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Torts - The Obvious Danger Rule - A Qualified Adoption of Secondary Assumption of Risk Analysis - O'Donnell v. City of Casper

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TORTS—The Obvious Danger Rule—A Qualified Adoption of Secondary Assumption of Risk Analysis. *O'Donnell v. City of Casper,* 696 P.2d 1278 (Wyo. 1985).

On July 8, 1977, Michael O'Donnell was driving a friend's motorcycle on Mariposa Boulevard in Casper, Wyoming. The City of Casper had resurfaced Mariposa Boulevard a month earlier. As a result of normal resurfacing procedures and vehicular traffic, ridges and piles of gravel had accumulated on the road.

As O'Donnell was proceeding down the boulevard, an automobile pulled into his path. To avoid hitting the vehicle, O'Donnell veered to the left. He then veered to the right in order to avoid hitting vehicles parked on the other side of the street. In making these maneuvers, O'Donnell rode into the loose gravel remaining from the resurfacing, causing him to "fishtail."[1] At that point O'Donnell felt that his two choices were "to lay the motorcyle down"[2] or to run into a parked car on the opposite side of the street. Estimating that his speed of travel was five to ten miles per hour, he chose the latter.[3] Upon impact with the parked vehicle, O'Donnell rolled across its hood and fell to the ground, engulfed in flames.[4]

O'Donnell brought suit against Suzuki Motor Company for breach of warranty, negligent design, and strict products liability[5] and against the City of Casper for negligent maintenance of its streets. The district court granted summary judgment on behalf of Suzuki Motor Company and the City of Casper. With respect to Suzuki, the district court based the summary judgment on O'Donnell's failure to prove Suzuki's negligence.[6] It did not specifically address the strict products liability claim.[7] Regarding the City of Casper, the district court applied the obvious danger rule and held that since the danger was obvious to O'Donnell, the City of Casper had no duty to remove the danger or warn of its existence.[8]

The Wyoming Supreme Court reversed and remanded the district court's findings with respect to the City of Casper.[9] The court held that

> the known and obvious danger rule does not negate the City's duty to keep its streets and sidewalks in a reasonably safe condition and in reasonably good repair, and . . . the obvious danger of the

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1. O'Donnell v. City of Casper, 696 P.2d 1278, 1280 (Wyo. 1985).
2. *Id.* at 1280.
3. Brief for Appellant at 5, O'Donnell v. City of Casper, 696 P.2d 1278 (Wyo. 1985) [hereinafter Brief for Appellant].
4. *O'Donnell,* 696 P.2d at 1280.
5. Brief for Appellant, *supra* note 3, at 1; *O'Donnell,* 696 P.2d at 1280.
6. Brief for Appellant, *supra* note 3, at 3.
7. *O'Donnell,* 696 P.2d at 1288.
8. Brief for Appellant, *supra* note 3, at 3.
9. Since the summary judgment regarding Suzuki in the district court was based upon the appellant's cause of action for negligent design, the Wyoming Supreme Court refused to address the issue of strict products liability set forth in RESTATEMENT (SECOND) OF TORTS § 402A (1965). *O'Donnell,* 696 P.2d at 1288.

> streets may be considered by the trier of fact to determine the plaintiff's percentage of negligence.[10]

Except in cases regarding landowner liability and natural accumulations of ice and snow, the Wyoming Supreme Court, with this holding, has overturned the no-duty obvious danger rule. The rule provided that "whenever the danger is obvious or at least as well known to the plaintiff as it is to the defendant . . . , there exists no duty to remove the danger or warn . . . of its existence."[11] In Wyoming a duty now exists to remove obvious dangers created by a defendant. At the same time the jury may consider the plaintiff's knowledge of the danger when apportioning fault between the plaintiff and the defendant.[12]

The *O'Donnell* decision establishes the Wyoming Supreme Court's adoption of the implied secondary assumption of risk[13] analysis.[14] It is now clear that Wyoming no longer views a known and obvious danger as an absolute bar to recovery. The Wyoming Supreme Court found such an interpretation of the rule incompatible with the doctrine of comparative negligence, which was adopted by Wyoming in 1973.[15] It is clear that known and obvious dangers may be considered by the trier of fact in apportioning negligence between the plaintiff and the defendant in situations involving man-made dangers. It is unclear, however, how the court will apply the known and obvious danger rule to situations involving natural dangers, such as accumulations of snow and ice. A review of the assumption of risk approach of other comparative negligence jurisdictions, as well as a review of prior Wyoming decisions, will provide some insight into how the *O'Donnell* decision has changed Wyoming law and how it will influence the law in the future.

