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A Dispatch from America's Tobacco Litigation Ranks: Primary Assumption of Risk and Personal Responsibility in a Comparative Fault Age

I. The Past as Prologue

Tobacco litigation in the United States, as mature a body of product liability practice as one is likely to find, still produces fruit near the back and around the edges of the legal vineyard. After a run of nearly fifty years in the courts, it remarkably continues to regenerate itself, every once in a while tossing off a noteworthy grape for notice, study and efforts at transplantation elsewhere. In the early 1990s, for example, tobacco litigation was first exported to foreign jurisdictions – chiefly Europe, but elsewhere as well. Although efforts to get tobacco litigation off the ground in Europe continue, it did eventually land and take root in South America, where it continues to run its course. Tobacco companies in the United States have seen congressional inquiry and government litigation attempt to transform the manufacture, marketing and defense of a legal product into claimed violations of federal civil racketeering laws (i.e., Racketeer Influenced and Corrupt Organizations Act or "RICO"), which culminated in the case brought by the U.S. Department of Justice against the tobacco industry in 1999. The bench trial (which ended in June 2005) lasted nine months, with a decision expected by the end of the year. Since then, private litigants have taken up the RICO cudgels seeking trebled damages and attorneys fees for economic injury grounded on the alleged failure of "light" or "low tar" cigarettes to meet consumer expectations of safety, owing it is said to fraud and conspiracy by the companies in the marketing of those products. American tobacco litigation has also generated legal precedent of wide application, including *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), the seminal Supreme Court decision that has defined and shaped federal preemption law at large for nearly two decades.

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1 See West's Ann. Cal. Civ. Code § 1714.45 (pre-amendment); Miss. Code Ann. § 11-1-63.

2 See, e.g., *R.J. Reynolds Tobacco Co. et al. v. King*, No. 2004-IA-01170-SCT, 2005 WL 1713047 (Miss. June 30, 2005), reh'g denied, March 2, 2006, (holding that Miss. Code Ann. § 11-1-63 does not prohibit non-product liability theories of recovery against tobacco companies); West's Ann. Cal. Civ. Code § 1714.45 (as amended) (declaring there exists "no statutory bar to tobacco-related personal injury, wrongful death, or other tort claims against tobacco manufacturers").

3 See A Report of the Surgeon General. *The Health Consequence of Smoking: Nicotine Addiction* at 9 (U.S. GPO 1988).

The plaintiff lawyers who launched, coordinated, and waged the modern wave of American tobacco litigation beginning in the late 1980s, eventually were joined by state attorneys general, who in the mid-1990s themselves mounted a coordinated nationwide litigation offensive (under the banner of the National Association of Attorneys General). These suits mostly were in the state courts and sought to recover the cost to state treasuries of treating illnesses associated with cigarette smoking under various social welfare programs. In 1998, the U.S. tobacco industry agreed to settle these healthcare cost recoupment suits at a cost of some \$ 280 billion (US), spread over decades, and severe restrictions on their business practices going forward. The parties ultimately memorialized the terms in a document called the Master Settlement Agreement. Along the way, some states, like California, Texas and Mississippi, where plaintiffs first began aggressively pushing a tobacco litigation renaissance in the late 1980s, used tort reform to legislate against individual tobacco litigation.¹ But then inventive courts began finding ways around the will of the people, and legislatures began second-guessing themselves.²

II. Whither Personal Choice and Responsibility?

Much has changed in tobacco litigation since its resurgence in the late 1980s. Court TV is gone, no longer offering gavel-to-gavel coverage of tobacco trials, but tobacco trials continue. Contingency fees, the lack of a "loser-pays" rule, and the unpredictability of the jury system itself are part of the reason why the litigation continues, but these are not new developments and they certainly did not help to produce any trial success for plaintiffs until the late 1990s. The factors ultimately fueling the litigation relate to the gradual change in societal values and are naturally varied and numerous.

