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A Course of Action for Florida Courts to Follow When Injured Sports Participants Assert Causes of Action

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NOTES AND COMMENTS

A COURSE OF ACTION FOR FLORIDA COURTS TO FOLLOW WHEN INJURED SPORTS PARTICIPANTS ASSERT CAUSES OF ACTION

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I. INTRODUCTION

Jim McMahon's separated shoulder¹ and Darryl Stingley's broken neck² pose a serious question: What recourse should an injured sports participant have against another player? This issue has received well deserved attention because of competing social policies. While it is important to retain the intensity with which a game should be played, fear of legal responsibility should not cause this to diminish.³ Yet it is also critical to provide injured participants some remedy because there should be no immunity for those who injure others.⁴ Compensation must be awarded to those in-

1. Lieber, *Too Mean And Also Too Lenient*, SP. ILLUSTRATED, Dec. 8, 1976, at 24. (Jim McMahon is the controversial quarterback of the Chicago Bears football team).

2. Stingley & Mulvoy, *Where Am I? It Has To Be A Bad Dream*, SP. ILLUSTRATED, Aug. 13, 1978, at 56. (Darryl Stingley was a wide receiver for the New England Patriots).

3. See Note, *Civil Liability of Athletes—Professional Football Player May Have Tort Claim For Injuries Intentionally Inflicted During Football Games*, *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1979), 84 DICK. L. REV. 753, 768 (1980); Koppett, *Sports and the Law: An Overview*, 18 N.Y.L.F. 815 (1973); *Kabella v. Bouschelle*, 672 P.2d 290, 294 (N.M. Ct. App. 1983).

4. See Beumler, *Liability in Professional Sports: An Alternative to Violence?* 22

jured as a result of another's intentional or reckless misbehavior.⁵

Legal writers have examined the various avenues available under criminal and civil law.⁶ While there is no case law available to determine the scope of criminal responsibility in Florida, it is clear that one athlete who injures another in a sport can be held to civil liability.⁷ Success in a civil suit, however, is impaired because of the affirmative defense of assumption of risk.⁸ In the 1972 case of *Blackburn v. Dorta*,⁹ the Florida Supreme Court abolished all forms of implied assumption of risk, but passed no judgment on the express type, which it described as applying to actual consent cases "such as where one voluntarily participates in a contact sport."¹⁰

The 1983 case of *Kuehner v. Green*¹¹ decided *Blackburn's* unanswered question and specifically held that express assumption of risk would be a viable defense in contact sports if certain conditions existed.¹² As Justice Boyd pointed out in a concurring opinion, the majority holding accepted "the principle that a sport participant may recover damages for injuries resulting from simple negligence."¹³

The application of express assumption of risk has been expanded far beyond the contact sport setting since these two decisions.¹⁴ Lower Florida courts have applied the doctrine to professional non-contact sports¹⁵ and to non-sport cases.¹⁶ Unfortunately, the framework provided by *Blackburn* and *Kuehner* is problem-

ARIZ. L. REV. 919, 927 (1980); Kuhlman, *Violence in Professional Sports*, 1975 WIS. L. REV. 771 (1975); Note, *The Sports Court: A Private System To Deter Violence in Professional Sports*, 55 S. CAL. L. REV. 399, 407 (1982); *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1979), *cert. denied*, 444 U.S. 931 (1979).

5. *Kuehner v. Green*, 436 So. 2d 78, 81 (Fla. 1983).

6. Beumler, *supra* note 4; Note, *The Sports Court: A Private System To Deter Violence In Professional Sports*, 55 S. CAL. L. REV. 399 (1982); Note, *supra* note 3, at 753; Comment, *supra* note 4, at 771.

7. *Kuehner v. Green*, 436 So. 2d at 78.

8. *Id.*

9. 348 So. 2d 287 (Fla. 1977).

10. *Id.* at 290.

11. 436 So. 2d 78 (Fla. 1983).

12. *Id.* at 79.

13. *Id.* at 81.

14. Note, *The Reemergence of Implied Assumption of Risk in Florida*, 10 NOVA L.J. 1343, 1354-65 (1986).

15. See *Ashcroft v. Calder Race Course*, 464 So. 2d 1250 (Fla. 3d Dist. Ct. App. 1985), *rev'd*, 492 So. 2d 1309 (Fla. 1986). See also *infra* note 92.

16. See *Black v. District Board of Trustees*, 491 So. 2d 303 (Fla. 4th Dist. Ct. App. 1986), *pet. for rev. denied*, 500 So. 2d 593 (Fla. 1986). See also *infra* text accompanying notes 96-99.

atic. First, the notion of "actual consent" is broad and arguably justifies the increased use of express assumption of risk in Florida. One must also consider the similarity between the defense of actual consent and that of "implied" assumption of risk, and its distinction from express assumption of risk.¹⁷ *Blackburn* essentially destroyed implied assumption of risk, yet recreated it in the same opinion. Second, express assumption of risk is now being used outside its traditional context of express agreements not to sue and contractual waivers.¹⁸ Finally, the notion of allowing recovery for negligence in sports cases has undesirable consequences to legal relationships in the sports world.¹⁹

To overcome these problems, express assumption of risk should be redefined to include only express contractual waivers.²⁰ This will provide predictability and certainty in general tort law and that applicable to participants in contact sports. Additionally, a defendant's responsibility to other participants in a sporting activity should be addressed under a duty-breach analysis. In agreement with Justice Boyd's opinion in *Kuehner*, I suggest the proper duty standard to apply is whether the parties refrained "from intentional or reckless misconduct that is not customary to the sport."²¹ "Customary" implies that injuries resulting from conduct "inherent" in the sport not in violation of any safety rules would remain non-compensable.²²

The purpose of this comment is to set forth the appropriate mode of doctrinal analysis for Florida courts to follow in civil sports injury cases and to show that it is better suited to obtaining correct results than the current mode of dealing with liability aris-

17. See RESTATEMENT (SECOND) OF TORTS §§ 892, 892A, and 496 C, D and E (1965); See also *infra* notes 100-109 and accompanying text.

18. See *Cooney-Eckstein Co. v. King*, 69 Fla. 246, 254, 67 So. 918, 921 (Fla. 1915) (quoting *Tinkle v. St. Louis & San Francisco R.R. Co.*, 212 Mo. 445, 468, 110 S.W. 1086, 1093 (Mo. 1908)):

As a general rule, the doctrine of assumption of risk pertains to controversies between masters and servants, though circumstances may arise between parties other than masters and servants when the doctrine may apply; but such defense is never available, unless it rests upon contract, or . . . an act done so spontaneously by the party against whom the defense is invoked that he was a volunteer, and any bad result of the act must be attributed to an exercise of his free volition, instead of to the conduct of his adversary.

Id. See also *Bohlen, Voluntary Assumption of Risk*, 20 HARV. L. REV. 14 (1906).

19. *Kuehner v. Green*, 436 So. 2d 78, 81 (Fla. 1983). See also *infra* notes 116-18 and accompanying text.

20. See *Jacobsen Construction v. Structo-Lite Engineering*, 619 P.2d 306, 310 (Utah 1980); W. PROSSER & W. KEETON, LAW OF TORTS, § 68 at 480-82 (5th ed. 1984).

21. *Kuehner*, 436 So. 2d at 81.

22. See RESTATEMENT (SECOND) OF TORTS § 50, comment b (1965).

ing out of an athletic event.

II. POTENTIAL REMEDIES OF A SPORTS PARTICIPANT

One injuring another while participating in a sports activity can be held legally responsible in a number of different ways. Athletes can be criminally prosecuted under assault and battery theories.²³ Assault and battery are often used in conjunction with each other, and are usually referred to as a battery.²⁴ The traditional elements of a battery are an act by the defendant, an intent to touch or make contact with another, and causation between the act of the defendant and the contact with the victim.²⁵ This theory is appropriate in most sports fights.²⁶

Two defenses²⁷ are usually asserted in criminal cases. The first is consent, but it is generally not employed successfully because a criminal wrong affects the general public and, therefore, cannot be condoned by the victim.²⁸ Consent for participants in sports is limited to those blows "not likely to kill or seriously injure, delivered in accordance with the rules of the game."²⁹ For example, one consents to tackling in football or checking in hockey.³⁰ A second way to avoid criminal liability is by self-defense. Self-defense becomes operative when one, reasonably fearing immediate danger, believes force must be used to avoid being injured.³¹ Such force is limited by the requirement that it be reasonable under the circumstances of the case. Furthermore, retreat from the aggressive party must be unavailable.³² Given these contingencies, self-defense is rarely asserted.

