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

Alix Thornton

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Tort Law—ASSUMPTION OF RISK—ADOPTION OF COMPARATIVE NEGLIGENCE REQUIRES THAT THE DEFENSE OF IMPLIED ASSUMPTION OF RISK BE ELIMINATED AS AN ABSOLUTE BAR TO RECOVERY—*Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977).

Assumption of risk is raised as an affirmative defense against a plaintiff who, aware of a risk created by a defendant's negligence, nevertheless voluntarily encounters it.¹ In May, 1977, three consolidated cases tested the viability of the assumption of risk defense as an absolute bar to recovery in a Florida negligence action.

In *Dorta v. Blackburn*,² Kevin Blackburn, a minor passenger in a negligently operated dune buggy, was injured when it overturned. In *Parker v. Maule Industries, Inc.*,³ Raymond Parker was injured in a fall from a negligently operated truck. In *Rea v. Leadership Housing, Inc.*,⁴ Concetta Rea, trying to avoid two holes in her driveway which had negligently been left unfilled by the defendant, was injured falling from her bicycle.⁵ In *Dorta*, the Third District Court of Appeal reversed judgment for the plaintiff, holding that the defense of assumption of risk remained a bar to recovery notwithstanding Florida's adoption of the doctrine of comparative negligence.⁶ In *Rea*, the Fourth District Court of Appeal, although acknowledging the *Dorta* decision, reversed summary judgment for the defendant, finding that "assumption of risk ought to be treated as a special form of contributory negligence and merged with contributory negligence in light of the adoption of comparative negligence."⁷ The court stated that allowing the defense to bar recovery "is inconsistent with the underlying rationale of loss distribution in proportion to fault as espoused . . . in *Hoffman v. Jones*."⁸ In

1. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 65, at 440 (4th ed. 1971).

2. 302 So. 2d 450 (Fla. 3d Dist. Ct. App. 1974).

3. 321 So. 2d 106 (Fla. 1st Dist. Ct. App. 1975).

4. 312 So. 2d 818 (Fla. 4th Dist. Ct. App. 1975).

5. Only in Concetta Rea's case did the lower court opinion discuss whether the plaintiff's exposure was voluntary or the risk known. The court determined that there was a material issue of fact both as to the issue of a knowing appreciation of the risk and as to the issue of the voluntariness of exposure to a known risk, since Rea's driveway was the only means of ingress and egress to her home. *Id.* at 820.

6. 302 So. 2d 450. The trial judge had refused to instruct the jury on assumption of risk on the ground that it had been merged into comparative negligence. *Id.* at 451. In *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973), the Florida Supreme Court adopted the doctrine of comparative negligence.

7. 312 So. 2d at 821 (footnote omitted).

8. *Id.* at 823, citing *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973). In *Hoffman*, the Florida Supreme Court noted that its adoption of comparative negligence might effect a change in the concept of assumption of risk but declined to consider the issue absent a case or controversy. The court pointed out that until the issue was before it, judicial determinations were

Parker, the First District Court of Appeal adopted the position taken by the Fourth District in *Rea*.⁹ Reversing the lower court's *Dorta* decision¹⁰ the Florida Supreme Court approved *Parker* and *Rea*, holding "that the affirmative defense of implied assumption of risk is merged into the defense of contributory negligence and the principles of comparative negligence . . . shall apply in all cases where the defense is asserted."¹¹ In so holding, Florida joined other

to be guided by the express purposes for which comparative negligence was adopted: apportionment of fault and apportionment of damages between two negligent parties. 280 So. 2d at 439. As a guide to trial court judges, the *Hoffman* court referred to the comparative negligence case law developed under Florida's Railroad Statute. *Id.* The statute, enacted in 1887, applied comparative negligence principles to railroad accidents. It was held unconstitutional in *Georgia Southern & Florida R.R. v. Seven-up Bottling Co.*, 175 So. 2d 39 (Fla. 1965), on grounds that it violated the due process and equal protection clauses of both the federal and Florida constitutions because it was of limited scope and not of general application. 280 So. 2d at 437. Similar to the Florida Railroad Statute was the 1939 amendment to the Federal Employers' Liability Act, 45 U.S.C. 54, which abolished assumption of risk as a defense to a negligence action against a common carrier to recover damages for injury or death of an employee. The 1939 amendment is the subject of an extended discussion in *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54 (1943).