For example, shortly after publication of the 1988 Surgeon General's Report in the United States, with its widely-reported declaration that nicotine was addictive,³ plaintiffs in American tobacco litigation began asserting that there was no "choice" in the matter of smoking – they were "addicted", in effect smoking against their will and better judgment. This argument has been effective in rousing juries in an increasingly anti-corporate age to "send a message" to the boardroom. The message they are sending seems to be about abstract notions of rights and freedoms without (and actually divorced from) any countervailing notion of responsibility and consequence – in effect, a risk-free personal lifestyle. In the process, responsibility for undeniably infor-

med choices (if common sense is still to matter), are converted to the currency of torts – in the form of negligence, strict liability, fraud and all manner of general legal wrong by others. On one view, then, the continuance of tobacco litigation might be the product of a general trend by individuals toward the abdication of personal responsibility, in favor of a culture of victimization, blame and fault-finding – plaintiffs selling and juries sometimes buying.

III. Plaintiffs' Tactical Abuse of Comparative Fault

This brings us back to the observation made at the beginning about tobacco litigation occasionally delivering a noteworthy grape – the most recent involving plaintiff's affirmative advocacy of comparative negligence principles (a traditionally defensive doctrine by which, in the event defendant is found liable, the percentage of any culpable conduct by plaintiff is used to diminish any damage award proportionately).

Since the trial of *Eastman v. Brown & Williamson Tobacco Corp., et al.*,⁴ in a Florida state court in 2003, many plaintiffs have adopted a strategy of themselves pleading and injecting the comparative fault defense into tobacco cases, with some success. They typically raise the argument either preemptively, or in response to any use by defendants of evidence going to plaintiff's knowledge, choices and actions in relation to cigarette smoking. While defendants argue that evidence of this sort defeats the essential elements of plaintiff's prima facie case (i.e., duty, reliance, proximate cause), plaintiffs contend that such evidence is little more than "fault" or "negligence" by another name, and is therefore cause for charging the jury on principles of comparative negligence for purposes of apportioning liability and, with it, damages. They do so to promote compromise verdicts, basically encouraging juries to use plaintiff's confessed partial "fault" as evidence of defendant's partial liability in avoidance of an all-or-nothing compensation verdict (in order to get at punitive damages). Indeed, its proponents concede as much.⁵

Plaintiffs' strategy seems to be driven by the admittedly economically-sound view that, say, fifty or some other percentage of something (in today's American jury dollars, pick any number and then add a lot of zeros) is better than one-hundred percent of nothing. There is clearly empirical support for the view, given that juries charged on comparative negligence in American tobacco cases tend to split liability fairly evenly between plaintiffs and defendants.⁶ (Then, again, economic and legal soundness are not always necessarily equivalents.) Wholly absent from this strategy is acknowledgement of the fact that before there can be liability or "fault" at law for apportionment under principles of comparative negligence, there must first be a finding that plaintiff has carried the burden of making a prima facie case.⁷

A related strategy involves plaintiffs use of defendant's pre-trial withdrawal or waiver of the affirmative defense of comparative fault as the grounds to keep evidence of plain-

tiff's own conduct from the jury. While evidence of plaintiff's conduct logically should be relevant to whether the elements of a tort have been proved (such as duty, breach and resulting damages), plaintiffs argue that the evidence is irrelevant and inadmissible in the absence of a formally-pled comparative fault defense. In practice, plaintiffs are fundamentally altering the structure and nature of trial, "effectively convert[ing] the comparative fault doctrine from an affirmative defense [for a defendant to plead]... into a form of immunity, an affirmative entitlement extending over plaintiffs a protective shield which would bar any form of allusion to relevant conduct on their part that may smack of culpability, whether or not the reference is intended to address blame."⁸

In effect, plaintiffs are presuming (among other things) the existence of some duty in the first instance, which is what they must instead prove with evidence in order for there to be a case to answer at trial. And they are ignoring the fact that a defendant is free at the outset to defend itself by denying and negating plaintiff's ability to prove a prima facie case – through, for example, the common law doctrine of primary assumption of risk, encompassing the

4 *Eastman v. Brown & Williamson Tobacco Corp., et al.*, No. 97-5968-CI-11 (6th Jud. Cir. Ct., Pinellas Co., Fla.).