23. Kuhlman, *supra* note 4, at 773.

24. W. LAFAVE & A. SCOTT, 7 HANDBOOK ON CRIMINAL LAW 603 (1972). Assault may be either an attempted battery or an intentional frightening of the victim, but it involves no physical contact. *Id.*

25. *Id.* at 603.

26. Kuhlman, *supra* note 4, at 773.

27. While not common, two other defenses have been considered. The most common sports fight situations involve what is called "mutual combat" but technically this is no defense because the general rule is that both participants are guilty of the offense and may be prosecuted. 6 C.J.S. *Assault and Battery* § 90 (1937). "Provocation by words" is another defense and a very likely occurrence in sports batteries. However, rather than a defense, it is normally only a mitigating punishment absent some statutory authorization. Kuhlman, *supra* note 4, at 774.

28. Note, *The Sports Court: A Private System To Deter Violence in Professional Sports*, 55 S. CAL. L. REV. 339, 405 (1982).

29. W. LAFAVE & A. SCOTT, *supra* note 24, at 608.

30. Kuhlman, *supra* note 4, at 773.

31. Beumler, *supra* note 4, at 923.

32. Kuhlman, *supra* note 4, at 773.

The criminal theory has been used infrequently and without much success in the past. While three trials of defendants charged with sports related offenses resulted in acquittals,³³ criminal sanctions were imposed in one recent case.³⁴ The severity of criminal sanctions suggests that they are not the best measure to eliminate sports violence.

Athletes can also be subject to civil responsibility. An injured plaintiff has three potential theories on which to base a cause of action: a civil claim of assault and battery, recklessness, or negligence.³⁵ As with criminal battery, the intentional tort of battery requires an act by the defendant, intent to cause a harmful or offensive contact, a resulting contact, and a causal connection between the act of the defendant and the harmful or offensive contact with the plaintiff.³⁶

Generally, the affirmative defense of consent³⁷ is available to preclude recovery for harm resulting from the contact.³⁸ The *Restatement (Second) of Torts* defines two different types of consent: actual and apparent.³⁹ Actual consent is "willingness in fact for conduct to occur; this may be manifested by action or inaction and need not be communicated to the actor."⁴⁰ Apparent consent exists if a person's words, acts, or inaction manifest consent justifying another's actions in reliance upon them. This is so even if the person concerned does not "in fact agree" to the conduct of the other.⁴¹ Apparent consent is found when the words, acts or inac-

33. *Regina v. Green*, 16 D.L.R. 3d. 137 (1970); *Regina v. Maki*, 14 D.L.R. 3d. 164 (1970). Both of these cases arise out of an occurrence in a hockey game in September 1969. Wayne Maki, a player for the St. Louis Blues, fractured the skull of Ted Green, a player for the Boston Bruins, by hitting Green with his hockey stick. This was the final blow in a fight precipitated when Green hit Maki in the face with his gloved hand during an earlier part of the game. The fight resulted in both players being charged with assault. *See also State v. Forbes*, No. 63280 (Minn. 4th Dist. Ct., Aug. 12, 1975). In a 1975 hockey game, David Forbes of the Boston Bruins clubbed Henry Boucha of the Minnesota North Stars with the butt of his hockey stick, knocking Boucha to the ice. Forbes then jumped on Boucha and began pounding his head into the ice until another player stopped him. Forbes was prosecuted for assault but a jury was unable to reach a verdict and a mistrial was declared.

34. *People v. Freer*, 86 Misc.2d. 280, 381 N.Y.S.2d. 976 (1976). John Freer was convicted of assault after punching an antagonist who had punched Freer in the throat and eye during an amateur football game.

35. Note, *supra* note 3, at 759.

36. RESTATEMENT (SECOND) OF TORTS § 13 (1965).

37. The consent defense to intentional torts is comparable to consent as a defense to criminal assault and battery charges. However, the policy arguments against permitting it in the criminal area do not exist in the civil area.

38. RESTATEMENT (SECOND) OF TORTS § 892 A (1965).

39. *Id.* § 892.

40. *Id.*

41. *Id.* comment c.

tion would be understood by a reasonable person as consent and they are in fact so understood by the other.⁴² As suggested by comment B of section 50 of the *Restatement*, participation in a sport ordinarily involves apparent consent.⁴³ An important point to note is that the participant consents only to conduct within the rules and customs of the game.⁴⁴

A cause of action for reckless misconduct requires a showing of the following elements: a defendant must commit an intentional act or omission; he must know or have reason to know of facts which would lead a reasonable man to realize that his conduct creates an unreasonable risk of physical harm to another; and finally, he, or a reasonable person in his position, would appreciate the high degree of risk involved.⁴⁵ The degree of risk involved in a recklessness theory is one way to distinguish it from a negligence theory: the *Restatement* specifically calls for a risk of harm "substantially greater than that which is necessary to make [the actor's] conduct negligent."⁴⁶ Recklessness also differs from a cause of action for negligence in that more than mere inadvertence is required; rather, there must be a conscious election of the course of action by the actor, with knowledge that danger is present or with knowledge of facts which would disclose this danger to a reasonable man.⁴⁷

Negligence can also potentially sustain a complaint for damages. Some courts recognize a negligence cause of action,⁴⁸ but the modern trend seems to limit recovery to intentional torts and reckless behavior.⁴⁹ For those courts recognizing the cause of action,

42. *Id.*

43. RESTATEMENT (SECOND) OF TORTS § 50 comment b (1965).

44. *Id.* Consequently, the defense of consent is unavailable when injury results from contacts which are prohibited by rules or usages of the game if such rules or usages are designed to protect the participants and not merely to secure the better playing of the game as a test of skill. This is true even though the player knows that those with or against whom he is playing are habitual violators of such rules. *Id.*

45. RESTATEMENT (SECOND) OF TORTS § 500 (1965).

46. *Id.*

47. *Id.* comment a.

48. *See, e.g., Niemczyk v. Burleson*, 538 S.W.2d 737 (Mo. Ct. App. 1976) (plaintiff baserunner recovered for injuries sustained in collision with shortstop who blocked the runner's basepath).

49. *See* Part VI of text. In summary, the modern decisions include: *Nabonzy v. Barnhill*, 31 Ill.App.3d 212, 334 N.E.2d 258 (1975) (a player is liable for injury in a tort action if his conduct is such that it is either deliberate, willful or with a reckless disregard for the safety of the other player so as to cause injury to that player); *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1979), *cert. denied*, 444 U.S. 931 (1979) (recklessness, as defined in § 500 of RESTATEMENT (SECOND) OF TORTS, is the standard of care required by a participant in a contact sport toward a fellow player); *Kabella v. Bouschelle*, 100 N.M. 461,

the traditional elements must be shown: duty, breach, causation, and injury in fact.⁵⁰ The ability of injured athletes to assert negligence or recklessness claims is hindered by two possible affirmative defenses. First, defendant sports participants may assert that the plaintiff was contributorily negligent. Contributory negligence is defined as "conduct. . . which falls below the standard to which [the plaintiff] should conform for his own protection and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm."⁵¹ Contributory negligence usually arises in a sports injury case when the decision of the injured participant/plaintiff to take part in the activity was unreasonable.⁵² An unreasonable decision to participate exists when the injured participant/plaintiff lacks the skill or physical capacity to play the game or he suffers from some physical impairment.⁵³ Thus, one previously injured who nevertheless plays in a sport and has his/her injury aggravated might be considered contributorily negligent. Second, and more prevalent, is the controversial defense of assumption of risk.⁵⁴ While courts differ over the

672 P.2d 290 (1983) (the standard of reckless or willful conduct is a requisite of pleading and proof in tort cases involving participants engaged in contact athletic activities).

50. RESTATEMENT (SECOND) OF TORTS § 281 (1965).

51. *Id.* § 463.

52. *Segoviano v. Housing Authority of Stanislaus County*, 143 Cal. App. 3d 162, 191 Cal. Rptr. 578 (1983) (plaintiff's decision to participate in a flag football game found to be reasonable; no contributory negligence could be assigned to him because it was a voluntary decision to play and because he knew injuries were possible. Defendant, who had pushed plaintiff out of bounds causing him to separate his shoulder, was completely responsible).

