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From Negligence to Risk Management: A Comparative Policy-based Critique of the Assumption of Risk Doctrine

Che Su

Shanghai University of Political Science and Law, Shanghai 201701, China.

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***Corresponding author:** Che Su, Shanghai University of Political Science and Law, Shanghai 201701, China.

Abstract

The assumption of risk doctrine has historically served as a cornerstone in limiting tort liability, especially in cases where plaintiffs voluntarily exposed themselves to known risks or dangers. This doctrine is rooted in liberal principles of autonomy and individual responsibility, reflecting a moral intuition that one shouldn't recover from harm knowingly accepted. However, the increasing complexity of social, commercial, and institutional relationships in modern societies has challenged the viability of the doctrine in its traditional form. This paper explores the evolution, structure, and challenges of the assumption of risk doctrine with a comparative focus on Chinese, the United States, and Australian tort law. Each jurisdiction represents a unique legal tradition and policy approach. The United States, with its deep common law heritage, continues to rely on doctrinal distinctions between express and implied assumption of risk. Australia, influenced by similar traditions, has transitioned toward statutory frameworks with strong policy overlays. China, under the civil law system, has undergone a rapid reform, codified the assumption of risk doctrine, but limited its application to certain activities. This paper will re-examine the concept of risk-taking from the perspective of comparative law.

Keywords

Assumption of risk; comparative law; comparative negligence

1. Overview of the Assumption of Risk Doctrine

Traditionally, assumption of risk can be categorized into two main types: express assumption of risk and implied assumption of risk. In the United States, this distinction remains operative, particularly in recreational and sports-related injury cases. Express assumption of risk means that the plaintiff agrees in writing or orally, often known as liability waivers, to accept the risk. The implied assumption of risk applies when the plaintiff's conduct implies acceptance and voluntarily exposes themselves to the known danger or risks. The implied assumption relies on case-specific evaluations of knowledge (Patch v. Hillerich & Bradsby Co., 257 P.3d 383 (2011)) and voluntariness (Thomas v. Panco Mgmt. of Md., LLC, 31 A.3d 583 (2011)).

Australia's approach has been significantly influenced by statutory reforms, notably the Civil Liability Acts enacted across various states. In New South Wales, Section 5L of the Civil Liability Act 2002 stipulates that a person is not liable for harm from the materialization of an "obvious risk" of a dangerous recreational activity (Civil Liability Act 2002, s 5L). This provision parallels the doctrine of assumption of risk but is filtered through statutory definitions and judicial interpretation. Importantly, courts in Australia often incorporate the doctrine into comparative negligence frameworks, mitigating the potentially harsh consequences of the application of the assumption of risk doctrine.

China, by contrast, does not formally categorize the doctrine. The concept was codified in Article 1176 of the Civil

Code, addressing situations where a person voluntarily participates in a certain risk-bearing sport or cultural activities and suffers damages due to the actions of other participants, the victim shall not request other participants to bear tort liability. However, this rule does not apply if other participants have acted with intent or gross negligence in causing the damage (Civil Code, Article 1176). Courts have generally applied this provision conservatively, emphasizing fairness and the relative capabilities of the parties to prevent harm.

The doctrine of true assumption of risk embodies the individualistic orientation of the common law, particularly in contexts where the primary responsibility for self-protection against foreseeable hazards is placed upon the individual (Fleming James Jr., 1952). Across jurisdictions, the prevailing theoretical foundation of this rule is that a person should not be entitled to compensation for injuries arising from risks that they knowingly and voluntarily accepted. However, this premise is increasingly questioned in environments characterized by unequal bargaining power, complex risks, and informational asymmetries. Moreover, as tort law evolves from an individual-centered framework to one that also considers systemic risk regulation and public welfare, the assumption of risk doctrine must be reassessed through a policy-sensitive lens.

2. Legal Frameworks of the Assumption of Risk Doctrine

2.1 The United States: Common Law Evolution

In the United States, the doctrine is deeply embedded within the common law tradition and historically divided into two distinct types: express assumption of risk and implied assumption of risk, and this distinction remains operative. The former typically arises in contract-based liability waivers, often seen in sports and recreational activities. The latter relies on circumstantial evidence suggesting that the plaintiff knew and voluntarily accepted the risk, which can overlap with principles of contributory or comparative negligence.

