THE ROLE OF PRIMARY ASSUMPTION OF RISK IN CIVIL LITIGATION IN MINNESOTA

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I. INTRODUCTION

Assumption of risk is a protean concept. It has presented courts with considerable difficulty in defining its theoretical justification and its relationship to tort duty limitations and to the defense of contributory negligence. In Minnesota and elsewhere, assumption of risk has been applied inconsistently. Sometimes it seems to relate to the duty issue and sometimes it is linked to the defense of contributory negligence, but without a clear differentiation of which issue is involved. In Minnesota specifically, the Minnesota Supreme Court has acknowledged that inconsistency and the difficulty in applying the concept in cases spanning several decades.

Prior to the court's decision in *Springrose v. Willmore*,[1] the Minnesota Supreme Court's first post-comparative negligence case in which the court considered the place of assumption of risk in Minnesota law, the court struggled mightily with assumption of risk issues, most of which arose in the context of employment cases. However, taking as its text the New Jersey Supreme Court's opinion in *Meistrich v. Casino Arena Attractions, Inc.*,[2] the court in *Springrose* abruptly broke with its prior precedent and smoothed out assumption of risk law by separating assumption of risk in its secondary sense from assumption of risk in its primary sense, and linking primary assumption of risk to the duty issue in negligence law and secondary assumption of risk to the defense of contributory negligence. For the most part, the supreme court's decisions have been consistent in their approach to assumption of risk issues. On the other hand, the Minnesota Court of Appeals and the Eighth Circuit have had a more difficult time applying assumption of risk principles, in part because their opinions have deviated from *Springrose*'s bedrock statement of assumption of risk principles.

This article focuses on primary assumption of risk, which is the facet of assumption of risk that has created the most difficult problems, post-*Springrose*. The primary problem in understanding primary assumption of risk is in determining its relationship to the duty issue in tort law. A secondary and dependent problem is in determining the appropriate relationship between judge and jury for purposes of applying primary assumption of risk principles.

Part two of the article begins with a short history of some of

1. 292 Minn. 23, 192 N.W.2d 826 (1971).
2. 155 A.2d 90 (N.J. 1959).

the key Minnesota cases involving assumption of risk in the employment context. Those decisions, perhaps more than any others, indicate the complexity and inconsistent treatment of assumption of the risk in Minnesota. Part three discusses *Springrose v. Willmore*,[3] the first Minnesota post-comparative negligence act case to deal with assumption of risk. Part four discusses the Minnesota Supreme Court's primary assumption of the risk cases decided after *Springrose*, primarily to illustrate the substantial inconsistency in the court's approach to primary assumption of the risk issues. Part five discusses two illuminating Minnesota Court of Appeals cases that highlight the problems that can arise when *Springrose* is not tightly followed. That discussion is followed by part six, which is an analysis of a recent Eighth Circuit Court of Appeals opinion that devoted a substantial amount of space in an attempt to delineate primary assumption of risk principles in Minnesota. It provides an interesting insight into the difficulty that courts have in determining the place of primary assumption of risk in Minnesota law.

The seventh part of the article examines the problems involved in instructing juries on primary assumption of risk. Given Minnesota's reliance on New Jersey law in *Springrose*, part eight compares Minnesota and New Jersey law, speculating on what the face of how Minnesota primary assumption of risk law would look had it followed more tightly the New Jersey Supreme Court's abolition of assumption of risk. Part nine compares Minnesota with the Restatement (Third) of Torts: Apportionment of Liability, which abolishes primary assumption of risk.

II. THE HISTORY—ASSUMPTION OF RISK IN EMPLOYMENT INJURIES

Assumption of risk concepts initially arose in the master-servant context in Minnesota, as in other jurisdictions. There are numerous cases involving the issue and it is clear that the supreme court has struggled mightily with the concept. The court has been candid in acknowledging the problems in assessing the theoretical basis of assumption of risk and in relating it to the duty of masters to their servants and to the defense of contributory negligence. The following four decisions, spanning almost six decades in Minnesota law, are illustrative of the difficulties the court has had

3. 292 Minn. 23, 192 N.W.2d 826 (1971).

in dealing with assumption of risk.

In *Rase v. Minneapolis, St. Paul, & Sault Ste. Marie Railway Co.*,[4] a 1909 opinion, the court engaged in a lengthy analysis of assumption of risk in a case involving injuries sustained by a railroad employee while working on a coal elevator. The trial court held as a matter of law that the employee assumed the risk of injury. The supreme court's initial comment on the case says much about the state of the law, even at an early state:

> [The trial court's] conclusion was sustained and opposed by an almost equal number of decisions of this court on similar facts. This is one of the class of constantly recurring cases in which counsel are unable to advise their clients and courts unable to agree or decide consistently. It would be easy, but inadequate, to dogmatically determine this particular question without considering the 'veritable chaos of conflicting precedents' which have applied the doctrine.[5]

In the interest of clarifying assumption of risk, the court proceeded to consider its basis, the character of assumption of risk as a distinctive defense, its standards, and when assumption of risk is a question of fact for the jury or a question of law for the court.

There are three potential theoretical bases for assumption of risk in the master-servant context. One justification is economic: that public policy demands a significant modification and restriction of the doctrine. The argument is that the original rule is "artificial in origin" and "unjust in operation" because it imposes the risks of injury associated with employment upon the servant, rather than on industry, and also because of the paradoxical impact of the rule that insulates the employer from liability the greater the employer's negligence.[6] At the other extreme, the argument is that natural law principles justify imposing the risks of employment on the employee, given the natural right of the master to conduct business as he sees fit and the right of the servant to refuse to work under the specified conditions.[7]

Without reconciling the approaches, the court noted that abrogation of the doctrine of assumption of risk would require judicial legislation:

4. 107 Minn. 260, 120 N.W. 360 (1909), *overruled in part*, Suess v. Arrowhead Steel Products Co., 180 Minn. 21, 25-26, 230 N.W. 125, 126-27 (1930).

5. 107 Minn. at 264, 120 N.W. at 362.

6. *Id.* at 265, 120 N.W. at 362-63.

7. *Id.* at 265, 120 N.W. at 363.

> The difficulty arises because the premises on which the rule, regarded as juristic, is based are so confused and indefinite that to deduce from them with metaphysical consistency is almost certain to result in practical absurdity. None the less a faithful effort, accompanied by neither hostility to nor advocacy of the abstract merits of the doctrine, must be made to discover and apply the law as the courts, taken as a whole, have determined it to be.[8]

In distinguishing contributory negligence and assumption of risk, the court noted that it is often said that assumption of risk is a matter of contract and contributory negligence a matter of tort, but that in the current class of cases assumption of risk cannot rest on contract.[9] However, the court concluded that both defenses arise from the employee's conduct, and that both are peculiar to tort law. The court said that a less-indefensible distinction is the following:

> Failure to exercise due care, which the law has imposed as a duty, is the necessary differentia which distinguishes the species, negligence, from the genus, tort. It is equally an essential characteristic of contributory negligence. It has no logical connection with assumption of risk. Carelessness is not the same thing as intelligent choice . . . . Voluntary assumption negatives the idea of even prima facie liability. Contributory negligence displaces liability prima facie established. The former is mere passive subjection by the servant to risk of injury inherent in known defective conditions. The latter is an act or omission on complainant's own part tending to add new danger to his situation not necessarily incident to conditions, and bringing upon himself a harm caused not solely by them, but created in part, at least, by his own misconduct . . . . Contributory negligence is a breach of legal duty to take due care, imposed by law upon the servant, however unwilling or protesting he may be. Assumption of risk is not a duty, but is purely voluntary upon the part of the servant. The doctrine of assumption of risk rests on intelligent acquiescence with knowledge of danger and appreciation of the risks. The distinction varies from being clear and vital at one extreme to being vague and insignificant at the other.[10]

8. *Id.* at 266, 120 N.W. at 363.
9. *Id.* at 267, 120 N.W. at 363.
10. *Id.* at 267, 120 N.W. at 363-64 (citations omitted).

The court also considered whether assumption of risk rests on contract or the principle expressed in the civil law maxim, "volenti non fit injuria"—that to what the party assents is no wrong. The court rejected contract as the basis for assumption of risk, concluding instead that assumption of risk depends on "public policy, the status assumed by master and servant, and upon the maxim 'volenti non fit injuria.'"[11] The court appears to indicate that assumption of risk in this context relieves the employer of liability for a duty, whereas contributory negligence arises only after the breach.

The court next examined English, American, and Minnesota cases for purposes of determining whether assumption of risk is a question for the court or a question for the jury. The court concluded that a change in theory in the English cases confused the American courts, but that in general, the American cases as of 1909, at least, thought the issue to be one for the jury. The court found that the Minnesota Supreme Court decisions "involve the complexity and confusion and inconsistency of opinion on the subject which is to be found everywhere."[12] However, the court found that the tendency in Minnesota is to send close questions concerning assumption of risk to the jury.[13]

In *Westcott v. Chicago Great Western Railway Co.*,[14] a 1923 Federal Employers' Liability Act ("FELA") case arising out of the death of a railroad employee injured during a flying switch of railroad cars, one of the issues concerned the application of assumption of risk.[15] Contributory negligence was not a complete defense, but would reduce the plaintiff's recovery. Assumption of the risk, however, was a complete defense under FELA, unless the railroad violated a safety statute intended for the protection of its employees. Prior to the enactment of those statutes, courts did not have to distinguish between contributory negligence and assumption of risk, but after enactment it became important to distinguish between the two to be sure that contributory negligence was not mistaken for assumption of risk. The jury found the defendant negligent, but, on appropriate instructions, concluded that the plaintiff did not

11. *Id.* at 270, 120 N.W. at 365 (citing Green v. Western Am. Co., 70 P. 310 (Wash. 1903)).
12. *Id.* at 279, 120 N.W. at 369.
13. *Id.* at 280, 120 N.W. at 369.
14. 157 Minn. 325, 196 N.W. 272 (1923).
15. *Id.* at 328, 196 N.W. at 273.

assume the risk of injury and that he was not contributorily negligent.[16]

The court built on *Rase* and other Minnesota cases in noting the stated differences between assumption of risk and contributory negligence, including the fact that assumption of risk does not depend on contractual relations between the plaintiff and defendant.[17] The court also noted that assumption of risk shades into negligence, and that there is continuing difficulty in separating the two terms.[18] The court noted the overlap, but indicated "that assumption of risk involves the notion that the master is absolved from negligence by the consent of the servant who works with defective appliances, with notice of the defect and appreciation of the danger," but that the defenses are habitually confused.[19] No less confused about the relationship between the defenses than the court in *Rase*, the court's observation is indicative of the difficulty it had in arriving at any clear line of demarcation: "It has been said that just what is necessary to constitute an assumption of a risk by the person injured which will relieve the other party of responsibility can be truly said to constitute the great unsolved problem of the law of negligence."[20] The court left the analysis of assumption of risk at that and affirmed the trial court's denial of the defendant's motions for judgment notwithstanding the verdict or alternatively for a new trial.

In *Geis v. Hodgman*,[21] a 1959 decision, a housekeeper was injured when she slipped and fell on a patch of ice on her employer's driveway when she returned from getting the mail. One of the issues in the case was whether the plaintiff assumed the risk of injury as a matter of law. In an opinion by Chief Justice Knutson, the court held that she did. The court began its analysis with the familiar refrain that "it is apparent at the outset that a great deal of confusion exists in the law as to the proper application of the doctrine,"[22] and that there is such confusion over the history and origin of the rule, the theory upon which it rests, and the inconsistency in application that "respectable authority can

16. *Id.* at 331, 196 N.W. at 274.
17. *Id.* at 330, 196 N.W. at 274.
18. *Id.*
19. *Id.* at 329, 196 N.W. at 274.
20. *Id.* at 330, 196 N.W. at 274 (citing 1 THOMAS ATKINS STREET, FOUNDATIONS OF LEGAL LIABILITY 150 (1906)).
21. 255 Minn. 1, 95 N.W.2d 311 (1959).
22. *Id.* at 3, 95 N.W.2d at 313.

be found to support almost any view."[23]

The court stated that the rule in Minnesota originally rested on contract, a statement that seems to conflict with the court's analysis of the issue in the *Rase* case, and then noted that the master was generally under no duty to indemnify a servant for injuries arising out of perils incident to employment. The problem arose in cases where the master did in fact owe the servant an obligation to do something. In those cases the court noted the difficulty in distinguishing assumption of risk from contributory negligence. The court acknowledged that the defenses overlap, yet it also said that they are distinct in master-servant cases.

The application of assumption of risk hinges upon an assessment of the risks inherent in particular employment. The employee is deemed to have accepted risks that the employee knew or should have known existed; where the employee's knowledge is as complete as the employer's, assumption of risk bars recovery.[24]

The court said that assumption of risk is a disfavored defense and that it is usually a jury issue, except in cases where the evidence is conclusive and the issue becomes a question of law for the court.[25] As applied, the court concluded that the plaintiff was aware that the ice was slippery. Because her knowledge and appreciation of the danger were equal to her employer's, the court held that she assumed the risk as a matter of law.[26]

The court added a postscript indicating that its opinion involved only the master-servant relationship, and that in other cases other considerations would be present.[27] The court made no attempt to resolve those cases.

Seven years later, Chief Justice Knutson wrote for the court again in another assumption of risk case, *Knutson v. Arrigoni Bros. Co.*[28] The case arose out of injuries sustained in an industrial accident by the plaintiff, who was employed as a carpenter on a construction project by a general contractor. He was injured when he slipped on a terrazzo floor that was insufficiently set. He sued the subcontractor responsible for laying the floor. Following a verdict for the plaintiff, the defendant argued among other things

23. 255 Minn. at 3-4, 95 N.W.2d at 313.
24. *Id.* at 9, 95 N.W.2d at 316.
25. *Id.* at 6, 95 N.W.2d at 314-15.
26. *Id.* at 11-12, 95 N.W.2d at 318.
27. *Id.* at 12, 95 N.W.2d at 318.
28. 275 Minn. 408, 147 N.W.2d 561 (1966).

that the plaintiff assumed the risk as a matter of law. The supreme court began its analysis by noting again that assumption of risk continues to be troublesome, but that it would be futile to try to discuss the authority on the issue.[29]

The court noted that in a broad sense, assumption of risk may be a phase of contributory negligence, but that there are differences in the two defenses, citing *Rase* and *Westcott* for that proposition. The court noted that assumption of risk requires notice or knowledge and appreciation of the risk. It "involves comprehension that a peril is to be encountered and a willingness to encounter it," whereas contributory negligence is based upon carelessness.[30] The pivotal point is that contributory negligence does not necessarily involve knowledge of the danger and a willingness to encounter the danger. The court also said that it had difficulty in seeing how assumption of risk could not involve unreasonable conduct, and in that limited sense, it might be a phase of contributory negligence. However, the court also thought that assumption of risk involved something more than what is required to establish contributory negligence. Assumption of risk involves "comprehension that a peril is to be encountered and a willingness to encounter it,"[31] and it differs from the defense of contributory negligence, which is based on carelessness, because it is "an exercise of intelligent choice."[32] As applied, the court held that the trial court correctly refused to instruct the jury on primary assumption of risk because of the lack of evidence indicating that the plaintiff was aware of the risk of injury. Assumption of risk in the court's discussion seems to be a facet of contributory negligence, rather than directed toward the issue of whether the defendant owed a duty to the plaintiff.

