ASSUMPTION OF RISK

FLEMING JAMES JR.
ASSUMPTION OF RISK

FLEMING JAMES, JR.†

The term assumption of risk has led to no little confusion because it is used to refer to at least two different concepts, which largely overlap, have a common cultural background, and often produce the same legal result. But these concepts are nevertheless quite distinct rules involving slightly different policies and different conditions for their application. (1) In its primary sense the plaintiff’s assumption of a risk is only the counterpart of the defendant’s lack of duty to protect the plaintiff from that risk. In such a case plaintiff may not recover for his injury even though he was quite reasonable in encountering the risk that caused it.\(^1\) *V*\(o*lenti n*\(o*\)n *\(f*it *i*njuria.* (2) A plaintiff may also be said to assume a risk created by defendant’s breach of duty towards him, when he deliberately chooses to encounter that risk. In such a case, except possibly in master and servant cases, plaintiff will be barred from recovery only if he was unreasonable in encountering the risk under the circumstances. This is a form of contributory negligence.\(^2\) Hereafter we shall call this “assumption of risk in a secondary sense.”

This study, except for the section on master and servant cases, will be concerned exclusively with assumption of risk in the primary sense, i.e. as the counterpart of defendant’s lack of duty. But even in the field thus limited there lurks an ambiguity. There are many risks which are not, in any real

†Lafayette S. Foster Professor of Law, Yale Law School. The Author gratefully acknowledges the assistance rendered by Mr. Martin Mensch, class of 1952, Yale Law School.

1. Under some statutes they do not produce the same results. *Sec.,* e.g., Tiller v. Atlantic C. L. R. Co., 318 U.S. 54, 62 et seq. (1943) (describing the situation under the Federal Employers Liability Act both before and after the 1939 amendment); Campbell, *Wisconsin’s Comparative Negligence Law,* 7 Wis. L. Rev. 222, 235 (1932); Whelan, *Comparative Negligence* [1938] Wis. L. Rev. 465, 482; Williams, *Joint Torts & Contributory Negligence,* c. 12 (1951) (describing the situation under comparative negligence statutes).


3. Tharp v. Pennsylvania R. Co., 332 Pa. 233, 2 A.2d 695 (1938) (choice of dangerous route when safe route was easily available); Wright v. City of St. Cloud, 54 Minn. 94, 55 N.W. 819 (1893); see *Restatement, Torts* §465, comments c and d (1934).
sense, voluntarily assumed by the plaintiff but are rather imposed by the law. Thus in general one man does not owe another the duty to refrain from hurting him, but only to refrain from doing so negligently; in a sense each of us broadly assumes the risk of injuries inflicted without negligence.4 But this possible use of the expression is neither helpful nor usual.5 It is simply an artificial way to express the rule that liability is based on fault. There may also be express agreement to assume a risk, but that will be dealt with later.

The term assumption of risk in its primary sense refers to risks that are incidental to a relationship of free association between plaintiff and defendant, that is to say one which either is at liberty to take or leave as he will.6 In such a case defendant’s duty toward plaintiff is limited. It does not extend to the use of care to make the conditions of the relationship reasonably safe—at most the duty is one of care to make these conditions as safe as they appear to be and it may fall short of that.7 If these risks are fully comprehended, or perfectly obvious, or of the kind which plaintiff and not defendant must look out for, then plaintiff will be held to have assumed them by voluntarily entering into the relationship which entails them. Thus if one man borrows another’s automobile for his own purposes, knowing that the tires are worn smooth and the brakes in bad order, the borrower assumes the ordinary risks of smooth tires and bad brakes;8 indeed, he even assumes the risks of concealed defects in the car provided the owner does not himself know of them.9 Or if one has a gratuitous permission to use the path across

4. As Bramwell, B. said, in Holmes v. Mather, LR 10 Ex. 261, 267 (1875), “For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid.” But we have no real choice to avoid using the highways altogether. Nor indeed would it make any difference if on the particular occasion, the plaintiff were present quite without his will. The baby in his perambulator or the prisoner in the patrol wagon must assume the risks of highway accidents caused without negligence just as much as the adult who has chosen to stroll along the sidewalk rather than sit on his front porch reading the paper. The learned judge might as well have said that people must put up with such accidents “as they go along the road of life,” at least under a system where liability is based on fault.

5. But see Salmond, Torts 32 (10th ed. 1945) wherein this notion is described as a “very important application” of the doctrine volenti non fit injuria.

6. See, e.g., Gow, supra note 2, at 37, 38, “But the essence of the defense of ‘volenti’ is that there has been no breach of duty on the part of the defender; inasmuch as the pursuer voluntarily encountered and took the risk, the defender was not owing him any duty to take care.”

The other authorities cited in note 2, supra, take the same basic position.

7. See the examples given at notes 9 and 10, infra.


9. Johnson v. H. M. Bullard Co., 95 Conn. 251, 111 Atl. 70 (1920); Lutz’s Adm’t v. W. J. Hughes & Sons Co., 232 Ky. 675, 24 S.W.2d 578 (1930); Ruth v. Hutchinson
another's land, he takes it as he finds it and cannot expect the owner to make or keep it safe for him. And even one who enters ordinary private premises for a purpose in which the owner or possessor has an interest, takes the risk of dangers which he fully comprehends, or which are as perfectly obvious, as a walkway covered with glare ice in the daytime.

Cases like those we have been discussing have sometimes been described as situations where the plaintiff subjects himself to a "known but reasonable risk created by the defendant," but this may be misleading. In determining whether there has been voluntary assumption of risk (in the primary sense) it is immaterial whether the risk is reasonable or not. This is true whether the matter be considered from defendant's or from plaintiff's point of view. Defendant may, for example, have allowed his automobile or his premises to fall into such dangerous disrepair that he would be clearly negligent to all those to whom he owed the duty of careful maintenance. Nevertheless he does not owe that duty to a borrower or licensee; his failure is not negligence to such a person. From the plaintiff's point of view, his encountering of the risk may be reasonable or unreasonable depending on the seriousness of the danger, the extent of his own knowledge or opportunity for knowledge, and the exigencies of the situation. In either event he will have assumed the risk.

Gas Co., 209 Minn. 248, 296 N.W. 136 (1941); and see Dickason v. Dickason, 84 Mont. 52, 274 Pac. 145 (1929).


12. HARPER, LAW OF TORTS 289 (1933).

13. Unless, at least, it is coupled with non-disclosure of a known, concealed defect. See notes 8 and 9 supra.

14. And if he was unreasonable in taking the risk, plaintiff will also be contributorily negligent.
association is the gist of the defense. True assumption of risk reflects the individualism of the common law in relationships wherein it was felt that the duty of self-protection against many hazards rested primarily on each participant. It is a negation of duty by one to look out affirmatively for the other's safety.\(^{15}\)

It is clear then that the concept of assumption of risk in the primary sense is not to be considered in a situation where defendant has breached a duty towards plaintiff—where the latter has "a statutory right to protection, or . . . a common right or individual right at law to find these particular premises [or appliances] free from danger . . . ."\(^{16}\) This means specifically that even when a danger is fully known and comprehended plaintiff is not barred from recovery simply because he chooses deliberately to encounter it, in the following situations:\(^{17}\)

(1) Where a traveler uses a highway which has not been closed for repairs.\(^{18}\)

It is sometimes said that there must be "no other convenient safer way,"\(^{19}\) but this statement comes from confusion. The condition it implies is not valid for any of the situations presently being discussed.\(^{20}\) The existence of a safer alternative may make the plaintiff's choice of this one an unreasonable, hence negligent choice.\(^{21}\) But it does not bar plaintiff's recovery merely because he voluntarily chose the more dangerous way. If that choice was a reasonable one under the circumstances it will not prevent recovery.\(^{22}\) Of course if a highway has been properly closed for repairs, a traveler who ventures on to it assumes the dangers it may present.\(^{23}\)

\(^{15}\) See authorities cited in note 2 supra.