Courts have frequently scrutinized express waivers under doctrines of public policy and unconscionability. Since the express assumption of risk entails a party waiving, in advance, the right to seek compensation for injuries caused by another's tortious conduct, courts have historically subjected such agreements to stricter judicial scrutiny than ordinary contractual provisions. A plaintiff may expressly assume the risk either through a written agreement or, where permissible under the contract law, through an oral arrangement. In Zipusch v. LA Workout, Inc. (2007), the court held that any ambiguity in such agreements should be construed against the party that drafted the contract (Zipusch v. LA Workout, Inc., 155 Cal.App.4th 1281 (2007)).

In addition, courts often take public policy considerations into account when assessing the enforceability of liability waivers. A landmark case mentioning this issue is Tunkl v. Regents of the University of California, in which a hospital required patients to sign a release waiving all liability, regardless of fault, as a condition for admission. The California Supreme Court held that the enforcement of clauses for such activities would result in problematic policy consequences because the patients had not genuinely and voluntarily consented to absolve the hospital of liability. The court emphasized the essential nature of medical services (Tunkl v. Regents of the Univ. of Cal., 60 Cal.2d 92 (1963)).

In the context of the implied assumption of risk, a key limitation is that the plaintiff's acceptance of the risk must be voluntary. This requires that the plaintiff had a reasonable alternative course of action. If no such alternative existed and the plaintiff had no practical means to avoid the hazardous situation, then their continued exposure to the risk cannot be considered truly voluntary (Thomas v. Panco Mgmt. of Md., LLC, 423 Md. 387 (2011)). Another limitation is about the plaintiff's subjective mind, the plaintiff did not assume the risk unless she knew of the risk itself as well as the facts that gave rise to it and "really" assumed the risk, the subjective awareness of the risk was required (Patch v. Hillerich & Bradsby Co., 257 P.3d 383 (2011)).

However, the prevailing modern view is that the assumption of risk doctrine should be fully integrated into the framework of comparative fault and eliminated as a separate legal principle (Kenneth W. Simons, 2002). The 'Restatement (Third) of Torts: Distribution of Liability' has explicitly deleted the concept of assumption of risk that exists in the Second Restatement, but the assumption of risk remains firmly embedded in tort law, and the specific approach varies based on different jurisdictions (Alexander B. Lemann, 2019). In some jurisdictions, the traditional assumption of risk condition is not merged, but survives comparative fault.

2.2 Australia: Statutory Integration and Judicial Interpretation

According to the common law principles, there are generally three criteria that have to be satisfied to make out the assumption of risk defense: i) the plaintiff knew the facts constituting the risk or danger; ii) the plaintiff fully

appreciated it; iii) the plaintiff voluntarily consented to the danger or risk (Carey v Lake Macquarie City Council [2007] NSWCA). In general, it is not enough for the defendant to prove that the plaintiff has voluntarily undertaken an activity that she or he knew to be dangerous. In order to succeed, the defendant must also prove that the plaintiff consented to the risk of the defendant's breach of duty (Smith v Charles Baker & Sons [1891] AC 325).

In New South Wales, the voluntary assumption of risk has been abolished in actions by employees against employers by the Workers Compensation Act 1976 (Workers Compensation Act 1976, s 151O). If people can prove that there is an employer-employee relationship and the injury occurred during any work-related activities, they are entitled to claim compensation. However, the Act indicates that, where that defense would otherwise have been available, the amount of any damages is to be reduced to such extent as is just and equitable, which is similar to contributory negligence.

Furthermore, in recognition of the importance of promoting altruistic behavior, courts have held that rescuers who suffer injury in the course of rendering aid are not deemed to have voluntarily and knowingly assumed the risk of harm. This approach reflects that Australia also takes the public policy into consideration, ensuring that the law does not disincentivize acts of rescue in emergency situations. The advent of apportionment statutes eliminated the harshness of the common law's all-or-nothing consequence produced by a contributory negligence finding.

Australia's approach has been significantly influenced by legislative reforms, notably the Civil Liability Acts enacted across various states. In New South Wales, section 5F(1) of the Civil Liability Act 2002 (NSW) defines an "obvious risk" as a risk that, in the circumstances, would have been apparent to a reasonable person in the position of the plaintiff, and section 5L stipulates that a person is not liable for harm from the materialization of an "obvious risk" of a dangerous recreational activity. Where a risk is deemed obvious, a person who suffers harm is presumed to have been aware of that risk (Civil Liability Act 2002 (NSW) s 5F, s 5G, s 5L). This statutory presumption facilitates the defendant's ability to invoke the common law defense of voluntary assumption of risk, thereby reinforcing the interplay between legislative and common law principles in the Australian tort system. What's more, the statute in New South Wales gives 'recreational activities' additional explicit consideration (Martin Davies and Ian Malkin, 2023).