9. 321 So. 2d at 107. Chief Judge Boyer dissented, urging that contributory negligence and assumption of risk were distinct doctrines requiring separate treatment. He posed the following hypothetical: a persistent party-goer insists on catching a ride home in the car of a fellow party-goer, despite being expressly warned that the car's brakes and tires are bad, the car's driver is weak-eyed and slightly intoxicated, and the roads home are rain-slick and heavily traveled. Judge Boyer's view was that if the car subsequently crashes because of the driver's negligence, allowing the persistent party-goer to recover is unjust. *Id.* at 108. For a contrary view, see *Pedrick, Taken for a Ride: The Automobile Guest and Assumption of Risk*, 22 LA. L. REV. 90 (1961). *Pedrick* deplores the continued validity of assumption of the risk as a bar to recovery in comparative negligence jurisdictions, particularly when used to deny recovery to automobile guest plaintiffs. He premises his disapproval on the idea that even if an intoxicated driver and his equally intoxicated passengers discussed the risks of a drive, the driver "would encourage all to be of good cheer on the ground that he is insured." *Id.* at 99. The apparent difficulty with merging assumption of risk into the doctrine of contributory negligence in automobile guest cases is a misapprehension that without proof that the persistent guest, as in Judge Boyer's hypothetical, is himself causally negligent, a close to total recovery could result. This notion rests on the assumption that generally a guest's duty is merely to keep a lookout and to warn. See *Kaplan v. Wolff*, 198 So. 2d 103, 106 (Fla. 3d Dist. Ct. App. 1967). In apportioning damages, however, the recklessness of a passenger's decision to go along for a ride will be considered in determining how much he was at fault. The causal requirement relates to the totality of the passenger's conduct—to what extent his injuries were caused by his own unreasonable choice. Under this reasoning, Judge Boyer's hypothetical is less persuasive. For a discussion, see *McConville v. State Farm Mutual Auto. Ins. Co.*, 113 N.W.2d 14 (Wis. 1962). Another commentator, discussing whether in a comparative negligence jurisdiction an "unreasonable assumption of risk" should constitute a complete defense, suggests that the better view is that it would not. See *James, Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185, n.4 (1968).

Subsequent to the Florida Supreme Court's granting of conflict certiorari in the three cases, the Second District Court of Appeal, in *Hall v. Holton*, 330 So. 2d 81 (Fla. 2d Dist. Ct. App. 1976), followed the *Rea* and *Parker* decisions.

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

11. *Id.* at 293.

jurisdictions which have expressed dissatisfaction with the assumption of risk doctrine.¹²

According to the *Blackburn* court, assumption of risk is a catch-all phrase which defines no concept not already subsumed either under contributory negligence or the common-law concept of duty.¹³ Because the term historically has been carelessly used,¹⁴ the court, in analyzing assumption of risk, was confronted with a "potpourri of labels, concepts, definitions, thoughts, and doctrines."¹⁵ It broke into categories the various ideas which assumption of risk has been used to express. They can be schematically shown as follows:

12. As the *Blackburn* decision noted, *id.* at 289 n.3., the following states have indicated either that assumption of risk should not be pled as a defense or that, if pled, it should be treated as the equivalent of contributory negligence: Alaska: *Leavitt v. Gillaspie*, 443 P.2d 61 (Alas. 1968); Connecticut: CONN. GEN. STAT. § 52-572h (1973); New Hampshire: *Bolduc v. Crain*, 181 A.2d 641 (N.H. 1962); New Jersey: *McGrath v. American Cyanamid Co.*, 196 A.2d 238 (N.J. 1963); New Mexico: *Williamson v. Smith*, 491 P.2d 1147 (N.M. 1972); North Dakota: *Wentz v. Deseth*, 221 N.W.2d 101 (N.D. 1974); N.D. STAT. 9-10-06 (1973); Utah: UTAH STAT. 78-27-37 (1975); Wisconsin: *McConville v. State Farm Mutual Auto. Ins. Co.*, 113 N.W.2d 14 (Wis. 1962).