\(^{17}\) He may be contributorily negligent if he does so under circumstances which make the choice unreasonable. But that is because his encountering the risk is negligent and not because it is voluntary.

The classification given in the text is adapted from Bohlen, supra note 2, at 19 et seq.\(^{18}\)

\(^{19}\) See Thomas v. Quartermaine, supra note 2, at 19 et seq.

\(^{20}\) The opinion in Paubel v. Hitz, 339 Mo. 274, 281, 96 S.W.2d 369, 373 (1936), neatly contrasts the case of the highway traveler with that of the invitee on private premises. See note 11 supra.

\(^{21}\) See Paubel v. Hitz, supra note 2, at 19.

\(^{22}\) The existence of a safe alternative is altogether immaterial to assumption of risk in the primary sense. It is not a question of whether plaintiff has a choice between a dangerous and a safe way. It is rather a question of whether defendant has a right to put plaintiff to a choice between using a dangerous way and simply not using it (quite without regard to whether there is a safe alternative). See cases cited in notes 22, 24 infra.


\(^{24}\) Rogers v. Cox, 130 Conn. 616, 36 A.2d 373 (1944); Jones v. Collins, 177 Mass. 444, 59 N.E. 64 (1901); Johnson v. New York, 208 N.Y. 77, 101 N.E. 691 (1913);
ASSUMPTION OF RISK

(2) Where a tenant (or someone in his right) uses a common approach, hall, elevator, etc. which has remained under the control of the landlord with the duty of safe maintenance.24

(3) Where the patron of a public utility uses a part of its premises or its equipment which is appropriate to be used in order to secure the services which the utility is bound to perform for the public.25

(4) Where a landowner's access to his premises has been impeded or jeopardized by defendant's wrong, and he incurs the risk to gain the access.26

(5) Where defendant's wrong injures a plaintiff who is at a place where he has a right to be without regard to defendant's consent.27

(6) Where plaintiff moves to a nuisance or uses his own land in such a way as to increase the hazard caused to it by defendant's wrongful use of his land.28

(7) Where plaintiff seeks to rescue another person, or his own or another's property which is endangered by defendant's negligence. This is the rule today though it has not always been; and in these cases the English law has been more laggard than ours. As a recent writer has put it, "The older doctrine of


Contrast, for instance, the landowner's duty to one traveling along an adjacent highway with that to one entering his premises with his consent, or even his invitation, with regard to the dangerous condition of his building. The highway traveler assumes no risks which reasonable care could prevent. The licensee takes all risks unless they are both concealed and known to the landowner. Even the invitee takes the risk of defects he knows about and of sufficiently obvious defects. See PROSSER, TORTS §§ 76, 78, 79 (1941).

Again, contrast the case of a highway traveler struck by a golf ball or a baseball with the case of a player on the links or a spectator at the ball game. Castle v. St. Augustine's Links, Ltd., 33 T.L.R. 615 (K.B. 1923); 33 Yale L.J. 181 (1923); notes 44-7, and 105, infra.

the common law has been expressed thus: 'Each for himself' meant that, in the
eyes of the law, to help someone else in an emergency was an extravagance
' which the helper indulged in at his own risk and expense.' In this type of
case, the problem of voluntary assumption of risk overlaps the negligence prob-
lem, or rather is a phase of that problem. Thus in "Eckert v. Long Island R.
Co." in which the plaintiff's decedent was killed while attempting to rescue a
child imperiled by the defendant's negligence, the question was presented
whether the decedent had not voluntarily exposed himself to peril. The court
held that he had not. The problem is presented in another way by inquiring
whether the defendant's conduct constituting negligence toward the child was
also negligence toward the decedent. Under the modern view it is, since the
foreseeable consequences of an act are regarded as "including . . . the likeli-
hood of an intervening rescuer." As the Iowa court has said, "Defendant
could have foretold, with almost absolute certainty, when it set the fire in
question, that plaintiff, being near, would use every reasonable means in
attempting to save Qatman's horses from the flames, and there was nothing
surprising or unusual in the chosen attempt he made." Moreover the act of
the rescuer is no less foreseeable when it is deliberate than when it is spontaneous.
Of course the means of rescue chosen might be so unreasonable as
to amount to negligence even in the light of the emergency. If so plaintiff
will be barred for contributory negligence but not for want of breach of duty
towards him.

Comprehension of the Risk

It is sometimes said that knowledge or comprehension of the risk by plain-
tiff is the watchword of assumption of risk. In many types of situations this
is true; in others it is not. Unless the limitations which should be put on such
a statement are fully appreciated, it may be very misleading. There may be
assumption of a specific risk of which the plaintiff is completely ignorant. On
the other hand the plaintiff does not assume, in the primary sense, many risks
which he knows and fully appreciates. Thus the borrower of a chattel or
the licensee on land takes the risk of dangers that he does not and cannot

30. 43 N.Y. 502 (1871).
70 Minn. 272, 73 N.W. 648 (1897).
35. See, e.g., Cincinnati N.O. & T.P.R. Co. v. Thompson, 236 Fed. 1, 9 (6th Cir.
1916).
36. As Bowen, L.J., has said, "the maxim . . . is not 'scienti non fit injuria' but
ASSUMPTION OF RISK

know about. The rescuer or traveler on the highway, for instance, does not assume the most open and obvious risks (though he may be negligent in encountering them under the circumstances of any given case). The key to the problem lies in the relationship between the parties, and the duty owed by defendant to plaintiff under all the circumstances. It is only where (1) defendant knows of the danger, or (2) is under a duty to plaintiff to use care to discover the danger, but (in either event) will fully discharge his duty to plaintiff by complete disclosure of the danger, that plaintiff’s knowledge and comprehension of the risk will spell assumption of risk in the primary sense. The commonest examples of this are cases of invitor and invitee on real property and (formerly, at least) master and servant. In these situations plaintiff is viewed as having no right to enter into or remain within the relationship, but only to be apprised of its risks so he can choose intelligently whether to encounter them. And if the risks are such that he who runs may read them, defendant owes no further duty with respect to them. Here, indeed, comprehension of the risk is the watchword of the doctrine.

In such a situation at least actual comprehension of a risk by a plaintiff means that if he voluntarily encounters it, he assumes it. But actual comprehension implies more than knowledge of the defect that constitutes the danger. It also includes an appreciation and an understanding of the dangers that lurk in the defect and result in the injury, and it is usually a jury question whether there was such appreciation in fact.

A different and more difficult question concerns a defendant’s duty with respect to defects which are obvious and visible or to conditions pregnant with risks which most men would appreciate, but which this plaintiff does not see

37. See notes 9 and 10 supra.

Some courts also hold that the gratuitous guest in a vehicle takes the driver’s degree of skill and competence as he finds it, whether he knows about it or not. Eisenhut v. Eisenhut, 212 Wis. 467, 250 N.W. 441 (1933); see also notes 48, 57 infra.

Of course it might be said that the borrower or licensee will be taken to know and comprehend the nature of the relationship and that as gratuitous beneficiary of it he cannot reasonably expect its conditions to be prepared for his safety. But this is a far different thing from the way the expression is generally used, viz., to mean knowledge of the specific defect and comprehension of the dangers that lurk in it for plaintiff.