While there are dozens of Minnesota cases involving workplace injuries where assumption of risk was an issue, this short history demonstrates continuing concern expressed by the Minnesota Supreme Court over the role of assumption of risk in tort litigation. As of 1966, the court had not settled on the basis for applying assumption of risk in master-servant cases and it had not established any clear distinction between primary assumption of

29. *Id.* at 412, 147 N.W.2d at 565.
30. *Id.* at 413, 147 N.W.2d at 565 (citing Schrader v. Kriesel, 232 Minn. 238, 247, 45 N.W.2d 395, 400 (1950)).
31. *Id.*
32. *Id.*

risk and assumption of risk in its secondary sense. 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. The court's discussion of assumption of risk seems sometimes to relate to duty and sometimes to assumption of risk as an aspect of duty. The court had taken the edge off the defense, at least when it was considered an affirmative defense, by stating that the assumption of risk issue was usually for the jury to resolve. Additionally, the court was unwilling to readily extend the law in master-servant cases to other areas.

The confusion exhibited by the court was of course not unique in American tort law. Most jurisdictions struggled with the same problems and most had difficulty in arriving at a satisfactory resolution of the issue.[33] Minnesota's opportunity arrived with the first case to raise assumption of risk after the passage of the comparative negligence statute in 1969.

III. PRIMARY ASSUMPTION OF RISK—*SPRINGROSE V. WILLMORE*

In *Springrose v. Willmore*,[34] the supreme court considered the impact of the Minnesota comparative negligence statute on implied assumption of risk in a case involving injuries to a passenger who rode in a car with knowledge that the driver was inexperienced and was racing other cars. The trial court submitted the plaintiff's contributory negligence and assumption of risk to the jury, which found that she was not contributorily negligent, but that she had assumed the risk of injury. The issue on appeal involved the appropriateness of the assumption of risk instruction.

In its analysis of assumption of risk, the court relied in part on the New Jersey Supreme Court's opinion in *Meistrich v. Casino Arena Attractions, Inc.*,[35] a roller skating accident case. The case is important because the Minnesota Supreme Court in *Springrose* noted that its own "departure from precedent is neither recent nor radical," and that "[t]he bench and bar will observe the extent to which we have responded to the landmark opinion" in *Meistrich*.[36]

33. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 Reporters' Notes (2000).

34. 292 Minn. 23, 192 N.W.2d 826 (1971).

35. 155 A.2d 90 (N.J. 1959).

36. *Springrose*, 292 Minn. at 25, 192 N.W.2d at 827. The supreme court was urged to follow *Meistrich* in *Parness v. Economics Laboratory, Inc.*, 284 Minn. 381, 386,

The court in *Meistrich* noted the development of assumption of risk in the master-servant context and the confusion that the terminology spawned, given its use to describe different concepts. One concept was that the master was simply not negligent in cases where an employee was injured by risks inherent in the employment, and one described the affirmative defense in cases where the master had breached his duty to provide the employee a reasonably safe place to work but where the employee nonetheless voluntarily exposed himself to the risk the master negligently created.[37] The problem was compounded because of the practice of pleading the defense without any indication of which aspect of assumption of risk was being asserted.

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. The court, however, thought the application of assumption of risk was "but a harsh and improvident application of the familiar standard of the behavior of the reasonable man." Because "courts thought it indisputable that a reasonably prudent man would not continue to work with such knowledge," they took the issue from the jury.[38]

The court noted that the concept as it operated in the master-servant context was discredited upon legislative adoption of workers' compensation. Given this history, the court was not inclined to extend the concept into other areas "with the discredited notion that one who knew (or should have known) of a negligently created risk is barred even though free of fault, i.e., even though a reasonably prudent man would have incurred the risk despite that knowledge."[39]

The court then held that secondary assumption of risk merged with the defense of contributory negligence.[40] "[A] well-guarded charge of assumption of risk in its primary sense" could aid comprehension,[41] but there was no reason to separately instruct on secondary assumption of risk:

170 N.W.2d 554, 557-58 (1969), but declined to do so because it preferred to wait for a case where the issue of the relationship between secondary assumption of risk and contributory negligence would be present under the Minnesota comparative negligence act.

37. *Mesitrich*, 155 A.2d at 93.
38. *Id.* at 94-95.
39. *Id.* at 95.
40. *Id.* at 95-96.
41. *Id.* at 96.

> We are satisfied that there is no reason to charge assumption of risk in its sectiondary [sic] sense as something distinct from contributory negligence, and hence that . . . the terminology of assumption of risk should not be used. Rather, . . . the subject should be subsumed under the charge of contributory negligence. With respect to its primary sense, it will not matter whether a trial court makes or omits a reference to assumption of the risk, provided that if the terminology is used the jury is plainly charged it is merely another way of expressing the thought that a defendant is not liable in the absence of negligence; that a plaintiff does not assume a risk defendant negligently created, . . . ; and that if defendant is found to have been negligent, plaintiff is barred only if defendant carries the burden of proving contributory negligence, i.e., plaintiff's failure to use the care of a reasonably prudent man under all of the circumstances either in incurring the known risk or in the manner in which he proceeded in the face of that risk.[42]

However, in discussing primary assumption of risk, it is clear from the court's opinion that what has been called primary assumption of risk is nothing other than a denial of the defendant's duty.[43] The potential for charging a jury on primary assumption of risk has to be understood in that narrow context. However, that nod to primary assumption of risk did not last long in New Jersey.

Four years after *Meistrich*, the New Jersey Supreme Court put an end to primary assumption of risk in *McGrath v. American Cyanamid Co.*,[44] a case involving a workplace accident that resulted in the death of a construction worker. One of the defendants in the case argued that the suit should be barred by assumption of risk. The court rejected the argument and concluded that assumption of risk should be banished from New Jersey law. The court said that it had hoped that post-*Meistrich*, "the bench and bar would focus upon the true issues, but unhappily some cling to the terminology of assumption of risk and continue to be misled by it even while purporting to think of it as merely a convertible equivalent of negligence or contributory negligence."[45]

The court noted its statement in *Meistrich* that a well-guarded

42. *Id.* (citations omitted).
43. *Id.* at 97.
44. 196 A.2d 238 (N.J. 1963).
45. *Id.* at 240.

charge of primary assumption of risk could aid in comprehension of the issues in a negligence case, but the court said that its experience indicated that the term "assumption of risk" was "so apt to create mist that it is better banished from the scene."[46] The court said that it hoped to "have heard the last of it," and that the key inquiries would now be negligence and contributory negligence.[47]

Aside from some differences concerning the origin of the doctrine of assumption of risk in master-servant cases, *Meistrich*'s discussion of the origins of assumption of risk and the confusion caused by incorporation of two distinct concepts under a single term could just as easily be a description of Minnesota assumption of risk law.

The Minnesota Supreme Court in *Springrose* was required to consider more carefully the role of assumption of risk in Minnesota tort law because of the legislature's adoption of the comparative negligence statute, which made contributory negligence subject to comparison with the defendant's negligence,[48] rather than a complete bar to recovery.[49] The court focused on the relationship between secondary assumption of risk and the defense of contributory negligence and held that "[t]he doctrine of implied

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46. *Id.* at 240-41.

47. *Id.* at 241.

48. 1969 Minn. Laws ch. 624, § 1. *See* MINN. STAT. ANN. § 604.01, Historical and Statutory Notes (2002). The comparative negligence statute was enacted in 1969, but was applicable to the trial of any action that commenced after July 1, 1969. Therefore, even though the accident that gave rise to the suit occurred in 1966, the statute applied to the case. The comparative negligence statute read as follows when it was enacted:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering. The court may, and when requested by either party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence attributable to each party; and the court shall then reduce the amount of such damages in proportion to the amount of negligence attributable to the person recovering. When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each, provided, however, that each shall remain jointly and severally liable for the whole award.

49. Springrose v. Willmore, 292 Minn. 23, 23, 192 N.W.2d 826, 826 (1971).

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."[50]

While most of the court's opinion was devoted to a discussion of the relationship between contributory negligence and what it termed "secondary assumption of risk," the court also distinguished secondary from primary assumption of risk and indicated the place of primary assumption of risk in Minnesota law:

> 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. The limited duties owed licensees upon another's property, . . . or patrons of inherently dangerous sporting events . . . are illustrative.[51]

In an abbreviated statement, the court made it clear that "[t]he classes of cases involving an implied primary assumption of risk are not many." However, because primary assumption of risk was not involved in the case, the court said that "we have no occasion to determine the method by which such issue should be presented to a jury."[52] That conclusion was consistent with the New Jersey Supreme Court's position on primary assumption of risk in *Meistrich*.

One of the *Springrose* court's two illustrative examples of primary assumption of risk, the sporting event case, was *Aldes v. Saint Paul Ball Club*,[53] a 1958 case arising out of injuries sustained by a boy when he was hit by a baseball that got away from one of the

50. *Id.* at 24, 192 N.W.2d at 827.

51. *Id.* at 24, 192 N.W.2d at 827. In 1978, the legislature converted the comparative negligence statute [1978 Minn. Law ch. 738, §§ 6, 7] into a comparative fault statute, *see* MINN. STAT. ANN. § 604.01, subd. 1 (2002), and provided for the comparison of various forms of fault, including "acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability," and "breach of warranty, unreasonable assumption of risk not constituting an express consent or primary assumption of risk . . . ." *Id.* at subd. 1a. Unreasonable assumption of risk, or secondary assumption of risk, is subject to comparison. Express consent and primary assumption of risk are not subject to comparison. *Id.*

52. *Springrose*, 292 Minn. at 24, 192 N.W.2d at 827.

53. 251 Minn. 440, 88 N.W.2d 94 (1958).

players during infield practice. The plaintiff had been asked by one of the ushers if he wanted to sit with the usher in one of the first-base box seats. The facts established that the plaintiff was familiar with baseball, and that he knew that misdirected baseballs could land in the box seats. The court said that "[i]t is clear that, had the minor plaintiff been struck while sitting in the seat for which he paid and from which he viewed most of the game, neither he nor his father would be entitled to recover."[54] However, the court said that the fact that the plaintiff accepted the invitation did not mean that he assumed the risk of injury: "A patron assumes only the risk of injury from hazards inherent in the sport, not the risk of injury from the proprietor's negligence."[55] The court went on to hold that the trial court erred in its holding that the plaintiff was barred from recovery as a matter of law, and that he was entitled to a trial on the issue of whether the defendant was negligent and whether the plaintiff assumed the increased risk of injury under the circumstances.

The second example cited by *Springrose* involved landowners' duties to licensees. The illustrative case the court noted was *Sandstrom v. AAD Temple Building Association, Inc.*,[56] a premises liability case in which the plaintiff fell and was injured on her way to the bathroom at an auditorium where she was attending a public event. The court held that under the circumstances the defendant did not breach any duty to the plaintiff. Her status as a licensee precluded recovery. The plaintiff argued that the distinctions between business invitees and gratuitous licensees had disappeared, and that the resolution of the case should instead have turned on her contributory negligence, but the court rejected the argument:

> It is still the recognized and prevailing view of American judicial opinion that the licensee assumes the risk of defective conditions on property unknown to the possessor and at most is entitled to only a warning of known hidden defects.[57]

While the opinion uses assumption of risk terminology, the term is used in defining the scope of the defendant's duty.

Springrose initiated a new analytical methodology in assumption

54. *Id.* at 441, 88 N.W.2d at 96.
55. *Id.* at 443, 88 N.W.2d at 97.
56. 267 Minn. 407, 127 N.W.2d 173 (1964).
57. *Id.* at 411, 127 N.W.2d at 176.

of risk cases.[58] The court made no attempt to reconcile divergent Minnesota precedent on the primary assumption of risk issue, and it did not incorporate prior analyses of assumption of risk in its opinion, except to note the two earlier cases it said were illustrative of cases where primary assumption of risk might apply, although both cases are in effect limited duty cases that focus on the defendant's obligation to exercise reasonable care for the safety of the plaintiff. The most important point of the court's discussion of primary assumption of risk is that it has limited reach, and that primary assumption of risk in the cases it might reach are in effect cases involving the defendant's duty to the plaintiff.

The terminology used to address assumption of risk issues also changed in *Springrose*. While prior Minnesota cases may have involved what now may be termed primary assumption of risk, the court in earlier cases did not frame its analysis in those cases in those terms, although some of those cases discuss assumption of the risk in terms of a no-duty rule. *Springrose's* split of primary and secondary assumption of risk permits a sharper focus on the concept of primary assumption of risk and how it relates to the duty issue in tort litigation. The court also avoided the issue of jury submission of primary assumption of risk issues. That question has continued to be problematic for the courts as well.

IV. POST-*SPRINGROSE*—PRIMARY ASSUMPTION OF RISK IN THE MINNESOTA SUPREME COURT

The Minnesota Supreme Court has subsequently decided several cases involving primary assumption of risk. The court has been quite consistent in dealing with assumption of risk cases, with the exception of two more recent decisions that have raised questions concerning the proper application of primary assumption of risk. This section discusses those cases seriatim.

A. Olson v. Hansen (1974)

In *Olson v. Hansen*,[59] the issue was whether primary assumption of risk barred the plaintiff's recovery for injuries she sustained while a passenger on a snowmobile driven by the defendant. The court held that it did not. The court characterized primary

58. 292 Minn. 23, 192 N.W.2d 826 (1971).
59. 299 Minn. 39, 216 N.W.2d 124 (1974).

assumption of risk as "not so much an affirmative defense as an expression of the idea that the defendant owes a limited duty of care to the plaintiff with respect to the risk incident to their relationship."[60] Primary assumption of risk applies "only where parties have voluntarily entered a relationship in which plaintiff assumes well-known, incidental risks."[61] The defendant has no duty to protect the plaintiff as to those risks, and, "if the plaintiff's injury arises from an incidental risk, the defendant is not negligent."[62] The court reiterated *Springrose*'s narrow range of assumption of risk cases, while also adding hockey games to the list.[63]

B. Bakhos v. Driver (1979)

The plaintiff in *Bakhos v. Driver*[64] was injured when he fell from a tree he had climbed to assist in removing a tree limb. Although the jury assigned 60% of the fault to the defendant, who was pulling on a rope attached to the tree limb while the plaintiff sawed the limb, the jury also found that the plaintiff had assumed the risk of injury of the procedure. Based on that finding, the trial court entered judgment for the defendant. The supreme court held that the evidence established as a matter of law that the plaintiff did not assume the risk. The court noted that assumption of risk required proof that the plaintiff had knowledge of the risk, appreciated the risk, and had a chance to avoid or accept the risk and chose to accept it.[65] However, the court concluded that the plaintiff did not assume the risk of the defendant's negligence because the plaintiff did not have "certain knowledge" of the defendant's negligence when he ascended the tree. The fact that the plaintiff climbed a ladder to cut off the limb "did not relieve the defendant of his duty to exercise reasonable care in his handling of the rope." The court held that "[t]he continued existence of this duty makes the defense of primary assumption of risk inapplicable to this case."[66]

60. *Id.* at 43, 216 N.W.2d at 127.
61. *Id.* at 44, 216 N.W.2d at 127.
62. *Id.*
63. *Id.* at 44, 216 N.W.2d at 128. *See* Modec v. City of Eveleth, 224 Minn. 556, 29 N.W.2d 453 (1947).
64. 275 N.W.2d 594 (Minn. 1979).
65. *Id.* at 595. The court relied on the Minnesota Civil Jury Instructions as a guide. 4 MINN. DIST. JUDGES ASS'N, COMM. ON JURY INSTRUCTION GUIDES (CIVIL) JIG II, 135 G-S (2d ed. 1974, James Hetland, Jr. and Oscar C. Adamson, II, Reporters) in 4 MINN. PRACTICE 104-07 (2d ed. 1974).
66. 275 N.W.2d at 595.

