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"Lost in Translation": The Blurring of the Distinction Between Assumption of Risk and Comparative Fault by Tort Plaintiffs For Profit

by David L. Wallace

I. The Past as Prologue

Tobacco litigation in the United States, as mature a body of product liability law as one is likely to find, still produces fruit near the back and around the edges of the legal vineyard. After a run of more than fifty years in the courts, it remarkably continues to regenerate itself, every once in a while tossing off a noteworthy grape for imitation and efforts at transplantation elsewhere. Examples abound.



In the early 1990s, for instance, 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 is still running its course. Pharmaceutical companies are now facing similar actions in Europe, where legal reform is underway to make U.S.-style class action litigation possible. Tobacco companies in the United States also 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, and produced a voluminous decision in August 2006 that is now pending appeal.

Since the onset of this case, private litigants have taken up the RICO cudgels seeking hundreds of billions of dollars in trebled damages and attorneys fees for economic injury grounded on the alleged failure of "light" or "low tar" cigarettes -- in an age of ubiquitous "light" products of all sorts -- to meet consumer expectations of safety, owing it is said to fraud and conspiracy by tobacco companies. See, *e.g.*, *Schwab v. Philip Morris USA Inc.*, 449 F. Supp. 2d 992 (E.D.N.Y. 2006) (certifying a class of tens of millions of U.S. residents who have purchased certain brands of cigarettes labeled as "Lights") (review pending). Into the wake of this litigation, the plaintiff's bar is already chasing pharmaceutical companies on analogous RICO theories, arguing that their marketing and promotional fraud caused plaintiffs to pay unwarranted premium prices for prescription drugs, for which a trebled recovery is sought on a class-wide basis. See, *e.g.*, *Keisker v. Pfizer, Inc.*, No. 1:06-CV-0361 (S.D. Ind. filed March 2, 2006).

The plaintiff lawyers who launched, coordinated, and aggressively pushed the tobacco litigation renaissance in the late 1980s were eventually joined by state attorneys general, who in the mid-1990s themselves mounted a coordinated nationwide legal offensive (under the banner of the activist National Association of Attorneys General or NAAG). These suits 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 recoupment cases at a cost of some \$280 billion, spread over decades, and severe restrictions on their business practices going forward -- making state AGs a veritable profit center for state government. With this template in place, NAAG has used it more recently to target acts by other deep-pocketed lawful enterprises, such as drug pricing by pharmaceuticals -- and it's not likely to stop there.

II. Plaintiffs' Misuse of Comparative Fault Law in the Guise of Personal 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, punitive damages and the unpredictability of the jury system itself

are part of why the litigation persists, 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 are varied, but chief among them has been the innovation of the plaintiff's bar in surmounting obstacles to convert responsibility for undeniably informed choices (if common sense still matters) into the currency of torts -- negligence, strict liability, fraud and the like, and ultimately Monopoly-money verdicts. Lurking behind it all is the continuing erosion of personal responsibility, in favor of a culture of victimization and blame -- even when plaintiffs say otherwise.

In this regard, a more recent innovation taking root in tobacco litigation, worth noting for both its novelty as well as the possibility of replication in other areas of products liability litigation, involves plaintiff's affirmative advocacy of the comparative fault defense (in jurisdictions that allow a plaintiff to recover no matter the degree of her "fault") -- under the pretext of accepting partial responsibility for smoking cigarettes. In reality, it is a legally flawed ploy intended to bar defendants from using (or to immunize plaintiff from the effects of) any evidence that might be characterized as going to plaintiff's culpability, no matter its actual purpose. In short, plaintiffs are ignoring or blurring the critical distinction between primary or express assumption of risk (as a measure of the nature and scope of defendant's duty of care, which is an essential part of plaintiff's *prima facie* case) and comparative fault (as a mitigating measure of defendant's liability and damages, once a breach of the duty of care has been established), fundamentally altering the structure and outcome of trial.

It began with the trial of *Eastman v. Brown & Williamson Tobacco Corp.*, No. 97-5968-CI-11 (6th Jud. Cir. Ct., Pinellas Co.), in a Florida state court in early 2003. After weeks of argument in the midst of trial, plaintiff persuaded the court at the charge conference that defendants' use of evidence and argument regarding plaintiff's long-standing knowledge of the health risks of smoking, among other things, entitled him to a comparative fault charge, notwithstanding that defendants had waived that defense and explained that they were using the evidence in refutation of a *prima facie* case by plaintiff. The court essentially reasoned that because the evidence of plaintiff's knowledge and conduct could also have been admissible to prove his culpability (even though that was not its purpose), a comparative fault charge was warranted.