38. See notes 18, 22 and 30 supra.

39. See e.g., note 11 supra, and notes 44, 46, 91, and 92 infra.

40. Or licensor and licensee or lender and borrower where the licensee or lender knows of a danger.

41. Or, in master and servant cases, “was.” As we shall see assumption of risk is largely abrogated by statute in master and servant cases. See notes 83, 84 infra.


or does not comprehend. Elsewhere I have dealt with some aspects of this problem.43 There an attempt was made to examine the extent to which his own shortcomings would be considered in evaluating the plaintiff's conduct as negligent or not. Now our problem is the different one of deciding the extent to which certain defendants may assume a minimum of knowledge and perceptiveness on the part of others and act on that assumption. For example, the owner of a baseball park owes no duty to warn the experienced spectator of the dangers of foul balls in the unscreened part of the bleachers;44 and an analogous situation is presented by hockey. But does the proprietor of either sporting event owe such a duty to the uninitiated? Except for a few situations the rule does not seem clear and opinions are too often clouded with talk about presumptions.45 It seems fairly safe to say, however, that there are at least some situations whose dangers are so obvious, so customary, and so commonly known that a defendant need give no warning of them.46 Here again a plaintiff may assume a risk that he does not in fact comprehend. Yet by no means all the dangers which would be obvious to the attentive or appreciated by

43. James, Qualities of the Reasonable Man in Negligence Cases, 16 Mo. L. Rev. 1 (1951); see also, James & Dickinson, Accident Proneness & Accident Late, 63 Harv. L. Rev. 769, 782 et seq. (1950).


45. See, e.g., Thurman v. Ice Palace, 36 Cal. App. 2d 364, 97 P.2d 999, 1001 (1939) ("it is reasonable to presume that [the average person of ordinary intelligence] appreciates the risk of being hit by a pitched or batted ball without being specifically warned of such danger."); Hunt v. Thomasville B. Co., 80 Ga. App. 572, 573, 56 S.E.2d 828, 829 (1949); Modec v. City of Eveleth, 224 Minn. 555, 558, 29 N.W.2d 453, 454 (1947).

The word "presumption" is ambiguous. It might mean (1) a rebuttable presumption of fact; (2) a conclusive presumption, i.e., that the law will disregard plaintiff's lack of knowledge and therefore not allow him to show it in any case; or (3) that the defendant may act on the assumption that all spectators have knowledge, and gauge his conduct accordingly.

46. Thus in baseball cases the proprietor has generally been held to fulfill his duty if he has screened enough seats to accommodate the number of calls for them which may reasonably be expected on an ordinary occasion, and spectators, even with limited experience, are held to assume the risks of thrown or batted balls in the unscreened portion of the bleachers. Brown v. San Francisco B. Club, 99 Cal. App. 2d 484, 222 P.2d 19 (1950); Brisson v. Minneapolis B. & A. Ass'n, 185 Minn. 507, 240 N.W. 903 (1932); Keys v. Alamo C. B. Co., 150 S.W.2d 368 (Tex. Civ. App. 1941); cf. Leck v. Tacoma B. Club, 229 P.2d 329 (Wash. 1951) (adult assumed risk of absence of roof over screened stands, though he did not in fact notice it at night game). But cf. Wells v. Minneapolis B. & A. Ass'n, 122 Minn. 327, 142 N.W. 766 (1913).

the experienced are thus assumed. Whether they are depends upon the kind of relationship, the character of the place, the likelihood that attention will be distracted, the customary behavior of people who frequent the place, the likelihood that inexperienced, young, or handicapped people will be there, and the like. These are of course the same factors which are to be considered on the issue of defendant’s duty, for as we have seen, the issue is the same.

Another question about knowledge of the risk is how specifically must future dangerous conduct be comprehended? A prospective guest may, for instance, know that his driver-host has often driven carelessly. Does the guest then assume the risks of his host’s possible carelessness in driving on the present occasion? A few courts say that he does; others that he does not. The actual decisions are not altogether harmonious or clear. Where the host is intoxicated, or has a definite handicap (like being one-armed), the guest assumes the risks of flying pucks. Thurman v. Ice Palace, 36 Cal. App.2d 364, 97 P.2d 999 (1940); Tite v. Omaha C. Co., supra; James v. Rhode Island Auditorium, Inc., 60 R.I. 405, 199 Atl. 293 (1933); Note, 31 M.Ia. L. Rev. 298 (1948) (tracing history of the sport).

47. Compare Modec v. City of Eveleth, 224 Minn. 556, 29 N.W.2d 453 (1947) with Tite v. Omaha C. Co., 144 Neb. 22, 12 N.W.2d 90 (1943) (pointing up the difference in degree of general familiarity with hockey in the two states). The inexperienced hockey spectator is generally not held, as matter of law, to assume the risks of flying pucks. See opinion of Bowen, L. J., in Thomas v. Quartemaine, 18 Q.B.D. 685, 695 (C.A. 1887) (the duty “may vary according to the age and comprehension of the visitor.”)

48. In a few states the courts, without the aid of any statute, limit the host’s duty towards his guest to that of refraining from gross or from wanton negligence. Massaletti v. Fitzroy, 228 Mass. 487, 118 N.E. 165 (1917); Rice, The Automobile Guest & the Rationale of Assumption of Risk, 27 Minn. L. Rev. 429 (1943). Of course under such a rule the guest assumes the risks of his host’s future ordinary negligence whether he has reason to anticipate it or not. Cf. Eisenhut v. Eisenhut, 212 Wis. 467, 243 N.W. 440, 91 A.L.R. 549 (1933) (guest assumes risk of accidents due to driver’s lack of skill or competence, whether this is known to guest or not).

Under guest statutes, of course, the host does not owe the guest the duty of refraining from ordinary negligence. This result could also be described in terms of assumption of risk, viz., that the guest assumes the risk of his host’s ordinary negligence.


50. Marks v. Dorkin, 105 Conn. 521, 136 Atl. 83 (1927); 4 Blashfield, Cyclopedia of Automobile Law & Practice 716 (perm. ed. 1935).

51. Garrity v. Mangan, 232 Iowa 1188, 6 N.W.2d 292 (1942); Note, 33 Mich. L. Rev. 556 (1940); Blashfield, op. cit. supra note 50, 716.

who perceives this condition undoubtedly assumes the risks it entails, even if they should involve wanton misconduct. If, to the guest’s knowledge, the host has some well-defined dangerous habit pattern (such as speeding around curves) some courts rule that the risks of this habit also are assumed. Beyond this there is a line of cases, mainly in Wisconsin, holding that the host owes the guests only the duty to exercise the degree of skill and experience which he actually possesses (even though that should fall short of ordinary reasonable care) and that the guest assumes the risks that come from any failure to exercise a higher degree of skill (even though such failure would otherwise amount to negligence). These cases, however, draw a distinction between precautions which only experience would school a man to take, and those precautions—such as accurate observation, obedience to basic traffic regulations, etc.—which a reasonable man would take whatever his level of experience. Any driver owes his guest the duty to take this latter kind of precaution. Some dicta would make the guest’s assumption of risk even broader.

53. This perception may come before the guest accepts the ride, or during the ride. In the latter case the risk is assumed only if there is a reasonable opportunity to terminate the guest-host relationship, or at least to protest against the risk. Raddant v. Labutzke, 233 Wis. 381, 289 N.W. 659 (1940); White, Liability of an Automobile Driver to a Non-Paying Passenger, 20 Va. L. Rev. 326, 354 (1934); Note, 154 A.L.R. 924 (1945).

54. Assumption of risk is therefore a defense to an action under the typical guest statute. White v. McVicker, 216 Iowa 90, 246 N.W. 385 (1933); Rice, The Automobile Guest & the Rationale of Assumption of Risk, 27 Minn. L. Rev. 429, 452 (1943); White, Liability of an Automobile Driver to a Non-Paying Passenger, 20 Va. L. Rev. 326, 346-55 (1934).