53. *Id.* The *Segoviano* Court stated:

In the present case, the plaintiff is a young man who decided to play in a flag football game, a healthy, socially desirable organized recreational activity. His decision to play should not be deemed negligence on his part, absent proof that he lacked skill or physical capacity to play the game or suffered from some physical or emotional impairment which would have made his decision to play in the game unreasonable. By "unreasonable", we mean his decision falls below the standard of care which a person of ordinary prudence would exercise to avoid injury to himself or herself under the circumstances. . . The "person" used as the standard to evaluate the plaintiff's decision to participate in the game is not the extraordinarily cautious individual nor the exceptionally skillful one but a person of reasonable and ordinary prudence.

Id. at 175, 191 Cal. Rptr. at 587.

Note the court found that plaintiff's knowledge that injury was possible and option of not playing at all did not make his decision to play unreasonable. *Id.* at 176, 191 Cal. Rptr. at 588.

54. The controversy has arisen because many states are adopting comparative negligence statutes in lieu of retaining contributory negligence which is a complete bar. Given the elimination of contributory negligence because of its harshness, it is inconsistent to permit assumption of risk which would likewise act as a complete bar. See *Blackburn v. Dorta*, 348 So. 2d 287, 289-90 (Fla. 1977).

appropriate form of assumption of risk in the sports participant context, a successful use of the defense will bar recovery by an injured athlete.⁵⁵ The following discussion elaborates on the assumption of risk defense in Florida.

III. ASSUMPTION OF RISK IN FLORIDA

Assumption of risk is commonly used to defend against an action by an injured sports participant. The real issues underlying the doctrine in the sports context are what type of assumption of risk applies, and whether this type has been abolished in the given jurisdiction.

The two types of assumption of risk are implied and express.⁵⁶ Some courts characterize sports participant cases as a form of implied assumption of risk.⁵⁷ Florida law treats such cases as express assumption of risk.⁵⁸ It is significant that those courts which choose an express assumption of risk analysis deal with sports participant cases in a manner indistinguishable from implied assumption of risk.⁵⁹ For example, the factors examined in Florida to support the defense of express assumption of risk are the same factors which were required to establish implied assumption of risk⁶⁰ before the leading case of *Blackburn v. Dorta*.⁶¹ A brief description of each type of assumption of risk and its development in Florida follows. The specific problems generated in Florida from the doctrine's application to sports cases is then discussed in greater detail.

A. Implied

Implied assumption of risk is the more complicated area because of its numerous subdivisions. Initially, it has two forms: primary and secondary. In a negligence action, primary implied as-

55. RESTATEMENT (SECOND) OF TORTS § 496A (1965).

56. *Id.* §§ 496B, 496C.

57. *Blair v. Mt. Hood Meadows Dev. Corp.*, 291 Or. 293, 630 P.2d 827 (1981); *Rutter v. The Northeastern Beaver County School Dist.*, 496 Pa. 590, 437 A.2d 1198 (1981); *Turcotte v. Fell*, 510 N.Y.S.2d 49, 68 N.Y.2d 432, 502 N.E.2d 964 (1986).

58. *Blackburn v. Dorta*, 348 So. 2d 287, 290 (Fla. 1977); *Kuehner v. Green*, 436 So. 2d 78 (Fla. 1983).

59. See *Meulners v. Hawkes*, 299 Minn. 76, 80, 216 N.W.2d 633, 635 (1974).

60. See Note, *supra* note 14, at 1362. The defense of implied assumption of risk was applicable when the plaintiff knew and appreciated the risk of danger and voluntarily consented to exposure to that particular risk. *Bartholf v. Baker*, 71 So. 2d 480 (Fla. 1954); *Byers v. Gunn*, 81 So. 2d 723 (Fla. 1955); *Brady v. Kane*, 111 So. 2d 472 (Fla. 3d Dist. Ct. App. 1959).

61. 348 So. 2d 287 (Fla. 1977).

sumption of risk focuses on the scope of the defendant's duty.⁶² It is used when the defendant either had no duty to prevent the plaintiff's injury, or had a duty but did not breach it.⁶³ Secondary implied assumption of risk is an affirmative defense asserted to bar a plaintiff from recovery.⁶⁴ This aspect of implied assumption of risk focuses on the plaintiff's state of mind.⁶⁵ If no express assumption of risk has occurred, a plaintiff who fully knows of and appreciates a specific risk of injury, voluntarily chooses to encounter it, and does so under circumstances that manifest a willingness to accept it has impliedly assumed the risk in its secondary form.⁶⁶ The *Restatement* requires that these four elements be demonstrated to successfully assert secondary implied assumption of risk as a defense.⁶⁷

Complicating the situation is the fact that secondary assumption of risk distinguishes between the reasonable (strict) and unreasonable (qualified) forms.⁶⁸ Simply stated, a plaintiff's conduct in assuming the risk may be either reasonable or unreasonable. If the latter applies, a plaintiff is also contributorily negligent.⁶⁹

Florida judicially adopted the system of comparative negligence in 1973 because it was more equitable than the "all or nothing" approach of contributory negligence.⁷⁰ The comparative system is desirable because it equates liability with fault and produces less harsh results.⁷¹ Given the transition to comparative negligence, the viability of assumption of risk became an important issue. It was argued that the purpose of assumption of risk was subsumed by either the doctrine of contributory negligence or the common law concept of duty.⁷² It was also said that this redun-

62. Note, *supra* note 14, at 1348.

63. *Id.* See also *RESTATEMENT (SECOND) OF TORTS* § 496C comments c-f (1965).

64. Note, *supra* note 14, at 1348.

65. *Id.* at 1349. See also *RESTATEMENT (SECOND) OF TORTS* § 496C (1965).

66. *RESTATEMENT (SECOND) OF TORTS* § 496C, D and E.

67. *Id.*

68. *Blackburn v. Dorta*, 348 So. 2d 287, 291 (Fla. 1977); W. PROSSER & W. KEETON, *THE LAW OF TORTS*, § 68 (5th ed. 1984); James, *Assumption of Risk: Unhappy Reincarnation*, 78 *YALE L.J.* 185 (1968).

69. James, *supra* note 68.

70. *Hoffman v. Jones*, 280 So. 2d 431, 437 (Fla. 1973).

71. *Id.* at 437-38. A pure system makes the comparative negligence calculation, regardless of the percentages of negligence between the parties. This type of system should be distinguished from a partial system which usually requires that a plaintiff not be as negligent as the defendant or that the plaintiff not be more negligent than the defendant to compare fault between the parties (if the test is not met, the plaintiff has no recovery). See 3 S. SPEISER, C. KRAUSE, & A. GANS, *THE AMERICAN LAW OF TORTS*, § 13:7 (1986).

72. *Blackburn v. Dorta*, 348 So. 2d 287, 289 (Fla. 1977) (referring to *Petrone v. Margolis*, 20 N.J.Super. 180, 89 A.2d 476 (1952)).

dancy resulted in confusion and, in some cases, unjustly denied recovery.⁷³ The Florida Supreme Court resolved this dilemma in 1977. *Blackburn v. Dorta*⁷⁴ merged the defense of implied assumption of risk into the defense of contributory negligence. The court held that the principle of comparative negligence would apply in all cases where such a defense was asserted.⁷⁵ The court felt primary implied assumption of risk was adequately dealt with under the principle of negligence because the concepts of duty and breach were already evaluated in a negligence analysis.⁷⁶ As for secondary assumption of risk, the court felt that the unreasonable form was so similar to contributory negligence that it should be eliminated.⁷⁷ Reasonable secondary assumption of risk was also merged into contributory negligence because the court believed the retention of this form would be unfair and inconsistent with the policies enunciated by *Hoffman v. Jones*.⁷⁸ The court placed emphasis on the inequity of granting a proportionate recovery to a plaintiff who unreasonably assumed a risk and denying recovery to a plaintiff who reasonably assumed a risk.⁷⁹ In contrast to implied assumption of risk, the status of express assumption of risk remained an active issue after *Blackburn*.⁸⁰

B. Express

Express assumption of risk is traditionally characterized as an actual agreement between two parties who agree to allocate the risk of loss.⁸¹ Such agreements may either be oral or written.⁸² Although these agreements are not favored by the courts, they will be upheld if certain conditions are met.⁸³ As mentioned, *Blackburn* lightly touched on this type of assumption of risk. While the status

73. *Blackburn*, 348 So. 2d at 289.