BACKGROUND

The relationship between the known and obvious danger rule and the assumption of risk doctrine is a complicated one.[16] Before considering that relationship, an understanding of the assumption of risk doctrine is important. The requirements for the affirmative defense of assumption of risk are: 1) that plaintiff knows a risk is present, 2) that plaintiff understands the nature of the risk, and 3) that plaintiff voluntarily chooses to incur the risk.[17]

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10. *O'Donnell*, 696 P.2d at 1284.
11. Sherman v. Platte County, 642 P.2d 787, 789 (Wyo. 1982).
12. *O'Donnell*, 696 P.2d at 1284.
13. In implied assumption of risk, the plaintiff does not expressly agree to assume a risk of harm but fully understands the risk of harm and voluntarily chooses to subject himself to the area of risk. RESTATEMENT (SECOND) OF TORTS § 496C (1965).
14. *O'Donnell*, 696 P.2d at 1284.
15. *O'Donnell*, 696 P.2d at 1283; WYO. STAT. § 1-1-109 (1977) (originally enacted as WYO. STAT. § 1-7.2(a) (Supp. 1973)).
16. In fact, the known and obvious danger rule is part of the definition of the assumption of risk doctrine. BLACK'S LAW DICTIONARY 113 (5th ed. 1979). For example, under the assumption of risk doctrine, a person may not recover damages for an injury he suffers when he willingly exposes himself to a known and obvious danger.
17. W. PROSSER & W. KEETON, THE LAW OF TORTS § 68, at 486-487 (5th ed. 1984).

The assumption of risk doctrine can be divided into two major categories, express[18] and implied.[19] Express assumption of risk, which occurs when the plaintiff demonstrates, by contract or otherwise, acceptance of the risk,[20] is easily understood. For example, express assumption of risk occurs when a plaintiff stores his automobile in a defendant's garage, and it is specifically agreed that the defendant is under no duty to provide heat in the garage. Thus, the defendant will not be liable for damage to the car resulting from cold temperatures.[21]

Implied assumption of risk analysis, with which this casenote is concerned, is more complicated.[22] In their treatise on torts, Professors Harper and James explain that implied asssumption of risk can be analyzed in one of two ways, which they label as "primary" and "secondary" assumption of risk.[23] Under the primary assumption of risk analysis, the plaintiff's assumption of risk is only the counterpart of the defendant's lack of duty to protect the plaintiff. In other words, since the defendant has no duty to protect, the plaintiff has assumed the risk. Under the secondary assumption of risk analysis, the assumption of risk is only a form of contributory negligence. The key question is whether or not the plaintiff's conduct is reasonable.[24] In *Meistrich v. Casino Arena Attractions, Inc.*,[25] a New Jersey court recognized and adopted these same categories.

As noted above, implied assumption of risk in its secondary sense is similar to traditional contributory negligence. Comparative negligence was designed to alleviate the harshness of contributory negligence.[26] By allowing the trier of fact to weigh the plaintiff's negligence against that of the defendant's, the comparative negligence doctrine does not totally preclude a negligent plaintiff's recovery. Because it would be inequitable to apportion fault when the plaintiff has been negligent and to bar recovery completely when the plaintiff has assumed a risk, most jurisdictions either abolished the doctrine of assumption of risk[27] or merged it with com-