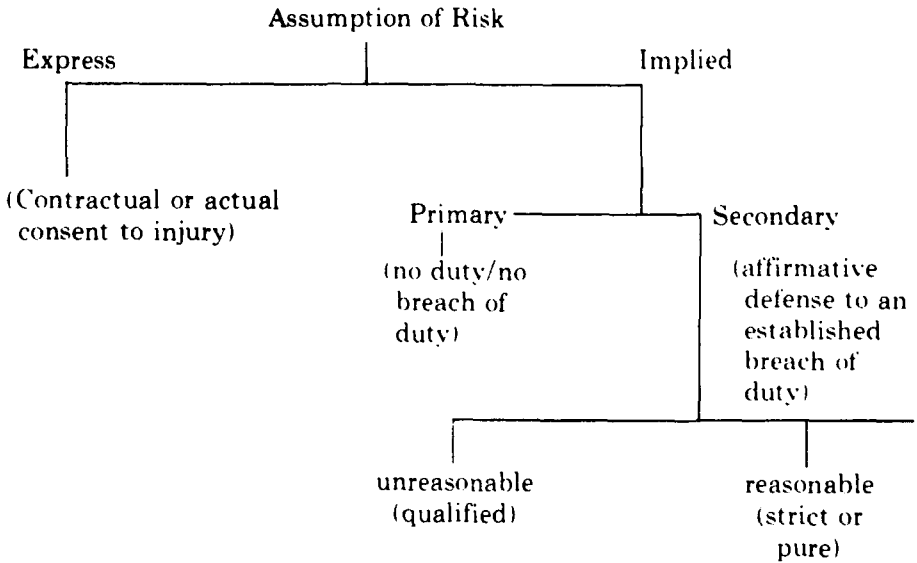
The following states, while finding that express assumption of risk is still a viable defense, have indicated that implied assumption of risk should be treated as equivalent to contributory negligence: Kansas: *Smith v. Blakey*, 515 P.2d 1062 (Kan. 1973); Maine: *Wilson v. Gordon*, 354 A.2d 398 (Me. 1976); Minnesota: *Springrose v. Willmore*, 192 N.W.2d 826 (Minn. 1971); Oregon: *Zumwalt v. Lindland*, 396 P.2d 205 (Ore. 1964); OR. REV. STAT. § 18.470 (1971); Texas: *Farley v. M.M. Cattle Co.*, 529 S.W.2d 751 (Tex. 1975); Washington: *Lyons v. Redding Constr. Co.*, 515 P.2d 821 (Wash. 1973); Wyoming: *Sanders v. Pitner*, 508 P.2d 602 (Wyo. 1973).

California and Hawaii merge assumption of risk when it overlaps with contributory negligence. *Li v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975); *Bulatao v. Kauai Motors Ltd.*, 406 P.2d 887 (Hawaii 1965).

13. 348 So. 2d at 289 n.2., citing *Petrone v. Margolis*, 89 A.2d 476, 480 (N.J. Super. Ct. 1952) which found the doctrines of assumption of risk and contributory negligence to be "convertible terms."

14. For a discussion of the historical development of the doctrine, see Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 91 (1906). The industrial revolution produced a doctrine governing the master-servant relationship which could be characterized as "employee beware!" The *Blackburn* court noted the interests which gave rise to the assumption of risk defense. 348 So. 2d at 292, quoting *Tiller v. Atlantic Coast R.R.*, 318 U.S. 54, 68-69 (1943). The vagaries of historical change undergone by the doctrine of assumption of risk will not be discussed in this comment.

15. 348 So. 2d at 290.



Excluding express assumption of risk¹⁶ from its discussion, the court confined its analysis to distinguishing between primary implied assumption of risk and two categories of secondary implied assumption of risk.¹⁷ The term primary assumption of risk is a misnomer: the term simply means that the defendant was not negligent. He either owed the plaintiff no duty or did not breach a duty owed.¹⁸ For example, if a man is struck by lightning while waiting for his train on an open railway platform, his widow could not recover in a wrongful death action against the railroad. Whatever the duty of care that a railroad owes its passengers, that duty cannot be stretched to requiring it to protect passengers standing outside from lightning bolts. Living involves risk. Many injured persons are

16. *Id.* at 290. Express assumption of risk is a contractual concept whereby the covenantor agrees not to sue for injury resulting from the covenantee's negligence. The validity of contractual clauses exculpating the covenantee from liability have limitations. See Keeton, *Assumption of Products Risks*, 19 Sw. L.J. 61, 63-66 (1965). Also covered under the express assumption of risk doctrine is voluntary participation in a contact sport. The doctrine expresses the idea that the plaintiff has consented to intentional battery. See *Hackbart v. Cincinnati Bengals, Inc.*, 435 F. Supp. 352 (D. Colo. 1977). The distinction between consent and assumption of risk usually is grounded upon the distinction between intentional torts and negligence. Mansfield, *Informed Choice in the Law of Torts*, 22 LA. L. REV. 17, 31-33 (1961), suggests that consent is the proper term when a plaintiff is not only willing that a certain event occur but desires an invasion of a normally protected interest. Assumption of risk is the proper term to use when a plaintiff, although willing that a certain event occur, neither desires the invasion of a normally protected interest nor is substantially certain that the invasion will result.