74. 348 So. 2d 287 (Fla. 1977).

75. *Id.* at 293.

76. *Id.* at 291.

77. *Id.* at 291-292.

78. *Id.* at 291.

79. *Id.* at 293. See also Note, *supra* note 14, at 1353.

80. *Blackburn v. Dorta*, 348 So. 2d 287, 290 (Fla. 1977).

81. RESTATEMENT (SECOND) OF TORTS § 496A (1965); Note, *supra* note 14, at 1347.

82. RESTATEMENT (SECOND) OF TORTS § 496A (1965); Note, *supra* note 14, at 1347.

83. Note, *supra* note 14, at 1347-48. The specific conditions which must be met are: first, the intention of assuming the risk must be clear and unequivocal; second, the parties to the agreement must have comparable bargaining power; and finally, the agreement must not be against public policy. *Id.* at 1348. See also *Ivey Plants, Inc. v. FMC Corp.*, 282 So. 2d 205, 208 (Fla. 4th Dist. Ct. App. 1973); *O'Connell v. Walt Disney World Co.*, 413 So. 2d 444, 427 (Fla. 5th Dist. Ct. App. 1982); RESTATEMENT (SECOND) OF TORTS § 496B comment e (1965).

of express assumption of risk was not decided in this case,⁸⁴ the Florida Supreme Court defined the defense in a significant way: "express contracts not to sue for injury or loss which may thereafter be occasioned by the covenantee's negligence as well as situations in which actual consent exists such as where one voluntarily participates in a contact sport."⁸⁵

Only six years after it first defined express assumption of risk, the Florida Supreme Court addressed the issue of whether express assumption of risk, like implied, would be eliminated.⁸⁶ In *Kuehner v. Green*,⁸⁷ the court accepted the use of express assumption of risk in a contact sport, and also provided an intricate framework for applying the doctrine. *Kuehner* held that the following analysis should be engaged in to determine if express assumption of risk applies, or more specifically, if a participant in a sporting activity "actually consented" to confront certain dangers:

Express assumption of risk, as it applies in the context of contact sports, rests upon the plaintiff's voluntary consent to take certain chances. . . . It is the jury's function to determine whether a participant voluntarily relinquished a right. . . . In so doing, several threshold questions must be answered. First, the jury must decide whether the plaintiff subjectively appreciated the risk giving rise to the injury. . . . If it is found that the plaintiff recognized the risk and proceeded to participate in the face of such danger, the defendant can properly raise the defense of express assumption of risk. . . . If the plaintiff is found not to have subjectively appreciated the risk, the trier of fact must determine, after reviewing all evidence, whether this plaintiff should have reasonably anticipated the risk involved. If it is found that a reasonable man would not have anticipated this risk, the "unsuspecting plaintiff" cannot be said to have consented to such danger and he, therefore, should be allowed to recover in full.⁸⁸

Conversely, if the jury determines that the plaintiff should have anticipated the particular risk and did not, then plaintiff's conduct should be subjected to comparative negligence apportionment principles. Allowing the jury to assess a plaintiff's failure to anticipate a risk poses no greater practical problems in the apportion-

84. *Blackburn*, 348 So. 2d at 290.

85. *Id.*

86. *Kuehner v. Green*, 436 So. 2d 78 (Fla. 1983).

87. 436 So. 2d 78 (Fla. 1983).

88. *Id.* at 80.

ment process than allowing it to consider contributory negligence.⁸⁹

The most significant aspect of the majority opinion in *Kuehner*, clearly identified in Justice Boyd's concurrence,⁹⁰ was the acceptance of the principle that a sports participant may recover damages for injuries resulting from simple negligence.⁹¹ The majority essentially felt that mere inadvertence during contact sports, which by nature involves touching and hitting, would give rise to a lawsuit if a participant were injured. They believed that express assumption of risk had to remain a viable defense to negligence actions to allow contact sports to continue to serve as a legitimate recreational function in society.⁹²

Together, *Blackburn* and *Kuehner* defined express assumption of risk and described its proper use. Since that time, the application of express assumption of risk has been expanded far beyond the contact sport setting. The lower Florida courts have applied the doctrine to professional non-contact sports,⁹³ aberrant forms of non-contact sporting activities,⁹⁴ and to non-sports cases.⁹⁵ For example, in *Black v. District Board of Trustees*,⁹⁶ a police officer trainee was injured by another trainee during a non-athletic police

89. *Id.*

90. *Id.* at 81.

91. *Id.* at 79.

92. *Id.*

93. See *Ashcroft v. Calder Race Course*, 464 So. 2d 1250 (Fla. 3d Dist. Ct. App. 1985), *rev'd*, 492 So. 2d 1309 (Fla. 1986) (jockey during horse race received serious injuries because of the negligent design of the track; the Supreme Court of Florida held "assuming" express assumption of risk applies to horse racing, the doctrine cannot bar recovery here because the injuries resulted from risks not "inherent" in that sport).

94. See *Strickland v. Roberts*, 382 So. 2d 1338 (Fla. 5th Dist. Ct. App.), *petition for review denied*, 389 So. 2d 1115 (Fla. 1980) (waterskier trying to spray others on dock hit the dock and was injured; court held that while waterskiing was not a contact sport, engaging in an aberrant form of the sport gives rise to express assumption of risk; *Gary v. Party-Time Co.*, 434 So. 2d 338 (Fla. 3d Dist. Ct. App. 1983) (the plaintiff was injured while roller-skating down a ramp holding ski poles; court held express assumption of risk applicable under the Strickland approach of participating in an aberrant form of non-contact sport); *Caravel v. Alverz*, 462 So. 2d 1156 (Fla. 3d Dist. Ct. App. 1984) (plaintiff decedent died as a result of a fall while horseback riding double; court upheld express assumption of risk because such was an aberrant form of the sport of horseback riding); *Robbins v. Department of Natural Resources*, 468 So. 2d 1041 (Fla. 1st Dist. Ct. App. 1985) (plaintiff became a quadriplegic as a result of diving into shallow water at a public park; court held such an aberrant form of participation in the recreational activity of diving would be an appropriate occasion for the application of the defense of express assumption of risk, notwithstanding the fact that diving is, of course, not a contact sport and involves no other participants, and that no formal release, consent, or waiver form was involved.)

95. See *Black v. District Board of Trustees*, 491 So. 2d 303 (Fla. 4th Dist. Ct. App. 1986).

96. *Id.*

academy training exercise.⁹⁷ The Fourth District Court of Appeal held that spirited participation in police training, no less than participation in sports, is an activity which is beneficial to society as a whole.⁹⁸ As a result, it held that *Kuehner's* underlying rationale, maintaining the recreational function of contact sports in society, applied, and therefore, express assumption of risk barred recovery.⁹⁹ I suggest that these departures from the contact sport context resulted because the framework provided by *Blackburn* and *Kuehner* is problematic.

IV. PROBLEMS WITH THE PRESENT APPLICATION OF EXPRESS ASSUMPTION OF RISK IN FLORIDA

The first problem in the application of express assumption of risk is only understood by looking at the language used to define it in *Blackburn*. The court states that "[i]ncluded within the definition of express assumption of risk are . . . situations in which actual consent exists such as where one *voluntarily* participates in a contact sport."¹⁰⁰ Indeed, the notion of actual consent is broad and on the surface justifies the increased use of express assumption of risk.¹⁰¹ However, express assumption of risk does not encompass actual consent cases because the two doctrines are not similar.¹⁰² Rather, the similarity exists between actual consent and implied assumption of risk.¹⁰³ Consider the elements one has to demonstrate to establish actual consent: first, one must manifest a willingness in fact for conduct to occur;¹⁰⁴ second, one must have the capacity to consent, i.e., appreciate the nature, extent and probable consequences of the conduct consented to;¹⁰⁵ and third, the consent must be to the particular conduct or to substantially the same conduct from which harm has actually resulted.¹⁰⁶ These elements are very similar to the elements of secondary implied assumption of risk described earlier.¹⁰⁷ The requirements that one

97. *Id.* at 304.