18. RESTATEMENT (SECOND) OF TORTS § 496B (1965).
19. *See supra* note 13.
20. RESTATEMENT (SECOND) OF TORTS § 496B (1965).
21. *Id.* comment a.
22. As early as 1956, Harper and James criticized the entire doctrine of implied assumption of risk and argued that except in cases of "express assumption of risk," the doctrine should be abolished. 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1162, 1191 (1956). Other authorities argue that only the category of primary assumption of risk should be abolished. One commentator has suggested that the concept of primary assumption of risk serves only to confuse both the court and the jury. Kionka, *Implied Assumption of the Risk: Does It Survive Comparative Fault?* 1982 S. ILL. U.L.J. 371, 377-78.
23. HARPER & JAMES, *supra* note 22 at 1162.
24. *Id.* It is important to note that under traditional contributory negligence, the plaintiff's recovery has been barred. Under the secondary assumption of risk form of contributory negligence, the plaintiff's behavior is merged into the mainstream of comparative fault, thus serving only to reduce the plaintiff's damages, not to bar them altogether. PROSSER & KEETON, *supra* note 17, at 497-98.
25. 54 N.J. Super. 25, 148 A.2d 199 (1959), *modified*, 31 N.J. 44, 155 A.2d 90 (1959).
26. HEFT AND HEFT, COMPARATIVE NEGLIGENCE MANUAL § 1.20, at 5 (1978).
27. Whether or not a plaintiff will prevail in a comparative negligence jurisdiction depends on how assumption of risk is interpreted. If a jurisdiction follows the *primary* assumption of risk analysis, the plaintiff will never prevail since no duty is recognized and no duty

parative negligence.[28] Wyoming is such a jurisdiction.[29] When Wyoming followed the rule of contributory negligence, it recognized no distinction between traditional contributory negligence and assumption of risk.[30] However, when Wyoming abolished contributory negligence and adopted comparative negligence, it preserved the assumption of risk doctrine for the purpose of allocating fault between the plaintiff and the defendant. In *Brittain v. Booth*,[31] the Wyoming Supreme Court explained that

> [t]he comparative negligence statute directs apportionment of fault occasioned by [the plaintiff's] negligence which is "not as great as the negligence of the person against whom recovery is sought." Since, in Wyoming, assumption of risk has been held to be a form of contributory negligence, the obvious legislative intent was to include it within the apportionment [of fault].[32]

Thus, as a form of contributory negligence, assumption of risk is not an absolute defense in Wyoming. It is merely a basis for the apportionment of fault by the trier of fact.[33] The known and obvious danger rule falls

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can be breached. On the other hand, if a jurisdiction follows the *secondary* assumption of risk analysis, a plaintiff might prevail after the defendant's breach of duty is weighed against the plaintiff's contributing behavior.

28. Easterday and Easterday, *The Indiana Cooperative Fault Act: How Does It Compare With Other Jurisdictions?* 17 IND. L. REV. 883, 895 (1984). Comparative negligence jurisdictions have taken a variety of approaches in applying the assumption of risk doctrine. A majority of states merged assumption of risk with contributory negligence prior to adopting comparative negligence. H. WOODS, THE NEGLIGENCE CASE: COMPARATIVE FAULT § 6:10, at 151-152 (1978 & Supp. 1985). A large majority of states have statutorily merged or completely abolished assumption of risk upon adopting comparative negligence. *Id.* § 6:7, at 142. Other states have merged the doctrine of implied assumption of risk with contributory negligence after adopting comparative negligence. *Id.* § 6:4, at 129; § 6:8, at 146-147; § 6:9, at 149. Some jurisdictions still maintain the assumption of risk doctrine even though they have adopted comparative negligence. *Id.* § 6:11, at 155. In addition, a very few states still view assumption of risk as a valid defense despite the advent of comparative negligence. *Id.* § 6:3, at 128-129; § 6:6, at 140-141. Finally, in the state of Georgia, the doctrines of assumption of risk and contributory negligence co-exist. *Id.* § 6:2, at 122.

29. *See* WYO. STAT. § 1-1-109 (1977) (originally enacted as WYO. STAT. § 1-7.2(a) (Supp. 1973)) which provides:

> (a) Contributory negligence shall not bar a recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if the contributory negligence was not as great as the negligence of the person against whom recovery is sought. Any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person recovering.
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> (b) The court may, and when requested by any party shall:
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> (i) If a jury trial, direct the jury to find separate special verdicts;
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> (ii) If a trial before the court without a jury, make special findings of fact, determining the amount of damages and the percentage of negligence attributable to each party. The court shall then reduce the amount of such damages in proportion to the amount of negligence attributed to the person recovering;
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> (iii) Inform the jury of the consequences of its determination of the percentage of negligence.