These cases usually also involve voluntary self-exposure to a known unreasonable risk, and therefore the kind of contributory fault that would probably bar an action for a wanton breach of the duty to use care (e.g. for an action under a guest statute). Wilson v. Hill, 103 Colo. 409, 86 P.2d 1084 (1939); Donelon v. Wright, 148 Kan. 287, 81 P.2d 50 (1938); cf. McMahon v. Schindler, 38 Cal. App. 2d 642, 102 P.2d 378 (1940); Hall v. Meister, 42 Ohio App. 425, 182 N.W. 350 (1932). But the result is often rationalized in terms of a limitation on duty. White v. McVicker, supra, 216 Iowa at 93, (“toward a person fully cognizant and appreciative of a danger—a risk to which the defendant's conduct exposes him—the defendant has no duty of taking care, and is therefore not negligent.”); Hall v. Hall, 63 S.D. 343, 258 N.W. 491 (1935).

55. Young v. Nunn, Bush & Weldon Shoe Co., 212 Wis. 403, 249 N.W. 278 (1933) (overtaking traffic on right); Olson v. Hermansen, 196 Wis. 614, 220 N.W. 203 (1928) (speed).

56. See citations of cases in Note, 91 A.L.R. 554 (1934); 4 Blashfield, Cyclopedia of Automobile Law & Practice § 2512 (perm. ed. 1935).

57. The leading case is Cleary v. Eckart, 191 Wis. 114, 210 N.W. 267, 51 A.L.R. 576 (1926) (inexperience of driver). Other typical cases are Kelly v. Gagnon, 121 Neb. 113, 236 N.W. 169 (1931); Hall v. Hall, 63 S.D. 343, 258 N.W. 491 (1935). In most cases of this kind it was shown that plaintiff knew the host's degree of experience and the court mentioned that as though it was a factor of significance. In Wisconsin, however, the guest's ignorance of limitations upon the driver's experience is immaterial. Eisenhut v. Eisenhut, 212 Wis. 467, 472, 250 N.W. 441 (1933).

than under the Wisconsin rule by extending it to all the risks from the negligence of a driver known to be negligent. But few decisions go this far and some clearly repudiate any such result. The soundest rule would be that the guest is bound to anticipate, and so assume, only those future acts of negligence which are so serious and so likely to happen that the question would be largely academic whether the guest assumed the risk or needlessly exposed himself to peril.

Perhaps the fellow servant rule, once applied in master and servant cases, represented the assumption of the risks from another's future careless conduct. Perhaps, however, that rule more truly represented an unwillingness to extend vicarious liability to cases arising within the employer's economic family. At any rate the question is no longer important, for the rule is dead.

The Voluntary Character of Assumption of Risk

We have said that the voluntary character of the association between plaintiff and defendant is the gist of the defense. This needs further elucidation. Plaintiff may voluntarily encounter a risk in one sense, yet not assume it. An example is the case of the traveler who chooses the more dangerous mode of travel. 59. Except, of course, in states like Massachusetts where the guest assumes the risk of his host's ordinary negligence whether he has reason to anticipate it or not. See note 48 supra.

60. See notes 49 and 50 supra.

61. See, as examples, Young v. Wheby, 126 W. Va. 741, 30 S.E.2d 6 (1944) and cases collected in annotation thereto, 154 A.L.R. 924.

This kind of contributory fault (as well as assumption of risk) would probably bar even an action for wantonness (e.g. under a guest statute). See note 54 supra. If a rule like that in Wisconsin is adopted, on the other hand, a plaintiff would sometimes be barred where his conduct could not fairly be called unreasonable and where defendant would be considered negligent to third persons. See, e.g., Olson v. Herman, 195 Wis. 614, 220 N.W. 203 (1923). Cf. the analysis of Pinckard v. Pease, 115 Wash. 232, 197 Pac. 49 (1921), in White, The Liability of an Automobile Driver to a Non-Paying Passenger, 20 Va. L. Rev. 326, 352-3 (1934). Such a result is to be deplored, unless the policies which have given rise to guest statutes be accepted.

Even if the conclusion in the text is adopted, a distinction between assumption of risk and contributory negligence will have to be made if a comparative negligence statute is applicable. If the case be analyzed as involving no breach of defendant's duty, then there would be no liability without regard to any such statute. If defendant's breach of duty be conceded, then under a comparative negligence statute the effect of voluntary self-exposure to peril might well be simply to diminish damages. Landrum v. Reddy, 143 Neb. 934, 12 N.W.2d 82 (1943). Cf. Williams, Joint Torts & Contributory Negligence c. 12 (1951).


63. See Bohlen, Voluntary Assumption of Risk, 20 Harv. L. Rev. 14, 30 (1906).

but shorter route on the highway. On the other hand plaintiff may assume a risk which in a very real sense he does not voluntarily encounter, as where a fireman in the line of duty enters a factory which is dark and full of dangerous machinery, or where a tenant leases premises in a dangerous state of disrepair because no other quarters are available. The key is to be found in the character of the relationship between the parties and their respective duties in the light of it. The plaintiff takes a risk voluntarily (within the meaning of the present rule) where the defendant has a right to face him with the dilemma of "take it or leave it"—in other words where defendant is under no duty to make the conditions of their association any safer than they appear to be. In such a case it does not matter that plaintiff is coerced to assume the risk by some force not emanating from defendant, such as poverty, or a sense of moral responsibility.

65. See p. 144 supra.

The situation here referred to is to be distinguished from cases where defendant has negligently caused the condition calling for rescue (e.g. set the fire). See Liming v. Illinois Cent. R.R., note 32 supra (bystander). But cf. Suttle v. Sun Oil Co., 15 Pa. D. & C. 3 (1931); Note, 141 A.L.R. 584 (1942) (as to public firemen). The text deals simply with the question whether defendant is negligent in failing to prepare a safe place for firemen.


68. See notes 6-11 supra.
69. This was well pointed up by the early master and servant cases. Thus in Ogden v. Rummens, 3 F & F 751, 752 (N.P. 1863), a suit by the widow of a workman killed by the falling of an arch on which he was working, a witness was asked "whether, if he thought there was danger, he would not have remonstrated about it, he answered that he certainly might have done so, but that the answer would no doubt have been, 'Well, if you don't like to do the work, some one else will be glad to do it:' an answer which the learned Judge observed was very sensible."

See also Welsh v. Barber Asphalt Paving Co., 167 Fed. 465, 471 (9th Cir. 1909); and cf. Skipp v. The Eastern Counties Ry. Co., 9 Ex. 223, 23 L. J. Ex. 23, 156 Eng. Rep. 95 (1853) where the same attitude—though not expressly articulated—obviously underlies the decisions. Later developments in these cases are treated at pp. 155-7, 165 infra. Note, however, that modifications of the earlier attitude have come largely within the master-servant relationship. If another's employee (e.g. the postman or the deliveryman) finds the pathway to my home defective, the relationship is still regarded as voluntary so far as the employee and I are concerned, even though he may be under economic pressure from his employer (and his circumstances) to encounter the risk I have faced him with. This does not seem to have been discussed but it is frequently assumed, as in Paubel v. Hitz, 339 Mo. 274, 96 S.W.2d 369 (1936) (postman); Ft. Worth & D.C. Ry. Co. v. Hambright, 130 S.W.2d 436 (Tex. Civ. App. 1939).

70. See note 67 supra.
ASSUMPTION OF RISK

sibility.71 If, on the other hand, defendant is not privileged to put plaintiff to the choice of taking or leaving a danger, the mere posing of the dilemma takes away the voluntary character of any assumption there may be of the risk.72

So much for theoretical analysis. It will be apparent at once that the whole spirit of the defense and of the reasoning it employs, bears the strong imprint of laisser faire and its concomitant philosophy of individualism which has passed its prime. For the most part it is a product of the same climate of opinion that gave vitality, for example, to cavat emptor, contributory negligence, and notions of freedom of contract between employer and workman.73 Small wonder then that assumption of risk has lost ground as that climate of opinion has undergone modification—especially in some relationships like that of master and servant or landlord and tenant where the change has gone farthest and the duties of one party to the relationship have been greatly extended. It is likely to lose more ground as notions of social insurance gain strength and techniques for effecting broad distribution of enterprise liability are developed. But it would be a mistake to assume that the notion has lost all vitality today.74 Perhaps it never will—at least there has been one relationship (that of host and guest in an automobile) wherein the defendants’

71. The solicitor for the community chest drive or the volunteer fireman, going upon private premises in the course of his self-imposed duties would be an example. Such a person would occupy at best the status of an invitee. But see note 11 supra.