98. *Id.* at 306.

99. *Id.* at 305-06.

100. *Blackburn v. Dorta*, 348 So. 2d 287, 290 (Fla. 1977) (emphasis added).

101. See RESTATEMENT (SECOND) OF TORTS § 892 and comment b (1965).

102. Compare RESTATEMENT (SECOND) OF TORTS § 496B and comment *with* § 892 and comment c (1965).

103. Compare RESTATEMENT (SECOND) OF TORTS § 496C, D and E *with* §§ 892, 892A (1965).

104. RESTATEMENT (SECOND) OF TORTS § 892(1) (1965).

105. *Id.* § 892A(2)(a) and comment b.

106. *Id.* § 892A(2)(b).

107. *Id.* § 496C, D and E.

must "voluntarily" assume the risk¹⁰⁸ "under circumstances that manifest a willingness to accept it"¹⁰⁹ sound analogous to the first and third elements of actual consent. The requirements that one must have "knowledge"¹¹⁰ and "appreciation"¹¹¹ of the particular risk being assumed are the equivalent of the second element of actual consent. These factors indicate that *Blackburn* may have purported to destroy implied assumption of risk, yet the court essentially recreated it in the same opinion.

It is also worthwhile to note that the *Restatement (Second) of Torts* considers cases in which a sports participant is injured to involve apparent consent and not actual consent as dictated by *Blackburn*.¹¹² For this reason, and because of the misperceived relationship of actual consent to express assumption of risk, the definition of express assumption of risk provided by *Blackburn*¹¹³ is inappropriate.

The second problem, which arises out of the definition given to the doctrine by *Blackburn*, is that the meaning of express assumption of risk is expanded beyond its traditional and historic usage.¹¹⁴ Express assumption of risk is a contract principle and should be so limited.¹¹⁵

Another problem exists in the majority opinion in *Kuehner*. The notion of allowing recovery for negligence in a sports case has undesirable consequences "to legal relations in the sports world."¹¹⁶ Justice Boyd, in his concurrence, described the policy ramifications of permitting a cause of action based on negligence to go forward.¹¹⁷ He states:

The majority opinion will encourage the filing of tort action suits whenever an injury occurs during a sport activity. Any person who participates in a sport may now be faced with a lawsuit whenever he or she causes an injury. Although that person may ultimately prevail because of the plaintiff's assumption of risk, that person will still be saddled with the expense of defending against such a suit and will have the burden of proving that the plaintiff was actually aware of the risks involved. Moreover the

108. *Id.* § 496E.

109. *Id.* § 496C.

110. *Id.* § 496D.

111. *Id.*

112. *Id.* § 50, comment b.

113. *Blackburn v. Dorta*, 348 So. 2d 287, 290 (Fla. 1977).

114. See *supra* note 18 and accompanying text.

115. See *infra* notes 121-26 and accompanying text.

116. *Kuehner v. Green*, 436 So. 2d 78, 81 (Fla. 1983).

117. *Id.*

only way a sport participant can be sure that the defense will be available is to actually warn all the other participants of the risks involved.¹¹⁸

To overcome these problems and provide predictability and certainty in general tort law and that applicable to participants in contact sports, I propose a method for Florida courts to use in dealing with civil contact sports cases.

V. PROPOSED METHOD FOR DEALING WITH CONTACT SPORTS CASES IN FLORIDA

I suggest two alterations to the current mode of analysis in Florida. First, the doctrine of express assumption of risk should be redefined to apply only in those situations where an agreement not to sue, such as a contractual waiver, is involved. This would avoid the necessity of inquiring if one "voluntarily" participated in a sport and if one "subjectively" appreciated the risks of the sport.¹¹⁹ Eliminating examination of one's mental state at a given time presents a simple but still effective analysis. Furthermore, requiring the express assumption of risk defense to rest on contract is consistent with its traditional meaning.¹²⁰

In *Jacobsen Construction v. Structo-Lite Engineering*,¹²¹ the Utah Supreme Court suggested that express assumption of risk is more of a contract principle than tort principle.

For purpose of analysis, assumption of risk is often divided into three categories. Those courts which attempt to deal with the various concepts subsumed under the one label refrain from considering one form, that is, the "express" form of assumption of risk. . . . An express assumption of risk involves a contractual provision in which a party expressly contracts not to sue for injury or loss which may thereafter be occasioned by the acts of another. We not only follow suit by refraining to include this form of assumption of risk in our discussion, but furthermore fail to see a necessity for including this form within assumption of risk terminology. . . . [T]he field of contract law is more than adequate to deal with this bar to recovery.¹²² (citations omitted).

118. *Id.*

119. See *infra* 141-42 and accompanying text.

120. See *supra* note 18 and accompanying text.

121. 619 P.2d 306 (Utah 1980) (plaintiffs sued subcontractors for faulty construction of a fiberglass storage tank; Supreme Court held that assumption of risk is abolished and does not act as a bar to recovery under Utah's comparative negligence statute).

122. *Jacobsen*, 619 P.2d at 310. The *Jacobsen* court relied on James, *Assumption of Risk*, 61 YALE L.J. 141 (1952):

Prosser also seems to analyze express assumption of risk as a contract notion, indicated by his discussion of the matter under the topic of "express agreements."¹²³ He states:

It is quite possible for the parties expressly to agree in advance that the defendant is under no obligation of care for the benefit of the plaintiff, and shall not be liable for the consequences of conduct which would otherwise be negligent. There is in the ordinary case no public policy which prevents the parties from contracting as they see fit, as to whether the plaintiff will undertake the responsibility of looking out for himself.¹²⁴

In summary, it is my contention that express assumption of risk be limited to instances when a plaintiff has orally or in writing waived any recourse against the alleged defendant for injuries arising out of his conduct.¹²⁵ Note that two recent Florida cases have applied express assumption of risk to situations involving contractual waivers.¹²⁶

The doctrine of assumption of risk, however, as it is analyzed and defined, is in most of its aspects a defendant's doctrine which restricts liability and so cuts down the compensation of accident victims. It is a heritage of the extreme individualism of the early industrial revolution. But quite aside from any questions of policy or of substance, the concept of assuming the risk is purely duplicative of other more widely understood concepts, such as scope of duty or contributory negligence. The one exception is to be found, perhaps, in those cases where there is an actual agreement.

James, *Assumption of Risk*, 61 YALE L.J. 141, 168-69 (1952).

123. W. PROSSER & W. KEETON, *LAW OF TORTS*, § 68 at 482 (5th ed. 1984).

124. *Id.* Prosser also provides a set of guidelines to determine the enforceability of such contracts.

First, the courts have refused to uphold such agreements where one party is at such an obvious disadvantage in bargaining power that the effect of the contract is to put him at the mercy of the other's negligence. Usually, courts say these contracts are against public policy. Second, if an express agreement exempting the defendant from liability for his negligence is to be sustained, it must appear that its terms were brought home to the plaintiff; and if he did not know of the provision in his contract and a reasonable person in his position would not have known of it, it is not binding upon him, and the agreement fails for want of mutual assent. Third, it is also necessary that the expressed terms of the agreement be applicable to the particular misconduct of the defendant. Finally, on the basis either of common experience as to what is intended, or of public policy to discourage aggravated wrong, such agreements are not construed to cover the more extreme forms of negligence which are described as willful, wanton, reckless or gross, or to any conduct which constitutes an intentional tort.

Id.