30. Ford Motor Company v. Arguello, 382 P.2d 886, 891 (Wyo. 1963).
31. 601 P.2d 532 (Wyo. 1979).
32. *Id.* at 534.
33. *Id.*

within the parameters of the assumption of risk doctrine.[34] Like the assumption of risk doctrine, application of the known and obvious danger rule requires knowledge, understanding and voluntariness on the part of the plaintiff. It follows, therefore, that like the assumption of risk doctrine, the obvious danger rule should not constitute an absolute defense. It should, like the assumption of risk doctrine, be considered by the trier of fact in allocating fault. As will be shown, this has not always been the case in Wyoming.

WYOMING CASE LAW

It is clear that Wyoming merged assumption of risk and contributory negligence prior to adopting comparative negligence. But, it is not clear whether Wyoming uses the primary or secondary assumption of risk analysis in applying the obvious danger rule. A review of Wyoming case law reveals that the Wyoming Supreme Court has applied both the primary assumption of risk analysis and the secondary assumption of risk analysis on different occasions.[35]

In the past thirty years the Wyoming Supreme Court has on numerous occasions interpreted the obvious danger rule as primary assumption of risk.[36] In February 1983, the Wyoming Supreme Court reiterated the primary assumption of risk rule in the case of *Norman v. City of Gillette.*[37] The plaintiff in *Norman* complained that a barricade on the sidewalk caused him to walk in the street where he slipped and fell while climbing over a mound of snow and ice. In denying the plaintiff's claim, the court applied the no-duty formula of primary assumption of risk, stating:

> First there is the rule that no duty exists which requires either the removal of an obvious danger or a warning of its existence. Second is the rule that no duty exists to remove the natural accumulation of snow and ice. . . .[38]

Had the court applied secondary assumption of risk, the plaintiff's negligence would have been weighed against that of the city's. Rather than basing the verdict against the plaintiff on the lack of defendant's duty to remove natural, obvious accumulations, the trier of fact would have analyzed both defendant and plaintiff behavior. Conceivably, the trier of fact could have reached the same conclusion, but the analysis would have been from the opposite point of view—looking at the plaintiff's behavior rather than the defendant's lack of duty.

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34. 57 AM. JUR. 2D *Negligence* § 277 (1971); Annot., 35 A.L.R. 3D 230, 268 (1971).

35. For a detailed, informative history of the cases illustrating Wyoming's treatment of the obvious danger rule see Note, *Assumption of Risk and the Obvious Danger Rule, Primary or Secondary Assumption of Risk?*, 18 LAND & WATER L. REV. 374, 377-382 (1983).

36. *See* Norman v. City of Gillette, 658 P.2d 697 (Wyo. 1983); Sherman v. Platte County, 642 P.2d 787 (Wyo. 1982); Johnson v. Hawkins, 622 P.2d 941 (Wyo. 1981); Bluejacket v. Carney, 550 P.2d 494 (Wyo. 1976); LeGrande v. Misner, 490 P.2d 1252 (Wyo. 1971); Watts v. Holmes, 386 P.2d 718 (Wyo. 1963); Boatman v. Miles, 27 Wyo. 481, 199 P. 933 (1921).

37. 658 P.2d 697 (Wyo. 1983).

38. *Id.* at 705 (citing Sherman v. Platte County, 642 P.2d 787, 789 (Wyo. 1982)).

At the same time, the Wyoming Supreme Court has applied the secondary assumption of risk analysis since at least as early as 1914.[39] Although it did not specifically apply the secondary assumption of risk doctrine in *Continental Motors Corp. v. Joly,*[40] the court in that case relied on *McKee v. Pacific Power and Light Co.*[41] for the proposition that the obvious danger rule reflects secondary assumption of risk. In *McKee,* an experienced electrician was denied compensation for the injuries he suffered when he came in contact with a high voltage power line. *McKee* illustrates just how confusing the law on this subject has been since the Wyoming Supreme Court used both primary and secondary assumption of risk analysis to reach that holding. On one hand the court said that the no-duty obvious danger rule negates a defendant's duty, stating that "there is no liability for injuries from dangers that are obvious, reasonably apparent, or as well-known to the person injured as they are to the owner of the facilities in question."[42] On the other hand, the court stated that the plaintiff's negligence barred recovery:

> Without deciding whether there was substantial evidence of a breach in the standard of care which defendant owed to plaintiff, we can say as a matter of law the accident. . . necessarily resulted from one of the following: (1) From an unavoidable accident; (2) from the assumption of a risk as well-known to plaintiff as it was to defendant; or (3) from the contributory negligence of plaintiff.[43]

Indeed, in subsequent decisions, the court has cited *McKee* as authority for both primary and secondary assumption of risk analyses.[44] More recently in *Brittain v. Booth,* the court considered the complaint of a sixteen year old plaintiff who was injured while working on an excavation for an underground gasoline tank.[45] Acknowledging that the pit was an open and obvious danger, the court declared, nonetheless, that "assumption of risk, as a form of contributory negligence is not an absolute defense to a negligence action, but is a basis for apportionment of fault."[46]

A pattern can be discerned from the way the Wyoming Supreme Court has applied the two different assumption of risk analyses. In suits against landowners and government entities for injuries caused by natural ac-

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39. Carney Coal Co. v. Benedict, 21 Wyo. 163, 129 P. 1024 (1913), *aff'd on rehearing,* 22 Wyo. 362, 140 P. 1013 (1914). *See also* Brittain v. Booth, 601 P.2d 532 (Wyo. 1979); Berry v. Iowa Mid-West Land and Livestock Co., 424 P.2d 409 (Wyo. 1967); Loney v. Laramie Auto Co., 36 Wyo. 339, 255 P. 350 (1927); Chicago and Northwestern Ry. v. Ott, 33 Wyo. 200, 237 P. 238 (1925), *reh'g denied,* 33 Wyo. 200, 238 P. 287 (1925), *cert. denied,* 269 U.S. 585 (1926).

40. 483 P.2d 244 (Wyo. 1971).

41. 417 P.2d 426 (Wyo. 1966).

42. *Id.* at 427.

43. *Id.* at 428.

44. In *Sherman* the court indicated that the *McKee* formulation of the obvious danger rule was primary assumption of risk analysis. *Sherman,* 642 P.2d at 789. In direct contrast, the *Joly* court interpreted *McKee* to reflect secondary assumption of risk analysis. *Joly,* 483 P.2d at 246.

45. *Brittain,* 601 P.2d at 536.

46. *Id.* at 534.

cumulations of ice and snow, the court has applied the no-duty obvious danger rule.[47] In suits involving the plaintiff's status as a trespasser, licensee or invitee and in suits involving the master-servant relationship, the court has applied the secondary assumption of risk analysis.[48] The 1921 case of *Boatman v. Miles,*[49] however, defies this pattern. In *Boatman,* a servant sued his master for injuries caused by the attack of the master's vicious stallion. The court applied primary assumption of risk analysis, stating that a servant's assumption of risk was the equivalent of saying that no duty existed on the part of the master-defendant.[50]

While application of both forms of implied assumption of risk can be found in Wyoming case law, the most recent decisions employ the primary assumption of risk doctrine.[51] This apparent trend toward adoption of primary assumption of risk analysis makes the *O'Donnell* decision, in which the court rejects primary assumption of risk analysis in favor of secondary assumption of risk analysis, even more surprising.

In the 1983 case of *Cervelli v. Graves,*[52] however, the Wyoming Supreme Court foreshadowed a departure from the primary assumption of risk analysis by placing significant limitations on the no-duty obvious danger rule. In *Cervelli,* an ice and snow case that did not involve landowner liability, the court, for the first time, limited the application of the no-duty obvious danger rule to situations in which a landowner is sued for accidents caused by natural accumulations of snow and ice on his land.

The plaintiff-truck driver in *Cervelli* brought a cause of action against a cement truck driver for personal injuries sustained in an automobile accident. The Wyoming Supreme Court ruled that the trial judge erred in instructing the jury that the known and obvious danger rule applied to an automobile collision case where the parties involved were not in control of the premises where the accident occurred.[53]

The court held that the known and obvious danger rule was not applicable to all negligence cases or even to all ice and snow cases.[54] The court said application of the known and obvious danger rule in cases other than those involving landowners and natural accumulations of ice and snow abrogated the comparative negligence statute.[55] The court, however, did not explain why application of the no-duty obvious danger rule in landowner and natural accumulation cases did not itself abrogate the statute.

