applied in a contributory negligence context. \(^{126}\) In its current limited state, however, primary assumption of risk no longer applies to situations where the defendant engaged in reckless conduct, \(^ {127}\) and strict liability is not likely to apply in the limited context of sport and recreative activities. The subjective standard, although it remains a distinction, is not a strong leg for this doctrine to stand on, as it is recognized "that a purely subjective standard opens a very wide door for the plaintiff who is willing to testify that he did not know or understand the risk." \(^ {128}\)

Even the drafters of the Third Restatement recognize that there is "[n]o separate defense of assumption of risk." \(^ {129}\) Accordingly, the proposed final draft of the Third Restatement provides that a "plaintiff[] whose recovery would have been barred under the Second Restatement can secure a partial, although generally small, recovery." \(^ {130}\)

Accordingly, the courts should cease the use of the term "assumption of risk" as it applies to any set of facts. Instead, the courts should engage in an analysis to determine whether the defendant owed a duty to protect the plaintiff from the particular risk he or she encountered. This analysis is not new; it finds ample support in New York’s case law. As stated in *Benitez v. New York City Board of Education*, there is a duty to protect "from injuries arising out of . . . [the] concealed[] or unreasonably increased risks" present in sporting activities. \(^ {131}\) This standard should be applied as an objective standard, and plaintiff should have the burden of proof to show breach of this duty. \(^ {132}\) After all, this is essentially what the courts have been asking all along, but under the confusing terminology and application of "assumption of risk." \(^ {133}\)

\(^{126}\) *RESTATEMENT (SECOND) OF TORTS* § 496 A cmt. d (1965).


\(^{128}\) *KEETON ET AL.*, supra note 30, at 487.

\(^{129}\) *RESTATEMENT (THIRD) OF TORTS* § 25 cmt. e (Proposed Final Draft No. 1, Apr. 6, 2005).

\(^{130}\) *Id.*


\(^{132}\) If a plaintiff can show that the risk that caused his or her injuries was an unassumed, concealed, or unreasonable concealed risk over and above the inherent risks of the activity, then the defendant will be found negligent.

\(^{133}\) Some scholars feel that how you label the doctrine has little significance. According to Prosser and Keeton, "[i]t is difficult to see how this amounts to
Once the determination is made that the defendant breached a duty to the plaintiff, then the courts should treat any consensual and voluntary conduct that contributed to plaintiff's injury as "culpable conduct," to be considered in the apportionment of damages in accordance with CPLR 1411. This is what the legislature intended, as is evident from the statute's legislative history: "[T]he phrase 'culpable conduct' [is] broad enough to encompass [more than just] negligence . . . ."134

B. Abolish the Doctrine by Legislative Fiat

If the court refuses to carry out the legislature's intent, the burden may shift to the legislature to enact new legislation to overturn the Court of Appeals's precedent on primary assumption of risk. In fact, this process has already begun in the New York State Assembly.

New York State Assemblyman Joseph R. Lentol has proposed a bill to amend CPLR 1411 to add section (b):

In any action to recover damages for personal injury, injury to property, or wrongful death, arising out of the voluntary participation in competitive athletics, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.135

Although this proposed bill may be a step in the right direction, it is not likely sufficient to overcome the existing case precedent. By its terms, it relates only to "competitive athletics" and not to all of the sporting events and recreative activities identified in Trupia as needing the protection of the assumption of risk doctrine. The proposed bill also fails to define the term anything more than a change of terminology, or how it offers any advantage, other than the elimination of a phrase which is so cordially disliked by some writers and courts as to amount almost to a phobia." KEETON ET AL., supra note 30, at 495. However, when a term brings about as much confusion and irrelevance as the term "assumption of risk" has, it is imperative to change it to preserve the consistency of the legal system.

“competitive athletics.” Such an undefined term leaves room for the courts to exclude from the statute’s scope whichever “competitive athletics” they see fit, and, as we can see from the court’s precedent, the courts are inclined to do so. The doctrine is quite resilient, and the courts will find a way to resurrect it in the absence of absolute clarity from the legislature.\footnote{136}

To avoid another judicial resurrection of this seemingly immortal doctrine, the legislature would be wise to consider a more straightforward approach—similar to how Oregon handled its abolition of the doctrine.\footnote{137} It should unambiguously abolish the doctrine of assumption of risk: “All forms of assumption of risk are hereby abolished.” This will leave the courts with no choice but to apply a duty analysis under a normal negligence regime and will relegate the term “assumption of risk” to its CPLR 1411 status.