In stating that the record established as a matter of law that the plaintiff did not assume the risk of the accident so as to bar recovery under "the doctrine" of *Springrose*, the court said that the definition of assumption of risk was correctly set out in JIG 135 of the Civil Jury Instruction Guides. That instruction establishes the requirements of knowledge and appreciation of the risk and a choice to chance or avoid the risk and a voluntary acceptance of that risk.

However, in *Springrose*, the court indicated that the instruction was an appropriate definition of secondary assumption of risk, with the additional requirement that the plaintiff had acted unreasonably in chancing the risk, and that, as such, secondary assumption of risk is an aspect of contributory negligence. Noting the elements of primary assumption of risk as the court did in *Bakhos* creates a tendency to give it an identity that is potentially separate from the duty issue. On the other hand, the court's emphasis on whether the plaintiff had "certain knowledge" of the risk of the accident is still linked to the duty issue. The court's disposition of the case appears to be consistent with *Springrose*, given the court's conclusion that the defendant breached a duty owed to the plaintiff, and that primary assumption of risk was therefore inapplicable.

C. Adee v. Evanson (1979)

In *Adee v. Evanson*,[67] the plaintiff was injured when she slipped and fell on an icy sidewalk in front of the defendant's store while she was on her way to the store's entryway. The trial court instructed the jury "that there is no duty to warn a customer who comes upon the store owner's premises of risks of which the customer himself or herself had present knowledge and present realization."[68] The jury found that neither the defendant nor the plaintiff was negligent. The issue was whether the trial court erred in giving that instruction in light of *Peterson v. Balach*,[69] in which the court abolished the distinctions between licensees and invitees in favor of a general duty of reasonable care toward entrants.[70] The supreme court held that the instruction should not have been

67. 281 N.W.2d 177 (Minn. 1979).
68. *Id.* at 179.
69. 294 Minn. 161, 199 N.W.2d 639 (1972).
70. *Id.* at 174, 199 N.W.2d at 647.

given.

The instruction in *Adee* was based in part on section 343A(1) of the Restatement (Second) of Torts,[71] which states that "[a] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them," but the court omitted the crucial modifying language, "unless the possessor should anticipate the harm despite such knowledge or obviousness."[72] Omitting the "unless" language permitted an inference that the store owner owed the plaintiff no duty if the plaintiff was aware of the ice on the sidewalk. The court held that failure to add that language was prejudicial.

In any event, the court noted that it is inappropriate to give an instruction directly based on section 343A of the Restatement in cases controlled by *Peterson v. Balach*.[73] *Peterson* suggested an instruction that considered a variety of factors to determine the liability of a possessor of land,[74] but did not focus exclusively on the plaintiff's knowledge of the danger.

The trial court did instruct the jury on secondary assumption of risk. The supreme court found this instruction appropriate because assumption of risk was to be considered by the jury in relation to the plaintiff's contributory negligence. The court held that the evidence was sufficient to justify the instruction.[75]

Adee did not involve a primary assumption of risk issue, but it becomes important for understanding later supreme court cases involving the primary assumption of risk issues. The case involved an issue concerning the duty of a possessor of land toward an entrant, and it involved an obvious danger. The court employed a straight duty analysis in resolving the case. To the extent that assumption of risk applied, it applied only in its secondary sense, so that the only issue concerning the plaintiff's conduct would have been whether the plaintiff was contributorily negligent.

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71. RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965).

72. *Adee*, 281 N.W.2d at 179.

73. 294 Minn. 161, 174, 199 N.W.2d 639, 648 (1972).

74. *Id.* The court said that the pattern instruction noted by the court in 4 MINNESOTA PRACTICE, JURY INSTRUCTION GUIDES, JIG II, 330 G-S and 332 G-S (2d ed. 1976), adequately instructs the jury as to the duties of landowners and entrants.

75. *Adee,* 281 N.W.2d at 180.

D. Armstrong v. Mailand (1979)

Armstrong v. Mailand[76] arose out of the deaths of three firemen who were killed while attempting to extinguish a fire that broke out at a large liquid propane storage tank at an apartment complex. The case involved the intersection of primary assumption risk and landowners' duties, as well the relationship of primary assumption of risk to strict products liability theory and strict liability for abnormally dangerous activities.

The court first concluded that the rule in *Shypulski v. Waldorf Paper Products Co.*[77] continued to apply, even after *Springrose* and also after *Peterson v. Balach*,[78] in which the court held that the status of an entrant on property as a licensee or invitee was no longer relevant in determining the landowner's duty to the entrant. In these cases, the classifications were abolished in favor of a general duty of reasonable care owed to those entrants by the landowner. In *Shypulski* the court treated firefighters as sui generis, classified somewhere between licensees and invitees, and held that they assume the usual risks that are incident to their entry on property made dangerous by the impact of fire. The court concluded that the abolition of those distinctions in *Peterson* did not affect the basic duty owed to firefighters, given the origin of the firefighter's rule and the policy justification for the rule that a person who voluntarily confronts a hazard is not entitled to recover for injuries he or she sustains in doing so. The court also held that *Springrose* did not affect that duty. The court characterized *Shypulski* as a rule "which relieves a landowner of his duty to firemen except for a duty to warn of hidden dangers."[79]

The court also concluded that "primary assumption of the risk may be invoked under the proper circumstances to relieve a landowner's duty of reasonable care toward firemen with respect to reasonably apparent risks that are part of firefighting."[80] The court further held that the "doctrine of primary assumption of risk technically is not a defense, but rather a legal theory which relieves a defendant of a duty which he might otherwise owe to the plaintiff with respect to particular risks."[81] Given that characterization,

76. 284 N.W.2d 343 (Minn. 1979).
77. 232 Minn. 394, 45 N.W.2d 549 (1951).
78. 294 Minn. 161, 199 N.W.2d 639 (1972).
79. *Armstrong*, 284 N.W.2d at 349.
80. *Id.* at 350.
81. *Id.* at 351.

primary assumption of risk also applied to theories of recovery based on strict products liability theory and strict liability for abnormally dangerous activities.[82]

E. *Griffiths v. Lovelette Transfer Co. (1981)*

Other supreme court cases involving the application of the so-called firefighter's rule[83] also involve the duty issue. Illustrative is the supreme court's decision in *Griffiths v. Lovelette Transfer Co.*,[84] a case involving injuries sustained by a police officer directing traffic in the aftermath of a road accident. The issue was whether the doctrine of primary assumption of risk in its "firefighter's rule" articulation as set out in *Armstrong v. Mailand*[85] applied to the case.

The *Griffiths* court followed up its notation of *Armstrong* with observations on the confusion of primary and secondary assumption of risk in Minnesota and on the scope of the firefighter's rule:

> The Minnesota cases which have discussed the particular vs. general-risk question have defined assumption of the risk as a voluntary encounter with a known risk. *See* Wegscheider v. Plastics, Inc., 289 N.W.2d 167 (Minn. 1980); Bakhos v. Driver, 275 N.W.2d 594 (Minn. 1979); Bigham v. J. C. Penney Co., 268 N.W.2d 892 (Minn. 1978). According to *Armstrong v. Mailand*, that is the definition of secondary assumption of the risk, but both the pre and post *Armstrong* cases have failed to distinguish between primary and secondary assumption of the risk as those terms were defined in *Armstrong*.[FN1] Nevertheless because the cases cited above involve risks assumed by plaintiffs during the course of their employment, they are an indication that firemen and policemen do not, by accepting dangerous employment, generally assume all risk that may occur. Rather, each situation encountered

82. *Id.* at 352. (The exception in cases involving landowners or defendants who are subject to liability under strict liability theories is that the firefighters do not assume hidden or unanticipated risks of injury.)

83. The legislature abolished the firefighter's rule in 1982. The statute, currently codified at MINN. STAT. § 604.06 (2002), reads as follows: "The common law doctrine known as the fireman's rule shall not operate to deny any peace officer, as defined in section 626.84, subdivision 1, clause (c), or public safety officer, as defined in section 299A.41, subdivision 4, a recovery in any action at law or authorized by statute."

84. 313 N.W.2d 602 (Minn. 1981).

85. 284 N.W.2d 343 (Minn. 1979).

> may involve some risks which are anticipated and assumed and some which are unanticipated and therefore unassumed.
>
> FN1. In *Bakhos* the voluntary assumption of a known risk was labeled primary assumption of the risk while in *Wegscheider* and *Bigham* it is treated as secondary assumption of the risk although it is simply called assumption of the risk without a distinction being made between primary and secondary.
>
> The basic premise underlying our decision in *Armstrong* is that the defendant owes a duty to the plaintiff and others. However, where the plaintiff is a policeman or fireman, the defendant may be relieved of that duty by reason of the nature of the work performed by policemen and firemen.[86]

Another way of putting the court's conclusion is that the defendant simply owes no duty to police officers and firefighters to guard against the risks that are inherent in their jobs. The court appears to read *Armstrong* narrowly, as a rule peculiar to firefighters or police officers, rather than a broadly applicable primary assumption of risk rule.

There are two followup Minnesota Supreme Court cases applying the firefighter's rule. In *Hannah v. Jensen*,[87] an on-duty police officer was injured by an intoxicated bar patron. The police officer brought suit against the bar and the person who assaulted him. The suit against the bar was based on the Civil Damage Act.[88] The supreme court held that the police officer was not within the class of persons intended to be protected by the Act, based on its observation that the risk of injury from an intoxicated bar patron is one of the inherent risks in the job, just as the danger of injury or death is an inherent part of firefighting. The court also concluded that sound public policy reasons precluded recovery, because if bar owners were held liable for such injuries they might be reluctant to call for assistance in the first place, which would create additional risk to the public.[89]

86. 313 N.W.2d at 605.

87. 298 N.W.2d 52 (Minn. 1980).

88. MINN. STAT. ANN. § 340.95 (1976) (repealed 1985).

89. 298 N.W.2d at 55. In *Hannah v. Chmielewski, Inc.*, 323 N.W.2d 781 (Minn. 1982), a police officer's wife brought a Civil Damage Act claim against the bar seeking recovery for loss of means of support due to her husband's injury. The court held that her claim was not barred by the firefighter's rule. The court noted

In *Lang v. Glusica*,[90] a police officer was injured by the defendant in the course of arresting him. The court held that the firefighter's rule should not extend beyond its landowner/occupier foundation to bar recovery by a police officer against a person who intentionally injures the officer or who causes injury to the officer by his active negligence after the officer arrives on the scene.[91] The so-called "firefighter's rule" was abolished by the legislature in 1982.[92]

F. Iepson v. Noren (1981)

In *Iepson v. Noren*,[93] the plaintiff, who was riding a motor bike, collided with a pickup truck. The trial court granted the defendants' motion for a directed verdict based in part on a finding that the plaintiff's conduct constituted primary assumption of the risk. The supreme court reversed, concluding that the elements of primary assumption of risk were not met. The court followed *Springrose* in noting that primary assumption of risk relates initially to the issue of whether the "defendant was negligent at all—that is, whether the defendant had any duty to protect the plaintiff from a risk of harm."[94] Then, citing Prosser,[95] the court indicated that primary assumption of risk turns on whether the plaintiff consented to relieve the defendants of any obligation to act reasonably, but that under the circumstances there was no

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that allowing her claim to proceed was consistent with the purposes of the Civil Damage Act. The act's penal and remedial purposes were to punish the vendor who makes the illegal sale, to deter others from committing similar acts, and to foster compensation for those who would not be entitled to recover under ordinary tort principles.

90. 393 N.W.2d 181 (Minn. 1986).

91. *Id.* at 183.

92. *See supra* note 83.

93. 308 N.W.2d 812 (Minn. 1981).

94. *Id.* at 815, citing *Springrose*, 292 Minn. at 24, 192 N.W.2d at 827.

95. WILLIAM H. PROSSER, HANDBOOK OF THE LAW OF TORTS § 68 (4th ed. 1971). Prosser's statement on primary assumption of risk frames the issue in terms of consent:

> There must first of all . . . be some manifestation of consent to relieve the defendant of the obligation of reasonable conduct. It is not every deliberate encountering of a known danger which is reasonably to be interpreted as evidence of such consent.
>
> The jaywalker who dashes into the street in the middle of the block, in the path of a stream of cars driven in excess of the speed limit, certainly does not manifest consent that they shall use no care and run him down. On the contrary, he is insisting that they shall take immediate precautions for his safety . . . .

manifestation of the necessary consent, and that the continued existence of the defendants' duty to the plaintiff made primary assumption of risk inapplicable to the case.[96] The important point is that primary assumption of risk is inapplicable where the defendant owes a duty to the plaintiff.

G. Rieger v. Zackowski (1982)

In *Rieger v. Zackowski*,[97] the plaintiff was injured when he was hit by a unauthorized car on the Brainerd International Raceway (BIR) track, when he tried to flag down another unauthorized car that was circuiting the track. One of the issues in the case was whether the trial court erred in refusing to instruct the jury on primary assumption of risk.[98] The supreme court held that it was not error to refuse to do so.

The court noted its statement in *Armstrong* that primary assumption of risk relates to the initial issue of whether a defendant is negligent in the first place, citing as examples the limited duties owed licensees on another's property. Although it is somewhat confusing, the court went on to frame the issue as "whether the jury should have been permitted to decide whether BIR's duty of care to Rieger, as a patron, was relieved absolutely by Rieger's action in moving onto the racetrack."[99] The court went on to explain that if Rieger had moved on the track and suffered an injury during the course of a sanctioned race, he clearly would have assumed the risk in the primary sense. However, the court also explained that he would be entering without permission by BIR, and therefore primary assumption of risk would be patent. The conclusion is obviously that the defendant would owe no duty to the plaintiff under those circumstances.

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.

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96. 308 N.W.2d at 816-17.

97. 321 N.W.2d 16 (Minn. 1982).

98. The requested instruction was 4 MINN. DIST. JUDGES ASS'N COMM ON JURY INSTRUCTION GUIDES, MINNESOTA JURY INSTRUCTION GUIDES (CIVIL) JIG II, 135 G (James L. Hetland, Jr. & Oscar C. Adamson II, Reporters) in 4 MINN. PRACTICE, 106-07 (2d ed. 1974).

99. 321 N.W.2d at 23.

H. Wagner v. Thomas J. Obert Enterprises (1986)

In *Wagner v. Thomas J. Obert Enterprises,*[100] which involved a roller skating accident, the court assumed that primary assumption of risk principles applied because the plaintiff was involved in an "inherently dangerous sporting event." The jury found that the defendant was not negligent and that the plaintiff was 100% negligent. One of the issues in the case was whether the trial court should have instructed the jury on primary assumption of risk.

The facts in the case were in dispute. The plaintiff's version was that she slipped and fell on a concave part of a metal entrance ramp to the roller rink. The defendant disputed any claims based on improper maintenance and supervision of the ramp, and argued that the plaintiff had simply lost her balance while trying to avoid a child who was skating toward her.