47. *See* Norman v. City of Gillette, 658 P.2d 697 (Wyo. 1983); Sherman v. Platte County, 642 P.2d 787 (Wyo. 1982); Johnson v. Hawkins, 622 P.2d 941 (Wyo. 1981); Bluejacket v. Carney, 505 P.2d 494 (Wyo. 1976).

48. *See* Brittain v. Booth, 601 P.2d 532 (Wyo. 1979); Berry v. Iowa Mid-West Land & Livestock Co., 424 P.2d 409 (Wyo. 1967); Loney v. Laramie Auto Co., 36 Wyo. 339, 255 P. 359 (Wyo. 1927); Chicago and Northwestern Ry. v. Ott, 33 Wyo. 200, 237 P. 238 (Wyo. 1925).

49. 27 Wyo. 481, 199 P. 933 (1921).

50. *Id.* at 935.

51. Norman v. City of Gillette, 658 P.2d 697, 699 (Wyo. 1983).

52. 661 P.2d 1032 (Wyo. 1983).

53. *Id.* at 1039.

54. *Id.* at 1039-40.

55. *Id.* at 1039.

ANALYSIS

By holding in *O'Donnell* that an obvious danger does not negate the defendant's duty to keep streets and sidewalks in good repair and that the obviousness of the danger may be considered by the trier of fact to determine the plaintiff's comparative negligence,[56] the Wyoming Supreme Court has departed from the primary assumption of risk analysis. The *O'Donnell* court expanded the *Cervelli* rule by holding that the primary assumption of risk analysis will not be applied in cases other than landowner and natural accumulation situations, even where a defendant has control over the premises. In effect, the court's perspective of the obvious danger rule has shifted to accommodate full recognition of comparative negligence. Thus, the Wyoming Supreme Court in *O'Donnell* makes two key changes in Wyoming law. First, it overturns the no-duty obvious danger rule, and second, it adopts the secondary assumption of risk analysis.

In reaching its decision, the court addressed the City of Casper's argument regarding *McKee.* The City of Casper cited *McKee*[57] for the proposition that Wyoming law creates no liability for injuries from obvious, apparent, or well known dangers if such dangers are as well known to the plaintiff as to the defendant.[58] In *McKee,* the court applied the obvious danger rule to a situation involving man-made dangers.[59] As the court noted, however, *McKee* was decided before the adoption of comparative negligence in Wyoming.[60]

At the time of the *McKee* decision, the obvious danger rule was viewed as negating a duty on the part of the defendant— primary assumption of risk. Although the court has held that the comparative negligence statute did not impose any new duty of care on defendants,[61] the court declared in *O'Donnell* that a landowner has a duty to protect against known and obvious dangers, except in situations involving natural accumulations of snow and ice.[62] The court, thus, adopted the long held position of Justice Rose[63] by applying the obvious danger rule as a factor for the trier of fact to consider in apportioning negligence between the plaintiff and the defendant.

The court attempted to reconcile the *O'Donnell* decision with the rules in *Sherman v. Platte County* and other cases—that no duty exists which requires the removal or warning of an obvious danger and that no duty exists to remove natural accumulations of snow and ice—by noting that the rules[64] were established before the advent of comparative negligence

56. O'Donnell v. City of Casper, 696 P.2d 1278, 1284 (Wyo. 1985).
57. 417 P.2d 426 (Wyo. 1966).
58. Brief for Appellee at 5-6, O'Donnell v. City of Casper, 696 P.2d 1278 (Wyo. 1985).
59. *McKee,* 417 P.2d at 426.
60. *O'Donnell,* 696 P.2d at 1281.
61. Sherman v. Platte County, 642 P.2d 787, 790 (Wyo. 1982).
62. *O'Donnell,* 696 P.2d at 1284.
63. Brittain v. Booth, 601 P.2d 532, 540 (Wyo. 1979) (Rose, J. dissenting); Bluejacket v. Carney, 550 P.2d 494, 499 (Wyo. 1976) (Rose, J. specially concurring).
64. Sherman v. Platte County, 642 P.2d 787, 789 (Wyo. 1982).