72. See notes 21 and 24 supra.


74. Some courts have declared that they have repudiated assumption of risk save in master and servant cases. Papakalos v. Shaka, 91 N.H. 265, 18 A.2d 377 (1941); Snelling v. Harper, 137 S.W.2d 222 (Tex. Civ. App. 1940); cf. Peyla v. Duluth, Missabe & Iron Range Ry. Co., 218 Minn. 196, 205, 15 N.W.2d 518 (1944) (“In other than master and servant cases, assumption of risk is but a phase of contributory negligence.”) From what has been said above it is apparent that every decision which is based on the rationale of assumption of risk in the primary sense, could equally well be based on reasoning from the lack of defendant's duty. And not only will the decision be the same in either case but so will be the essential reasoning (though not all the verbage). So it is not surprising to find that the courts in question do not actually come to conclusions in concrete cases any different from those which are reasoned in terms of assumption of risk—all that is repudiated is a form of words. Cook v. 177 Granite St., Inc., 95 N.H. 397, 64 A.2d 327 (1949) (licensee); Keys v. Alamo City Baseball Co., 150 S.W.2d 368 (Tex. Civ. App. 1941) (spectator at ball game); Ft. Worth & D.C. Ry. Co. v. Hambright, 130 S.W.2d 436 (Tex. Civ. App. 1939) (invitee); McGregor, Incurred Risk in Texas, 1 BAYLOR L. REV. 410 (1949); Keeton, Assumption of Risk & the Landowner, 20 TEX. L. REV. 562 (1942). Compare Sinclair Prairie Oil Co. v. Thornley, 127 F.2d 128, 133 (10th Cir. 1942) (“The defense of assumption of risk is not available in Oklahoma between parties not in a contractual relationship”) with City of Tulsa v. Harman, 148 Okl. 117, 239 Pac. 462 (1931) (stating broadly the usual rule that invitee on land assumes the risk of perfectly obvious dangers there). Perhaps, however, the repudiation is helpful to clarity of thought because of the ambiguities that lurk in the term assumption of risk.
duties have been cut down rather than expanded in the last quarter century. At any rate, for present purposes it remains to consider the application of assumption of risk to specific types of situations, and to sketch very briefly whatever trends may be observable in connection with them.

Master and Servant

Apparently the doctrine came to full recognition in actions brought by workmen against their employers for injuries incurred at work. The early attitude was clear and led quite naturally and logically to the concept of assumption of risk. This was very simply expressed by a Scottish court in a case where the workman was injured by a horse whose dangerous tendencies he knew (and of which he had complained). "This is a country of free labour. We have no such thing as travaux forcés, still less have we anything approaching slavery. . . . Now, if a servant, in the face of a manifest danger, chooses to go on with his work, he does so at his own risk, and not at the risk of his master." As the Supreme Court has recently pointed out, assumption of risk developed in response to the general impulse of common-law courts "to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost—to someone—of the doing of industrial business." Any other rule "would not only subject employers to unreasonable and often ruinous responsibilities, thereby embarrassing all branches of business" but would also "encourage carelessness on the part of the employee."

This, of course, is almost the exact antithesis of the philosophy which underlies workmen's compensation acts. That regards the toll of industrial accident as an inevitable, though reducible, cost of our industrial and economic system and compensates the victim without regard to fault on the part of anyone, distributing the cost of compensation among the beneficiaries of the enterprise that takes the toll. Under such a system the risks of injury are put directly upon industry—there is no room for their assumption by the


76. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT §§ 1167 et seq (2d ed 1913); Bohlen, Voluntary Assumption of Risk, 20 HARV. L. Rev. 14, 91 (1910); Warren, Volenti Non Fit Injuria in Actions of Negligence, 8 HARV. L. Rev. 457 (1895).


78. Black, J., in Tiller v. Atlantic Coast Line Ry. Co., 318 U.S. 54, 59 (1943) quoting Mr. Justice Bradley in Tuttle v. Detroit, Grand Haven & Milwaukee Ry., 122 U.S. 189 (1887). In his thoughtful treatise, Labatt states that it was only by an "accident of litigation" that the early cases on this subject attacked the problem of employer's liability from the point of view of the servant's assumption of risks rather than that of the master's duty which might fairly have been regarded as one "to be held responsible if . . . conditions [of work] are not such as a prudent man would maintain under the circumstances." This accident of birth produced an "intolerably severe doctrine" which has led to much conflict and confusion. See 3 LABATT, COMMENTARIES ON THE LAW OF MASTER & SERVANT §§ 893, 1181 (2d ed. 1913) (hereinafter cited as LABATT).
Assumption of Risk

employee. Between the early cases and the advent of workmen’s compensation there emerged, at least in England, a growing recognition of the reality of the forces which pretty much coerced a workman to continue in one employment or another with its various attendant dangers. As one judge succinctly put it, it was “his poverty, not his will” which consented. Another pointed out that “freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will.”

This change of attitude was accompanied by many inroads upon the defense. The story of this development has been ably told elsewhere. But for present purposes in America it is sufficient to note: (1) that nearly all industrial accidents are covered by workmen’s compensation statutes; (2) that the largest single area where that is not so (injuries to railroad employees engaged in interstate commerce and to seamen) is covered by a statute which since 1939 has abolished the defense of assumption of risk; (3) that there


83. All the states, Alaska, the District of Columbia and Hawaii have workmen’s compensation laws. Federal legislation of this character covers many employees of the federal government and of federal agencies, and also longshoremen and harbor workers. While coverage under these acts is not complete, the excluded classes of employees are for the most part those in domestic service, in agriculture, or in the service of those employing labor on a very small scale. The complete text of all Statutes is to be found in Schneider, Workmen’s Compensation Statutes (1939) and current supplements thereto.


As we shall see (notes 85-93 infra), assumption of risk had come to have a dual aspect in master and servant cases, viz. (1) assumption of the ordinary risks of employment which the master was not bound to protect the servant against, but the servant had to protect himself against, and (2) assumption of risks created by the negligence of the master (but known to and appreciated by the servant). The amendment was therefore open to the possible construction that only the second kind of assumption of risk was abolished. The first kind, being simply the negation of negligence, was not affected, for negligence was still the basis of liability under the Act. This possible construction of the amendment was adopted by some courts and by Frankfurter, J., in Tiller v. Atlantic Coast Line Ry. Co., 318 U.S. 54, 63 et seq. (1943) (concurring opinion). Cf. Tiller v. Atlantic Coast Line Ry. Co., 123 F.2d 420 (4th Cir. 1942).
are a few areas not covered by the above-mentioned statutes (such as agricultural, or domestic labor in some states) where the defense still exists;\(^8^6\) (4) where it does, the American cases do not reflect to any appreciable extent the developments which have marked the last century of English law, though they should.

The conventional statement of the rule in America today is that the servant "assumes (1) such dangers as are ordinarily and normally incident to the work, and a workman of mature years is presumed to know them whether he does or not; (2) such extraordinary and abnormal risks as he (a) knows and appreciates and faces without complaint or (b) are obvious and apparent."\(^8^7\) Ordinary risks are sometimes defined as those existing after the master has done all he is bound to do for the safety of the servant,\(^8^7\) but this is not helpful for it does not tell us what the master is bound to do. A better definition of ordinary risk is one which is "so regularly and normally incident to the employment that anyone who considers the matter at all must see that the liability to

---

It did not, however, prevail. The majority of the Supreme Court held that "every vestige of the doctrine of assumption of risk was obliterated." Tiller v. Atlantic Coast Line Ry. Co., *supra*, at 58.

