

# The Philosophical Basis for the Evolution of the Doctrine of Assumption of Risk in Anglo-American Law: A Liberal Perspective

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## Abstract

The doctrine of assumption of risk—the notion that one cannot blame others for damage, that is, the realization of risk to which one has willingly exposed oneself—was first codified in the Civil Code of the PRC in 2021. Judicial practice has interpreted and applied this in a variety of ways. The maxim “volenti non fit injuri” finds deep roots in our extralegal life and in Roman law. After its first application in the case of *Cruden v. Fentham* more than 200 years ago, this doctrine has experienced a dramatic and controversial evolution due to its straightforward literal meaning and revolutionary effect on society. I review the evolution of liberalism, one of the most important philosophical foundations of the doctrine of assumption of risk, and provide an in-depth analysis of the social and historical conditions, content, and impact on the assumption of risk of the three phases of liberalism, from laissez-faire liberalism to paternalistic liberalism to liberal egalitarianism. I conclude that in a risk society, the doctrine of assumption of risk is not only necessary but also provides an illuminating framework for the apportionment of liability in more areas of torts.

## Keywords

Assumption of Risk, Anglo-American Law, Liberalism

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## 1. Introduction

Article 1176 of the Civil Code of the People’s Republic of China (hereinafter, “Civil Code”) clearly stipulates the doctrine of assumption of risk for the first time in the PRC’s legal history.

Although this doctrine has a relatively short history in modern China, it has extensive application in civil law and common law systems and has been the sub-

ject of unceasing debates and transformation. Currently, it remains highly controversial. Although almost all civil law scholars from China's mainland and Taiwan region mention it in relation to tort law, different scholars have different views on its connotations. These views are often based on a simple comparison of similar doctrines and lack a comprehensive and in-depth analysis of the legal nature of the doctrine of assumption of risk, the scope of its application, and its constituent elements and legal effects.

In contrast to the lukewarm state of theoretical research, judges in the mainland of China have recently referred to this doctrine in combination with other basic legal principles, such as the principle of fairness in the reasoning of judgments, as an important basis for adjudication. However, the understanding of the assumption of risk (or similar terms such as “self-inflicted adventure” and “self-inflicted risk”) varies from one judgment to another.<sup>1</sup>

Literally, the key to the assumption of risk is the victim's subjective nonresistance to the realization of the risk. However, is this nonresistance an active pursuit or a passive indulgence? Must the victim's perception reach foresight of the harmful consequences of the risk, or is it sufficient to foresee the possibility of the risk occurring? Does “assumed” risk include man-made risks in addition to natural risks? If man-made risks are included, which parties can cause risks? What correlation is required between risk and damage? Does the doctrine of assumption of risk apply in the context of intentional torts and in the field of strict liability? Should the consequence of its application be a complete defense, or should the principle of proportionality be applied to further divide the liability among relevant parties?

The Civil Code and related judicial interpretations do not provide specific provisions on these issues. Some provisions that are often interpreted as assumptions of risk in judicial practice are not reasonable, some are not sufficiently rigorous, some are incomplete, and some run counter to the legislative trend of liability apportionment in a risk society. These imperfect provisions have created unreasonable behavioral guidance for personal interactions and have led to negative social impacts in judicial practice. These issues must be studied in depth so that recommendations can be made to improve legislation and judicial practice. This analysis is conducive not only to the development of tort law theory but also to the cultivation of a harmonious and friendly society.

The abuse of the term assumption of risk and similar terms in daily life and judicial practice has led to confusion in the construction, interpretation, and judicial application of this rule. Therefore, tracing the origin of the term assumption of risk, clarifying the evolution of its philosophical foundations, and implementing it in practice to achieve standardization and relatively consistent understanding and application are issues of great theoretical and practical value.

<sup>1</sup>According to Fayi Big Data Legal Empirical Research Platform, from 2000 to 2024, there are 4980 cases cited “assumption of risk” or similar terminologies in the reasoning section of the judgments. The cases are distributed among tort law, contract law, criminal cases and administrative disputes, but only 35% of these cases are tort. Among these tort cases, traffic accidents contribute 31%, sports and recreation activities contribute 41% and 11% are construction tort; less than 50% are absolute defense.