in Wyoming. In addition, the court pointed out that although the aforementioned rules were cited in *Norman, Sherman, Bluejacket v. Carney, and Johnson v. Hawkins,* those cases were actually decided on the second rule: that no duty exists to remove the natural accumulation of snow and ice.[65] Finally, and most importantly, the court recognized that a no-duty obvious danger rule acting as a complete bar to recovery is incompatible with the doctrine of comparative negligence.[66]

The court drew another distinction between *Sherman,* the cases cited therein, and *O'Donnell.* The court observed that the slip and fall situations in those cases resulted from the natural accumulation of snow and ice. In *O'Donnell,* however, the accumulation of gravel was not a product of natural conditions. Instead, it was the result of road and maintenance work by the City of Casper.

In his dissenting opinion in *O'Donnell,* Justice Rooney, joined by Justice Raper, defined the obvious danger rule in Wyoming as being premised on lack of negligence on the part of the defendant.[67] Justice Rooney maintained that assumption of risk, on the other hand, is something resulting from the plaintiff's behavior.[68] Accordingly, if a known and obvious danger exists, there is no duty to be breached or negated.

Justice Rooney ignored the Wyoming decisions in which the court has interpreted the obvious danger rule as secondary assumption of risk—examining the plaintiff's conduct—and failed to reconcile the court's prior inconsistent holdings.[69] Justice Rooney's contention that the obvious danger rule is separate from the assumption of risk doctrine directly conflicts with the majority view that the obvious danger rule is a part of the assumption of risk doctrine.[70]

As the court noted in *O'Donnell,* the choice between primary assumption of risk analysis and secondary assumption of risk analysis is of critical importance. If the rule is viewed as negating a defendant's duty—primary assumption of risk—the plaintiff will never be allowed to recover. But, if the rule is viewed as a factor to be considered by the trier of fact, the plaintiff is not necessarily barred recovery.[71]

By adopting secondary assumption of risk analysis, Wyoming affords the plaintiff the opportunity to present his case and to have his negligence weighed against the defendant's in all but those situations involving landowners and natural accumulations of snow and ice. The *O'Donnell* decision makes sense in light of the court's rationale to apply the comparative negligence statute. The only drawback to *O'Donnell* is that the court did not go far enough. Rather than definitively adopting secondary assump-

65. *O'Donnell,* 696 P.2d at 1282.
66. *Id.* at 1283.
67. *Id.* at 1290 (Rooney, J., concurring in part and dissenting in part).
68. *Id.*
69. *Id.*
70. 57 AM. JUR. 2D *Negligence* § 277 (1971); Annot., 35 A.L.R. 3D 230, 268 (1971); HARPER & JAMES, *supra* note 23, at 1471.
71. *O'Donnell,* 696 P.2d at 1281-82.

tion of risk analysis in all obvious danger cases, the court hedges by distinguishing between man-made hazards and natural hazards of snow and ice.[72]

Implicit in the *O'Donnell* decision is the realization that comparing the plaintiff's negligence with the landowner-defendant's negligence will not result in harsh verdicts against landowners or a flood of lawsuits brought on by injured plaintiffs as a result of unpredictable Wyoming weather. Instead, the application of the comparative negligence statute will merely allow the equitable analysis of plaintiff and defendant behavior.

Because the court in *O'Donnell* qualified its decision by drawing a distinction between natural and non-natural hazards, it is unclear whether the court will apply primary or secondary assumption of risk analysis in situations involving land possessors and natural accumulations of snow and ice. Since the court has adopted secondary assumption of risk analysis in all other cases, it might be anticipated that the obvious danger rule will no longer serve as an absolute bar to plaintiff recovery in landowner and natural accumulations of snow and ice cases, either. On the other hand, the Wyoming Supreme Court has a history of tenaciously protecting landowners from potential liability for natural accumulations of snow and ice. This history and the distinction made in *O'Donnell* suggests that the court will continue to apply the no-duty obvious danger rule to protect landowners in cases involving natural accumulations of snow and ice.