5 See *Acosta, Denson & Newsome, Confessing Fault, AFLT*, at 28 (May 2003) ("Without an opportunity to compare and apportion plaintiff's fault, the jury may decide the case against [the plaintiff].")

6 See, e.g., *Arnitz v. Philip Morris USA Inc.*, No. 00-4208-Div. D (13th Jud. Cir. Ct., Hillsborough Co., Fla.) (plaintiff's jury verdict returned Oct. 21, 2004, splitting liability on a 60/40 basis), appeal pending, No. 2D05-826 (Fla. 2d DCA 2005); *Frankson v. Brown & Williamson Tobacco Corp.*, No. 24915/00 (N.Y. Sup. Ct., Kings Co.) (plaintiff's verdict returned Dec. 18, 2003, splitting liability on a 50/50 basis), appeal pending, No. 2005-01059, 2005-01060, 2005-01061, 2005-01062 (N.Y. App. Div. 2d Dep't); *Eastman v. Brown & Williamson Tobacco Corp.*, No. 97-5968-CI-11 (6th Jud. Cir. Ct., Pinellas Co., Fla.) (plaintiff's verdict returned on April 3, 2003, splitting liability on a 50/50 basis), aff'd per curiam, 888 So.2d 34 (Fla. 2d DCA 2004). But see *Beckum v. Philip Morris Inc.*, No. 02-01836-Div. D (13th Jud. Cir. Ct., Hillsborough Co., Fla.) (defendant's verdict returned on April 29, 2005); and *Vandenburg v. Brown & Williamson Tobacco Corp., et al.*, No. 03-CV-237238 (Cir. Ct., Jackson Co., Mo.) (defendants' verdict returned on February 22, 2006).

7 See, e.g., *Akins v. Glens Falls City School District*, 53 N.Y.2d 325, 333 (1981), rearg. denied, 54 N.Y.2d 831 (1981) ("In short, a court always is required to undertake an initial evaluation of the evidence to determine whether the plaintiff has established the elements necessary to a cause of action in negligence, to wit: (1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof."); *Goulah v. Ford Motor Co.*, 118 F.3d 1478, 1486 (11th Cir. 1997) (holding that "even if [defendant] had never raised a comparative negligence defense, the same evidence... would have been admissible at trial" as it "directly refutes Plaintiffs' contention that [defendant's] negligence caused this accident"); *Marino v. Otis Engineering Corp.*, 839 F.2d 1404, 1408 (10th Cir. 1988) (recognizing distinction "between the introduction of evidence in support of an affirmative defense [of contributory negligence] and the introduction of the same evidence to refute plaintiff's allegations of causation raised in the complaint and denied in the answer").

8 *Kwiatkowski v. Bear, Stearns & Co., Inc.*, 2000 WL 640625, at *4 (S.D.N.Y. May 18, 2000) (applying New York law in a breach of fiduciary duty case).

notion that the plaintiff willingly and knowingly committed himself to a course of action (behavior) that he knew (by common sense or otherwise) involved serious risks of premature illness and death. In a word, consent.

IV. Primary Assumption of Risk in a Nutshell

The whole issue, unfortunately, has received uneven treatment in American trial courts and to this point generated no clear higher authority to speak of. Some part of the resulting decisional confusion and inconsistency is due to the failure of pre-comparative fault age decisions to distinguish between the type of assumption of risk at issue – whether primary or secondary. Both being complete defenses, careful discrimination in the case law between the two did not matter so much in the past as it does now. The resulting confusion is regrettable.⁹ In the vernacular, it at once refers to an affirmative defense to established negligence (i.e., secondary assumption of risk) in mitigation of damages on a finding of liability, as well as to the doctrine by which a defendant presents evidence tending to negate the essential elements of plaintiff's prima facie case in denial of liability altogether – on the principle of consent and along the lines of the concept of *volenti non fit injuria* (i.e., primary assumption of risk).