The apportionment of liability has consistently been a cornerstone of tort law. As society develops and technology advances, the objective environment in which the law operates changes. In the pursuit of fairness, the system and even the principles of tort law have undergone substantial changes. These are reflected in the principle of liability allocation, which has seen a shift from “eye for an eye” retribution to fault-based liability, the gradual refinement of fault-based liability, the expansion of strict liability, and the introduction of liabilities for ultrahazardous or abnormally dangerous activities. Furthermore, there are specific institutional rules for applying these understandings of liability to special scenarios or for use as defenses, such as consent, contributory negligence (which has mostly been replaced by comparative negligence), and the assumption of risk.

Liberalism is one of the most influential schools of Western political and economic thought and has profoundly influenced the formation and development of the doctrine of assumption of risk.

I take the impact of the evolution of liberalism on the doctrine of assumption of risk in Anglo-American tort law as an example to explore the philosophical foundation of the doctrine, its developing forces, and the implications for its improvement in China.

## 2. 200 Years of the Doctrine of Assumption of Risk in Anglo-American Law

The common law doctrine of assumption of risk originated in Roman law as “*volenti non fit injuria*” and became part of English tort law in the 19<sup>th</sup> century (Heuston, 1977). According to the observations of Prof. Prosser (1971), the case of *Cruden v. Fentham*, which was heard in the English Court of King’s Bench in 1798, may have been the first case to determine the application of the doctrine of assumption of risk.<sup>2</sup> However, because it was rarely cited in subsequent cases, it was of little importance in the history of the common law assumption of risk doctrine. Although the legal maxim “*volenti non fit injuria*” was subsequently invoked by the courts in various cases, it was often used as a principle to limit the obligations of the defendant rather than as a rule of civil law in the modern sense. It was not until 40 years later, in 1838, in the English Court of Appeal case of *Priestley v. Fowler*, that the development and establishment of the rule of “*volenti non fit injuria*” gained ground.<sup>3</sup>

In the 1850s, the assumption of risk existed only in the status between master and servant. It was based on and limited to the contractual relationship and was interpreted by Thomas Shearman and Amasa Redfield, among others, as a waiver in the context of a contract, even an implied contractual relationship (Shearman & Redfield, 1870; Thompson, 1880). Later, its scope of application was gradually extended to carrier-passenger and employment relationships. After the 1880s, a growing number of scholars recognized that it was not limited to the master-serv-

<sup>2</sup>This observation was obtained by Bohlen (1906) and recognized by case law, like *Thomas v. Holliday By and Through Holliday* (1988 OK 116, 764 P.2d 165).

<sup>3</sup>See more from the reasonings of *Felgner v. Anderson* and *Priestley v. Fowler*.

ant relationship but could be extended to other legal relationships.

In the 1870s, theorists began to deny the necessary connection between the contractual rationale and the doctrine of assumption of risk and argued that the assumption of risk rested “on the general principle that a party cannot recover for the injury he incurs in risks, themselves legitimate, to which he intelligently submits himself” (Wharton, 1874). Accordingly, the scope of the application of the assumption of risk is no longer limited.

By 1895, Charles Warren had incorporated the doctrine of assumption of risk into the general theory of the law of negligence and eliminated its independent identity (White, 1985), listing it as a defense alongside a lack of proximate cause and contributory negligence.<sup>4</sup> Warren argued that “assumption of risk” was derived from the old Latin maxim “volenti non fit injuria” and was not a defense in the strictest sense. Bohlen (1906) argued that “volenti non fit injuria” applies equally to any relation that is voluntarily assumed, whether contractual or not, and that it is an important limitation on legal liability. Its philosophical foundations lie in a) economic conditions (capable workers have sufficient choice) and b) the sociological context (workers are subjectively motivated to take advantage of opportunities to maintain personal safety, and risks often arise from recklessness or active trade-offs). The individualistic tendency of common law makes it natural to regard the freedom of individual action as the cornerstone of the entire system, and the doctrine of assumption of risk, which shields risks that arise from one’s own personality or voluntary actions, rests upon this cornerstone.<sup>5</sup>