The court began its analysis of the primary assumption of risk issue by noting that it applies "only where parties have voluntarily entered a relationship in which plaintiff assumes well-known, incidental risks," and that the defendant has no duty to protect the plaintiff against those risks.[101] Therefore, if the plaintiff's injury arose from one of those risks, the defendant would not be negligent.[102] Primary assumption of risk therefore relates to the issue of whether the defendant owes a duty to the plaintiff. The court noted the impact of the factual dispute:

> If the accident happened simply because plaintiff, concerned about other skaters, lost her balance and fell while exiting, defendant owed no duty to prevent her fall, or, to put it another way, plaintiff had assumed a primary risk of roller-skating. On the other hand, if the fall occurred as plaintiff testified at trial, defendant owed her a duty of care which was breached and this negligence would be compared with plaintiff's contributory negligence, if any. Which legal principles would govern depended on which version of the facts was found by the jury.[103]

Primary assumption of risk relates to the duty issue. Whether the defendant owed a duty to the plaintiff would turn on the

100. 396 N.W.2d 223 (Minn. 1986).
101. *Id.* at 226 (citing Olson v. Hansen, 299 Minn. 39, 44, 216 N.W.2d 124, 127 (1974)).
102. *Id.*
103. *Id.*

disputed facts. If the jury would find that the plaintiff was injured simply because she lost her balance and fell, the legal conclusion that would follow is that the defendant owed no duty to the plaintiff.

I. Grisim v. TapeMark Charity Pro-Am Golf Tournament (1987)

In *Grisim v. TapeMark Charity Pro-Am Golf Tournament*,[104] the plaintiff, a spectator at a charity golf tournament, was hit in the left eye by a shot hooked by an amateur golfer who was playing in the tournament. The plaintiff decided to sit under a tree to the left of the green, after noticing that the bleachers were crowded. She sued the tournament sponsor and organizer and the golfer who hit the errant shot. The supreme court held that her claim against the golfer was barred by the doctrine of primary assumption of risk. Noting that primary assumption of risk relates to the issue of whether the defendant owes a duty to the plaintiff, the court noted that the only duty owed to the plaintiff "was to provide her with a reasonable opportunity to view the participants from a safe area."[105]

104. 415 N.W.2d 874 (Minn. 1987).

105. *Id.* at 875. The court relied on *Wells v. Minneapolis Baseball & Athletic Ass'n*, 122 Minn. 327, 331, 142 N.W. 706, 708 (1913), in formulating the relevant standard. *Wells* involved injuries sustained by a spectator at a baseball game. The plaintiff's theory was that she chose to sit near the edge, but inside a screened area, although there were available seats that were more protected. She said she was struck on her collarbone by a fouled-off baseball that somehow curved around the screen and hit her. The court said that if that was her only theory, she did not state a claim upon which relief could be granted, given the fact that the defendant had no duty to guard against such an improbable result. *Id.* at 330-31, 142 N.W. at 707. Under those circumstances, the defendant would have performed its duty of providing a sufficiently safe number of screened seats. *Id.* However, the trial court also permitted the jury to determine whether the plaintiff should be entitled to recover if she was in fact sitting outside the screen, and was mistaken as to where she was sitting. The court noted that if the plaintiff clearly knew of the dangers involved in sitting in an open area, she would have assumed all risk of injury from thrown or hit balls in the game, but the court thought that such knowledge clearly appeared from the record:

> Baseball is our national game, and the rules governing it and the manner in which it is played and the risks and dangers incident thereto are matters of common knowledge. But we do not think that all who attend baseball games would, or should, enter such a stipulation. Only those who have been struck with a baseball realize its hardness, swiftness, and dangerous force. Women and others not acquainted with the game are invited, and do attend. It would not be either a safe or reasonable rule to hold that, in these games to which the general public is invited, no duty rests upon the management to protect from the dangers incident thereto, other than by a proper screening of part

The court of appeals held that there were factual issues concerning whether the sponsor and organizer took adequate steps to provide sufficient safe seating, which precluded the grant of summary judgment for the sponsor and organizer.[106] That ruling was not challenged on appeal. The supreme court concluded, however, that the golfer who hit the shot that struck the spectator in the eye was not liable because "[h]e had no control over the arrangements for spectators and therefore breached no duty to Grisim."[107]

Grisim and *Wagner* are similar: disputed facts determined whether the defendant was negligent, but primary assumption of risk determined whether the defendant owed the plaintiff a duty in the first place.

J. Baber v. Dill (1995)

In *Baber v. Dill*,[108] the plaintiff was injured when he fell and was impaled on a steel reinforcing rod while working on property owned by the defendant. One of the issues concerned the defendant's duty as a landowner. The plaintiff confronted an obvious danger that he was partly responsible for creating. Treating the plaintiff as an invitee, and using the standards from section 343A of the Restatement (Second) of Torts,[109] the court

> of the seats. What precaution the ordinarily prudent person, furnishing a public amusement of this kind, should take to warn and protect the spectators from the attendant dangers of which they may be ignorant, we think a question for the jury.

Id. at 332, 142 N.W. at 708 (quoting Crane v. Kansas City Baseball & Exhibition Co., 153 S.W. 1076, 1077 (Mo. Ct. App. 1913).

106. Grisim v. TapeMark Charity Pro-Am Golf Tournament, 394 N.W.2d 261, 264 (Minn. Ct. App. 1986), *rev'd in part on other grounds*, 415 N.W.2d 874 (Minn. 1987). While the court of appeals acknowledged the potential application of primary assumption of risk principles, it focused on the defendant's duty to provide safe seating. The plaintiff presented evidence of various golf association standards for crowd control at tournaments, including the use of barricades and marshals. The court held that the evidence was sufficient to create a genuine issue of material fact as to whether the defendants had taken adequate safety precautions for spectators.

107. 415 N.W.2d at 875.

108. 531 N.W.2d 493 (Minn. 1995).

109. RESTATEMENT (SECOND) OF TORTS § 343A (1965). The court's reliance on the Restatement seems to be inconsistent with its statement in *Adee v. Evanson*, 281 N.W.2d 177 (Minn. 1979), that it is no longer appropriate to rely on the Restatement in setting out the factors relevant to a landowner's liability to entrants. *See infra* note 153 and accompanying text. Other supreme court cases rely on *Peterson* in articulating the landowner's duty to entrants. *See, e.g.,* Louis v. Louis, 636 N.W.2d 314, 319 n.4 (Minn. 2001); Bisher v. Homart Dev. Co., 328

noted that a landowner's continuing duty to avoid causing harm to an entrant is not absolute. Even in cases involving obvious dangers, the landowner has a duty to warn if the landowner should anticipate harm to the entrant, notwithstanding the obviousness of the danger. However, the court also noted that no warning is necessary in cases where the danger is so obvious. "[T]he difference between open and obvious dangerous activities and conditions for which the possessor should anticipate harm and those activities and conditions for which the possessor should not anticipate harm because they are so open and obvious is a fine one, but one that we choose to make."[110] The court was persuaded by the fact that the plaintiff assisted in creating the dangerous condition and decided that "[t]o hold that a landowner has a duty to warn an invitee of danger created, in part, by that individual is untenable."[111]

Because the court held that the defendant owed no duty to the plaintiff, the court concluded that it was unnecessary to consider the primary assumption of risk issue. The court acknowledged confusion in its decisions over primary assumption of risk, noting its "seemingly inconsistent decisions,"[112] but chose not to resolve that confusion because primary assumption of risk was not involved in the decision. Primary assumption of risk will not come into play until a court first determines whether a defendant owes a duty to the plaintiff:

> 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. Although that may seem elementary, because the trial court indicated it considered whether a duty existed, only after it had resolved the case on the basis of assumption of the risk, and the court of appeals did not address it at all, we reiterate the primacy of this consideration.[113]

The court's suggested approach, which requires a determination of the duty issue before primary assumption of risk is considered, detaches duty and primary assumption of risk from

N.W.2d 731, 733 (Minn. 1983).

110. *Baber*, 531 N.W.2d at 496.

111. *Id.*

112. *Id.* at 495.

113. *Id.*

each other, whereas prior supreme court decisions appear to view primary assumption of risk as an integral part of the duty determination. *Baber*'s statement is inconsistent with that approach.

K. Louis v. Louis (2001)

The court seemed to suggest a similar approach in *Louis v. Louis*,[114] a case involving a swimming pool accident in which the plaintiff was injured while going down a water slide headfirst into a pool, suffering a burst fracture of his C6 vertebrae.

The defendant property owner, the plaintiff's brother, moved for summary judgment, arguing that he owed no duty to the plaintiff because there was no special relationship between them and also because the plaintiff had assumed the risk in the primary sense. The district court denied the motion based on primary assumption of risk because there were genuine issues of material fact on the question. The district court granted summary judgment for the defendant, however, on the basis that there was no evidence that the defendant had actual or constructive knowledge of the dangers associated with making headfirst belly slides into the pool.

The plaintiff appealed on the duty issue; the defendant appealed the court's denial of summary judgment based on primary assumption of risk. The court of appeals affirmed the denial of summary judgment based on primary assumption of risk but reversed the district court's holding on the duty issue.[115]

The sole issue before the supreme court was whether the defendant owed a duty to the plaintiff. The court began its analysis with the acknowledgment that a landowner has a duty "to use reasonable care for the safety of all . . . persons invited upon the premises." The duty is the same whether the person is an invitee or licensee.[116]

The defendant argued that because there was no special relationship between the plaintiff and defendant, the defendant did not owe any duty to the plaintiff. The supreme court rejected the argument, bringing needed clarification to this area of the law:

We have consistently recognized that a duty based on a

114. 636 N.W.2d 314 (Minn. 2001).

115. Louis v. Louis, 2001 WL 15739, at *2 (Minn. Ct. App. 2001). The court of appeals took the position that the duty issue had to be resolved before the primary assumption of risk issue. *Id.*

116. *Louis*, 636 N.W.2d at 318-19.

> special relationship theory is separate and distinct from a duty based on a premises liability theory . . . . Accordingly, we hold that, where the negligence claim at issue is based on a theory of premises liability, whether there is a duty owed by the landowner does not depend on the existence of a special relationship.[117]

The next issue was whether the defendant was entitled to summary judgment on the basis that he owed no duty to the plaintiff. The court stated that "[t]his legal determination must be made before a court considers assumption of the risk. If no duty existed, there is no need to determine whether respondent assumed the risk, thus relieving appellant of the duty."[118] Resolution of the duty issue involved the following steps:

> In this case, there is no factual dispute as to appellant's [defendant's] knowledge of the condition of the premises at issue. Appellant [defendant], as possessor of the premises, installed and maintained the pool, deck, and slide and knew that one going down the slide would land in about 3½ feet of water. Therefore, as to conditions on appellant's [defendant's] land, including the swimming pool and slide, appellant [defendant] had a continuing duty to use reasonable care for the safety of respondent [plaintiff], as an entrant on his premises . . . . Appellant [defendant] would not have owed a duty, and hence not have been liable for any physical harm caused to respondent [plaintiff], if the danger associated with doing a headfirst belly slide was either known or obvious unless appellant [defendant] should have anticipated the harm despite its known or obvious nature. Accordingly, the district court must determine if the activity or condition involved known or obvious dangers.
>
> According to the Restatement, "the word 'known' denotes not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves. Thus, the condition or activity must not only be known to exist, but it must also be recognized that it is dangerous, and the probability and gravity of the threatened harm must be appreciated." The district court did not consider this issue in this case. Accordingly, we remand to the district court to determine if respondent

117. *Id.* at 320-21.
118. *Id.* at 321.

> [plaintiff] knew that the slide was dangerous and appreciated the probability and gravity of the threatened harm. If the court determines that the danger associated with doing a headfirst belly slide was not a "known" danger, then the court must also consider whether there was an obvious danger.[119]

In footnote 8, the court made the following statement:

> While the district court held that there was a genuine issue of material fact as to whether respondent [plaintiff] knew and appreciated the risk associated with doing a headfirst belly slide, it made this determination when considering primary assumption of the risk. The question of whether a condition or activity was known for purposes of determining whether a duty was owed is generally a question for the court to determine as a matter of law.[120]

The court continued its analysis with an examination of the obvious danger issue:

> Under both our case law and the Restatement, the test for what constitutes an "obvious" danger is an objective test: the question is not whether the injured party actually saw the danger, but whether it was in fact visible. According to the Restatement, a condition is not "obvious" unless both the condition and the risk are apparent to and would be recognized by a reasonable man "in the position of the visitor, exercising ordinary perception, intelligence and judgment."
>
> We are mindful of the fact that certain conditions have been held to involve dangers so obvious that no warning was necessary, including walking into a low hanging branch, walking down a steep hill, walking into a large planter, walking across a 20-foot square pool of water, and skydiving over a lake. However, we also recognize that the rationale underlying the rule eliminating a duty where the dangers are known or obvious is that "no one needs notice of what he knows or reasonably may be expected to know." In this case, the district court failed to consider whether the danger associated with the condition and the risk at issue involved such an "obvious" danger. Accordingly, we choose not to answer this question. Instead, we remand to the district court to determine

119. *Id.* (citations omitted).
120. *Id.* at 321 n.8.

> whether the anticipated harm to respondent [plaintiff] from using the slide to execute a headfirst belly slide was a harm that was either known to him or one that he reasonably should have been expected to know.
>
> If the district court concludes that the danger was neither known nor obvious as a matter of law, it must hold that appellant [defendant] was not relieved of his duty to use reasonable care for the safety of respondent [plaintiff]. If the court concludes that the danger was either known or obvious as a matter of law, it must then decide whether appellant [defendant] should nevertheless have anticipated the harm despite its known or obvious danger. *Lastly, if the court finds that appellant [defendant] owed respondent [plaintiff] a duty, the jury should then be allowed to decide the primary assumption of risk question since the court has already held that a genuine issue of material fact exists as to this issue.*[121]

The duty of the property owner thus turned on whether the danger was obvious and whether the owner should nonetheless have anticipated injury. The court said that the primary assumption of risk analysis would follow if the trial court determined on remand that the defendant owed a duty to the plaintiff. But primary assumption of risk would be a question for the jury, given the fact that the trial court had previously ruled that there were material questions of fact that precluded summary judgment on the issue. The supreme court did not consider primary assumption of risk beyond that point because the issue was not raised on appeal.[122] The analysis again partitions primary assumption of the risk and duty.

The primary assumption of risk analysis is confusing and introduces a methodology into the Minnesota cases that the court in *Springrose* seemed to have put to rest by connecting primary assumption of risk to the duty issue in cases involving obvious dangers. This opinion also raises questions concerning the circumstances under which a jury will be instructed on primary assumption of risk. If the elements of primary assumption of risk are knowledge and appreciation of the danger, and voluntarily encountering that danger, then any instruction to a jury would have to focus on that issue. A jury, having determined that the

121. *Id.* at 321-22 (emphasis added) (footnote omitted) (citations omitted).
122. *Id.* at 318 n.2.

defendant was negligent in failing to exercise reasonable care for the safety of the plaintiff, would then have to determine whether the plaintiff assumed the risk in the primary sense. The appropriate question following the defendant's breach of duty and causation questions would be whether the plaintiff assumed the risk, as determined by the appropriate instruction; or it could be framed in terms of the specific elements, or whichever of those elements are in contention. The jury would also presumably be instructed on contributory negligence in these sorts of cases.