17. 348 So. 2d at 290. The labels are widely used judicially and by commentators. See 82 ALR 2d 1218 (1962).

18. 348 So. 2d at 290.

denied recovery not because they have "assumed" risks but because there is no one to blame for their injuries; no one has been negligent.

Characterizing the situation above as no-duty or no-duty-breached by the railroad is both more accurate and less confusing than terming it primary assumption of risk by the passenger.¹⁹ The *Blackburn* court pointed out that Florida jury instructions first cover the plaintiff's burden of proof.²⁰ There is no justification for rephrasing what is a failure of proof by the plaintiff as an assumption of risk by the plaintiff, thus perpetuating a term of dubious utility. The defendant need not prove his affirmative defense of secondary implied assumption of risk—the assumption of risk which the *Blackburn* decision treated in its holding—if the plaintiff fails to prove the defendant's negligence.

Despite the distinction which exists between a failure of proof and a successfully asserted affirmative defense, judges in the past have couched decisions in terms of a plaintiff having assumed a risk rather than the plaintiff having failed to prove the defendant negligent.²¹ Because assumption of risk barred recovery when successfully asserted as an affirmative defense, the ground for decision did not affect the outcome of those cases. Plaintiffs received nothing for their injuries and, however careless the judicial analysis, defendants were not heard to complain.

The *Blackburn* holding will not change the outcome of a case in which there is no proof of a defendant's negligence—plaintiffs will continue to be barred from recovery. The rationale for denying recovery, however, should no longer be expressed in terms of the plaintiff having assumed risk of injury.

19. *Id.* at 291, citing *McGrath v. American Cyanamid Co.*, 196 A.2d 238 (N.J. 1963).

20. *Id.*

21. See *Rindley v. Goldberg*, 297 So. 2d 140 (Fla. 3d Dist. Ct. App. 1974). In *Rindley*, the plaintiff was struck by the defendant's golf ball. Both women were members of a golf foursome. The defendant had been verbally guided to her lost ball by the plaintiff who then stood on the edge of a green some 40-50 feet away and watched the defendant hit her ball toward that same green. The ball struck the plaintiff, who sued for damages. The defendant's answer alleged the affirmative defenses of contributory negligence and assumption of risk. The trial judge granted the defendant's motion for summary judgment. The court of appeal affirmed, concluding that "plaintiff's injury was a result of the certain obvious and ordinary risks of the sport of golfing which she assumed as a member of a golfing foursome with full knowledge of the normal dangers of participating therein." *Id.* at 141. Clearly, the decision expresses the idea that the defendant had breached no duty owed to the plaintiff. Golf balls are routinely struck on a golf course. The plaintiff was fully aware of the defendant's actions and the defendant was under no duty to shout "Fore" or to refrain from striking her ball, since she reasonably could have believed that the plaintiff would be aware of any danger and take steps to avoid it. Such foreseeable self-protective measures to reasonably apparent risks reduced the defendant's conduct to no-duty conduct, or non-negligence. See *Mansfield*, *supra* note 6, at 19.