The famous jurist Pound (1921: pp. 47-48) introduced the legal thought of this period in a blunter way in *The Spirit of the Common Law*:

The employee is a free man, guided by his own conscience and his own interpretation of Scripture. He chooses for himself. So choosing, he elects to work in a dangerous employment in which he runs a risk of being injured...he is a free man, let him bear the loss. The master has done no wrong...The common law says to him, ‘You are a free man, you have a mind and are capable of using it; you chose freely to do a dangerous thing and were injured; you must abide by the consequences.

Legal scientists<sup>6</sup> subsequently transformed the assumption of risk from a common law principle to a philosophical principle. Bohlen (1906) claimed that the idea of a “duty to protect others” was anomalous in the tort law. In 1906, federal legislation<sup>7</sup> limited jury awards in workplace injury cases involving railroads en-

<sup>4</sup>See Warren (1895). Although Warren claimed that “volenti non fit injuria” is not strictly a defense but a rule of law regarding a plaintiff’s conduct that forms a bar to a suit brought by him based on another’s alleged negligence, he admitted that “volenti non fit injuria” led to the same result as the other defense, contributory negligence.

<sup>5</sup>See: Bohlen (1906) and White (1985). For more detailed introduction of the evolution of assumption of risk in the US.

<sup>6</sup>The title derives from what White (1985) considered the emergence of legal scientism in American legal theory during the period of 1880-1910 and the trend toward systematization that manifested in the field of tort law.

<sup>7</sup>Act of June 11, 1906.

gaged in interstate commerce and effectively exempted railroads from paying “mandatory pensions” to injured employees in general. The assumption of risk as a principle of liability gradually permeated all aspects of legislation and judicial practice.

In subsequent legal research and judicial practice, to overcome the impact of the application of the rule of assumption risk on the gradually changing concept of fairness in the context of “laissez-faire liberalism”, the legal profession has conducted a series of subdivisions and reforms of the rule that have gradually been systematized as important defenses. The assumption of risk has been divided into the assumption of risk vs. the implied assumption of risk. The implied assumption of risk has been further divided into a primary and secondary assumption of risk according to whether the tort-feasor has a duty of care<sup>8</sup> and according to whether the victim’s “voluntariness” is in line with the judgment of a reasonable person, it is divided into reasonable and unreasonable assumption of risk. Although different types of assumptions of risk are used as a complete bar to plaintiffs’ claims, they are subject to different elemental standards and analytical processes (Restatement (2nd) of tort, 1965; Keeton & Prosser, 1984; James, 1952; Giesler, 1995). The assumption of risk is addressed in § 893 of the First Restatement of Torts and Chapter 17A of the Second Restatement of Torts of the United States.

Dramatically, in 1968, after more than a century of development and just five years after it was explicitly systematized in the influential *Restatement (Second) of Torts*, opposing voices appeared (James, 1968). These voices gradually increased in the 1980s and finally developed into a thorough rejection of the independence of the doctrine of assumption of risk. These objections stemmed from the impact of industrialization on the social concept of justice, which in turn inspired the libertarian paternalist apportionment of liability that shared a general sympathy for the cognitive deficiencies of the victim. They also stemmed from the expansion of the defense of comparative negligence, whose proportional division of responsibility between the tortfeasor and the victim, according to the degree of fault, was more in line with society’s expectations of fairness.

Although the doctrine of assumption of risk has been discredited by many leading tort scholars, constantly attacked by comparative negligence, and criticized and challenged in specific areas such as junk food consumption, industrial injuries, and strict liability for products, it retains a place in common-law jurisdictions. For example, Part 1A, Division 4, “Assumption of risk,” and Division 5, “Recreational activities”, of the Civil Liability Act of South Wales (2002), Australia, provide that there is no tortious liability for damage caused by an obvious risk in dangerous recreational activities. Similar provisions are found in the Queensland