Those provision parallels the implied assumption of risk but are filtered through statutory definitions and judicial interpretation, and courts in Australia often incorporate the doctrine into comparative negligence frameworks, mitigating its potentially harsh consequences. Notably, the distinction between express and implied assumption of risk has become less prominent, with courts integrating the doctrine into broader statutory liability assessments.

2.3 China: Codified Principle

The Chinese Civil Code does not follow the Anglo-American classification system. The concept appears in Article 1176 of the Civil Code, derived from the 2009 Tort Liability Law, addressing situations where a person voluntarily participates in a cultural or sports activity that carries certain risks and suffers harm due to the conduct of another participant, the injured party may not claim tort liability against the other participant, except where the other participant has acted with intent or gross negligence (Civil Code, Article 1176). Chinese courts, lacking detailed legislative guidelines beyond Article 1176, rely heavily on judicial interpretations and policy considerations.

However, this provision presents two notable limitations that merit further discussion. First, it lacks clear criteria for determining the 'voluntariness' of risk assumption, especially in cases involving minors. Second, the term "cultural and sports activities" remains undefined; there is still controversy over whether the application of the rule should be strictly limited to this scope. These ambiguities raise important questions about the practical application and policy rationale of the doctrine under Chinese law.

2.3.1 Voluntariness

Although Article 1176 of the Civil Code establishes the basic framework for the doctrine of assumption of risk, it remains vague in its treatment of the requirement of "voluntariness," particularly in cases involving minors participating in high-risk activities.

The law does not provide specific criteria for assessing whether an individual possesses the requisite cognitive or legal capacity to give valid consent. Therefore, the issue that may arise in judicial practice is the extent to which the victim must have accepted the risk. Specifically, the question is whether this acceptance pertains solely to the inherent risks of the activity or whether it must also encompass an understanding of the potential harmful consequences resulting from those risks. Some scholars hold that the 'voluntariness' should be interpreted as the "voluntary based on

full awareness"; it should be the voluntary of the actor who has the cognitive ability to recognize the legal benefits and risks of the specific sports and cultural activities he/she participate in. It includes both the recognition of the nature and conditions of this behavior, as well as the recognition of the risks and possible damages it may face (Dong & Yang, 2022).

The ambiguity also raises another concern about whether minors, who may lack full understanding of the risks involved, can truly be said to have voluntarily assumed such risks. For instance, if a minor suffers harm while engaging in a risky recreational activity without adequate comprehension of the danger, can the defendant legitimately invoke the defense of assumption of risk? How should the voluntariness be evaluated? Probably, the assessment should consider factors including the individual's age, cognitive development, and the extent to which the organizer fulfilled a duty of risk disclosure (Cao Quanzhi, 2021).

2.3.2 Cultural or Sports Activity

Another important observation relates to the scope limitation imposed by Article 1176 of the Chinese Civil Code, which confines the application of the assumption of risk doctrine to "sporting and recreational activities that involve certain risks and are voluntarily undertaken."

However, the term "sporting and recreational activities" is not clearly defined in the legislation, leaving its interpretation largely subject to judicial discretion (Shen Haien, 2023). This ambiguity, while problematic in terms of legal certainty, reflects a deliberate policy choice grounded in lessons drawn from foreign legal systems as discussed above. Specifically, the exclusion of assumption of risk in contexts involving special relationships—such as employment, education, or healthcare—is a response to the potential for abuse where power imbalances exist, which is contrary to the aims of tort law.

Some scholars hold that, based on the relevant theoretical research and the experience of judicial practice, the scope of application of the rule should neither be too broad nor too narrow. If the applicable conditions are too broad, it may lead to the abuse of the rule, thereby infringing upon the legitimate rights and interests of the victim; conversely, if the restrictions are too strict, it may weaken the function of the rule in adjusting risk liability (Chen Longye, 2025).