125. This rule is subject to Prosser's guidelines mentioned in note 124.

126. *O'Connell v. Walt Disney World*, 413 So. 2d 444 (Fla. 5th Dist. Ct. App. 1982) (plaintiff, a minor whose father had signed a release form was injured while on a guided horseback ride; court held that agreement only waived recovery for injuries resulting from inherent risks in horseback riding and not resulting from defendant's negligence; such agreements are disfavored and strictly construed); *Van Tuyn v. Zurich Am. Ins. Co.*, 447 So. 2d

Given this redefinition of express assumption of risk, I suggest as a second charge that a defendant's responsibility to other participants in a sporting activity be addressed under a duty-breach analysis. The important decision is what duty and standard of care to apply. *Kuehner v. Green*¹²⁷ offered a desirable approach: "the only duty that a person participating in a contact sport has toward a fellow participant is to refrain from intentional or reckless misconduct that is not customary to the sport."¹²⁸ Presumably, "misconduct that is not customary to the sport" means that injuries resulting from intentional or reckless conduct inherent in the game (or part of the way the game is played), will remain non-compensable. For example, one could not sue for an injury arising out of an ordinary tackle in football,¹²⁹ out of an ordinary blow to the face in boxing,¹³⁰ or out of checking in hockey.¹³¹ In addition, Florida should recognize, in appropriate circumstances (e.g. when formal rules exist), the duty in contact sports that prohibits one from engaging in intentional or reckless behavior in violation of a safety rule created for the game.¹³² The *Restatement (Second) of Torts* defines safety rules as those designed to protect the participants and not merely to secure the better playing of the game as a test of skill.¹³³ The duty involving "conduct uncustomary to the sport" will, in almost all instances, encompass the "safety rule" duty. Consider a football player who intentionally kicks another player in the head: this conduct is uncustomary to football and it also

318 (Fla. 4th Dist. Ct. App. 1984) (waiver signed by the plaintiff before she rode and was injured by a mechanical bull ride at defendant's club did not bar recovery; waiver was invalid because it did not contain specific language manifesting an intent to either release or condemn the club for its own negligence.

127. 436 So. 2d 78 (Fla. 1983)

128. *Id.* at 81 (Boyd, J., concurring).

129. RESTATEMENT (SECOND) OF TORTS § 50 comment b (1965); *See also* Note, *supra* note 28, at 401.

130. *See generally* *McAdams v. Windham*, 94 So. 742 (Ala. 1922) (a friendly boxing match resulted in the death of one of the participants; the court held that the deadly blow had been consented to and was therefore not actionable).

131. *See* Note, *supra* note 28, at 401.

132. *See, e.g.*, *Nabozny v. Barnhill*, 31 Ill. App. 2d 212, 334 N.E.2d 258 (1975); *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 520-21 (1979), *cert. denied*, 441 U.S. 931 (1975); RESTATEMENT (SECOND) OF TORTS § 50 comment b (1965).

133. RESTATEMENT (SECOND) OF TORTS § 50 comment b (1965). Safety rules have also been distinguished by the courts from rules of play. Again, safety rules are adopted and enforced to protect players from injuries. Another set of rules exist, however, to regulate the actual conduct of the game. In football, for example, "grabbing the facemask" penalty is a safety rule. "Encroachment", on the other hand, is a rule to prevent premature movement and enhance the flow of the game. *See generally* OFFICIAL RULES FOR PROFESSIONAL FOOTBALL (A. McNally & N. Schachter, eds. 1976).

violates the safety rules of personal foul or unnecessary roughness.

Kuehner criticized causes of action premised on the lower standard of negligence because the defendant would bear the expenses of the suit and would shoulder the burden of proving the plaintiff's assumption of risk.¹³⁴ Employing a duty-breach analysis and using an intentional or reckless misconduct standard of care takes this burden off the defendant:

Any complaints which fail to allege facts showing the defendant engaged in intentional or reckless misconduct should be subject to motions to dismiss for failure to state a cause of action. This would relieve sport participants of the financial burden of having to prove the affirmative defense of assumption of risk.¹³⁵

Plaintiffs should also benefit from this mode of analysis because they will be assured of compensation when a defendant engages in the necessary misconduct without the confusion and misunderstanding present under an express assumption of risk analysis.¹³⁶ Even if the defendant committed an intentional or reckless act, the plaintiff might be barred from recovery if it could be shown he assumed the risk. Plaintiffs should have a remedy for intentional or reckless misconduct by a defendant.¹³⁷

The abolition of express assumption of risk in favor of a duty-breach analysis (reckless/intentional act standard of care) is desirable for many reasons, some of which have been alluded to. First, it would "abolish the absurd legal semantics which classify voluntary participation in a contact sport as an express assumption of risk."¹³⁸ As previously mentioned, express assumption of risk should be limited to what is truly express: contractual waivers.

Second, it eliminates any implied immunity from liability given athletes.¹³⁹ It has been suggested that since contact sports are a national pastime and are a part of the American tradition, courts tried to stay out of the picture to preserve the intensity of athletic participation.¹⁴⁰ Stripping away complicated defenses and defining clearly the elements necessary to bring a successful cause

134. See *supra* note 118 and accompanying text.

135. *Kuehner v. Green*, 436 So. 2d 78, 81 (Fla. 1983).

136. A plaintiff's comparative negligence, if any exists, must be considered; therefore, he is not "assured" of compensation.

137. Again, a plaintiff's potential remedy is subject to reduction because of any comparative negligence on his part.

138. *Kuehner*, 436 So. 2d at 81-82.

139. See *supra* note 4.

140. See *Kuhlman*, *supra* note 4 at 780; *Beumler*, *supra* note 4, at 919, 927; *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 520-21 (1979), *cert. denied*, 441 U.S. 931 (1975).

of action weigh in favor of eliminating any immunity.

Third, a reckless or intentional act method offers more predictability and certainty than express assumption of risk which requires an inquiry into what a plaintiff subjectively knew. A fundamental notion in our legal system is that a body of precedent should provide future litigants with guidelines as to how courts will handle a problem.¹⁴¹ Given the indecisive meaning of express assumption of risk in the area of contact sports and the resulting inconsistent opinions, Florida lawyers and law students are not provided with any predictability. Furthermore, knowing at the threshold that only a complaint alleging reckless or intentional misconduct will survive offers certainty which the subjective nature of assumption of risk does not.¹⁴²

Fourth, a duty analysis takes care of the inherent/customary risk issue better than the subjective express assumption of risk defense. Whether an injury results from an inherent risk in a sport is an objective test. An objective, predictable duty analysis is more compatible.¹⁴³

Fifth, employing a higher standard of recklessness or intentional misconduct, as opposed to mere negligence, avoids a potential flood of tort suits. In addition, the higher standard will quell possible fear that athletes have of civil litigation which arguably limits the intensity with which they participate in a game.¹⁴⁴

Finally, it is more consistent with fault based liability. No longer will a plaintiff be barred from recovery by voluntary participation but his conduct will be weighed in comparison to that of the

141. See generally E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949); K. LLEWELLYN, THE BRAMBLE BUSH (1960).

142. If some degree of predictability and certainty exists in the law, lawyers can determine at the threshold if a client has a meritorious cause of action. This ultimately will save lawyers and clients time and expense. Furthermore, this has favorable effects on judicial efficiency in that most cases can be sifted out of the system early on.

143. The limitation that one can only assume "inherent risks" of the sport arose in *Kuehner v. Green*, 436 So. 2d 78, 80 (Fla. 1983) and was the basis of the holding in *Ashcroft v. Calder Race Course, Inc.*, 492 So. 2d 1309, 1311 (Fla. 1986). In *Ashcroft*, a jockey was held not to have assumed the risk of injury resulting from the negligent placement of an exit gap on a racetrack, despite his knowledge of the location of the exit gap. *Id.* Under a duty-breach analysis, the court would have held the racetrack breached a duty to safely place the exit gaps. Instead, they held the jockey didn't assume the risk of the negligently placed opening because it was not an "inherent risk" in the sport of horse racing. *Id.* I believe this is illogical because the jockey knew about the exit gap. It is better to say the defense of express assumption of risk is abolished and that the racetrack breached a duty.

144. Note, *Participant in Athletic Competition States Cause of Action For Injuries Against Other Participant*. *Nabozny v. Barnhill*, 334 N.E.2d 258 (Ill.App.Ct. 1975), 42 Mo. L. Rev. 347, 354 (1977). Such an approach (i.e. tacitly accepting negligence claims) might even deter individuals from participating. *Id.* at 354.

defendant's.¹⁴⁵ If the plaintiff's conduct was "unreasonable," the defendant's financial responsibility can be reduced accordingly.¹⁴⁶

VI. SUPPORT IN OTHER JURISDICTIONS

The proposed method for dealing with cases in Florida involving injuries to participants in contact sports has received recent support in other states. These authorities have dealt with such cases using a duty-breach analysis under the premise that assumption of risk had been abolished or was inapplicable.