The *Blackburn* holding will appreciably affect the outcome of cases involving secondary implied assumption of risk, that "thorn in the judicial side"²² which is the true affirmative defense to an established breach of duty. Secondary implied assumption of risk is either reasonable (pure or strict) or unreasonable (qualified).²³ To illustrate the distinction between the two categories, the *Blackburn* court posed the following hypothetical. A tenant, returning from work, sees his home on fire. The fire is a result of the landlord's having permitted the premises to become highly flammable, a breach of a duty owed to the tenant. Inside the house is either (1) the tenant's baby, or (2) the tenant's fedora. The tenant rushes into the raging fire and is injured. Certainly one can say he has encountered a known risk. But his conduct is a reasonable assumption of that risk if prompted by a desire to save his infant child. His conduct is an unreasonable assumption of risk if, instead of his baby, he was trying to save his hat.²⁴ The court noted that in the first instance, although a plaintiff technically would be precluded from recovery because of his voluntary exposure to a known risk, no Florida case has applied reasonable (pure-strict) implied assumption of risk to bar recovery and "there is no reason supported by law or justice in this state to give credence to such a principle of law."²⁵ Although the court's example is useful in illustrating the distinction between strict and qualified assumption of risk, it is arguable whether the hypothetical plaintiff's conduct in trying to save his baby is assumption of risk at all. Voluntariness is the crux of the doctrine—if a plaintiff must choose between two equal evils he cannot be said to act of his own free will. "Voluntary exposure is the bedrock upon which the doctrine of assumed risk rests."²⁶ If the defendant's negligence puts the plaintiff in the position of being compelled to choose between two evils, the options which the defendant's negligence present to the plaintiff are not true choices.²⁷ In

22. 348 So. 2d at 291.

23. *Id.*

24. *Id.*

25. *Id.* The general consensus seems to be that in those instances in which it appears that a plaintiff has reasonably assumed a risk but nonetheless has been barred from recovery, the cases are generally of the no-duty variety. See Note, 56 MINN. L. REV. 47 (1971). These are primary assumption of risk cases. The plaintiff undeniably has been injured but not through the negligence of the defendant.

26. *Bartholf v. Baker*. 71 So. 2d 480, 483 (Fla. 1954).

27. See RESTATEMENT (SECOND) OF TORTS § 496E (1965). Comment C states in part:

The plaintiff's acceptance of the risk is not to be regarded as voluntary where the defendant's tortious conduct has forced upon him a choice of courses of conduct, which leaves him no reasonable alternative to taking his chances. A defendant who, by his own wrong, has compelled the plaintiff to choose between two evils cannot

the example postulated by the *Blackburn* court, one option required an affirmative act—rushing into a fire, while the other option considered of doing nothing—letting the tenant's child perish. If the tenant had elected to do nothing he would have acted less reasonably than if he had assumed the risk of burns. In such instances, where the risky choice is the reasonable choice, the defense of assumption of risk is inappropriate.

The *Blackburn* holding is thus limited to one category embraced within the general phrase of assumption of risk. The court found only the affirmative defense of unreasonable (qualified) implied assumption of risk to be conceptually indistinguishable from contributory negligence.²⁸ The focus of both defenses is on the unreasonableness of the plaintiff's conduct. Contributory negligence is conduct by a plaintiff which falls below the standard to which he is required to conform for his protection and which contributes as a legal cause to the harm he suffers.²⁹ Unreasonable (qualified) assumption of risk is conduct whereby the plaintiff makes a wrong choice in the sense that he acts unreasonably by choosing to encounter the particular known risk created by the plaintiff's negligence.³⁰ In the 1955 decision of *Byers v. Gunn*,³¹ the Florida Supreme Court attempted to distinguish between the two defenses. Acknowledging that "[a]t times the line of demarcation . . . is difficult to define," the court found assumption of risk, unlike contributory negligence, to involve "a choice made more or less deliberately . . ."³² It described contributory negligence as "a matter of conduct,"³³ while assumption of risk is "a mental condition of willingness."³⁴

be permitted to say that the plaintiff is barred from recovery because he has made the choice. Therefore, where the defendant is under a duty to the plaintiff, and his breach of duty compels the plaintiff to encounter the particular risk in order to avert other harm to himself, his acceptance of the risk is not voluntary, and he is not barred from recovery. The same is true where the plaintiff is forced to make such a choice in order to avert harm to a third person.

28. 348 So. 2d at 291. Although the court's discussion makes clear that it is restricting its holding to unreasonable assumption of risk (implied-qualified), its concluding paragraphs pose the issue as being whether liability is equated with fault "under a doctrine which would bar recovery by one who voluntarily, but *reasonably*, assumes a known risk." *Id.* at 293 (emphasis supplied). As the court itself noted earlier, reasonable (pure) assumption of risk has never barred recovery in Florida. If the plaintiff's conduct is reasonable, his injuries are not his fault whether one applies contributory negligence or assumption of risk.

29. W. PROSSER, *supra* note 1, § 65, at 417, citing RESTATEMENT (SECOND) OF TORTS § 463 (1965).

30. W. PROSSER, *supra* note 1, § 68, at 441.

31. 81 So. 2d 723 (Fla. 1955).