<sup>8</sup>Some states in the United States still use the primary assumption of risk formulation, such as California, Minnesota, New York, Ohio, Oklahoma, Hawaii, and New Hampshire. See *Knight v. Jewett* (1992), 3 Cal. 4<sup>th</sup> 296, 834 P. 2d 696, 11 Cal. Rptr. 2d 2; *Soderberg v. Anderson* (2019), 922 N.W. 2d 200; *Custodi v. Town of Amherst* (2012), 20 N.Y. 3d 83, 980 N.E. 2d 933, 957 N.Y.S. 2d 268; *Horvath v. Ish* (2012), 134 Ohio St.3d 48, 979 N.E. 2d 1246; *Thomas v. Holliday By and Through Holliday* (1988), 764 P. 2d 165; *Yoneda v. Tom* (2006), 110 Hawaii 367, 133 P. 3d 796; *Sanchez v. Candia Woods Golf Links* (2010), 161 N.H. 201, 13A. 3d 268.

Civil Liability Act of 2003. Section 5 of the UK Animals Act 1971 (as amended in 2015) also states that the owner of an animal is not liable for injuries suffered as a result of the animal to a person who has voluntarily accepted the risk. The defense of assumption of risk has a statutory effect on the liability of occupiers to a visitor under Section 2 (5) of the Occupiers' Liability Act 1957 (as amended in 1991) and on the liability of occupiers to trespassers under Section 1 (6) of the Occupiers Liability Act 1984 (as amended in 2010) (Bahr, Clive, Nölke, et al., 2008).

Even in the US, where implied assumption of risk is most fiercely criticized, the *Restatement (Third) of Torts: Apportionment of Liability*, which has been described by many scholars as having abandoned the traditional doctrine of assumption of risk, declines to adopt Professor Simon's suggestion of a narrow rule of implied assumption of risk on a very practical basis: it would be difficult for courts to implement the rule in a narrow fashion and keep it from expanding into the old, overly broad version of implied assumption of risk instead of rejecting it theoretically. Furthermore, the explicit assumption of risk stipulated in the *Restatement (Second) of Torts* has not been abandoned but has been replaced by "contractual limitations on liability" to refer more directly to contract law on issues of validity and construction. Kenneth W. Simons, a law professor at the University of California, Irvine, pursued research on this topic and its relationship with relevant doctrines from the 1980s to the 2020s. Together with David Horton, a law professor at the University of California, Davis, Professor Simons, and others have elucidated the institutional value of "assumption of risk", its necessity in the fields of sports and recreational activities, and its independence from victims' consent and victims' negligence (as correlated with comparative negligence). Around 2010, more scholars joined and used a liberal-egalitarian account to revamp the traditional doctrine of assumption of risk, giving it vague signs of revival. Despite academic controversies, in practice, the doctrine maintains a solid position in specific areas such as sports, and the spirit of the rule is affirmed or absorbed in the statutory laws of special areas. For example, California, Nevada, and other states have exempted the owner of real property by statutes from the duty to ensure the safety of others entering or using the property for recreational purposes. Some US federal statutes have also adopted the philosophy underlying this doctrine, such as the Volunteer Protection Act of 1997, which exempted volunteers of nonprofit or governmental organizations from some liabilities for damages caused by their volunteer activities.

### 3. The Development of Liberalism and Its Influences on Assumption of Risk

In *The Idea of Complementarity as a Philosophical Basis for Pluralism in Tort Law*, Izhak Englard argues that empirical tort law is based on polyvalent grounds that the various aims and functions of the law of torts are inherently contradictory (Owen, 1997).

The doctrine of assumption of risk also has different jurisprudential founda-

tions and value bases in the eyes of different scholars and judges in different jurisdictions and at different times. Among the most influential are the liberal tradition that has accompanied the development of private law, the principle of estoppel, theories of the risk society, legal-economic analysis methods, and social policy theories derived from sociology and economics.

Liberalism, as an important theoretical school of Western political and moral philosophy, has profoundly influenced not only the formation and development of the modern political system but also the evolution of law, especially private law, by emphasizing the concepts of individual liberty, individual rights, the equality of all people, the right of private property and market economies. The dramatic evolution of the doctrine of assumption of risk is the product of the development of liberalism and a vivid reflection of its enrichment, systematization, and complexity in relation to social changes.