The upshot is that if the trial court determined that the issue of the defendant's liability should be submitted to the jury, a jury could find the defendant negligent according to the appropriate instructions, based on section 343A of the Restatement (Second) of Torts; but if instructed on primary assumption of risk, the plaintiff would still be barred from recovery if the plaintiff knew of and appreciated the risk, and voluntarily encountered it. The plaintiff would be barred even if his conduct was reasonable under the circumstances. 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. Primary assumption of risk in effect duplicates the duty determination, rather than merging into it.

L. Summary

In general, the Minnesota Supreme Court has tended to stick to what it said in *Springrose*. The court initially intended to give primary assumption of risk limited application, and in those limited potential categories of cases in which primary assumption of risk has operated, it has been clear from the court's decisions that primary assumption of risk relates to the duty issue. Primary assumption of risk has been linked to the duty issue in most of the court's other post-*Springrose* decisions. The only departures have come relatively recently in *Baber* and *Louis*, which split the analysis, looking for a duty first and then, only if a duty exists, for primary assumption of risk.

While the supreme court cases are largely consistent, the decisions of the Minnesota Court of Appeals and the Eighth Circuit seem to be more likely either to deviate from the court's opinion in *Springrose* or to have difficulty in applying primary assumption of

risk principles. The result is that primary assumption of risk is applied more broadly than the supreme court intended in *Springrose*. When primary assumption of risk does apply, it overrides a finding that the defendant owes a duty to the plaintiff and creates the potential for barring recovery as a matter of law based on the plaintiff's subjective knowledge and appreciation of the risk. In effect, the primary assumption of risk chokes the duty analysis by focusing solely on the awareness of risk as the decisive analytical element.

V. PRIMARY ASSUMPTION OF RISK AND THE MINNESOTA COURT OF APPEALS

The court of appeals has applied primary assumption of risk in a variety of cases,[123] but according to a set of principles that the

123. *See* Schneider *ex rel.* Schneider v. Erickson, 654 N.W.2d 144 (Minn. Ct. App. 2002) (barring recovery based on primary assumption where the plaintiff knew and appreciated the risk of playing paintball without eye protection and voluntarily encountered the risk); Snilsberg v. Lake Washington Club, 614 N.W.2d 738 (Minn. Ct. App. 2000) (affirming summary judgment based on primary assumption of risk where plaintiff assumed the inherent risk of diving off a dock into dark water and denied summary judgment to other defendant where his conduct may have enlarged the risk); Jussila v. United States Snowmobile Ass'n, 556 N.W.2d 234 (Minn. Ct. App. 1996) (barring recovery where the plaintiff primarily assumed the risk of being hit by a snowmobile because it was used at an inherently dangerous sporting event and plaintiff knew the risk of sitting in unprotected area); Albert v. Paper Calmenson & Co., 515 N.W.2d 59 (Minn. Ct. App. 1994) (affirming denial of new trial and JNOV, holding jury instruction on primary assumption of risk was not appropriate where there is not evidence that the plaintiff knew dangerous, flammable vapors had developed in the tank), *aff'd as modified,* 524 N.W.2d 460 (Minn. 1994); Maras v. City of Brainerd, 502 N.W.2d 69 (Minn. Ct. App. 1993) (holding that trustee's claims are not barred where primary assumption of risk doctrine was not applicable to shooting victim who was intoxicated and may not have comprehended the danger); Hassler v. Simon, 466 N.W.2d 434 (Minn. Ct. App. 1991) (denying JNOV and refused a jury instruction on primary assumption of risk where the promoter of the contest owed a duty to the participants and primary assumption of risk did not apply); Andren v. White-Rodgers Co., 465 N.W.2d 102 (Minn. Ct. App. 1991) (barring recovery based on primary assumption of risk in products liability case where plaintiff knew and appreciated the risk of the LP gas, yet voluntarily chose to light a cigarette); Rusciano v. State Farm Mut. Auto. Ins. Co., 445 N.W.2d 271 (Minn. Ct. App. 1989) (refusing to submit question of primary assumption of risk to the jury where it is not evident that the respondent completely assumed the risk of walking into the path of an oncoming vehicle where the driver's improper conduct enlarged the risk); Johnson v. S. Minn. Mach. Sales, Inc., 442 N.W.2d 843 (Minn. Ct. App. 1989) (upholding jury verdict for plaintiff finding him to be a young man with limited experience operating a saw who cannot be said to have primarily assumed the risk of injury), *appeal after remand,* 460 N.W.2d 68 (Minn. Ct. App. 1990); Goodwin v.

supreme court did not directly sanction in its post-*Springrose* cases. The court of appeals has often used assumption of risk to conclude that the plaintiff is not entitled to recover as a matter of law. Sometimes those results would be defensible because the defendant owes no duty to the plaintiff as a matter of law. In other cases, the court has applied primary assumption of risk as a principle that follows and trumps a defendant's breach of duty. The court of appeals also has taken a fairly consistent position that primary assumption of risk issues are generally for the jury to resolve, although there is not clarity in the issues the jury should be asked to resolve when it considers primary assumption of risk. The court has also dipped back into pre-*Springrose* law in search of defining assumption of risk principles, an endeavor the supreme court itself eschewed. The following discussion tracks two court of appeals decisions that illustrate the difficulty the courts have had in dealing with primary assumption of risk issues.

In *Andren v. White-Rodgers Co.*,[124] the plaintiff was injured in a propane gas explosion. He had gone to his lake cabin during the winter to check on it. When he entered the cabin basement, he smelled LP gas. He thought that the pilot light on the heater had gone out so he sent his daughter upstairs to find some matches to light it while he tried to open the basement windows. The windows were jammed shut so he left to retrieve a screwdriver from his car to pry the windows open. He stopped to light a cigarette just before exiting the basement, resulting in an explosion. He sustained severe burns on his hands, face, and head.

Legionville Sch. Safety Patrol Training Ctr., Inc., 422 N.W.2d 46 (Minn. Ct. App. 1988) (barring recovery based on primary assumption of risk where the plaintiff had prior roofing experience, and although not a professional roofer, recognized the danger of falling and voluntarily agreed to participate); Henkel v. Holm, 411 N.W.2d 1 (Minn. Ct. App. 1987) (reversing directed verdict on assumption of risk where reasonable minds could differ as to whether plaintiff voluntarily assumed the risk of injury by entering a fight or whether he was acting in self-defense); Swagger v. City of Crystal, 379 N.W.2d 183 (Minn. Ct. App. 1985) (granting JNOV due to primary assumption of risk where appellants assumed the risk of observing a softball game and there was no duty other than to provide some protected seating); Thompson v. Hill, 366 N.W.2d 628 (Minn. Ct. App. 1985) (denying JNOV where primary assumption of risk does not apply because although the plaintiffs assumed certain risks when they proceeded onto the ice, the driver owed his passenger certain duties of reasonable care).

124. 465 N.W.2d 102 (Minn. Ct. App. 1991). For an excellent discussion of primary assumption of risk and *Andren*, *see* Ann D. Bray, *Does Old Wine Get Better with Age or Turn to Vinegar? Assumption of Risk in a Comparative Fault Era*—Andren v. White Rodgers, 18 WM. MITCHELL L. REV. 1141 (1992).

The plaintiff had installed over 100 LP gas heaters and was aware that the gas could explode if sparked. He also knew that it was inadvisable to smoke when the smell of LP gas was present.

The plaintiff claimed that the heater had a defective regulator that permitted gas to leak into the basement. He brought suit against the manufacturer and retailer of the heater. The manufacturer moved for summary judgment, agreeing for purposes of the motion that the heater was defective. The trial court granted the motion for summary judgment on the basis that the plaintiff assumed the risk in the primary sense.

The court of appeals affirmed. The court acknowledged that Minnesota recognizes two types of assumption of risk, and, following the supreme court's opinion in *Olson v. Hansen*,[125] noted that they apply where parties have entered into a relationship in which the plaintiff assumes "well-known, incidental risks," and that the defendant owes the plaintiff no duty as to those risks.[126]

The court then said that the elements of secondary and primary assumption of risk are the same, and that "[t]he manifestations of acceptance and consent dictate whether primary or secondary assumption of risk is applicable in a given case."[127] Acceptance and consent are the indicia of primary assumption of risk that the court fastened on in its opinion.

The court then said that primary assumption of risk principles also apply in products liability cases, although the cases the court cited appear to discuss secondary, not primary, assumption of risk.[128] Then, the court shifted back to primary assumption of risk for purposes of considering the impact of the latent-patent danger

125. 299 Minn. 39, 216 N.W.2d 124 (1974).

126. *Andren*, 465 N.W.2d at 104 (citing Olson v. Hanson, 299 Minn. 39, 44, 216 N.W.2d 124, 127 (1974)).

127. *Id.* at 104-05, (citing Armstrong v. Mailand, 284 N.W.2d 343, 351 (Minn. 1979)).

128. One of the cases, *Omnetics, Inc. v. Radiant Technology Corp.*, 440 N.W.2d 177, 181 (Minn. Ct. App. 1989), clearly discusses secondary assumption of risk, as does *Rolfes v. International Harvester Co.*, 817 F.2d 471, 474 (8th Cir. 1987) (applying Iowa law). In fact, the court notes that the Eighth Circuit in *Rolfes* takes the position that assumption of risk is a defense, citing comment n to the Restatement (Second) of Torts § 402A (1965). Comment n clearly establishes that secondary assumption of risk requires unreasonable conduct by the plaintiff, and that it is referring to the related affirmative defense of secondary assumption of risk, not primary assumption of risk. The third case, *Wagner v. Firestone Tire & Rubber Co.*, 890 F.2d 652, 657 (8th Cir. 1989), also appears to be discussing secondary assumption of risk. A later Third Circuit case cited it for that proposition. *See* Surace v. Caterpillar, Inc., 111 F.3d 1039, 1054 (3d Cir. 1997).

rule on the application of primary assumption of risk principles in products liability cases. The court concluded that the latent-patent danger rule did not prevent application of primary assumption of risk principles because the two rules have different thrusts. The latent-patent danger rule absolves a defendant from liability when a product danger is obvious.[129] The latent-patent danger rule is no longer good law in Minnesota, however. The court noted it for purposes of contrasting it with primary assumption of risk, which includes "subjective and volitional elements which are beyond the scope of the latent-patent danger rule."[130]

The remaining discussion in the opinion details why the court thought that the plaintiff assumed the risk in the primary sense:

> First, Andren demonstrated his knowledge of the risk by testifying he knew LP gas was dangerous and was specifically aware that lighting a cigarette in a room filled with LP gas would cause an explosion. Second, the record shows appellant appreciated the risk because he recognized the smell of LP gas in the basement, and knew he should not light a cigarette while he was in the basement. Finally, the evidence is clear Andren had a choice to avoid the danger by not smoking, yet he voluntarily chose to light the cigarette.[131]

The court seemed to infuse primary assumption of risk with an objective element. That Andren lit the cigarette without considering the consequences did not make his act any less volitional "because it is clear a reasonable person in his position must have understood the danger."[132] The court cited a Minnesota Supreme Court case, *Schroeder v. Jesco, Inc.*,[133] decided before *Springrose*, and therefore not controlled by that decision. In *Schroeder*, assumption of risk barred the plaintiff's recovery from a negligent subcontractor in a workplace injury case. The court's discussion of assumption of risk was clearly secondary assumption

129. The Minnesota Supreme Court adopted the latent-patent danger rule in *Halvorson v. American Hoist & Derrick Co.*, 307 Minn. 48, 57, 240 N.W.2d 303, 308 (1976), but overruled that case in *Holm v. Sponco Manufacturing Co.*, 324 N.W.2d 207, 213 (Minn. 1982). Obviousness of a product danger is one factor among many to be considered. The latent-patent danger as a limiting doctrine is dead in Minnesota.

130. *Andren*, 465 N.W.2d at 105.

131. *Id.*

132. *Id.* at 106.

133. 296 Minn. 447, 209 N.W.2d 414 (1973).

of risk, not primary assumption of risk.[134]

The court of appeals' and supreme courts' propositions are slightly and critically different. The narrow proposition, however, is that reasonable people would not conclude that the plaintiff, an experienced construction worker, was unaware of the risk of falling objects on a construction site. The court of appeals used the case for the proposition that the plaintiff must have known of the risk because a reasonable person would have understood the danger. If primary assumption of risk involves a subjective understanding of the risks, then that issue ordinarily would have to be a jury issue.

Andren mixes and matches concepts that distorted primary assumption of risk as a bar to recovery, when in effect, the court's discussion of the concept points not to primary but rather secondary assumption of risk. The reliance on pre-*Springrose* cases and products liability cases clearly involving secondary assumption of risk principles illustrates the difficulties the supreme court had pre-*Springrose* in distinguishing between primary and secondary assumption of risk. *Andren* makes a good case for applying secondary assumption of risk to the plaintiff's conduct, but such a defense would not be a complete defense. Ordinarily, in such a case, the jury would not be instructed on secondary assumption of risk, but only on the plaintiff's contributory negligence. Assuming the plaintiff could have proved that the heater was defective, the jury, if finding the plaintiff contributorily negligent, would then compare the fault of the plaintiff and defendants. However, the plaintiff's conduct would not have been a bar to recovery as a matter of law. Even under the old comparative negligence act, *Busch v. Busch Construction, Inc.*[135] held that comparative fault principles applied in strict liability cases and that secondary assumption of risk would not be a complete bar to recovery.[136]

In the second case, *Schneider ex rel. Schneider v. Erickson*,[137] the court of appeals applied primary assumption of risk principles to affirm a summary judgment in favor of a defendant who shot the plaintiff in the eye during a paintball game when the plaintiff was not wearing protective eyewear. Three teenagers participated, playing by loose rules that included no shots to the head or groin, and no shots at a person who ran out of paintballs.

134. *See* 296 Minn. at 449 n.1, 209 N.W.2d at 415 n.1.
135. 262 N.W.2d 377 (Minn. 1977).
136. *Id.* at 395.
137. 654 N.W.2d 144 (Minn. Ct. App. 2002).

During a break in the game, the plaintiff and another participant took off their eye protection because it was getting dark and difficult to see. The defendant knew that they had taken off their eye protection. The plaintiff shot the defendant and paused to reload, at which time the defendant shot a paintball hitting the plaintiff's eye.

The defendant testified that he aimed at the plaintiff's shoulder and chest. Both the plaintiff and defendant knew that the paintball guns were not completely accurate, particularly when the carbon-dioxide cartridge powering the gun is not fresh.

The court's initial discussion of primary assumption of risk seems to link it to the duty issue. However, the court utilized a pre-*Springrose* case, *Hollinbeck v. Downey*,[138] for the proposition that "[w]hether a party has primarily assumed the risk is usually a question for the jury, unless the evidence is conclusive."[139] *Hollinbeck* appears to be discussing assumption of risk in its secondary sense, however, although as a pre-*Springrose* case, it was not characterized that way.