Since then, many plaintiffs have adopted a similar strategy of themselves pleading and injecting the comparative fault defense into tobacco cases, with some success. They typically raise the argument either preemptively, by incorporating it into the complaint, or in response to any use by defendants of evidence going to plaintiff's knowledge, choices and actions in relation to cigarette smoking. A related strategy is to attempt to use the defendant's refusal to assert the affirmative defense of comparative fault (or its waiver) to keep evidence of plaintiff's own conduct from the jury -- as irrelevant and inadmissible absent a formally pled comparative fault defense, on the blinkered view that the evidence can serve no other purpose. While defendants argue that evidence of this sort is being used to refute the essential elements of plaintiff's *prima facie* case (*i.e.*, duty, reliance, or proximate cause) and the existence of a viable cause of action -- that is, to show a voluntary and reasonable assumption of risk, plaintiffs alchemically contend that such evidence is little more than "fault" or "negligence" by another name, and is therefore cause for either excluding the evidence altogether or 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. Indeed, its proponents concede as much. See Acosta, Denson & Newsome, *Confessing Fault*, Acad. Fla. Tr. Law. J., at 28 (May 2003) ("Without an opportunity to compare and apportion plaintiff's fault, the jury may decide the case against [the plaintiff]").

Plaintiffs' strategy seems to be driven by the admittedly economically sound view that, say, 50 or some other percentage of something (in today's American jury dollars, usually a large number followed by a lot of zeros) is better than 100 percent of nothing. There is clearly empirical support for the view, given that juries charged on comparative negligence in tobacco cases tend to split liability fairly evenly between plaintiffs and defendants. See, *e.g.*, *Arnitz v. Philip Morris USA Inc.*, No. 00-4208-Div. D (Fla. 13th Jud. Cir. Ct., Hillsborough Co. Oct. 21, 2004) (plaintiff's jury verdict splitting liability on a 60/40 basis), *aff'd*, No. 2D05-826 (Fla. 2d DCA July 21, 2006); *Frankson v. Brown & Williamson Tobacco*

Corp., No. 24915/00 (N.Y. Sup. Ct., Kings Co. Dec. 18, 2003) (plaintiff's verdict splitting liability on a 50/50 basis), *aff'd*, No. 2005-01059 to 01062 (N.Y. App. Div. 2d Dep't July 5, 2006); *Eastman v. Brown & Williamson Tobacco Corp.*, No. 97-5968-CI-11 (Fla. 6th Jud. Cir. Ct., Pinellas Co. April 3, 2003) (plaintiff's verdict splitting liability on a 50/50 basis), *aff'd per curiam*, 888 So. 2d 34 (Fla. 2d DCA 2004); *Thompson v. Brown & Williamson Tobacco Corp.*, No. 00CV220555 (Mo. Cir. Ct., Jackson Co. Nov. 4, 2003) (plaintiff's verdict splitting liability on a 50/50 basis), *aff'd*, No. WD63987 (Mo. Ct. App. W.D. Aug. 22, 2006), *app. for transfer denied*, No. SC88067 (Mo. Dec. 19, 2006). *But see Beckum v. Philip Morris Inc.*, No. 02-01836-Div. D (Fla. 13th Jud. Cir. Ct., Hillsborough Co. April 29, 2005) (defendant's verdict); and *Vandenburg v. Brown & Williamson Tobacco Corp.*, No. 03-CV-237238 (Mo. Cir. Ct., Jackson Co. Feb. 22, 2006) (defendants' verdict). Then, again, economic and legal soundness are not always necessarily equivalents.

Wholly absent from this strategy is recognition that before there can be any liability or "fault" for comparison and apportionment purposes under principles of comparative fault, there must be a finding that plaintiff has carried the burden of making a *prima facie* case as an initial matter, proving for instance the existence of a duty of care. *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."). Basically skipping past "go" to give themselves a head start, plaintiffs' comparative-fault strategy in effect presumes the existence of a duty of care. This strategy further erroneously assumes that any evidence capable of touching upon two issues, one of which is not in the case (say, the comparative fault defense), requires either the exclusion of that evidence altogether or the injection of the absent issue into the case. At multiple levels, plaintiffs' position is flawed.