CONCLUSION

The Court of Appeals’s decision in Trupia turned an already dubious doctrine into one that is now beyond rational comprehension or orderly application. As a result, disorientation pervades New York’s case law on assumption of risk. Although the lower courts have sought valiantly to decipher the Court of Appeals’s precedent on this topic, their attempts have been fruitless. The courts have produced conflicting decisions, both in reasoning and results. To prevent further chaos, the doctrine of assumption of risk should be abolished. In doing so, the legislature’s intent in passing CPLR 1411 can come to fruition, and comparative negligence principles can prevail over the antiquated notion of a complete bar to recovery.

\footnote{136} Although the courts never distinguished between categories of assumption of risk prior to the enactment of CPLR 1411, the courts somehow have determined that the legislature \textit{intended} to exclude “primary” assumption of risk from CPLR 1411’s scope—an interesting conclusion, given that the terminology was not introduced until after the passing of the statute.

\footnote{137} OR. REV. STAT. ANN. § 31.620 (West 2012) (“The doctrine of implied assumption of the risk is abolished.”).
**Statement of Ownership, Management, and Circulation (Requester Publications Only)**

1. Publication Title: St. John's Law Review

2. Publication Number: 00362905

4. Issue Frequency: Quarterly

5. Number of issues Published Annually: 4

6. Annual Subscription Price: $30.00

7. Complete Mailing Address of Known Office of Publication (Not printed) (Street, city, county, state, and ZIP+4)
   
   St. John's University School of Law, 8000 Utopia Parkway, Queens, NY 11439

8. Complete Mailing Address of Headquarters or General Business Office of Publisher (Not Printed)
   
   St. John's University School of Law, 8000 Utopia Parkway, Queens, NY 11439

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor (Do not leave blank)

   Publisher (Name and complete mailing address)
   St. John's University School of Law, 8000 Utopia Parkway, Queens, NY 11439

   Editor (Name and complete mailing address)
   Kevin Wallace  
   St. John's University School of Law, 8000 Utopia Parkway, Queens, NY 11439

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   Full Name
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12. Tax Status (For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one)

   X Has Not Changed During Preceding 12 Months
   Has Changed During Preceding 12 Months (Publisher must submit explanation of change with this statement)

*PS Form 3828, August 2012 (Page 1 of 3 (Instructions Page2) PBE 7520-01-0004631 PRIVACY NOTICE: See our privacy policy on www.usps.com*
13. Publication Title
St. John's Law Review

14. Issue Date for Circulation Data Below
Spring-Summer 2012

15. Extent and Nature of Circulation
Average No. Copies Each Issue During Preceding 12 Months
No. Copies of Single Issue Published Nearest to Filing Date

| a. Total Number of Copies (Net Press run) | 602 | 590 |
| b. Paid Circulation (By Mail and Outside the Mail) | |
| (1) Mail Outside-County Paid Subscriptions stated on PS Form 3541, (include paid distribution above nominal rate, advertisers proof copies, and exchange copies) | 204 | 190 |
| (2) Mail In-County Paid Subscriptions stated on PS Form 3541, (include paid distribution above nominal rate, advertisers proof copies, and exchange copies) | 0 | 0 |
| (3) Paid Distribution Outside the Mails Including Sales Through Dealers and Carriers, Street Vendors, Counter Sales and Other Paid Distribution Outside USPS | 22 | 22 |
| (4) Paid Distribution by Other Classes of Mail Through the USPS (e.g. First-Class Mail) | 0 | 0 |
| c. Total Paid and/or Requested Circulation (Sum of 15b. (1), (2), (3), and (4)) | 224 | 212 |
| d. Free or Nominal Rate Distribution (By Mail and Outside the Mail) | |
| (1) Free or Nominal Rate Outside-County Copies Included on PS Form 3541 | 283 | 263 |
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| e. Total Free or Nominal Rate Distribution (Sum of 15d. (1), (2), (3), and (4)) | 357 | 357 |
| f. Total Distribution (Sum of 15c and 15e) | 581 | 569 |
| g. Copies not Distributed (See Instructions to Publishers #8, page #9) | 21 | 21 |
| h. Total (Sum of 15fand g) | 602 | 590 |
| i. Percent Paid (15c divided by 15f times 100) | 38.6% | 37.3% |

16. Publication of Statement of Ownership
If the publication is a general publication, publication of this statement is required. Will be printed
Publication not required.
In the FALL 2012 issue of this publication

17. Signature and Title of Editor, Publisher, Business Manager, or Owner
William A. Marx

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