What this means in effect is that the whole structure of reciprocal rights and duties has been shifted. Where the old law cast the burden of self-protection on the employee, the new dispensation puts the burden of exercising care for the protection of each employee on the railroad, so far as compensation for injuries goes. The employer must now take reasonable precautions against foreseeable sources of injury to employees even where those sources include inadvertence or oversight by the employee himself. The master's duty is no longer fulfilled by making the conditions of employment as safe as they appear to be; he must use care to make them reasonably safe. This is not, as Frankfurter suggests, an abrogation of negligence as the basis of liability. A main vice of assumption of risk in the older cases was that it limited the duties of employers far more drastically than would the ordinary canons of negligence. The books are full of cases (outside the master-servant sphere) where a defendant has been held negligent for failing to take some precaution to protect a plaintiff against a danger that plaintiff could have himself avoided if he had looked out for it. The common law often put one party to a relationship under the primary duty to use care to protect the other from injury (relieving the former of liability only when the other was negligent in "assuming the risk"). All the situations listed above (at notes 16-28) are of that kind and it would have been quite natural and logical for master and servant cases to take the same course. See *Labatt*, § 1181; note 78 *supra*.

The amendment has expanded the duties of defendants very greatly beyond what they were before. But they still all lie within the obligation to use due care under the circumstances. There will still be no liability, even for the risks of railroading, unless reasonable foresight by the employer could have prevented them by reasonable means. Cf. Roberts v. United Fisheries V. Co., 141 F.2d 288 (1st Cir.), *cert. den.*, 323 U.S. 753 (1944).


be injured by such an occurrence is an ever-present possibility."\(^{63}\) Against these risks the servant must protect himself; the master is bound to afford him no protection.\(^{89}\) Extraordinary risks, on the other hand, are said to be those attributable to the master's negligence.\(^{90}\) And if the master be regarded as under certain duties of care with respect to works, ways, and appliances to all employees, then the defense of assumption of risk may in this instance be interposed successfully to a defendant's negligence. Most of these cases, however, are susceptible of a different explanation, namely that there is no absolute or intrinsic duty or negligence to all employees, and a servant's knowledge of the risk is not a defense but a factor to be considered in determining whether the master is negligent towards him. "As regards a servant who fully understands the perils to which an instrumentality exposes him, it is not negligence to furnish or continue to use that instrumentality, however defective and dangerous it may be."\(^{91}\) Under this view the master's duty with respect to extraordinary risks is like that of an occupier of ordinary private land towards invitees: not an absolute one to use care to make conditions reasonably safe, but one that will be satisfied if conditions are made as safe as they appear to be.\(^{92}\) This analysis minimizes the theoretical difference between ordinary and extraordinary risks. Under any view, however, there is a distinction for the purposes of trial practice. "[T]he servant's knowledge of the risk must always be established by specific evidence where the risk is abnormal, but will frequently be presumed where the risk is normal."\(^{93}\)

In situations where there would otherwise be assumption of risk, it may be avoided by showing that the master had promised to remedy the dangerous conditions and that a sufficient time had not elapsed to warn the servant that the promise would not be kept.\(^{94}\) Under some circumstances, also, an assurance of safety by the master will have the same effect.

Other Situations

In the case of the gratuitous licensee on land, assumption of risk still holds full sway so far as condition of the premises goes, though the result is more often rationalized in terms of want of duty. This at least is the announced

---

88. LABATT, § 1169 at 3112; Baer v. Baird Mach. Co., 84 Com. 269, 79 Atl. 673 (1911).
89. Johnson v. Devoe Snuff Co. 62 NJL 417, 41 Atl. 936 (1898); LABATT, § 1167.
90. Hough v. Texas & P.R.R., 100 U.S. 213 (1879); LABATT, § 1178.
92. Guedelhofer v. Ernsting, 23 Ind. App. 188, 55 N.E. 113 (1899); Marsh v. Chickering, 101 N. Y. 396, 5 N.E. 56 (1886); LABATT, § 953.
93. LABATT, § 955 at 2573.
94. Gunning System v. Lapointe, 212 Ill. 274, 72 N.E. 393, (1904); LABATT, § 1349 et seq.
The licensee takes the premises as he finds them. The owner or possessor is not bound to inspect them or make them safe, but only to disclose concealed conditions of danger of which he actually knows. It would be a mistake to conclude that there has been no extension of liability here, but developments have been less radical and less widespread and well within the framework of existing doctrine. This deserves separate treatment, but a few points may be noted here. (a) There has been some tendency to liberalize the test of a concealed danger—it was once said "an open hole, which is not covered otherwise than by the darkness of night, is a danger which a licensee must avoid at his peril." Today the test is generally whether the licensee might be expected to discover the danger by using reasonable caution. (b) There has been greater readiness to find the plaintiff an invitee rather than a "bare licensee." (c) There has been considerable astuteness in finding affirmative negligent conduct rather than a mere condition of the premises. (d) These developments have been most noticeable where premises have been prepared for the entry of more or less unidentified segments of the public. (e) Orthodox

95. See note 10 supra. Harper, Law of Torts § 95 (1933); Prosser, Torts § 78 (1941); Restatement, Torts § 342 (1934).


See also Bohlen, Duty of a Landowner Towards Those Entering His Premises of Their Own Right, 69 U. of Pa. L. Rev. 142, 237, 340 (1921); Prosser, Business Visitors & Invitees, 26 Minn. L. Rev. 573 (1942); Harper, Licensor-Licensee: Tweedledum-Tweedledee, 25 Conn. B.J. 123 (1951); Notes, 1 DePaul L. Rev. 130 (1951), 22 Texas L. Rev. 489 (1944); Shulman & James, Cases & Materials on Torts 506-10 (1942); Restatement, Torts § 332, comments c and d (1934).


100. Ward v. Avery, 113 Conn. 394, 155 Atl. 502 (1931); Recreation Centre Corp. v. Zimmerman, 172 Md. 309, 191 Atl. 233 (1937); Carlisle v. J. Weingarten Inc., 137 Texas 220, 152 S.W.2d 1073 (1941), reversing 120 S.W.2d 886 (Tex. Civ. App. 1938); Note 17 Texas L. Rev. 503 (1939); Prosser, Business Visitors & Invitees, 26 Minn. L. Rev. 573 (1942).
notions have retained their greatest practical vigor in the case of ordinary private premises (homes, farms, and the like), or those parts of business and industrial premises not prepared or generally intended for the reception of outsiders.101

The matter as between borrower and gratuitous lender of a chattel stands in pretty much the same way—though perhaps subtle extensions of liability are even less perceptible here. The lender’s only duty is to disclose defects in the chattel which he knows about and which the borrower probably will not notice. All other defects the borrower assumes, whether he could have discovered them or not.102 The rule is the same for the similar case where a plaintiff accepts gratuitous use of the chattel. The typical situation is one where plaintiff is a guest in defendant’s automobile and is hurt when a defect in the automobile causes an accident.103

Even the business visitor or invitee on ordinary private premises assumes the risk of dangers which he knows about and fully comprehends or which are sufficiently obvious. To be sure the owner or occupier of land owes to such an entrant the duty of reasonable inspection (a duty not owed to the gratuitous licensee), but once he finds the defect he fulfills all further duty to the invitee by making full disclosure.104

Voluntary participants in lawful games, sports, and even roughhouse, assume the risk of injury at the hands of their fellow participants (and of course of “hurting themselves”), so long as the game is played in good faith and without negligence.105 Voluntary spectators generally assume the same risks, though


102. See note 9 supra.


This is to be distinguished from the case where plaintiff is injured by the driver’s negligence. Here the common law doctrine of assumption of risk was not generally applied. Dickerson v. Connecticut Co., supra; Rice, The Automobile Guest & the Rationale of Assumption of Risk, 27 Minn. L. Rev. 429 (1943); authorities cited supra, note 75. Guest statutes have, however, in many states cut the host’s duty down below that of using ordinary care and so may be said to require the guest to assume the risk of ordinary negligence. Cf. note 48 supra.