3. The Enduring Significance of the Assumption of Risk Doctrine

Despite evolving tort regimes and the growing popularity of comparative fault systems, the assumption of risk doctrine retains enduring theoretical and practical value. At its core, the doctrine embodies the principle of autonomy. From this perspective, even if a legal rule does not always impact the availability of an activity on the participants' preferred terms, failing to respect an individual's decision to face or accept a risk may be unjust to the injurer and potentially undermine the victim's autonomy (Mullins, 2013). This concept preserves the fundamental tort law tenet that courts should not compensate self-inflicted injuries.

On the other hand, in today's increasingly complex society marked by pervasive exposure to risk, the doctrine serves to define the scope of legal protection more clearly. Assumption of risk serves as a gatekeeping mechanism by distinguishing between harm resulting from socially unacceptable conduct and harm arising from voluntary exposure to ordinary risks. In this way, the doctrine filters out claims that would otherwise stretch tort liability beyond reasonable limits. As discussed, in the U.S. Courts scrutinize express waivers very carefully, especially where unequal bargaining power is present, but generally uphold them when they reflect genuine consent. In Australia, the use of statutory concepts such as "obvious risk" and "dangerous recreational activity" achieves a similar filtering function, reducing the burden on defendants who have not acted negligently.

The existence of the doctrine of assumption of risk also encourages participation in socially desirable activities, such as volunteering, sports, and emergency rescue. If participants in such activities were entitled to full compensation for any resulting harm, regardless of their voluntary choice to engage in risk-laden scenarios, potential defendants, including activity organizers, the education system, sports organizations, and emergency service providers, might face unbearable liability exposure. Article 1176 of the Civil Code in China, to some extent, serves precisely this purpose; it ensures that fear of liability does not deter the providers of sports or cultural activities.

4. Reconsidering the Integration of Assumption of Risk into Comparative Negligence

In recent decades, many jurisdictions—especially in the common law legal system—have questioned whether the assumption of risk doctrine should continue to exist independently from comparative negligence frameworks. A growing body of scholarship and case law supports the proposition that the doctrine should be either partially or

entirely merged into comparative fault systems.

This concern is primarily justified by the theoretical overlap and functional similarities shared by the two doctrines. Both assumption of risk and comparative negligence allocate fault based on the plaintiff's conduct. While assumption of risk historically operated as a complete bar to recovery, comparative negligence allows for a more nuanced, percentage-based reduction in damages (Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973)). Merging the doctrines would soften the harshness of an all-or-nothing defense and better reflect the proportional fault of the parties involved.

Nonetheless, critics contend that, unlike standard negligence, the doctrine of assumption of risk depends not only on conduct but also on the plaintiff's mental state—specifically, their awareness and acceptance of the danger. As such, rather than advocating for its complete elimination, a more balanced approach may be preferable. Courts might retain the assumption of risk as an evidentiary tool rather than upholding it as a separate affirmative defense. This blended model maintains the doctrine's conceptual value while mitigating its overly rigid application. In jurisdictions like China, where tort doctrines are still undergoing refinement, the experience of common law countries offers useful lessons.

Ultimately, the biggest problem is not whether the assumption of risk should be abolished or not, but how the voluntariness and fairness it represents can be manifested. As tort law continues to evolve, these insights can and should be preserved within more flexible and nuanced comparative fault systems.

5. Conclusion

The doctrine of assumption of risk continues to occupy a complex position in the landscape of tort law. While originally rooted in individual autonomy and freedom of choice, its rigid application has been increasingly challenged in modern legal systems that prioritize fairness, accountability, and the realities of power imbalance.

Although the American and Australian legal systems have taken steps to either integrate or reinterpret the assumption of risk within broader comparative fault frameworks, China's legal treatment of the doctrine remains comparatively underdeveloped. Article 1176 of the Civil Code provides a basic foundation, but as discussed, it lacks the doctrinal clarity required to address the diversity of risk-bearing scenarios in contemporary society.

The theoretical and functional significance of the doctrine should not be understated: it defines the limits of legal protection, clarifies responsibility in consensual risk-taking situations, and respects personal agency. However, this doctrine must be applied with sensitivity to context, particularly where vulnerabilities exist or consent is not genuinely informed.

In the course of future legal reforms, China may consider drawing on comparative law experiences to refine its tort law framework. A more coherent and equitable legal framework may be achieved by critically evaluating and balancing the theoretical foundations of the assumption of risk doctrine and the comparative negligence principle. In this way, the traditional doctrine of assumption of risk could be modernized to better meet the demands of an increasingly complex and risk-laden society.

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