In brief, the confusion in the jurisprudence arose following the amendment of product liability laws to abolish "assumption of risk" (otherwise undefined) in favor of comparative fault.¹⁰ While the incredibly diverse nature of the laws of assumption of risk across the American judicial system is a subject beyond the scope of this article, in most jurisdictions one will find authority for the defense of primary assumption of risk – i.e., argument going to plaintiff's knowing consent, and along with it the whole notion of personal choice and responsibility. It is only implied or secondary assumption of risk that was merged

into and abolished by comparative fault laws, not the other variety called primary or express assumption of risk. The former (under today's comparative fault regimes) is invoked after plaintiff's case in mitigation of damages, whereas the latter comes into play at the outset of the contest, in denial of the elements of plaintiff's prima facie case and the determination of whether there is even a case to answer for trial purposes.

V. Case Studies

A brief discussion of several New York state court cases will help to make the point by example, establishing that the doctrine of primary assumption of risk serves as a measure of defendant's duty of care, and as such survives enactment of comparative negligence laws.

As in modern tobacco litigation, plaintiff in *Arbergast v. Bd. of Education of South New Berlin Central School* – an injured participant in a recreational game of "donkey basketball," in which individuals played basketball while riding donkeys – moved for a comparative negligence charge (just prior to summations), which was denied.¹¹ On plaintiff's appeal from a jury verdict for the defense, the issue was "whether plaintiff must be held not to have been entitled to the comparative negligence charge her attorney requested because she had expressly assumed the risk."¹² The Court of Appeals affirmed, even though it agreed that the evidence of "plaintiff's acts may constitute 'culpable conduct' within the meaning of the [comparative negligence] statute."¹³ It described the doctrine of "express" assumption of risk as "a complete defense that by express consent of the injured party no duty exists and, therefore, no recovery may be had," notwithstanding the comparative negligence statute.¹⁴ Explaining that plaintiff's conduct was to be measured solely for purposes of determining whether all of the elements of her cause of action had been established prima facie, and not in diminution of damages, the court explained:

*"The comparative causation principle enacted by CPLR 1411 applies to a strict liability action involving the vicious propensities of a domesticated animal, and to the implied assumption of risk by a person injured by such an animal, but not to express assumption of risk by such a person. Although implied assumption of risk, therefore, was under these circumstances a defense in mitigation of damages to be pleaded and proved by defendant rather than an element of plaintiff's cause of action, defendant was entitled to dismissal of the complaint at the end of the plaintiff's case by reason of her admission that she had been informed both of the risk of injury and that 'the participants were at their own risk.'"*¹⁵

In other words, since the defendant had marshaled the evidence of plaintiff's conduct to defeat her prima facie case under the principle of express assumption of risk, it was not "foreclose[d]" by the comparative fault statute, which only "requires diminishment of damages in the case of an implied assumption of risk."¹⁶

9 See, e.g., *McGrath v. American Cyanamid Co.*, 41 N.J. 272, 276 (N.J. Sup. Ct. 1963) ("Experience . . . indicates the term 'assumption of risk' is so apt to create mist that it is better banished from the scene").

10 See, e.g., NY CPLR § 1411 ("In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages").

11 *Arbergast v. Bd. of Education of South New Berlin Central School*, 65 N.Y.2d 161, 163-164 (1985).

12 *Id.* at 165.

13 *Id.* at 168 & 171.

14 *Id.* at 170.

15 *Id.* at 164 (emphasis added).

16 *Id.* at 170.