104. See authorities cited note 11 supra.


Compare the similar but distinct problem whether consent to an illegal event (e.g. prize fight) bars recovery. Bohlen, Consent as Affecting Civil Liability, 24 Col. L. Rev. 819 (1924); Notes, 23 So. Calif. L. Rev. 135 (1949), 2 Vand. L. Rev. 301 (1949).
other elements enter the situation where a paying spectator sues the proprietor who has "invited" him to watch the game.

Many of the situations described above do not typically involve the "human overhead" which is an inevitable part of the cost—to someone—of the doing of industrial business. They could not so appropriately be brought under a scheme of "enterprise liability." Perhaps they are an inevitable cost of life just as are accidents in one's own home. This has always been so, and the parties directly concerned are often individuals who would have to pay damages out of their own pockets—much as was the case in 1800. Concepts of fault and individualism are therefore, perhaps, less unrealistic here than in so much of modern accident law, so we may expect them to persist longer and with fuller vigor. There is one factor that may change this. Liability insurance is already available to protect the individual against all the risks described. As yet it is not very widely held. As it becomes more so, these situations will become very much like that in automobile accident cases so far as techniques for distributing the loss are concerned, though the accident toll—hence the social problem of the uncompensated victim—is much smaller.

There are situations, however, where the injury caused may more appropriately be thought of as a casualty incident to a profitable kind of business enterprise which is (or should be) equipped to make a regular and equitable distribution of the costs of that enterprise among its beneficiaries according to the principles of insurance. Where that is the case, both the compensatory and the admonitory functions of tort law are more likely to be furthered by the imposition of liability. And the actual decisions are likely to reflect that fact, though the formal legal doctrine may make no distinction between cases involving neighbor and neighbor, and cases where the risks of an enterprise are concerned. Such a distinction is attempted here and what follows is a discussion of cases of the latter type.

Where the owner or occupier of land has prepared part of his premises for the reception of the public or some segment of it, there is coming to be increasing question whether the duty to his invitees is satisfied by simply making dangerous conditions obvious. There is a tendency towards holding the proprietor to the duty of care to make such premises reasonably safe (a duty...
similar to that of e.g., municipalities with respect to highways). To the extent that this tendency becomes realized, it will squeeze assumption of risk out of these cases. But this has not fully happened yet and most statements of the rule draw no distinction between the duties of the tenant of a house in the suburbs and the owner of a department store. At any rate, however, the invitee in the cases now under discussion may as a matter of fact make many assumptions as to safety that would be entirely unreasonable in the case of an invitee on ordinary private property. Many dangers which would be "obvious" (hence assumed) in the latter case will not be so in the former. Thus a customer in a store may to a certain extent assume that the aisles are free from obstructions and pitfalls and that he is free to give some attention to the merchandise on the counters and other displays as he walks along.

The group of cases in this field where assumption of risk has most frequently been invoked involves spectators at games. Ordinarily, for example, only the part of the baseball grandstand behind home plate is screened, and quite a few cases have occurred where spectators in the unscreened portion of the stands have been injured by batted or thrown balls. The courts have held that there is no negligence in this kind of arrangement and that the spectator takes the risk of these incidents. He does not, however, assume the risk of injury from such things as defective screening or negligence in allowing batting practice too near the stands. Hockey stands also often have screened (behind the goals) and unscreened portions, and here too a spectator may be hit by a flying puck. An experienced spectator no doubt assumes this risk, but in the case of one not familiar with the game and this risk, courts are divided.


111. The Restatement, for instance, states the same rule for business visitors, whether in homes or stores. RESTATEMENT, TORTS § 343 (1934). But cf. note 112 infra.

And contrast such a case as Blodgett v. B. H. Dyas & Co., 4 Cal. 2d 511, 50 P.2d 891 (1935), with those in note 110 supra.

112. See authorities cited supra note 110; RESTATEMENT, TORTS § 343, comment c (1934).

There is an illuminating discussion of the extent to which a highway traveler may assume conditions of safety, and a comparison of his lot with that of a store's customer, in McFarlane v. Niagara Falls, 247 N.Y. 340, 160 N.E. 391 (1928). The issue there was contributory negligence but, as the text suggests, the same considerations have a direct bearing on the amount of care which will be reasonable for the defendant.

113. See notes 44 and 46 supra.


115. See notes 46 and 47 supra.
Probably lack of experience would make no difference in the baseball cases, but there may well be a difference between the obviousness of the risk and the universality of popular knowledge of it that would warrant different treatment of the proprietor’s duties in the two cases. These decisions make sense under a fault principle of liability, but there is here a most appropriate basis for enterprise liability.

Another relationship in which the notion of assumption of risk has been applied is that between landlord and tenant with respect to the leased premises themselves (as distinguished from common hallways, approaches, and the like, which remain in the landlord’s control). Here, traditionally, the landlord’s only duty was to disclose concealed dangers known to him; other dangers the tenant assumes. Apart from statute, this is still the rule. But being a landlord is engaging in a business enterprise, though often a very small one. And in many periods of our very recent—and contemporary—history, housing shortages have drastically limited free choice on the part of tenants and put them, as a class, in a disadvantageous bargaining position. It is not surprising, therefore, that there has been an increasing number of statutes requiring landlords to put and keep leased premises in a given state of repair, or to take other precautions looking in part towards the safety of their tenants. Where statutes impose such duties, a tenant does not assume the risk of their breach.

Express Assumption of Risk

So far we have been discussing what may loosely be termed implied assumption of risk. Often, it will be noted, this involves nothing that could very realistically be called an agreement even by implication. Rather it represents a consequence that the law attaches to various voluntary relationships—a limitation of the duty owed by one party towards another with respect to the risks incident to that association. And very often the parties enter into such a relationship when one (or both) of them does not have these risks or duties in mind at all. But such parties may make an express agreement concerning these risks, and this agreement may seek to change the reciprocal rights and duties that the law would otherwise attach to the relationship.

What we are concerned with here are agreements by one party to assume the risk of what would ordinarily be a breach of duty by the other. Thus a warehouseman and a bailor may stipulate that the warehouseman shall not be liable for any damages caused to the goods by water, steam, or fire. Or a private carrier for hire which has only a defective vehicle available may

---

116. See note, 46 supra.
119. This duty is usually to exercise reasonable care, but it may be higher, as in the case of common carriers of freight.
agree to carry an urgent passenger only if he will assume the risk of the
vehicle's defect. In such cases the questions may arise (1) whether the
agreement is valid, and (2) whether it is to be construed so as to cover
the risk which caused the injury. In the warehouseman's case, for instance,
there might be a question whether the clause exculpated him from loss by
fire caused by his own negligence.

There is no general legal prohibition against express agreements to assume
risks. Specific agreements may however be invalid as against public policy
because of the character of one of the parties or of the relationship between
them, or because the gravity of the risk is out of all proportion to the utility
of creating it. In the highly individualistic atmosphere of the nineteenth
century, when unbridled freedom of contract was considered a paramount
social good and individuals in all sorts of diverse circumstances were more
apt to be regarded as fully able to protect themselves against the vicissitudes
of the system, this area of prohibition was pretty small. Even then it was
recognized. Persons who had undertaken one of the common callings, for
instance, were not altogether free to cut down their duties below those which
the law required of the calling. As individualism has become more bridled


Occasionally it has been stated broadly that clauses exculpating a party from liability for his own negligence are void as against public policy. See Papakalos v. Shola, 91 N.H. 265, 268, 18 A.2d 377, 379 (1941). But see Nashua G. & C. P. Co. v. Noyes Buick Co., 93 N.H. 348, 351, 41 A.2d 920, 922 (1945).