### **3.1. Laissez-Faire Liberalism**

Early liberalism can be traced to the Enlightenment, which was the realization of the philosophical idea of individualism in the field of politics and economy. Central to Enlightenment thought were the use and celebration of reason and a new concern for personal salvation, representative government, the rule of law, and religious freedom. Enlightenment justifies the legitimacy of the pursuit of material self-interest, emphasizes the naturalness and profitability of economic rivalry and competition, and suggests that society's wealth can be maximized through the profit-driven production of goods and services with the guidance of the "invisible hand". Early liberalism, therefore, advocated self-reliance, autonomy, and self-determination. The main function of the government was to protect civil liberties and private property and to promote the realization of social commonwealth and the growth of social wealth through the protection of individual interests.

Classical liberalism, which was popular in Europe and North America in the eighteenth and nineteenth centuries, emphasized that all human beings are born equal and have inalienable rights. It provided the framework for private law and emphasized individual initiative and self-determination in legal relations, such as the principle of autonomy in contract law and the principles of fault and self-responsibility in tort law. Adam Smith declared in his famous *The Wealth of Nations*, published in 1776 that the law should trust in the people's ability to look after their own interests. The people know perfectly how it enriched them, and they generally know better than the legislator where their interests lie (Smith, 2007). It encourages people to pursue their personal goals, emphasizes personal independence and autonomous choice, promotes the dominance of individuals in private relationships, and prescribes a wait-and-see attitude for the law in private disputes. It is, therefore, also known as laissez-faire liberalism. This laissez-faire liberalism was both an ideological and a cultural product of the early stages of industrialization at the time and, in fact, contributed to the prosperity of capitalism.

In the laissez-faire period, the law community emphasized individual rights and personal initiative in defending people's own interests and developed the doctrine of self-determination and self-responsibility accordingly. This theory highlights every person's entitlement to absolute independence within the scope of his or her own rights. People should therefore look after their own interests and should not expect parental protection from the law, and others should simply refrain from interfering in their affairs. If a person does what he or she wants, he or she must live with the possible consequences. He should be honorable enough to take the loss with a smile.<sup>9</sup> This philosophy has given rise to the principle of *caveat emptor* (buyer beware) in contract law and the defense of contributory negligence and assumption of risk in tort law (Dewsnup, 1991).

It is obvious that laissez-faire liberalism was the initial philosophical cornerstone of the rule of assumption of risk and that one must swallow the bitterness of his or her own choice. In the 19<sup>th</sup> century, when judges were influenced by the dominant doctrine of noninterventionism and combined liberalism with the concepts of free movement of labor, freedom of contract, and the promotion of industrial development, the value of assumption of risk came to the fore (North, 1984). Since taking care of one's own life is an inescapable responsibility of each individual, people should be prudent in their decisions and ready to take responsibility for their own actions, which are a natural extension of their own choices and an inevitable result of liberalism. "Responsibility" refers not only to the tortfeasor accounting for the infringement of rights but also to the victim, who willingly exposed himself or herself to risk and suffered when the risk materialized, bearing the loss. When the victim implies his or her willingness to bear possible losses by choosing certain work and signing a labor contract that might contain exemption clauses, there is no reason for the law to impose legal liability on the tort-feasor (Robertson, 1959). Professor Bohlen (1906), one of the leading American jurists of tort law, wrote in his seminal treatise:

The maxim "volenti non fit injuria" is a terse expression of the individualistic tendency of the common law, which, proceeding from the people and asserting their liberties, naturally regards the freedom of individual action as the keystone of the whole structure. Each individual is left free to work out his own destinies; he must not be interfered with from without, but in the absence of such interference, he is held competent to protect him from the effects of his own personality and from the consequences of his voluntary actions or of his careless misconduct.