*Nabozny v. Barnhill*¹⁴⁷ was the first opinion to recognize that a sports participant could recover damages for injuries resulting from only intentional or reckless misconduct.¹⁴⁸ In *Nabozny*, the plaintiff, a goalie for his amateur soccer club, had received a pass from one of his teammates. As the plaintiff knelt in the penalty area, the defendant, a forward on the opposing team, entered the area and kicked the plaintiff in the head. The Illinois Court of Appeal reversed a directed verdict for the defendant and remanded the case for a new trial.¹⁴⁹

In its holding, the court adopted what seemed to be a two-prong test in ascertaining the existence of a cause of action: there must be a violation of a safety rule and such violation must occur in a reckless or intentional manner.¹⁵⁰ The court reasoned that deliberate or reckless disregard for rules proscribing certain conduct cannot be an accepted part of the game.¹⁵¹ The court rested on comment b to section 50 of the *Restatement (Second) of Torts*

145. In other words, comparative negligence principles will apply under this duty-breach analysis.

146. See *supra* notes 51-53 and accompanying text.

147. 31 Ill. App. 2d 212, 334 N.E.2d 258 (1975).

148. 31 Ill. App. 3d at 214-15, 334 N.E.2d at 260-61.

149. 31 Ill. App. 3d at 215, 334 N.E.2d at 261.

150. 31 Ill. App. 3d at 214-15, 334 N.E.2d at 260-61.

The law should not place unreasonable burdens on the free and vigorous participation in sports by our youth. However, we also believe that organized, athletic competition does not exist in a vacuum. Rather, some of the restraints of civilization must accompany every athlete onto the playing field. One of the educational benefits of organized athletic competition to our youth is the development of discipline and self-control. Individual sports are advanced and competition enhanced by a comprehensive set of rules. Some rules secure the better playing of the game as a test of skill. Other rules are primarily designed to protect participants from serious injury. [cite omitted]. It is our opinion that a player is liable for injury in a tort action if his conduct is such that it is either deliberate, willful or with a reckless disregard for the safety of the other player so as to cause injury to that player, the same being a question of fact to be decided by a jury. *Id.*

151. See *id.* at 215, 334 N.E.2d at 261.

which states that violations of safety rules are actionable even if such violations are foreseeable and frequent.¹⁵²

This approach squarely rejected the traditional assumption of risk doctrine which precluded recovery for injuries resulting from violations which are frequent and foreseeable to a plaintiff.¹⁵³ Evidently, the *Nabozny* court felt this was too harsh on the plaintiff goalie. Questions that arise under the *Nabozny* approach are how one determines what a safety rule is,¹⁵⁴ and what to do if no set of formal rules exist.¹⁵⁵

In 1979, *Hackbart v. Cincinnati Bengals, Inc.*,¹⁵⁶ was decided by a federal court of appeals applying Colorado law. The case arose out of injuries sustained during a National Football League game between the Denver Broncos and the Cincinnati Bengals. After the Broncos intercepted a Bengals pass, Bengals running back "Booby" Clark, acting out of anger and frustration, but without a specific intent to injure, reacted by delivering a forearm blow to the back of Bronco's defensive back Dale Hackbart's neck. No penalty was called. Hackbart was eventually released by the team with a diagnosed fractured neck.

In reversing the district court's holding that the restraints of tort law do not apply to professional football because of the special nature of the sport, the court of appeals held that Hackbart's complaint alleging reckless behavior outside the general customs of football stated a cause of action.¹⁵⁷ The opinion emphasized that more than negligence was required and adopted the definition of recklessness contained in section 500 of the *Restatement (Second) of Torts*.¹⁵⁸ Since recklessness is less culpable than intentional

152. RESTATEMENT (SECOND) OF TORTS §50 comment b (1965). See also Tucker, *Assumption of Risk and Vicarious Liability in Personal Injury Actions Brought By Professional Athletes*, 1980 DUKE L.J. 742, 753.

153. *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 482, 166 N.E. 173, 174 (1929). See also Tucker, *supra* note 152, at 754.

154. See *supra* note 133 and accompanying text.

155. See *Kabella v. Bouschelle*, 100 N.M. 461, 672 P.2d 290 (1983).

156. 601 F.2d 516 (10th Cir. 1979), *cert. denied*, 444 U.S. 931 (1979).

157. 435 F. Supp. 352 (D. Colo. 1977), 601 F.2d 516, 520-21 (10th Cir. 1979), *cert. denied*, 441 U.S. 931 (1979).

158. Section 500 states:

[T]he actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

RESTATEMENT (SECOND) OF TORTS §500 (1965).

harm, the court of appeals obviously contemplated that an allegation of an intentional tort would suffice. In fact, the court distinguished between recklessness and an intentional tort to facilitate future analysis.¹⁵⁹

The doctrine of assumption of risk was not addressed in the opinion. Earlier decisions indicate that with the adoption of comparative negligence in Colorado, the doctrine of assumption of risk was abolished or merged into contributory negligence.¹⁶⁰

In *Kabella v. Bouschelle*,¹⁶¹ a New Mexico court of appeals followed the *Hackbart* decision and adopted the standard of reckless or intentional harm as a requisite of pleading and proof in tort cases involving participants engaged in contact athletic events.¹⁶² In *Kabella*, a group of minors were engaged in a friendly game of tackle football. As the plaintiff was being tackled by the defendant, he yelled to the defendant that he was down. The defendant continued the tackle and caused the plaintiff to sustain a dislocated hip. The trial court granted defendant's motion for summary judgment to plaintiff's complaint alleging negligence and this was affirmed on appeal.¹⁶³

The court stressed that a higher standard than mere negligence was necessitated by public policy reasons in its holding: "vigorous and active participation in sporting events should not be chilled by the threat of litigation."¹⁶⁴ While not stated explicitly, this opinion seemed to approve of both duty tests under the inten-

159. *Hackbart*, 601 F.2d at 524. The court stated: "Recklessness exists where a person knows that the act is harmful but fails to realize that it will produce the extreme harm which it did produce. It is in this respect that recklessness and intentional conduct differ in degree." *Id.*

160. *Brown v. Krueser*, 38 Colo. App. 554, 558, 560 P.2d 105, 108 (1977); *Rosen v. LTV Recreational Development, Inc.*, 569 F.2d 1117 (10th Cir. 1978).

161. 100 N.M. 461, 672 P.2d at 290 (1983).

162. 100 N.M. at 465, 672 P.2d at 294.

163. 100 N.M. at 462, 672 P.2d at 291.

164. 100 N.M. at 465, 672 P.2d at 294. The court further wrote:

The players in informal sandlot or neighborhood games do not, in most instances, have the benefit of written rules, coaches, referees, or instant replay to supervise or reevaluate a player's actions. As stated in *Ross v. Clouses*, 637 S.W.2d at 14, a cause of action for personal injuries between participants incurred during athletic competition must be predicated upon recklessness or intentional misconduct, not mere negligence. Fear of civil liability stemming from negligent acts occurring in an athletic event could curtail the proper fervor with which the game should be played and discourage individual participation. Yet it must be recognized that reasonable controls should exist to protect the players and the game.

Id. at 465, 672 P.2d at 294.

tional act/recklessness standard of care.¹⁶⁵ In any event, an allegation of recklessness or intentional misconduct was held to be a necessary threshold for recovery of damages. Note also that specific mention of the abolition of assumption of risk in New Mexico was made by the court.¹⁶⁶

Thus, the views of Justice Boyd expressed in his concurring opinion in *Kuehner* have been adopted by courts in other states. Such support gives merit to the proposition that a duty-breach analysis should be adopted in Florida with the corresponding redefining of express assumption of risk. Special attention should be paid to the policy implications of allowing a negligence cause of action in sports participant cases, a situation currently permitted in Florida.

VII. DEFENSES

Under the proposed method, contributory negligence, as treated under comparative negligence principles, will remain an affirmative defense available to defendants in sports participation cases. An inquiry into whether a plaintiff's decision to participate was one that a reasonable person would make is thus necessary.¹⁶⁷ It may be noted that in Florida, courts compare a plaintiff's negligent behavior with a defendant's reckless conduct.¹⁶⁸ Traditionally, courts did not compare a plaintiff's negligence with a defendant's intentional misconduct because of the marked difference in culpability between the two types of behavior.¹⁶⁹ Outside of Florida, at least one court has specifically looked at the contributory negligence defense in a sports participant setting.¹⁷⁰

With regard to the viability of contributory negligence, recall the earlier discussion in Part III (A) concerning the two types of

165. 100 N.M. at 463, 672 P.2d at 294. Note that the *Hackbart* court also addressed these two duty tests. As for conduct not customary to the sport, the court stated "the general customs of football do not approve the intentional punching or striking of others." *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 521 (10th Cir. 1979), cert. denied, 441 U.S. 931 (1979). In regards to violation of a safety rule, the Court wrote "it is highly questionable whether a professional football player consents or submits to injuries caused by conduct not within the rules." 601 F.2d at 520.