The court noted that assumption of the risk doctrine initially developed in the master-servant context to optimize industrial development,[140] a statement that is somewhat inconsistent with the Minnesota Supreme Court's own examination of the policy justifications for the rule.[141] "The distinct concept of primary assumption of risk," a complete bar to recovery, is a more recent development, and that "it is what remains of the original assumption-of-the-risk doctrine that has not been swallowed up by the principle of secondary assumption of the risk, comparative-negligence statutes, or workers' compensation laws."[142]

The court noted *Springrose*, and confirmed the limited reach of primary assumption of risk, stating that it is commonly applied in cases involving injuries to spectators at sporting events. The court also noted that other jurisdictions have abolished the concept of primary assumption of risk; but the court limited its statement to just that observation, with no additional discussion of the point.[143]

After stating the basic elements of assumption of risk, the

138. 261 Minn. 481, 486, 113 N.W.2d 9, 13 (1962).
139. *Schneider*, 654 N.W.2d at 148.
140. *Id.* (citing Tiller v. Atl. Coastline R.R., 318 U.S. 54, 58-59 (1943)).
141. *See supra* Part II.
142. *Schneider*, 654 N.W.2d at 148.
143. *Id.* at 149 n.2.

court agreed with the district court that the plaintiff knew and appreciated the risk of injury in participating in the paintball game. The plaintiff voluntarily chose to accept the risk of participating without wearing goggles. Having held that the plaintiff voluntarily encountered a known risk as a matter of law, the court continued its analysis under a heading labeled "Duty and Consent." The court noted *Baber*'s dictum that the defendant has to owe the plaintiff a duty of care before the plaintiff can consent to relieve the defendant of that duty. The court again defined primary assumption of risk, not in terms of a voluntary encounter of a known and appreciated risk, but rather in terms of consent: "For primary assumption of the risk to apply as a complete bar to the plaintiff's recovery, the evidence must show that the plaintiff manifested consent, express or implied, to relieve the defendant of his duty of care."[144]

Schneider referenced the general proposition that "[b]ecause participants in sports enter into relationships in which they assume well-known inherent risks, they consent to relieve other participants of their duty of care with regard to those risks."[145] The court relied in part on *Moe v. Steenberg*,[146] involving an ice skating accident, and concluded that, in *Moe*, assumption of the risk was a proper issue for jury submission. *Moe* was a little more specific, however. The court did find "that one who participates in a sport assumes the risks which are inherent in it,"[147] but "it is ordinarily for the jury to determine what those risks are."[148] If the jury resolves the issue of what risks are inherent in a particular sporting activity, the question is somewhat narrower than the issue of whether a person consented, or whether a person voluntarily encountered a known and appreciated risk of injury.

Schneider ultimately returned to this position, noting that assumption of risk is usually a question of fact for the jury. But the court thought the plaintiff's deposition established that he was aware of the risks. The court affirmed, finding as a matter of law that the plaintiff had knowledge and appreciation of the risk of injury, had a choice to encounter the risk or not, and decided to encounter it, and that the defendant owed the plaintiff a duty of

144. *Id.* at 150.
145. *Id.* at 151.
146. 275 Minn. 448, 450, 147 N.W.2d 587, 588-89 (1966).
147. *Id.* at 450, 147 N.W.2d at 589.
148. *Id.*

care but that the plaintiff consented to relieve the defendant of that duty.[149]

The final issue in the *Schneider* analysis was whether the defendant's conduct enlarged the risk by failing to comply with the no-head-shot rule the participants established at the outset of the game. In another case, primary assumption of risk did not apply if the defendant enlarged the risk so that the plaintiff would not have had the opportunity to make a decision whether or not to avoid the risk.[150] The court in *Schneider* held that there was no enlargement of the risk, given the fact that the defendant did not create any additional risks that did not already exist before the plaintiff removed his eye protection.[151]

The court seemed to develop a four-step analysis. The first step was to determine whether the plaintiff voluntarily encountered a known and appreciated risk of injury. The second step was to decide whether the defendant owed a duty to the plaintiff. If so, the third step was to resolve the consent issue. The critical issue in making that determination in sports injury cases is whether the plaintiff was injured by a risk inherent in the activity. Although ordinarily a jury issue, in this case the risk of getting hit in the eye by a paintball was inherent. Therefore, the plaintiff consented to relieve the defendant of any duty of care with respect to that particular risk. The final step was to determine whether the risk was enlarged by the defendant's conduct. The court held that it was not enlarged.

The opinion makes the primary assumption of risk assessment a complex endeavor. Primary assumption of risk turns on the plaintiff's knowledge and appreciation and voluntary acceptance of a risk as well as consent to inherent risks. It applies a bifurcated standard that requires an assessment first of the defendant's duty and then an assessment of primary assumption of risk. A cleaner approach would have focused on the defendant's duty in sports injury cases, and held that the plaintiff was not entitled to recover absent a showing of reckless or intentional misconduct on the part of the defendant.

149. *Schneider*, 654 N.W.2d at 151.
150. *See* Rusciano v. State Farm Mut. Auto. Ins. Co., 445 N.W.2d 271, 273 (Minn. Ct. App. 1989).
151. *Schneider*, 654 N.W.2d at 152.

VI. PRIMARY ASSUMPTION OF RISK AND THE EIGHTH CIRCUIT

In *Reimer v. City of Crookston*,[152] a recent Eighth Circuit Court of Appeals case, the plaintiff, a boiler repairman, sustained severe burns while inspecting a low-pressure boiler used to heat a swimming pool. The plaintiff, an independent contractor who worked for a boiler repair company, suffered burns when he accidentally brushed against a corroded "nipple" screwed into a boiler, causing a break and steam escape. Two issues concerned the duty of the school district and city to the plaintiff and the application of primary assumption of risk. The district court granted summary judgment for the school district both on the basis that the danger was so obvious that the school district owed no duty to the plaintiff and on the alternative ground that the plaintiff had assumed the risk of injury in the primary sense.

Applying Minnesota law, the court first concluded that the duty of the school district as a possessor of land was based on section 343A of the Restatement (Second) of Torts.[153] The critical aspect of section 343A states that a possessor of land is not liable to invitees who sustain injury because of activities or conditions on their land where the danger is known or obvious to them, unless the possessor should anticipate harm to the invitee, despite the obviousness of the danger. The court followed *Baber* by adding the caveat that liability still will not attach unless the danger is "so obvious" that no warning is necessary. This objective depends not on whether the injured person actually saw the danger, but whether the danger was visible.[154]

The court found that the record did not conclusively demonstrate that the dangerous condition was "so obvious" that the "unless" clause of section 343A should not apply. Material

152. 326 F.3d 957 (8th Cir. 2003).

153. The court followed the Minnesota Supreme Court opinions in *Louis v. Louis*, 636 N.W.2d 314 (Minn. 2001); *Baber v. Dill*, 531 N.W.2d 493 (Minn. 1995); and *Peterson v. W.T. Rawleigh Co.*, 274 Minn. 495, 144 N.W.2d 555 (1966), in applying section 343A. The court did not mention *Adee v. Evanson*, 281 N.W.2d 177, 180 (Minn. 1979), in which the Minnesota Supreme Court concluded that it was no longer appropriate to use section 343A as the standard of care for a possessor of land in cases after *Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639 (1972). The court in *Louis* appears to have taken the position that section 343A is not inconsistent with *Peterson*, and in fact has said that the standard in section 343A is appropriate for determining the duty owed to licensees and invitees. *See Louis*, 636 N.W.2d at 319.

154. *Reimer*, 326 F.3d at 963 (citing *Louis,* 636 N.W.2d at 321).

questions of fact remained as to whether the school district should have anticipated the harm to the plaintiff, notwithstanding the obviousness of the danger. The court held that it was a jury issue as to whether the case fell within the "unless" clause.[155] The court's primary assumption of risk analysis consumed a little less than five pages in the opinion. The opinion is an interesting melange of pre- and post-*Springrose* cases and Minnesota Court of Appeals decisions.

The court began its analysis by noting the standard elements of primary assumption of risk, which require a showing that the plaintiff knew of and appreciated the risk and voluntarily chose to encounter it. Unlike section 343A of the Restatement (Second) of Torts, which applies an objective standard to determine whether a danger is obvious, the court noted that primary assumption of risk applies a subjective standard requiring actual rather than constructive knowledge of a danger. The court also noted the standard statement from the court of appeals that the primary assumption of risk issue is usually a question for the jury.

The federal court followed the Minnesota Supreme Court. Assumption of risk in its primary sense applies in cases where the parties have voluntarily entered into a relationship in which the plaintiff "assumes well-known, incidental risks,"[156] and that it "is dependent upon the plaintiff's manifestation of consent, express or implied, to relieve the defendant of a duty."[157] The court capped its opening by noting that primary assumption of risk is rarely applied by the Minnesota courts.[158] The court also drew from the Minnesota cases a standard requiring evidence "so clear and undisputed" that no fact issues remain for the jury in order to justify summary judgment.[159]

Pulling these principles together, the court framed the issue as "whether the undisputed facts . . . permit only one conclusion: that Mr. Reimer's serious burn injuries from the boiler were a well-known, incidental risk of the type of work voluntarily entered into

155. *Id.* at 965.

156. *Id.* at 967 (citing Olson v. Hansen, 299 Minn. 39, 44, 216 N.W.2d 124, 127 (1974)).

157. *Id.* (citing Armstrong v. Mailand, 284 N.W.2d 343, 351 (Minn. 1979)).

158. *Id.* at 968 (citing Schneider *ex rel.* Schneider v. Erickson, 654 N.W.2d 144, 149 (Minn. Ct. App. 2002)). In a footnote, the court recognized that primary assumption of risk in Minnesota applies most often in cases involving inherently dangerous sporting events. *Id.* at 968 n.11.

159. *Id.* at 968.

by Mr. Reimer pursuant to the relationship between him and the defendants."[160] The court turned its attention to the specific risk involved. The district court and defendants construed the risk of injury broadly, concluding that risk of injury by scalding water is always incident to boiler work. The court of appeals, however, accepted the plaintiff's argument that risk of injury from scalding water was not a "well-known incidental risk" of performing an ultrasound test on a boiler. The court relied on *Armstrong v. Mailand*[161] for support. *Armstrong* focused not on the general risk of injury to the firefighters in fighting fires, but rather on whether they were aware of the specific risks of explosion from a high-volume liquid propane tank that could erupt with the force of a Saturn rocket. The court concluded that the emphasis on specific rather than general risks assumed was in accord with the Minnesota Supreme Court's narrow view of the applicability of primary assumption of risk. The issues then became whether the plaintiff had actual knowledge of the risk created by the defective nipple and whether he appreciated that risk. The facts were in dispute, precluding summary judgment on the issue. The court therefore held that it could not say as a matter of law that the plaintiff "implicitly or explicitly manifested an agreement to assume the risk of his actions in this instance."[162]

The court remained "mindful that the Minnesota Supreme Court has itself acknowledged that 'application of the doctrine of assumption of risk is confusing and has led to seemingly inconsistent decisions.'"[163] The supreme court's confusion underscored their view that "where primary assumption of risk is at issue, only those cases with overwhelming and conclusive records lend themselves to summary judgment resolution."[164] The district court was reversed on this basis, apparently leaving the issue open for ultimate resolution by the trier of fact.

The *Reimer* opinion is an interesting examination of the Minnesota law governing primary assumption of risk because it comes from a federal court in a diversity case attempting to make sense out of a confusing array of primary assumption of risk cases. The Eighth Circuit ultimately concluded that primary assumption

160. *Id.*
161. 284 N.W.2d 343 (Minn. 1979).
162. *Reimer*, 326 F.3d at 970.
163. *Id.* (citing Baber v. Dill, 531 N.W.2d 493, 495 (Minn. 1995)).
164. *Id.*

of risk was not a bar as a matter of law. The decision is questionable for several reasons, however, not the least of which is why relatively simple facts necessitated such a detailed examination of primary assumption of risk.

First, the Minnesota Supreme Court cases are quite consistent, at least post-*Springrose*, in limiting the scope of primary assumption of risk. The Eighth Circuit is right in its observation that the supreme court has narrowed the application of the doctrine. Notwithstanding that narrowing, primary assumption of risk pops up again and again in the Minnesota cases in situations not envisaged in *Springrose*. The Minnesota Court of Appeals' numerous decisions in the area[165] provide part of the basis for the continued vitality of primary assumption of risk amidst statements that the doctrine is to be narrowly applied.

If the supreme court's decisions are followed, several principles emerge. First, primary assumption of risk relates to the duty issue in negligence law. If a duty is owed to the plaintiff, and it is breached, primary assumption of risk principles will have no application apart from the duty determination. Second, primary assumption of risk applies only in limited circumstances, such as the "inherently dangerous" sporting events cases and cases involving landowners' duties to licensees. The objective obviousness of the danger to the plaintiff is considered in both, but they also focus on the obligation of the defendant to provide safe seating or to warn of hazards that may be obvious but still present an unreasonable risk of injury to entrants on property. Properly construed, they are also duty cases. Third, if fact questions arise concerning the duty/primary assumption of risk, they should be submitted to the trier of fact for resolution. Duty/primary assumption of risk is indistinguishable from the supreme court's treatment of other duty cases where the facts may be in dispute. In general, fact issues relating to duty would ultimately be considered by the trier of fact in determining whether the defendant breached a duty owed to the plaintiff. The only issue likely appropriate for jury resolution in disputed duty cases is the foreseeability issue.

The Eighth Circuit's opinion could have resulted in the simple conclusion that the defendant owed a duty to the plaintiff, based on the obligation of a landowner to warn of dangers that may be obvious yet still require action by the defendant if injury could

165. *See supra* note 123 and accompanying text.

nonetheless be anticipated. The breach issue would be for the jury then, as would the issue of whether the plaintiff acted reasonably in light of the knowledge he possessed or should have possessed concerning the risks presented. There would have been two questions: duty/breach and contributory negligence. The primary assumption of risk analysis tends to derail this analysis.

VII. INSTRUCTING THE JURY ON PRIMARY ASSUMPTION OF RISK

The initial problem is determining whether primary assumption of risk should ever be a question for the jury, and if so, how the issue should be submitted. Whether or not a jury is asked to resolve any fact issues that enter the primary assumption of risk orbit will be a function of how the courts view primary assumption of risk in relation to the duty issue.[166] If primary assumption of risk

166. Four examples are set out in this footnote. Ohio recognizes express and implied primary assumption of risk. Implied assumption of risk is an affirmative defense subject to apportionment under Ohio's comparative negligence statute. Primary assumption of risk is limited in scope, typically to sporting events, and if applicable results in a no-duty finding. *See, e.g.,* Gallagher v. Cleveland Browns Football Co., 659 N.E.2d 1232, 1236-38 (Ohio 1996) (holding primary assumption of risk is a viable doctrine, but narrowly confined); Anderson v. Ceccardi, 451 N.E.2d 780, 783-84 (Ohio 1983) (preserving primary assumption of risk in cases where defendant owes no duty to the plaintiff, such as in baseball spectator injuries). No jury instructions are set out for those cases. *See* OHIO JURY INSTRUCTIONS 9.50, Comments (2002).

In Illinois, implied primary assumption of risk is a complete bar to recovery, but only in situations where the plaintiff is the defendant's employee or there is a contractual relationship among the parties that exposes the plaintiff to some inherent hazard. ILL. PATTERN JURY INSTR.—CIV. 13.00 INTRO. (2000). In cases where assumption of risk is an appropriate issue, the pattern instruction in Illinois contains six elements:

> First, that at the time of the occurrence in question, the plaintiff was the defendant's employee;
>
> Second, that performing the duties of his employment exposed the plaintiff to the danger that resulted in the injury of which he complains . . .
>
> Third, that the danger was one that ordinarily accompanies the employment;
>
> Fourth, that the plaintiff had actual knowledge of this danger and understood and appreciated the nature and extent of the risk;
>
> Fifth, that the plaintiff voluntarily subjected himself to this danger; and
>
> Sixth, that this danger was the cause of the plaintiff's [alleged] [injuries] [damages].