It now appears that laissez-faire liberalism, with its emphasis on freedom of conduct and its guarantee of economic development, has led the law to minimize the liabilities of people to ensure space for freedom of conduct and to provide the impetus for economic development while ignoring the security and interests of victims. From the perspective of the balance of interests between the parties, the

<sup>9</sup>On the theories of laissez-faire liberalism, individualism, and self-responsibility. See: Stein & Shand (2004); Pound (1921); Mill (1996) and other works.

doctrine of assumption of risk, which is based on laissez-faire liberalism, is too harsh for victims. As industrialization grew rapidly and product safety accidents proliferated, the promotion of industry “in its infancy” came at great social costs. However, it was adapted to the needs of the infant industry because it eased the burden of economic development (Schwartz, 1990). It reflected the vibrant entrepreneurial spirit in bourgeois endeavors during the ascendant period and the value of survival of the fittest (i.e., legitimate detriment to others) and echoed the expansionist policies of the Industrial Revolution. Furthermore, it contributed to economic development and the fulfillment of individual aspirations by minimizing tort liability for the primitive accumulation and expansion of capital (Wang, 2009).

### 3.2. Paternalistic Liberalism

In the 20<sup>th</sup> century, with the rapid development of industrialization and urbanization, society was gradually divided. Especially when large enterprises developed during the Industrial Revolution wielded a substantial influence on the economy, the enormous growth of the economy gave rise to “robber barons”. The increasing complexity of society and the differentiation of individuals’ abilities, resources, ideals, and interests have made individual lives more conflicting and less autonomous than classical liberals imagined. In Germany, owing to pioneering industrialization, the judicial products of laissez-faire liberalism, such as “freedom of contract” and “liability based on fault”, essentially enabled different people to enjoy different degrees of freedom due to differences in their own abilities, social status, and family backgrounds and ultimately led to the generalized inequality of society. As social problems became increasingly serious and the contradiction between individual freedom and social justice became more prominent, laissez-faire liberalism became inalienable preemption, exploitation, and profligacy. The moral foundations of laissez-faire liberalism were shaken, and modern tort law was in crisis.

“Inequality of intelligence and economic resources, while noted, is irrelevant from a legal perspective” (Watson, 1981). The indifference to substantive inequality in the judicial arena produced great public disillusionment and a shock to the value of fairness. Famous cases such as *Yaconi v. Brady & Gioe*<sup>10</sup> and *Palsgraf v. Long Island Railroad Co.* show that the self-imposed equality guaranteed by laissez-faire liberalism ultimately leads to the legitimization of the domination of the strong group over the socially and economically weak group. In the face of an increasing number of industrial injuries and risks, self-responsibility and fault-based liability have resulted in a negative attitude toward legal remedies for victims. It has been recognized that it is unjust to treat those who are in fact unequal with a system of “equality”. As Blake (1906) said, “One law for the lion and the ox

<sup>10</sup>In the case of *Yaconi v. Brady & Gioe* (1927), the plaintiff, a longshoreman, was helping to load a ship when he noticed some oil stains on the passageway through which he had to pass. He notified the gangwayman, who said he would pass it on to his boss. Plaintiff continued to work and, an hour later, slipped and broke his leg. In the first trial, he obtained a judgment for damages. However, on appeal, the court ruled to vacate the judgment on the grounds that the plaintiff had assumed the risk and therefore could not recover under the Federal Employers’ Liability Act.

is oppression”.

Critics have viewed the doctrine of assumption of risk as an emotionless machine whose moral legitimacy is undermined by its indifference to changing circumstances, its indifference to the suffering of disadvantaged victims, and its lack of proper empathy and sense of responsibility. Courts have either denounced it as “cruel” and “anachronistic” or embraced it as a logical safeguard for individualism and a free economy. The Federal Employer’s Liability Act of 1908 was passed in response to public demand to amend common law provisions that were too harsh for employees. While the act was generally regarded as a liberal innovation because of the abolition of the fellow servant rule and the contributory negligence defense, it was often criticized for retaining the assumption of risk defense, albeit with limitations on its application.

