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## Dead or Alive?

The assumption of risk doctrine in Pennsylvania

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Although the well settled doctrine of assumption of the risk dates back to at least the Industrial Revolution, over the past 30 years there has been a great deal of confusion in Pennsylvania regarding the continuing validity of this defense, particularly as a complete bar to a cause of action.

The doctrine has been essentially waging a battle against extinction since the early 1980's. Yet, like a weed pushing through a crack in a sidewalk, it refuses to be eradicated.

While the doctrine of assumption of the risk is often equated with, and at times subsumed by, the concept of contributory negligence, by strict definition it has a distinct character as a separate defense. All voluntary risk-taking that can be described by the phrase of "assuming the risk" does not necessarily constitute the defense. Rather, the elements of the doctrine require that it be established that a plaintiff fully understood the specific risk at hand and voluntarily chose to encounter it under circumstances that manifest a willingness to accept the risk.

In contrast, contributory negligence has been described as conduct, although possibly involving an element of voluntary risk-taking, occurring so close in time and proximity to the accident such that there is no deliberate abandonment of the right to complain by the injured party but rather a situation better judged by principles of negligence, i.e. reasonableness.

The doctrine's battle for existence in Pennsylvania intensified as far back as 1981 when, in a plurality decision that can not be considered precedential, the state Supreme Court identified four different kinds of assumption of the risk defenses and purported to abolish the defense except in cases where it was expressly preserved by statute, in cases of express assumption of the risk, and in strict liability cases. See the 1991 revised edition of Stephen Feldman's *Pennsylvania Trial Guide* Section 30.73, citing *Rutter v. Northeastern Beaver County School District*, 437 A.2d 1198 (Pa. 1981), where one justice concurred only in the result and three justices dissented.

Two years after the *Rutter* decision, the Supreme Court, in a separate decision commanding a clear majority, reaffirmed the existence of the doctrine at least in situations where, because of the knowledge of the plaintiff of the risk involved, it could be said that the defendant owed the plaintiff no duty. Feldman cites *Carrender v. Fitterer*, **456 A.2d 1013 (Pa. 1983), where the plaintiff found to assume the risk in a case involving a slip and fall on ice. In the *Carrender* decision, the court did leave open the issue of whether the assumption of the risk doctrine remained a defense in cases where the defense overlapped with the defense of contributory negligence.**

The state Supreme Court next addressed the issue in the 1993 case of *Howell v. Clyde*, 620 A.2d 1107 (Pa. 1993). In that case, two dissenting justices indicated their opinion that the doctrine no longer had any place in Pennsylvania law and stated that they would abolish it as an affirmative defense altogether. Two other justices, who issued the lead opinion of the case, did not go so far and ultimately only recommended a modification of the defense. Two other justices concurred in the result only and did not express any opinion as to the validity of the doctrine.

### Barely Breathing?

Thus, even after *Howell*, the doctrine, although battered, still breathed life as that decision essentially reaffirmed that the defense of assumption of the risk remained a bar to recovery where a plaintiff's specific

decision to accept a risk resulted in injury. See *Staub v. Toy Factory, Inc.,* 749 A.2d 522 (Pa. Super. 2000). The Superior Court in *Staub* further stated that "until our Supreme Court or our legislature abrogates assumption of risk in negligence cases, the doctrine remains viable in Pennsylvania."

The Supreme Court would next revisit, at least peripherally, the issue of the viability of the doctrine for the last and most recent time in the 2000 case of *Hughes v. Seven Springs Farm, Inc*., 762 A.2d 339 (Pa. 2000). *Hughes* involved a claim presented by an injured skier. Under express terms of the Comparative Negligence Act, the assumption of risk defense remains viable in downhill skiing cases. In *Hughes*, although the doctrine was not held to be abolished, the Supreme Court did indicate, in dicta, that "[a]s a general rule, the doctrine of assumption of the risk, with its attendant "complexities" and "difficulties," has been supplanted by the Pennsylvania General Assembly's adoption of a system of recovery based on comparative fault in the Comparative Negligence Act."

At least one subsequent Superior Court decision construed the *Hughes* case to limit the applicability of the doctrine to downhill skiing cases, leaving all other types of negligence cases to be governed by comparative negligence principles. See *Terwilliger v. Kitchen*, 781 A.2d 1201 (Pa.Super. 2001).