Id. 13.02.

Washington takes the position that "[a]n implied primary assumption of the risk arises where a plaintiff 'has impliedly consented (often in advance of any negligence by defendant) to relieve defendant of a duty regarding specific known and appreciated risks.'" Tincani v. Inland Empire Zoological Soc'y, 875 P.2d 621, 633 (Wash. 1994) (citing Scott v. Pacific West Mt. Resort, 834 P.2d 6, 13 (Wash. 1992)). A classic example occurs in the sports-related injury cases where the plaintiff assumes the risks inherent in the sport. *Scott*, 834 P.2d at 13.
The following pattern instruction is intended for use in cases where implied primary assumption of risk is in issue:

> It is a defense to an action for [personal injury] [wrongful death] that the [person injured] [person killed] impliedly assumed a specific risk of harm.
>
> A person impliedly assumes a risk of harm, if that person knows of the specific risk associated with [a course of conduct] [an activity], understands its nature, voluntarily chooses to accept the risk by engaging in that [conduct] [activity], and impliedly consents to relieve the defendant of a duty of care owed to the person in relation to the specific risk.
>
> [A person's acceptance of a risk is not voluntary if that person is left with no reasonable alternative course of conduct [to avoid the harm] [or] [to exercise or protect a right or privilege] because of the defendant's negligence.]

6 WASHINGTON PRACTICE, WASHINGTON PATTERN JURY INSTRUCTIONS—CIVIL 13.03 (4th ed. 2002).

Oklahoma permits an assumption of risk instruction where there is "1) an express agreement by the plaintiff to assume the risk of injury, 2) a pre-existing relation between the defendant and plaintiff that alters the normal duty of care that the defendant would otherwise owe to the plaintiff or 3) the plaintiff's consent to an injury that the plaintiff knew and appreciated." VERNON'S OKLAHOMA FORMS 2D, OKLAHOMA UNIFORM JURY INSTRUCTIONS–CIVIL, Instruction No. 9.14, Notes on Use (2003).

The pattern instruction on assumption of risk is as follows:

> · [Plaintiff] assumed the risk of injury resulting from [Defendant's] negligence if [he/she] voluntarily exposed [himself/herself] to injury with knowledge and appreciation of the danger and risk involved. To establish this defense, [Defendant] must show by the weight of the evidence that:
>
> · [Plaintiff] knew of the risk and appreciated the degree of danger;
> · [Plaintiff] had the opportunity to avoid the risk;
> · [Plaintiff] acted voluntarily; and
> · [Plaintiff]'s action was the direct cause of [his/her] injury.

Id.
Nebraska's pattern instruction on assumption of risk defines it in terms of three elements:

> In connection with the defense of "assumption of risk" the burden is upon the defendant to prove, by the greater weight of the evidence, each and all of the following:
> · That the plaintiff knew of and understood the specific danger;
> · That the plaintiff voluntarily exposed (himself, herself, itself) to that danger; and
> · That the plaintiff's (injury, damage) occurred as a result of (his,

is viewed as melded with the duty issue, then only fact issues essential to the resolution of the duty issue would be submitted. Duty issues are questions of law for the court to resolve,[167] although in close cases, fact issues that are critical to the duty determination may be submitted to the jury. For example, while foreseeability, a critical determinant of duty, is usually not a jury issue, in close cases a jury may be asked whether a particular risk of injury was foreseeable.[168] Depending on the findings, the trial court decides whether the defendant owed a duty to the plaintiff.

If primary assumption of risk has no life apart from the duty issue, the elements of primary assumption (knowledge and appreciation of the risk and a voluntary encounter of the risk) would be irrelevant to the duty determination, unless the "consent" fiction is used to justify a finding that the plaintiff "relieved" the defendant of any duty owed. Those elements would, of course, be fact questions related to the plaintiff's contributory negligence,[169] but would not be directly relevant to the duty issue. The defendant's duty does not depend on whether the plaintiff was aware of the breach.

There are two Minnesota Supreme Court cases that consider the method of submitting primary assumption of risk cases to the jury. The method of submitting the cases is consistent with the understanding that primary assumption of risk and duty are in effect merged. In *Griffiths v. Lovelette Transfer Co.*,[170] the defendant

her, its) exposure to that danger.

1 Neb. Prac. NJI2d Civ. 2.02B (2002). Assumption of risk is a statutorily mandated defense in Nebraska. *See* NEB. REV. STAT. § 25-21,185.12 (2002).

167. Johnson v. Urie, 405 N.W.2d 887, 891 n.5 (Minn. 1987) (concerning an insurance agent's obligation to offer certain insurance coverage to its insureds; duty determination is for the courts, although if the duty issue turns on contradicted facts, the jury may resolve the conflict, although the legal implications of those findings must be resolved by the court).

168. Larson v. Larson, 373 N.W.2d 287, 289 (Minn. 1985) (regarding whether a police officer whose house had been threatened by an intoxicated driver had a duty to warn his brother of the threat, when his brother was watching his house; court acknowledged that it has said in close cases, foreseeability may be a jury issue, but that in this case there was no duty to warn as a matter of law); Lundgren v. Fultz, 354 N.W.2d 25, 28 (Minn. 1984) (considering whether a psychiatrist had a duty to warn the public of a danger presented by patient; foreseeability of harm, which is an integral part of the duty determination, may be a question for the jury in close cases).

169. Because secondary assumption of risk is merged with contributory negligence, the issue of plaintiff fault is typically a jury issue.

170. 313 N.W.2d 602 (Minn. 1981) (involving injuries to a police officer while directing traffic).

argued that the primary assumption of risk issue should have been submitted to the jury. The court's response was as follows:

> Lovelette contends that the issue of primary assumption of risk as defined under our interpretation of the fireman's rule is not a jury question. They rely on cases and treatises which indicate that in the determination of proximate cause the question of the existence of a duty is always a court question. We do not perceive this to be the question. Here, as we stated above, under the facts of this case, there was a duty existing towards the plaintiff and others. The question is whether the Lovelettes should be relieved of that duty to Griffiths because of his position as a police officer. That in turn raises the question of whether or not the risk was reasonably apparent to Griffiths so that he should have anticipated the danger. The trial court decided as a matter of law that he should not have. It is a close question as to whether this determination should be made as a matter of law but we conclude that this finding is not clearly erroneous. If the trial court had not decided this issue as a matter of law this question could have been submitted to the jury for a factual determination in a special verdict along with other factual determinations relating to negligence, causation, and contributory negligence. The jury should not be informed as to the effect of their answer if they were to determine that it was reasonably apparent to the officer that the particular risk was either not hidden nor should have been anticipated by the officer.[171]

The trial court in the case determined as a matter of law that the risk was not one that the police officer should have anticipated, and the supreme court affirmed. The trial court also said that in close cases the fact issue could be submitted to the trier of fact. The focus would be on whether the risk was or reasonably should have been known to the officer, not the classical application of the three elements of primary assumption of risk. The question would narrowly focus on awareness of a specific risk. The plaintiff would not need actual knowledge of the risk. It would be sufficient if a reasonable police officer should have known of the risk under the circumstances. That fact finding would inform the trial court's subsequent determination of whether the firefighter's rule would bar recovery because the risk was inherent in the job. *Griffiths* is

171. *Id.* at 605.

consistent with the court's other close cases in which certain fact issues essential to the duty issue may be found appropriate for jury resolution. However, legislative abrogation of the firefighter's rule[172] means that the issue of what a particular plaintiff knew or should have known of the risk of injury would less likely be the subject of a separate special verdict question, particularly when subsumed in the general duty/contributory negligence inquiries associated with the duties of landowners to entrants on land.[173]

The second case, *Wagner v. Thomas J. Obert Enterprises*,[174] involved a roller skating accident. The court assumed that primary assumption of risk principles applied because the plaintiff was involved in an "inherently dangerous sporting event."[175] The jury found the defendant not negligent, and the plaintiff 100% negligent. One of the issues was whether the trial court should have instructed the jury on primary assumption of risk.

The supreme court took note that neither party commented on the manner in which the assumption of risk issues were submitted to the jury. But the court nevertheless addressed the issue in dictum:

> The first special verdict question read, "Was the Defendant negligent on April 12, 1982?" With respect to the instruction on primary assumption of risk, the jury was then told, "[I]f you find that the accident on April 12, 1982 arose from a risk inherent in the activity of skating and well-known to plaintiff Vera L. Wagner, then you must answer the question 'No.'" The jury was also instructed on defendant's duty of care to keep its premises safe. Thus the first special verdict question was required to do double duty, *i.e.*, if the jury did not find Mrs. Wagner's fall due to an inherent skating risk, it could still answer the question "no" if it found defendant had used reasonable care to keep its premises safe. The jury answered the question "No," and under the evidence could have done so.[176]

The supreme court then suggested an alternative:

> Another way of submitting the case might have been to

172. *See supra* note 83.
173. For more information on that issue see 4A JURY INSTRUCTION GUIDES—CIVIL, CIVJIG 85.25 and Authorities (4th ed. 1999).
174. 396 N.W.2d 223 (Minn. 1986).
175. *Id.* at 226.
176. *Id.* at 227.

> have the first question read, "Did plaintiff assume an inherent risk of roller-skating in her accident of April 12, 1982?" The jury could then be told if it answered the question "yes," it need go no further; if it answered "no," it should proceed with the remaining questions, beginning with, "Was the defendant negligent?"[177]

The special verdict question suggested by the court did not focus on the three elements of assumption of risk. Rather, the question focused on the critical issue of whether injury to the plaintiff was from a risk inherent in the activity of roller skating, an inquiry appropriate for the narrow category of cases involving inherently dangerous sporting events. The approach has limited impact for determining how and whether other assumption of risk cases should be submitted to juries. Other courts, in fact, state that the issue of whether a particular sport is an inherently dangerous activity is a question of law for the court.[178]

So neither *Griffiths* nor *Wagner* provides general all-purpose guidelines for the submission of primary assumption of risk cases. If the supreme court's decisions linking primary assumption of risk to duty are followed, there will not typically be a jury issue involving any element of primary assumption of risk. The plaintiff's knowledge and appreciation of risk should have no independent significance apart from the duty determination. If there is a breach of duty, the plaintiff's knowledge of the risk would be relevant to the contributory negligence determination.

However, if the supreme court follows the dictum in *Baber* and its approach in *Louis*, then primary assumption of risk has independent life and may be decided only after the determination that the defendant owes a duty to the plaintiff, slightly complicating the problem. *Louis* assumes that the jury would resolve the issue of

177. *Id.*

178. *See, e.g.*, Staten v. Superior Court, 53 Cal. Rptr. 2d 657, 659 (Cal. Ct. App. 1996) (skating injury); Gyuriak v. Millice, 775 N.E.2d 391, 394 (Ind. Ct. App. 2002) (golfing injury); Mark v. Moser, 746 N.E.2d 410, 420 (Ind. Ct. App. 2001) (cycling injury in triathlon). In the sports injury cases, the courts typically hold that the plaintiff is not entitled to recover for injuries inherent in the sport. It is a duty issue. *See, e.g.*, Leonard *ex rel.* Meyer v. Behrens, 601 N.W.2d 76, 79 (Iowa 1999) (paintball game injury). The court adopted the "contact sports exception" to the general rule of negligence. The court noted that the majority view of these cases evolved from the view that the assumption of risk by a participant lowers the duty of care owed by other participants to that person from ordinary negligence to a recklessness standard. *Id.* New Jersey takes the same basic position. *See* Crawn v. Campo, 643 A.2d 600, 604-06 (N.J. 1994).

the defendant's negligence after concluding a duty was owed to exercise reasonable care for his brother's safety. But also, the primary assumption of risk issue in *Louis* would be a question of fact for the jury because the trial court already found material fact issues concerning the plaintiff's knowledge of the danger of sliding down the water slide headfirst.

Following the *Louis* approach, the jury instructions would have to focus on the specific elements of primary assumption of risk. If the jury found all the prerequisites for application of primary assumption of risk were present, the accompanying special verdict questions would have to be framed in terms of the elements of primary assumption of risk or else a single question would have to ask whether the plaintiff assumed the risk in the primary sense. Therefore, the special verdict form would have to first include questions asking whether the defendant was negligent and whether that negligence was the proximate cause of the plaintiff's injuries, and then whether the plaintiff assumed the risk of injury. The correlative jury instructions would be based on the three elements of primary assumption of risk (knowledge and appreciation of risk and a voluntary encounter of that risk). If the jury answered yes to the liability and direct cause questions, then it would have to decide whether the plaintiff was negligent and whether that negligence was a direct cause of the plaintiff's injuries.

The bifurcated approach highlights the fact that the defendant has two opportunities to avoid liability. The plaintiff may be unable to establish the defendant's duty and breach because of the obviousness of the danger. However, if the plaintiff does so, the defendant may avoid liability completely by proving the plaintiff's knowledge and appreciation of the risk of injury and voluntary choice to encounter it.

VIII. MINNESOTA AND NEW JERSEY—WHAT IF?

Springrose was decided against *Meistrich's* backdrop, but after *Springrose*, it appears at times the courts of the two states have proceeded on parallel tracks in dealing with primary assumption of risk.

Four years after *Meistrich*, the New Jersey Supreme Court put an end to primary assumption of risk in *McGrath v. American Cyanamid Co.*[179] A workplace accident resulted in the death of a

179. 196 A.2d 238 (N.J. 1963).

construction worker. One of the defendants argued that the suit should be barred by assumption of risk. The court rejected the argument and concluded that assumption of risk should be banished from New Jersey law. The court said that it had hoped that post-*Meistrich*, "the bench and bar would focus upon the true issues, but unhappily some cling to the terminology of assumption of risk and continue to be misled by it even while purporting to think of it as merely a convertible equivalent of negligence or contributory negligence."[180]

The court noted in *Meistrich* that a well-guarded charge of primary assumption of risk could aid in comprehension of the issues in a negligence case, but that its experience indicated that the term "assumption of risk" was "so apt to create mist that it is better banished from the scene."[181] The court hoped to "have heard the last of it" and said that the key inquiries in New Jersey would now be negligence and contributory negligence, unencumbered by primary assumption of risk.[182]

Spectator sports injury cases are similar. The Minnesota Supreme Court's approach focuses on the defendant's obligation to provide safe seating,[183] as do the New Jersey appellate courts.[184] Sports participant injury analysis is also parallel. *Meistrich* and *Wagner*, both skating accident cases, involved an assessment of the defendant's duty to the plaintiff, rather than deciding duty first and then resolving primary assumption of risk.[185]

The Minnesota Supreme Court cases involving the firefighter's rule, *Armstrong v. Mailand* and *Griffiths v. Lovelette Transfer Co.*, take an approach similar to New Jersey's[186] in focusing on policy

180. *Id.* at 240.

181. *Id.* at 240-41.

182. *Id.* at 241.

183. Aldes v. Saint Paul Ball Club, 251 Minn. 440, 88 N.W.2d 94 (1958).

184. *See* Schneider v. Am. Hockey & Ice Skating Ctr., Inc., 777 A.2d 380, 384-85 (N.J. Super. Ct. App. Div. 2001).