III. Primary or Express Assumption of Risk in a Nutshell

In practice, plaintiffs are "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." *Kwiatkowski v. Bear, Stearns & Co.*, 2000 WL 640625, at *4 (S.D.N.Y. May 18, 2000) (applying New York law in a breach of fiduciary duty case). Unfortunately, to this point the irregularity and consequences of plaintiff's manipulation of the comparative-fault defense in tobacco litigation has not been subjected to much probing or critical analysis by those courts that have allowed it.

For example, the intermediate appellate court in Florida that affirmed the *Eastman* verdict did so by a *per curiam* affirmance (on a raft of issues) without opinion, which prevented further appeal by defendants. Two years later, in *Arnitz*, the same court again affirmed, this time simplistically reasoning that "if a plaintiff chooses to plead his own comparative fault, a defendant should not be able to control the plaintiff's theory of his case and preclude the plaintiff from accepting some responsibility for his injuries." *Philip Morris USA, Inc. v. Arnitz*, No. 2005-826, slip op. at 8 (Fla. 2d DCA July 21, 2006), *appeal denied*, No. SC06-2085 (Fla. Dec. 20, 2006). In *Thompson*, meanwhile, the Missouri courts held that the determinative factor in deciding the appropriateness of a comparative fault charge, against defendants' withdrawal of that defense, was merely the sufficiency of the evidence. More to the point, the Missouri Court of Appeals concluded that defendants' emphasis throughout trial on plaintiff's "choice" to smoke cigarettes with knowledge of the health risks involved was "in reality . . . an attempt to assign fault" to plaintiff, justifying plaintiff's request for a comparative fault charge. *See*

Thompson, No. WD63987, *supra*, slip op. at 25 (available at www.courts.mo.gov, Western District Opinions). By contrast, a California trial court rejected plaintiff's attempt to inject the comparative fault defense into a tobacco case, granting defendants' motion to strike it from the complaint (as a "defense" to be pleaded and proved by defendants). See *Nichols v. R.J. Reynolds Tobacco Co.*, No. GIC858954 (Cal. Super. Ct., San Diego Co. 2005), *petition for writ of mandate denied*, No. D047854 (Cal. Ct. App., 4th App. Dist., Div. 1 April 25, 2006).

Remarkably, none of these decisions contains any acknowledgement or discussion of the critical distinction between comparative fault and primary or express assumption of risk, or that the same evidence can serve multiple purposes. Ultimately generating more heat than light, each turns instead solely on consideration of whether plaintiffs can plead a "defense," which actually avoids and obscures the root of the issue.

Some part of the resulting decisional confusion and inconsistency is attributable to reliance on a body of pre-comparative-fault age decisions that largely failed to distinguish between the type of assumption of risk at issue -- that is, primary or secondary. Both once being complete defenses at law, careful discrimination between the two did not matter so much in the past as it does in today's comparative-fault age. The eventual amendment of product liability laws to abolish assumption of risk (otherwise undefined) and contributory negligence in favor of comparative fault only exacerbated the problem. New York is an example, which introduced comparative fault by providing simply that: "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." See N.Y. C.P.L.R. § 1411 (emphasis added). The resulting confusion is regrettable. See, e.g., *McGrath v. American Cyanamid Co.*, 41 N.J. 272, 276 (1963) ("Experience . . . indicates the term 'assumption of risk' is so apt to create mist that it is better banished from the scene").

As a practical matter, through plaintiff's comparative-fault strategy, the doctrine of primary or express assumption of risk -- basically the exercise of free will in encountering a known or inherent risk -- is being read into extinction in the name of so-called "fairness." See *Thompson*, No. WD63987, slip op. at 26. Lost in translation is the fact that the assumption of risk doctrine can serve two distinct purposes, only one of which is subsumed by comparative fault principles. While the diverse nature of assumption of risk law is a subject beyond the scope of this article, in most jurisdictions one will find authority for the continued viability of primary or express assumption of risk -- that is, argument encompassing the notion that the plaintiff knowingly and voluntarily committed himself to a course of action (behavior) that he knew or should have known (by common sense or otherwise) involved serious risks of injury, thereby negating any duty of care; in a word, consent. This form of assumption of risk is not about "fault," and it is not a mere variant of comparative fault (or contributory negligence). It is "merely another way of expressing the thought that a defendant is not liable in the absence of negligence." *McGrath*, 41 N.J. at 276. As a result, it should not trigger application of comparative fault principles. See, e.g., Unif. Comp. Fault Act § 1 (Comm'r's Comments). It is only implied or secondary assumption of risk that was merged into and abolished by comparative fault laws. Otherwise, assumption of risk survives.