Against this background, there has been a shift from laissez-faire liberalism to paternalistic liberalism. Paternalistic liberalism recognizes disparities in the resources, cognition, and status of individuals, emphasizes the trade-off between individual freedom and social responsibility, and acknowledges the importance of individual rights while recognizing that the government and the law can intervene in certain circumstances to protect the greater public good. In tort law, paternalistic liberalism is reflected mainly in a shift in the principle of fault-based liability and a focus on the public interest. As society has emphasized the protection of vulnerable and disadvantaged groups, the concept of tort law has gradually evolved from abstract concepts of freedom and equality to ensuring substantive freedom and equality, and the principle of liability apportionment in tort law has begun to evolve toward strict liability. In public safety and consumer protection cases, even if there is no provable fault, the offending behavior may lead to liability. In cases involving public interest and social responsibility, such as environmental pollution and public health, the law takes greater account of collective interests and intervenes in individual choices to some extent to safeguard the welfare of society as a whole.

As a result, the application of the assumption of risk rule has been scrutinized. It is generally recognized that individual choices are influenced by a variety of factors, including educational background, socioeconomic status, and information asymmetry. Therefore, simply excluding the liability of the perpetrator based on the defense of the assumption of risk may have unfair consequences for the disadvantaged. First, in the field of labor law in the United States, the application of the rule of assumption of risk was gradually limited until it was eventually abolished completely in state workers’ compensation laws. In some cases, a participant’s personal circumstances (e.g., age or psychological condition) may determine whether he or she is truly capable of understanding and accepting the risks involved. This change makes it increasingly difficult to define legal liability within the framework of the doctrine of assumption of risk. As factors such as an individual’s awareness and understanding prior to participation have become important for legal determination, they prompt lawmakers to emphasize the clarification of legal concepts

and provisions. In the past, individuals could place themselves on the brink of bearing consequences as long as they were aware of the risks. The law is now beginning to give more consideration to ensuring that participants are truly able to make informed choices. These considerations and changes are systematically reflected in the *Restatement (Second) of Torts*, published in 1965, which categorizes the rule of assumption of risk into different types, such as express/implied, primary/secondary, and reasonable/unreasonable, on the basis of a variety of specific circumstances. The different types result in different applicable rules and different legal effects.

### 3.3. Liberal Egalitarianism

Although there have been many calls for and even practices of private law publicization and law socialization since the nineteenth century, the value of individualism and liberalism as the spiritual foundation of civil law has remained unshaken (Yi, 2006). Therefore, we should avoid the notion of “excluding liberalism from private law” as if liberalism is a stigma that cannot be mentioned in private law. In fact, in political philosophy, there are signs of rapprochement between liberty and the state’s moral authority. William Galston and Joseph Raz, for example, openly defend liberalism as perfectionists and, to some extent, communitarians (Damico, 1997). Some libertarians have also argued for the rethinking of liberalism in an explicitly political sense rather than a mostly metaphysical or polemical way, as has been the case in the past.

As the 20<sup>th</sup> century progressed, especially after socioeconomic crises such as the Great Depression, which underscored systemic inequities and the need for collective welfare, the New Deal, and WWII, when welfare states institutionalized safety nets, liberal egalitarianism emerged and reconciled liberty with social justice. John Rawls, in his field-shaping 1971 book *A Theory of Justice*, provided a systematic account of a morally equal society. With the advances offered by Ronald Dworkin, liberal egalitarianism not only conceptualized freedom and equality as codependent values but also incorporated individual choice and responsibility within the legal frame. Liberal egalitarianism thus redefined freedom as requiring not only noninterference but also equitable access to opportunities to address structural barriers perpetuated by unfettered capitalism. Liberal egalitarianism emphasizes equal basic liberties, fair equality of opportunity, and the difference principle, which states that “social and economic inequalities are to the greatest benefit of the least advantaged members of society” (Rawls, 2001). It also emphasizes the equality of resources, which was another development by Dworkin. Dworkin (1981) makes a distinction between “brute luck” and “option luck”<sup>11</sup> and claims that inequalities arise if a disadvantage is caused by brute luck (i.e., uncontrollable factors such as congenital disabilities), whereas inequalities are not justified if risks are assumed due to personal choices. This theory both preserves liberalism’s respect for individual

<sup>11</sup>Option luck is a matter of how deliberate and calculated gambles turn out, such as whether someone gains or loses by accepting an isolated risk he or she could have anticipated and might have declined. Brute luck is a matter of how risks play out that are not, in that sense, deliberate gambles.

choice and introduces a mechanism to redress social inequalities.