32. *Id.* at 727.

33. *Id.*

34. *Id.*

The distinction thus expressed was nebulous indeed since only by examining conduct could the "mental condition of willingness" be inferred. After *Blackburn*, the need to inquire into willingness is obviated. Regardless of the plaintiff's mental acquiescence, his conduct will be judged by whether he failed "to exercise the care of a reasonably prudent man under similar circumstances,"³⁵ the traditional standard by which contributory negligence is judged. The *Blackburn* court found no sound rationale for retaining as a separate affirmative defense that form of assumption of risk which can be "so readily characterized, conceptualized, and verbalized as contributory negligence"³⁶

Obviously the *Blackburn* decision will increase the class of plaintiffs who, despite proof of unreasonable choices, survive motions for summary judgment or directed verdicts. Juries will be required to examine the conduct of two different kinds of plaintiff: a plaintiff who has voluntarily decided to take his chances is conceptually not quite the same as one who has failed to exercise the care of a reasonable man for his own protection. The former has deliberated; the latter has been inattentive.³⁷ In apportioning fault, juries will need to focus on voluntariness and the nature of the choice which was presented to the plaintiff. For example, if the tenant in the *Blackburn* hypothetical had rushed into the burning house to save an irreplaceable and uninsured painting, his conduct would be less reasonable than if he were saving his child, yet far more reasonable than if he were saving his hat.³⁸ As noted earlier, the element of voluntariness is usually missing if the defendant's negligence puts a plaintiff in the position of choosing between two courses, both of which present a risk of harm to himself or harm to a third person. Where harm to property is involved, a presumption of voluntariness may be assumed to be present. The plaintiff should elect to avoid injury to himself and lose a prized art object rather than elect to risk

35. 348 So. 2d at 291.

36. *Id.*

37. The distinction is more apparent than real. When a jury can find unreasonable assumption of risk because a plaintiff has actual knowledge, it can also find contributory negligence—that the plaintiff failed to exercise the care of a prudent man under similar circumstances. It is immaterial that the reverse is not also true. If the plaintiff has no actual knowledge, the inquiry will be as to what knowledge he *should* have had. But once actual knowledge is shown, then the focus should be on the reasonableness of conduct. Thus, contributory negligence is always present where unreasonable assumption of risk is found. Note, 56 MINN. L. REV. 47, 60 (1971).

38. The Restatement position, *see* note 27 *supra*, suggests that voluntariness is never found when the plaintiff must choose a risk to avoid harm to himself or a third person. Choosing a risk to avoid harm to property, while understandable, apparently becomes voluntary.

injury and save the painting. Although one can argue that it is just as much no-choice if one substitutes the hat or the painting for the baby, the argument is misleading. The question of whether either of two courses of action is truly voluntary presupposes hard choices of equal weight. When only a hat or painting is at stake, the plaintiff's course is clear. Theoretically, to choose any property over the risk of physical injury is an unreasonable choice. But the *Blackburn* decision may have the practical result of allowing juries to determine degrees of unreasonableness. Depending on the value or importance of property at stake, the plaintiff will be more or less reasonable. A man who risks burns to save an irreplaceable painting is thus apt to be found at fault for a lesser portion of his injuries than a man who risks burns to save his hat. To choose to save objects rather than one's skin may indeed be an unreasonable choice; but, because plaintiffs should not be placed in the position of having to make such choices, those plaintiffs who pursue only slightly unreasonable choices are most likely to benefit by the *Blackburn* decision.

The court makes clear that under comparative negligence no distinction should be made as a matter of law between two such similar types of unreasonable conduct as are expressed by the doctrines of contributory negligence and unreasonable implied assumption of risk. Under the expressed rationale of *Hoffman v. Jones*,³⁹ it is inequitable to allow a defendant who is negligent to escape liability altogether simply because the defendant's negligence prompted the plaintiff to make an unreasonable choice. The defendant must instead share the costs of injury with a plaintiff who has assumed certain risks, just as defendants have shared the costs with plaintiffs who, failing to exercise the due care expected of a prudent man under similar circumstances, have been found to be contributorily negligent. If one accepts the principles of comparative negligence, one must accept an equality of treatment between both sorts of plaintiffs.

ALIX THORNTON

39. 280 So. 2d at 437. Comparative negligence "is simply a more equitable system of determining liability and a more socially desirable method of loss distribution." *Id.*