IV. 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 or express assumption of risk serves at the outset as a measure of defendant's duty of care (and determinant of whether plaintiff has a viable underlying cause of action), and as such survives enactment of comparative fault laws -- notwithstanding a plaintiff's wish to pursue a comparative-fault theory of the case, or that the evidence used to support an assumption of risk defense may also constitute "culpable conduct" within the meaning of comparative fault law.

As in modern tobacco litigation, plaintiff in *Arbegast 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, which was denied. 65 N.Y.2d 161, 163-64 (1985). 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.*" *Id.* at 165 (emphasis added). The Court of Appeals -- New York's highest court -- affirmed, even though it agreed, significantly, that the evidence of "plaintiff's acts may constitute 'culpable conduct' within the meaning of the [comparative negligence] statute." *Id.* at 168 & 171. 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" when explicit warnings have been given, despite New York's comparative fault statute. *Id.* at 170. 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 the implied assumption of risk by a person injured . . . 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.'

Id. at 164 (emphasis added). Put differently, since the defendant had marshaled the evidence of plaintiff's conduct as a measure of defendant's duty of care under the principle of express assumption of risk -- not as evidence of plaintiff's culpability or fault, defendant was not "foreclose[d]" from doing so by the comparative fault statute, which only "requires diminishment of damages in the case of an implied assumption of risk." *Id.* at 170.

In *Turcotte v. Fell*, 68 N.Y.2d 432 (1986), the Court of Appeals addressed the applicability of primary assumption of risk in the face of obvious risks (absent a warning) in a case involving a professional jockey. Again emphasizing the concept of "consent" in the threshold duty-of-care analysis, it held 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." *Id.* at 437 (emphasis added). More specifically, the *Turcotte* court helpfully 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 as an initial matter "whether the plaintiff's interests are entitled to legal protection against the defendant's conduct." *Id.* (emphasis added). 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.*

Turcotte, 68 N.Y.2d at 439 (emphasis added).

One of the few mentions of "personal responsibility" in the context of assumption of risk law in New York comes out of *Morgan v. State of New York*, 90 N.Y.2d 471 (1997), 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." *Id.* at 484. As such, plaintiffs were "legally deemed to have accepted *personal responsibility*" for the risks that "commonly inhere in the nature of those activities." *Id.* (emphasis added). 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.'" *Id.* at 485 (emphasis in original). In other words, the court made clear that assumption of risk as "a measure of the defendant's duty of care . . . survives enactment of the comparative fault statute." *Id.* at 483-84.

By no means is New York unique in this regard. Neither is there any principled legal basis for limiting primary or express assumption of risk to sports-related activities. Still, as clear as this precedent seems, it has not prevented trial courts there from allowing plaintiffs to argue comparative fault to juries in tobacco cases over defendants' objections, as in *Frankson, supra*. And the risk of the spread of this strategy to litigation involving other industries cannot be ignored.

V. Conclusion

A lesson for tort defendants from recent tobacco litigation experience is to beware the cry of a claimed comparative-fault foul. 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 the elements of liability. The fact-finder 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 or express assumption of risk (or the "no-duty" rule), comparative fault principles should not foreclose product liability defendants from employing evidence and arguments going to plaintiff's knowledge, choices and actions in respect of smoking (or any other notoriously risky behavior) to negate the essential elements of an underlying cause of action. Nor should it matter whether defendant has pled comparative fault, or that the same evidence could be used to establish plaintiff's "culpability" under different circumstances. What matters instead is the direction in which that evidence is aimed -- its purpose. 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*.

2000 WL 640625 at *2 (emphasis added).

In time, the issue will mature and percolate through higher courts for greater clarification and direction. Until that day, with the past as prologue, it is not unreasonable to expect the plaintiff's bar generally to take notice of this development in American tobacco litigation for replication in other types of products liability litigation. Time will tell.

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