In past decisions, the court has ignored legislative intent to compare landowner-defendant's fault with the fault of the plaintiff.[73] By holding that the no-duty obvious danger rule still applies to cases involving landowners and natural accumulations of snow and ice, the Wyoming Supreme Court has continued to exclude landowner cases from the purview of the comparative negligence statute. Yet, the comparative negligence statute contains no language which suggests that the landowner is exempt from comparative fault.[74]

In keeping with the legislative purpose of the comparative negligence statute, past Wyoming case law demonstrates the Wyoming Supreme Court's intention of eliminating all absolute defenses. For example, the last clear chance doctrine[75] was abrogated by the concept of comparative negligence in the 1979 decision of *Danculovich v. Brown.*[76] Similarly, the court stated that the comparative negligence statute has abolished "gross

72. *Id.* at 1282-83.

73. *See* Norman v. City of Gillette, 658 P.2d 697 (Wyo. 1983); Sherman v. Platte County, 642 P.2d 787 (Wyo. 1982); Johnson v. Hawkins, 622 P.2d 941 (Wyo. 1981); Bluejacket v. Carney, 505 P.2d 494 (Wyo. 1976).

74. *See* WYO. STAT. § 1-1-109 (1977) (originally enacted as WYO. STAT. § 1-7.2(a) (Supp. 1973)).

75. The last clear chance doctrine fixes liability upon the last wrongdoer. In other words, if the defendant has the last opportunity to avoid harm, the plaintiff's negligence is not a "proximate cause" of the result. PROSSER & KEETON, *supra* note 17, § 66, at 463.

76. 593 P.2d 187, 195 (Wyo. 1979).

negligence."[77] Wyoming appears to be moving towards abolishing absolute defenses as has Texas, a jurisdiction which has abolished the defenses of no duty, assumption of risk, open and obvious, and last clear chance.[78] Yet, for no good reason, the court still recognizes absolute defenses for landowners in cases involving natural accumulations of snow and ice.

The court should expand its earlier holdings in light of the comparative negligence statute and apply the *O'Donnell* secondary assumption of risk analysis to future cases regarding landowner liability and natural accumulations of snow and ice. The abolition of the no-duty obvious danger rule will not hurt landowners nor will it subject them to unjust treatment. Instead, the court will be giving full credence to the comparative negligence statute by recognizing that statute's purpose: to eliminate absolute defenses and to ameliorate the harsh consequences of traditional contributory negligence.[79]

CONCLUSION

In *O'Donnell v. City of Casper,* the Wyoming Supreme Court recognized that its past application of primary assumption of risk analysis was based on a rule established before the adoption of comparative negligence.[80] As such, the court conceded that the rule must be modified. "An inflexible rule that a known and obvious danger is an absolute bar to recovery is not compatible with the doctrine of comparative negligence."[81] It can be inferred from *O'Donnell* that with the adoption of comparative negligence in Wyoming, primary assumption of risk will no longer bar a negligent plaintiff's recovery. Instead, the court has embraced the doctrine of secondary assumption of risk: the trier of fact will compare the negligence of the plaintiff and the defendant. Futhermore, a known and obvious danger no longer negates a duty or the liability of the defendant.[82] "Gone are the days when a scintilla of negligence by the plaintiff will bar recovery."[83] All that remains now is for the Wyoming Supreme Court to relinquish the last vestige of the no-duty primary assumption of risk analysis by applying the secondary assumption of risk analysis in all obvious danger cases.

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77. GROSS NEGLIGENCE IS THE FAILURE TO USE EVEN THE SLIGHTEST CARE. PROSSER & KEETON, *supra* note 17, § 34, at 211-212; Tate v. Mountain States Tel. & Tel. Co., 647 P.2d 58, 61 (Wyo. 1982).

78. Bennett v. Span Industries, Inc., 628 S.W. 2d 470, 473 (Tex. 1982); Sherman v. Platte County, 642 P.2d 787, 790 (Wyo. 1982).

79. *See* WYO. STAT. § 1-1-109 (1977) (originally enacted as WYO. STAT. § 1-7.2(a) (Supp. 1973)); Brittain v. Booth, 601 P.2d 532, 534 (Wyo. 1979).

80. *O'Donnell,* 696 P.2d at 1283.

81. *Id.*

82. *Id.* at 1284.

83. *Id.*