185. In *Crawn v. Campo*, 643 A.2d 600 (N.J. 1994), the supreme court applied the majority position in assessing the obligation of participants in a pickup softball game in which the plaintiff, a catcher, brought suit against a member of the opposing team who collided with him at home plate. The court held that in the sports injury cases the duty of participants was to refrain from causing injury intentionally or recklessly. *Id.* at 604-06.

186. *See* Boyer v. Anchor Disposal, 638 A.2d 135, 138-40 (N.J. 1994) (refusing to extend the firefighter's rule to bar recovery by a fire inspector who slipped and fell in a shopping mall parking lot while performing fire inspection duties); Rosa v. Dunkin' Donuts of Pasaic, 583 A.2d 1129, 1131-33 (N.J. 1991) (regarding a police officer who slipped and fell when he responded to a medical emergency

justifications for refusing to permit liability for firefighters injured by risks inherent in their occupations. Both jurisdictions have legislatively abolished the firefighter's rule.[187]

When the cases stray from those fact settings, the differences are more pronounced. In cases involving landowners duties, New Jersey continues to adhere to the common law classification scheme, with landowners' duties dependent on the status of the entrant on property.[188] The Minnesota Supreme Court abolished the distinctions between licensees and invitees in landowners' duty cases in 1972,[189] although the court has also returned to section 343A of the Restatement (Second) of Torts[190] as a primary determinant of landowners' duties even, apparently, in cases involving licensees.[191] The obvious deviation in landowners' duty cases is in *Baber* and *Louis*, which appear to sanction a separate primary assumption of risk inquiry even after the duty issue is resolved. New Jersey engages in a straight duty analysis. Primary assumption of risk is not an issue.

In products liability cases the courts appear to diverge. Primary assumption of risk is not an issue in New Jersey, which applies comparative fault principles in products liability cases,[192] as does Minnesota.[193] However, in *Andren v. White-Rodgers Co.*,[194] the Minnesota Court of Appeals introduced an additional element in products liability litigation. It applied primary assumption of risk principles to bar recovery by the plaintiff as a matter of law based on the plaintiff's knowledge and appreciation of the risk of injury from a product that was assumed for purposes of the case to be

call).

187. *See* MINN. STAT. § 604.06 (2002); N.J. STAT. ANN. § 2A:62A-21 (2000). The statute abrogating the rule is given a narrow construction in New Jersey. *See* Kelly v. Ely, 764 A.2d 1031, 1033-34 (N.J. Super. App. Div. 2001) (holding that the plaintiff-firefighter was not entitled to recover for injuries that were not directly related to the defendant's negligence in causing the fire to which the plaintiff was responding).

188. *See* Vega v. Piediloto, 713 A.2d 442, 444 (N.J. 1998). New Jersey cases involving section 343A and obvious conditions focus on the application of the section and leave it at that, without the additional primary assumption of risk layer. *See* La Russa v. Four Points at Sheraton Hotel, 821 A.2d 1168, 1172-73 (N.J. Super. App. Div. 2003).

189. Peterson v. Balach, 294 Minn. 161, 199 N.W.2d 639 (1972).

190. RESTATEMENT (SECOND) OF TORTS § 343A (1965).

191. *See* Louis v. Louis, 636 N.W.2d 314, 319 (Minn. 2001).

192. *See* N.J. STAT. ANN. § 2A:15-5.2 (2000).

193. *See* MINN. STAT. § 604.01, subd. 1a (2002).

194. 465 N.W.2d 102 (Minn. Ct. App. 1991).

defective. *Armstrong* and the firefighter's rule aside, there is no indication that the Minnesota Supreme Court would apply primary assumption of risk in products liability cases.

There are also differences in workplace injuries, although this difference does not appear in Minnesota Supreme Court cases but, rather, in the court of appeals and Eighth Circuit cases involving the issue. In *Meistrich,* a roller-skating accident case, the New Jersey Supreme Court was concerned about the spread of assumption of risk principles outside the master-servant context. In *McGrath v. American Cyanimid Co.*,[195] the New Jersey Supreme Court clearly disapproved of a primary assumption of risk doctrine to bar recovery simply because a worker continued on the job with knowledge of a workplace hazard.[196] The Eighth Circuit's opinion in *Reimer*, on the other hand, focused primarily on the mechanics of applying primary assumption of risk, except for the court's deduction that primary assumption of risk is a doctrine of limited scope. Of course, not all workplace injuries giving rise to actions by the injured employee against third parties implicate the policies of *McGrath*, but in those cases the analysis of the plaintiff's awareness of a danger is diverted to affirmative defenses, which are subject to comparison, rather than to primary assumption of risk, which is a complete bar to recovery.[197]

Had the Minnesota courts made a more decisive statement concerning the role of primary assumption of risk in Minnesota, as the New Jersey Supreme Court did in *McGrath,* it is doubtful that it would take five pages of an Eighth Circuit opinion to comprehend Minnesota law on primary assumption of risk. In contrast, the New Jersey opinions following *Meistrich* and *McGrath*, dealing with what might in Minnesota have appeared to be primary assumption of risk issues, make it clear that the issue is subsumed in the duty determination. To be sure, questions about the obviousness of a danger and the plaintiff's awareness of that danger are issues in tort litigation in New Jersey, but the courts are absolutely clear in their channeling of anything that smacks of primary assumption of risk through the duty determination.

Of course, that does not mean that the New Jersey position is superior simply because primary assumption of risk is not an

195. 196 A.2d 238 (N.J. 1963).
196. *Id.* at 240.
197. *See* Kane v. Hartz Mountain Indus., Inc., 650 A.2d 808, 817-18 (N.J. Super. Ct. App. Div. 1994).

appropriate analytical tool in New Jersey. For purposes of comparison, the better question is whether primary assumption of risk advances the underlying goals of the tort system, as opposed to the predominant approach of New Jersey and other jurisdictions. The most plausible justification for retention of primary assumption of risk as a separate, barring doctrine is that it honors the autonomous choice of the plaintiff to engage in risky activity,[198] although traditional assumption of risk doctrine is perhaps too broad to accomplish that goal.[199] Even in the early workplace injury cases, the courts in Minnesota had difficulty finding and explaining the justification for the doctrine. The problem is magnified when it is applied broadly outside that context.

IX. THE RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY

The Restatement (Third) of Torts: Apportionment of Liability (2000) says that implied primary assumption of risk should no longer be recognized as a separate legal doctrine. It provides an explanation for the limitation of primary assumption of risk and is yet another way of evaluating Minnesota's position on primary assumption of risk.

Sections 2 and 3 of the Restatement cover implied primary assumption of risk. The Restatement does away with implied primary assumption of risk. Section 2 reads as follows:

> §2. Contractual Limitations on Liability: When permitted by contract law, substantive law governing the claim, and applicable rules of construction, a contract between the plaintiff and another person absolving the person from liability for future harm bars the plaintiff's recovery from that person for the harm. Unlike a plaintiff's negligence, a valid contractual limitation on liability does not provide an occasion for the factfinder to assign a percentage of responsibility to any party or other person.[200]

Section 2 permits express assumption of risk as a defense. The section on its face says nothing about implied primary assumption of risk, but the comments take the position that implied primary

198. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2, Reporters' Note (2000) (citing Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213 (1987)).

199. *Id.*

200. *Id.* § 2.

assumption of risk is no longer viable as a limiting concept. Comments i and j, which cover the issue, are set out below, along with the accompanying illustrations:

> i. Implied assumption of risk distinguished. This Section does not apply when a plaintiff's conduct demonstrates merely that the plaintiff was aware of a risk and voluntarily confronted it. That type of conduct, which is usually called "implied assumption of risk," does not otherwise constitute a defense unless it constitutes consent to an intentional tort. See Comment f. Thus, the rule stated in this Section rejects and replaces Restatement Second, Torts §§ 496C-496G. A plaintiff's conduct in the face of a known risk, however, might constitute plaintiff's negligence and therefore result in a percentage reduction of the plaintiff's recovery. See § 3, Comment c. (In jurisdictions that continue to recognize implied assumption of risk as a comparative defense, or that continue to use the term "implied assumption of risk" to refer to a type of plaintiff's negligence, the defense results in a percentage reduction of the plaintiff's recovery. In contrast, a valid contractual limitation on liability, within its terms, creates an absolute bar to a plaintiff's recovery from the other party to the contract.)
>
> j. Relationship to other liability-limiting doctrines. A plaintiff's knowledge of a risk may support a conclusion, based on other liability-limiting doctrines, that the defendant is not liable. These liability-limiting doctrines sometimes are called "no duty" or "limited duty" rules. Common examples are the limited liability (or duty) a landowner has to a public official, such as a police officer or fireman, who enters the defendant's land as a matter of right, and the limited liability (or duty) one participant in a sporting event has to other participants. Those issues are questions of a defendant's primary liability (or duty) under tort law and are not addressed in this Restatement. This Section neither supports nor precludes a determination that a particular actor has limited or no liability (or duty) in specific circumstances.[201]
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> The Illustrations demonstrate the impact:
>
> 1. A, a police officer, enters B's land to apprehend C, who is suspected of committing a crime. A is injured by a

201. *Id.* cmts. i, j.

> condition on B's land and argues that B was negligent for not remedying the condition. B argues that A knowingly and voluntarily accepted the risk of injury by becoming a police officer or entering B's land. A's decisions do not constitute a defense under the rule stated in this Section. Whether B has full or limited liability to A is governed by the substantive law regarding liability (and duty), not by the rule stated in this Section.
>
> 2. A and B are jockeys in a horse race. A claims that B negligently caused their horses to collide, injuring A. B argues that A understood the risk of a collision and implicitly agreed to accept it merely by entering the race. A's decision does not constitute a defense under the rule stated in this Section. Whether negligence suffices to make one participant liable to another in a sporting event in which they impose reciprocal risks is governed by the applicable rule of liability, not by the rule stated in this Section.[202]

Section 3 and the accompanying comments reiterate the position taken in section 2. Section 3 reads as follows:

> Section 3. Ameliorative Doctrines for Defining Plaintiff's Negligence Abolished
>
> Plaintiff's negligence is defined by the applicable standard for a defendant's negligence. Special ameliorative doctrines for defining plaintiff's negligence are abolished.[203]

Comment c explains:

> Comment c. Relationship to implied assumption of risk and defendant's negligence. This Section applies to a plaintiff's negligence even when the plaintiff is actually aware of a risk and voluntarily undertakes it. *See* § 2; Restatement Second, Torts §§ 496A, 496C-496G. Except as provided in § 2, no jury instruction is given on assumption of risk.
>
> A plaintiff who is actually aware of a *reasonable* risk and voluntarily undertakes it, as when a parent tries to rescue a child from a fire, is not negligent. The parent may, however, be negligent for other reasons, such as the

202. *Id.* illus. 1, 2.
203. *Id.* § 3

> manner of the rescue. When a plaintiff is negligent, the plaintiff's awareness of a risk is relevant to the plaintiff's degree of responsibility. *See* § 8.
>
> Whether the defendant reasonably believes that the plaintiff is aware of a risk and voluntarily undertakes it may be relevant to whether the defendant acted reasonably. The defendant might reasonably have relied on the plaintiff to avoid the known risk, or other policy considerations may dictate that the defendant has no duty or a limited duty to the plaintiff. See § 2, Comment j; Restatement Second, Torts § 282. Whether the plaintiff is aware of a risk and voluntarily assumes it may also be relevant to whether the plaintiff's conduct is a superseding cause. See Restatement Second, Torts § 442. Comparative responsibility may affect what constitutes a superseding cause, but that issue is beyond the scope of this Restatement.[204]

To summarize, the Restatement permits express assumption of risk as a defense, but does not recognize what the courts have called implied primary assumption of risk or implied assumption of risk. The comments acknowledge that the plaintiff's knowledge of danger may be relevant to three issues: (1) whether the plaintiff acted reasonably, (2) whether the defendant owed a duty to the plaintiff, and (3) whether the plaintiff's conduct constituted a superseding cause. The Restatement adopts the predominant position in assumption of risk cases.[205]

The Minnesota Supreme Court cases are mostly consistent with the position taken in the Restatement. The illustrative primary assumption of risk cases noted in *Springrose* are in fact limited duty cases of the type noted in the Restatement comments. That leaves plaintiff conduct in the face of an obvious danger as relevant to the issues of whether the defendant owed the plaintiff a duty, whether the plaintiff acted reasonably under the circumstances, and whether the plaintiff's conduct was a superseding cause. Those liability-limiting doctrines provide cleaner analytical lines. The elimination of implied assumption of risk avoids duplicating those doctrines.

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204. *Id.* cmt. c.
205. *Id.* Reporters' Note.

X. CONCLUSION

Primary assumption of risk appeared to have a limited life after the supreme court's decision in *Springrose*. The supreme court's decisions generally confined primary assumption of risk by linking it to the duty determination in Minnesota law, although two of the court's later decisions, *Baber* and *Louis*, may have revived primary assumption of risk and given it a distinct status apart from the duty determination. The status of primary assumption of risk depends on how those decisions are interpreted.

Primary assumption of risk analysis regularly appears in court of appeals decisions. Its application turns on whether the plaintiff *consented* to the specific risk of injury. Rather than framing the primary assumption of risk question for the jury in those terms, however, *consent* is apparently established by showing the three elements of assumption of risk.

Outside of the now discredited master-servant context, the issue is whether *consent*, as a legal principle turning on plaintiffs' subjective knowledge of the risk, justifies barring recovery in a lawsuit by an injured person. If there is a policy imperative implicit in primary assumption of risk that cannot be served through a duty analysis and contributory negligence/secondary assumption of the risk defense, it is difficult to find. In Minnesota, its clearest articulations are in the cases involving the now-abolished firefighter's rule and perhaps in the sports injury cases. Even those cases, however, target the defendant's duty as the means of determining the defendant's responsibilities.

A general policy of limiting liability because of a voluntary choice by the plaintiff to encounter a known risk of injury seems to be unduly expansive. As it is applied in cases such as products liability cases, workplace injury, or landowners' duty cases, such a policy bars recovery even in cases where the defendant owes a duty to the plaintiff and has breached that duty.

Perhaps the most significant criticism of the doctrine of primary assumption of risk is that it duplicates other limiting tort doctrines. If obviousness of a particular risk of injury is part of the duty analysis, yet a court finds that the defendant owes the plaintiff a duty, notwithstanding the obviousness of the danger, consideration of primary assumption of risk as a further limiting doctrine provides the defendant with a second opportunity to totally bar the plaintiff's claim. Doing away with primary assumption of the risk focuses on the key issues in tort litigation:

whether a defendant was negligent and whether the plaintiff has been contributorily negligent.

There are limited alternatives available to the courts. Trying to define primary assumption of risk and limiting the application of the doctrine has proved difficult. The Minnesota Supreme Court tried to limit the doctrine in *Springrose*, and in its own decisions has generally managed to confine primary assumption of risk, but that has not been the experience in the court of appeals. Continued application of primary assumption of risk will necessarily result in continued confusion concerning the meaning and application of the doctrine.

If the doctrine is retained, perhaps because there is value in holding that rational choices to encounter danger should be deemed to relieve defendants of the consequences of their negligent actions, the doctrine will continue to have a potentially expansive application. If so, the courts will have to provide a clear definition of the factual findings that will trigger primary assumption of risk. The issue would very likely have to be framed for a jury in terms of the specific elements of assumption of risk and those questions would have to be asked in a way that juries could respond to them via appropriate special verdict questions. Framing the issue for the jury is less of a problem than generating a justification for the continued existence of primary assumption of risk.