166. *Kabella*, 100 N.M. at 463, 672 P.2d at 292.

167. See *supra* note 52 and accompanying text.

168. *American Cyanamid Company v. Roy*, 466 So. 2d 1079, 1085 (Fla. 4th Dist. Ct. App. 1984) (compensatory damages award based on the defendant's wanton and willful behavior properly reduced by the percentage of negligence attributed to the plaintiff).

169. See generally RESTATEMENT (SECOND) OF TORTS §463 and comment; *Ewing v. Cloverleaf Bowl*, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978).

170. See *supra* notes 52-53.

implied assumption of risk: primary, which was used when a defendant either had no duty or had a duty but did not breach it; and secondary, which was the affirmative defense tantamount to contributory negligence.¹⁷¹ Again, both these forms were eliminated with the introduction of comparative negligence.¹⁷² Interestingly, many opinions, including some recent Florida decisions rendered under the guise of express assumption of risk within the contact sports exception, have classified sport situations as primary implied assumption of risk situations.¹⁷³

Under the proposed duty-breach rule, the equivalent of primary implied assumption of risk is achieved by saying either a defendant is under no duty to avoid acting negligently toward a plaintiff or a defendant has a duty not to act intentionally or with reckless disregard toward a plaintiff in a contact sport. The equivalent of secondary implied assumption of risk, however, can only be achieved by retaining the defense of contributory negligence. As *Segoviano* suggests, a court should look at a number of factors to determine if a plaintiff's decision to play in a game was unreasonable.¹⁷⁴

Defenses to reckless misconduct claims aside, one should not forget the availability of consent as a defense in an intentional tort case.¹⁷⁵ Initially, one must determine which type of consent applies: apparent or actual. As mentioned, the *Restatement* includes sports cases under apparent consent.¹⁷⁶ On the other hand, *Blackburn* analogized sports cases to actual consent.¹⁷⁷ In fact, one court

171. See *supra* notes 62-69 and accompanying text.

172. See *supra* notes 70-79 and accompanying text.

173. See *Blair v. Mt. Hood Meadows Dev. Corp.*, 291 Or. 293, 630 P.2d 827 (1981) (snow skiing accident in which skier fell into a ravine characterized as primary implied assumption of risk; on appeal, the court agreed but stated implied assumption of risk had been abolished with enactment of comparative negligence statute); *Turcotte v. Fell*, 68 N.Y.2d 432, 502 N.E.2d 964 (1986) (professional jockey injured in fall during horse race; court generally stated that as assumption of risk "applies to sporting events it involves what commentators call primary assumption of risk"; the court, however, pointed out that the doctrine was merged with contributory negligence); *O'Connell v. Walt Disney World*, 413 So. 2d 444, 448 (Fla. 5th Dist. Ct. App. 1982) (the court specifically stated that the theory of primary implied assumption of risk was more applicable to the situation); *Van Tuyn v. Zurich Am. Ins. Co.*, 447 So. 2d 318, 321 (Fla. 4th Dist. Ct. App. 1984) (court agreed with *O'Connell* that these types of situations better analyzed as primary implied assumption of risk).

174. See *supra* note 53.

175. *RESTATEMENT (SECOND) OF TORTS*, § 50 and comment (1965).

176. *Id.* comment b. Note that the Second Restatement of Torts appears to omit the equivalent of § 892(1) "actual consent" for "intentional invasions of interests of personality." Only § 50 is provided, which is equal to § 892(2) "apparent consent."

177. *Blackburn v. Dorta*, 348 So. 2d 287, 290 (Fla. 1977).

has stated "plaintiff's 'consent' is not constructive [apparent] consent; it is actual consent implied from the act of the electing to participate in the activity."¹⁷⁸ Notwithstanding the type of consent a court uses, the main concern is the result of applying the consent defense: it acts as a complete bar.¹⁷⁹

Indeed, the focus in a consent analysis will be whether the conduct or contact of the defendant exceeded the scope of the consent by the plaintiff.¹⁸⁰ Under the proposed duty-breach method of dealing with sports participant lawsuits, the standard would be that a plaintiff can only consent to intentional or reckless acts which are an inherent part of the game and do not violate any safety rules adopted for that particular game.¹⁸¹ A New York court essentially agreed with this observation in stating: "There is a limit to the magnitude and dangerousness of a blow to which another is deemed to consent. In all sports, players consent to many risks, hazards and blows."¹⁸² Cases outside Florida have used consent to preclude recovery for sports injuries predicated upon a theory of assault and battery.¹⁸³

VIII. CONCLUSION

If injured, sports participants have a right to compensation as any other injured person. Any sort of immunity extended to athletes has no place under modern legal systems.¹⁸⁴ However, those who worry about retaining the fervor in which a game should be played and in not deterring participation are justified. Fear of civil litigation could lead to these results.

Florida has elected to apply express assumption of risk in sports participant cases.¹⁸⁵ In *Kuehner v. Green*, the Florida Supreme Court tacitly accepted mere negligence as a potential standard of recovery.¹⁸⁶ As well as placing unnecessary inconvenience

178. *Turcotte v. Fell*, 68 N.Y.2d 432, 502 N.E.2d 964, 968 (1986) (referring to RESTATEMENT (SECOND) OF TORTS § 892(2) [1965]).

179. RESTATEMENT (SECOND) OF TORTS §§ 49, 892A(1) (1965).

180. *Id.* §§ 53, 892A(2)(b).

181. *See id.* § 50, comment b.

182. *People v. Freer*, 86 Misc. 2d 280, 282, 381 N.Y.S.2d 976, 978 (1976).

183. *See Hellriegel v. Tholl*, 69 Wash. 2d 97, 417 P.2d 362 (1966) (recovery not allowed for the plaintiff who suffered a broken neck during roughhouse horse play); *McAdams v. Windham*, 94 So. 742 (Ala. 1922) (no recovery for plaintiff's intestate who died during a boxing match).

184. *See supra* note 4.

185. *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977); *Kuehner v. Green*, 436 So. 2d 78 (Fla. 1983).

186. *Kuehner*, 436 So. 2d at 79.

and expense on a defendant participant, the results just mentioned will certainly be by-products of this holding.¹⁸⁷ In summary, three problems exist under the present method of dealing with sports cases as provided by *Blackburn v. Dorta* and *Kuehner*: first, implied assumption of risk, which was abolished, is being recreated under the guise of express assumption of risk;¹⁸⁸ second, express assumption of risk is being applied beyond its historical meaning;¹⁸⁹ and third, allowing a negligent cause of action to initially proceed has undesirable consequences.¹⁹⁰

I have proposed in this comment that Florida redefine express assumption of risk to apply only when a contract not to sue is involved. I have also suggested that a duty-breach analysis for contact sports participant cases be adopted in which a defendant's only duty is to avoid engaging in intentional or reckless misconduct which is not customary to the sport or which does violate any safety rules adopted for the game. Such an approach is more equitable and offers some predictability. Furthermore, athletes will not let fear of a civil lawsuit govern their aggressiveness in the sport under this analysis.

An earlier writer stated that it is time for Florida courts to resolve the confusion currently existing with the assumption of risk doctrine.¹⁹¹ Essentially, Florida has been unable to restrict the application of the intended narrow exception of express assumption of risk. Time will not stand still. For the sake of sports participants as well as general tort litigation, express assumption of risk needs to be put to sleep except for that which is truly express. Otherwise, assumption of risk will totally reemerge and any concept of fault-based liability will be a relic of the past.¹⁹²

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187. See *supra* note 117 and accompanying text.

188. See *supra* notes 100-11 and accompanying text.

189. See *supra* notes 114-15 and accompanying text.

190. See *supra* notes 116-18 and accompanying text.

191. Note, *supra* note 14, at 1369.

192. *Id.* at 1343, 1369.

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