Although the *Restatement (Second) of Tort* allotted a good number of pages to define different types of assumptions of risk, it also foreshadowed the significant contraction of the doctrine in the *Restatement (Third) of Tort*. The underlying logic and pursuit of justice in these two documents are identical; that is, the all-or-nothing consequence of the doctrine is overly harsh and should be restructured.

In *Restatement (Third) of Tort*, “express assumption of risk” is replaced by “contractual limitations on liability” to refer more directly to contract law on issues of validity and construction. The implied assumption of risk is treated as the duplication of other doctrines, such as plaintiffs’ negligence and the scope of a defendant’s duty. As a result, under comparative responsibility, a plaintiff’s negligence only reduces his or her recovery.

However, a plaintiff who is aware of a risk (either reasonable or unreasonable) and who voluntarily undertakes it is not always negligent. When engaging in a risky or challenging activity, the plaintiff’s autonomous choice should be honored instead of being blamed or penalized. The consequence of a plaintiff’s willing and knowing choice is not inequality as long as it is the result of real “option luck”. The realized damage is a natural result of the plaintiff’s choice rather than a penalty compelled by tort law because of his or her negligence.

Legal theorists provide insightful criteria for what real “option luck” is. “Full Preference” by Kenneth Simons and “Availability of Other Options” by Avihay Dorfman are the most convincing. When the plaintiff prefers to engage in an activity with tortiously created risk rather than not engaging in the activity or engaging in the activity without such risk or when there is no option of engaging in the activity without risk, and the absence of this option is not caused by the defendant, the plaintiff has a “full preference”, and the damage is the result of real option luck. Dorfman (2014) describes a continuum ranging from the utmost essentials to the most repugnant activities. All types of activities, including work, recreational activities, and consumption, lie somewhere between survival and criminal activity. Activities that are closer to meeting basic survival needs have fewer genuine alternatives; however, the closer an activity is to being repugnant, the more alternatives are available. Therefore, risks that emerge from activities further from essentials are more likely to be distributed to voluntary actors.

On the basis of the above theories, the assumption of risk doctrine can be reconstructed as a relative defense that applies the comparative responsibility doctrine. This means that in cases where the assumption of risk applies, the plaintiffs’ liability may range from no liability to full liability, depending on the degree of preference.

#### 4. Conclusion

The future of the doctrine of assumption of risk is likely to be shaped by ongoing debates over the state’s role in protecting individual rights and promoting social welfare. This doctrine exemplifies the interplay between legal principles and philosophical evolution. Initially rooted in laissez-faire liberalism, which emphasized

individual autonomy with minimal state intervention, the doctrine has evolved significantly over time to reflect broader shifts in liberal thought and social and economic conditions. Its erosion and current limitations underscore the enduring influence of liberal egalitarianism, which prioritizes not only freedom but also justice and equity. As societies continue to grapple with issues of inequality and individual autonomy, the doctrine may further evolve to reflect changing values and priorities. The application of the doctrine will continue to balance tensions between autonomy and equity and ensure that the law remains a dynamic instrument of social progress.

In contemporary China, the doctrine of assumption of risk that emphasizes autonomy and self-responsibility better aligns with the current stage of social development and legal-cultural reality. Specifically, nonresistance stresses a passive indulgence rather than an active pursuit. The victim needs only to foresee the possibility of risk materializing without the foresight of the harmful consequences of the risk. The “assumed” risks include man-made risks besides natural risks. All parties associated with the risky activity may invoke this doctrine for defense. For instance, provided other conditions are met, players, referees, spectators, and even journalists in a football match could be tortfeasors as well as risk bearers. However, the doctrine does not apply to intentional torts, where the victim’s consent applies, though it remains applicable to strict liability scenarios, primarily manifesting as no-fault liability under Chinese tort law. Meanwhile, the principle of proportionality should be applied to further divide the liability among relevant parties.

### Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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