Yet, throughout the history of Supreme Court precedent on the issue and up to the present time, the lower courts of Pennsylvania have continued to issue conflicting opinions, some recognizing that the assumption of risk doctrine as a viable defense and others denying the same. The above review of Pennsylvania precedent confirms that the viability and applicability of the doctrine remains in a state of confusion that requires clarification from the Pennsylvania Supreme Court. As noted below, cases such as *Vargus v. Pitman Manufacturing Co.*, 510 F.Supp. 116 (E.D.Pa. 1981), reveal that such clarification is possible without eradicating the doctrine altogether.

In *Vargus*, the assumption of risk doctrine was divided into two categories by the Pennsylvania federal courts applying Pennsylvania law. Assumption of risk in its primary and strict sense was defined as "voluntary exposure to an obvious known danger which negates liability." This definition was grounded in the policy that an injured party should not be allowed to knowingly and voluntarily choose to encounter a danger and thereafter attempt to shift blame to another when they are injured.

By contrast, assumption of risk in its secondary sense was defined as ordinarily synonymous with contributory negligence and involved a failure to exercise reasonable care for one's safety. More specifically, where the conduct of the plaintiff leading to the accident is close in time and space to the accident, the principles of assumption of risk and contributory negligence tend to overlap. In such situations, comparative negligence principles should be applied rather than the doctrine of assumption of the risk as there may not have been time for the plaintiff to make a deliberate and voluntary decision to face a known danger.

The *Vargus* court noted that, while assumption of risk in its secondary sense has been considered merged into the definition of contributory negligence, assumption of risk in its primary and strict sense should be viewed as having survived as a separate and distinct defense that still serves as a complete bar to a cause of action.

**Still a Complete Bar**

As recently as last year, trial courts have likewise continued to uphold the use of the assumption of risk defense, in its primary and strict sense, as a complete bar to the plaintiff's cause of action. Such courts have reiterated that the continuing validity of the doctrine is grounded in the basic injustice of permitting a plaintiff to claim that someone else is responsible for his or her injury after that plaintiff knowingly and voluntarily accepted and encountered the risk which unfortunately resulted in injury. *McMurdie v. Wyeth*, **2005 WL 465952 (C.P. Philadelphia 2005). Most recently, in a decision dated September 21, 2005 the Superior Court likewise acknowledged that the doctrine remains a valid defense. See *Hadar v. Avco Corp.,* 2005 WL 2292831, PICS Case No. 05-1529 (Pa. Super. 2005).**

**A review of Pennsylvania law reveals that, over the years, the assumption of the risk doctrine, in its primary and strict sense has been applied in the following situations to bar a plaintiff's cause of action:**

**• where the plaintiff struck a match knowing there was leaking gas nearby;**

**• where the plaintiff rode on the outside of a motor vehicle;**

**• where the plaintiff was a participant or spectator at a sporting event;**

**• where the plaintiff rode in a vehicle with an operator known to the plaintiff to be intoxicated or incompetent;**

**• where the plaintiff rode in a vehicle he knew to be in defective condition;**

**• where the plaintiff walked or stepped into an area he knew to be dangerous;**

**• where the plaintiff voluntarily placed his body in proximity to machinery he knew to be dangerous; and**

**• where the plaintiff knowingly worked in a dangerous occupation.**

**Feldman's *Pennsylvania Trial Guide* provides a guide to situations where assumption of the risk has governed.**

**Thus, it would appear that the doctrine of the assumption of risk remains valid in Pennsylvania, at least in its primary and strict sense where it operates as a complete bar to a plaintiff's cause of action due to a plaintiff's voluntary and intelligent encountering of a known risk. It would also appear that the secondary or generic form of the "assuming the risk" argument, pertaining to the conduct of a plaintiff which is not premeditated or which is close in time and space to the subject accident, is subsumed by the concept of comparative negligence.**

**Yet it appears that, until the Supreme Court or the General Assembly expressly reaffirms the important distinction between the primary and secondary sense of the defense, the doctrine of assumption of the risk, although alive, will not be able to enjoy its full force and effect.**

**In the words of Justice Stephen A. Zappala in his concise dissenting opinion found in *Howell v. Clyde:* "Until such time as this Court arrives at a clear-cut majority, we will continually muddy the waters in the sensitive areas of both comparative negligence and the assumption of risk, both of which are cornerstones of the negligence law in this Commonwealth." •**