In *Turcotte v. Fell*,¹⁷ involving a professional jockey, New York's highest court again emphasized the concept of "consent" in the threshold duty of care analysis, holding that "by participating in a [thoroughbred] race, plaintiff consented that the duty of care owed him by defendants was no more than a duty to avoid reckless or intentionally harmful conduct."¹⁸ More specifically, the *Turcotte* court explained that "while the determination of the existence of a duty and the concomitant scope of that duty involve a consideration not only of the wrongfulness of the defendant's action or inaction, *they also necessitate an examination of plaintiff's reasonable expectations of the care owed him by others,*" in order to determine at the outset "whether the plaintiff's interests are entitled to legal protection against the defendant's conduct."¹⁹ Elaborating, *Turcotte* concluded:

"If the risks of that activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty... Plaintiff's 'consent' is not constructive consent; it is actual consent implied from the act of the electing to participate in the activity... *When thus analyzed and applied, assumption of risk is not an absolute defense but a measure of the defendant's duty of care and thus survives the enactment of the comparative fault statute.*"²⁰

One of the few mentions of "personal responsibility" in the context of primary assumption of risk law comes out of another New York case – *Morgan v. State of New York*²¹, a consolidated appeal involving four sports-related injury cases against the operators of various recreational facilities. Grounding its decision squarely on primary assumption of risk, New York's highest court held that "[r]elieving an owner or operator of a sporting venue from liability for inherent risks of engaging in a sport is justified when a consenting participant is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks."²² As such, plaintiffs were "legally deemed to have accepted *personal responsibility*" for the risks that "commonly inhere in the nature of those activities."²³ At the same time, the court explained that while assumption of risk per se is "no longer treated as a defense to the abandoned contributory negligence equation," the doctrine of primary assumption of risk "still helps and serves to define the standard of care under which a defendant's duty is defined and circumscribed 'because assumption of risk in this form is really a *principle of no duty* or no negligence and so *denies the existence of any underlying cause of action.* Without a breach of duty by the defendant, there is thus logically nothing to compare with any misconduct of the plaintiff."²⁴

VI. Conclusion

A lesson from America's recent tobacco litigation experience is to beware the cry of a claimed comparative fault foul and, with it, the continued erosion of personal responsibility. This is a "sword and shield" tactic where plaintiffs both attempt to foist a liability-balancing act upon the trier of fact while at the same time precluding the trier of fact from hearing evidence relevant to all the elements of liability. The trier of fact should not be forced to apportion liability between the parties unless this is sought by the defendant. Further, regardless of whether it is called primary assumption of risk or the "no-duty" rule, comparative fault rules should not foreclose product liability defendants – in the continued defense of personal choice and responsibility – from employing evidence and arguments going to plaintiff's knowledge, choices and actions in respect of smoking to negate the essential elements of a prima facie case. Neither should it matter whether defendant has pled comparative fault, or some variant. What matters instead is the direction in which that evidence is aimed. As the *Kwiatkowski* court explained:

"[I]t does not follow that by failing to assert comparative fault or withdrawing their affirmative defense at any time so long as it does not prejudice the plaintiff's ability to present his case or unduly confuse the jury – defendants must be foreclosed by a preclusive ruling or jury instruction from introducing arguments or evidence regarding plaintiff's role in the events underlying the case *to the extent that such arguments or evidence are relevant to defendants' denial of elements of plaintiff's case.*"²⁵

In time, the issue will mature and percolate to higher courts for greater clarification and direction. Until that day, with the past as prologue, one should expect the plaintiff's bar generally to take notice of this development in American tobacco litigation for purposes of its transplantation and use in other types of products liability litigation. Time will tell.

17 *Turcotte v. Fell*, 68 N.Y.2d 432 (1986).

18 *Id.* at 437 (emphasis added).

19 *Id.* (emphasis added).

20 *Id.* at 439 (emphasis added).

21 *Morgan v. State of New York*, 90 N.Y.2d 471 (1997).

22 *Id.* at 484.

23 *Id.* (emphasis added).

24 *Id.* at 485 (emphasis in original).

25 2000 WL 640625 at *2 (emphasis added).