121. This is the way the rule is usually expressed. It has been suggested that it would be more accurate to say that the social reason for preserving the incidents of the relationship outweigh the desirability of allowing parties full freedom of contract. Note, 37 Col. L. Rev. 248 (1937). This is most apt to be the case where there is great disparity between the bargaining positions of the parties.

122. See, e.g., Maying v. Todd, 4 Camp. 225 (N.P. 1815); New Jersey S.N. Co. v. Merchants' Bank, 6 How. 343, 381-5 (U.S. 1848); Ill. Cent. R. Co. v. Morrison, 19 Ill. 136 (1857); Gashweiler v. Wabash St. L. & P.R. Co., 83 Mo. 112 (1884); Dissell v. N.Y. Cent. R. Co., 25 N.Y. 442 (1862); Note 175 A.L.R. 8, 110 et seq. (1948).

123. Cole v. Goodwin, 19 Wend. 251 (N.Y. 1838); Gould v. Hill, 2 Hill 623 (N.Y. 1842); Jones v. Voorhees, 10 Ohio 145 (1840); Fish v. Chapman, 2 Ga. 349 (1847); McClain, Contractual Limitation of Liability for Negligence, 23 HAW. L. REV. 550 (1951); Haythe, Limitation of Carriers' Common Law Liability in Bills of Lading, 8 VA. L. REV. 849 (1933).

The English courts came to uphold limitations of liability (usually to £5) made by general notice by a carrier, when they were coupled with an option to obtain full insurance by paying a higher rate. Such limitations were construed as not relieving the carrier from liability for gross negligence or willfulness, but only from his strict liability as insurer. Smith v. Horne, 8 Taunt. 144 (C.P. 1818); Newborn v. Just, 2 Carr. & P. 76 (N.P. 1825); Riley v. Horne, 5 Bing. 217 (C. P. 1838).
and regulated, in what has come to be thought the paramount general interest, this area of prohibition has naturally been extended.

More and more relationships are seen to involve inequality in bargaining powers. Thus today courts are becoming increasingly reluctant to allow public utilities, professional bailees (e.g. warehousemen), and employers to exculpate themselves by contract from liability for damage caused by their own negligence to patrons, bailors, and employees, respectively.\textsuperscript{124}

The courts have also shown a marked tendency towards construing exculpatory clauses strictly, even where they may be valid. Many courts, for instance, have held in effect that a clause will not be construed to include an exemption for negligence unless it does so in the clearest terms, as by using the word "negligence," or language so broad and sweeping that it must be taken to include negligence.\textsuperscript{125}

In the American cases cited above the courts were loath to give even this much liberty of contract to the carrier. But Cf. New Jersey S.N. Co. v. Merchants' Bank, 6 How. 343, 381-5 (U.S. 1848). Subsequent American decisions were not harmonious. A measure of uniformity was brought about however by federal legislation and administrative action (1) allowing common carriers engaged in interstate or foreign commerce to make differential charges according to the declared value of goods shipped in such commerce and enforcing the agreed valuations even in cases of negligence, Adams Exp. Co. v. Croninger, 226 U.S. 491 (1913); Galveston H. & A. Ry. Co. v. Woodbury, 254 U.S. 357 (1920), and (2) permitting telegraph companies to limit their liability for mistakes in transmitting unrepeated messages in interstate and foreign commerce and to charge higher rates for repeated messages. Western Union T. Co. v. Estevé Bros. & Co., 256 U. S. 566 (1920). See, however, state court cases collected in Note, 175 A.L.R. 8, 53 et seq. (1948), some of them coming to an opposite conclusion so far as intra-state messages are concerned.


Some illustrative cases are Collins v. Virginia P & E Co., 204 N.C. 320, 168 S.E. 500 (1933) (electric company); Denver U.T.R. Co. v. Cullinan, 72 Colo. 248, 210 Pac. 602 (1922) and Note, 27 A.L.R. 157 (1923) (owners of parcel checkroom); Agricultural Ins. Co. v. Constantine, 56 N.E.2d 687, 690 (Ohio App. 1943), aff'd, 144 Ohio 275, 58 N.E.2d 658 (1944) (parking lot owner).

In this field as in that of carriers and telegraph companies, some courts are willing to enforce agreements for a released valuation where coupled with a lower rate. It has been urged that such an option (if the rates are reasonable) gives an artificial equality to the bargaining position of the parties. Note, 37 Col. L. Rev. 248 (1937). See also note 131 infra.

125. This tendency is not new. In Newborn v. Just, 2 Carr. & P. 76 (N.P. 1825) defendant, a bailee, defended on the ground of a notice that he would not be answerable for goods above £5 unless they were specially paid for. He argued that since he was not a common carrier he had the right to stipulate against liability for negligence but Best, C.J., answered, "Then your client must give distinct notice to that effect: and if the public were told that he would not be liable either for the negligence of himself or his servants, he would not have many persons trust him."

In addition to these common law developments, there is an ever growing number of specific duties imposed by statutes representing a policy of protection so peremptory that it will not brook an agreement to assume the risk of a breach of the statute. Thus where the legislature has required a device or precaution for the protection of employees in a certain trade, where similar precautions are prescribed in a tenement house law for the protection of tenants, where the employment of child labor has been forbidden, or the like, the statute has often been either written or construed as precluding express as well as implied assumption of the risks which a statutory breach would entail.

Moreover, legislatures as well as courts have increasingly recognized the pressures which in fact compel people to enter into many relationships which once were regarded as altogether voluntary. Such a feeling has often crystallized in statutes barring agreements to assume the risks of those relationships. We have seen how railroad workers are no longer barred by implied assumption of risk; the express assumption of the same risk stands no better. Nor would there be any room for an agreement by a workman to assume risks covered by workmen's compensation laws. And exculpatory clauses in warehouse receipts have been widely outlawed by statute.

Griffiths v. Broderick, Inc., 27 Wash. 2d 901, 182 P.2d 18 (1947) affords an example of language so broad that it was held to include defendant's own negligence ("from any and all loss, damage or injury . . . arising from any cause or for any reason whatsoever."). 27 Wash. 2d at 903, 182 P.2d at 19.

126. See, e.g., Narramore v. C.C.C. & St. L. R. Co., 96 Fed. 298, 302 (6th Cir. 1899); Welsh v. Barber Asphalt P. Co., 167 Fed. 465, 471 (9th Cir. 1909); 5 Labatt, Master & Servant §§ 1647, 1647a (2d ed. 1913); Note, 15 A.L.R. 1380, 1485 (1921).


132. Section 3 of the Uniform Warehouse Receipts Act forbids terms in such a receipt which "in any wise impair [warehouseman's] obligation to exercise that degree of care in the safe-keeping of the goods entrusted to him which a reasonably careful man would exercise. . . ."


On the other hand limitations of liability to an agreed valuation where the rate charged is based on the value of the article have been upheld under that section, even
Occasionally also the courts have felt that some kinds of dangers, or dangers from some kinds of conduct, are so great, and produce so little social utility, that an agreement to assume them is invalid. "The interest of the state in the safety of the citizen"\textsuperscript{133} outweighs in such a case the importance "to society that men abide by ticket and contract stipulations."\textsuperscript{134} Thus one who rides "free" on a railroad pass will be bound by his assumption of the risk of injury from simple negligence,\textsuperscript{135} but not that of injury for wilful or wanton misconduct.

Outside of these growing areas of prohibition, an express agreement to take certain risks will be upheld. Perhaps it should be noted here that some writers confine the term "assumption of risk" to those cases where there is a positive agreement (either express or actually to be implied in fact) to waive a right of action in cases where "the plaintiff has proved that a presumptive tort has been committed."\textsuperscript{138} It might well be a good thing if the courts would confine their use of the term to such cases, but they do not.

\textbf{Procedural Aspects}

\textit{Functions of judge and jury.} Here as elsewhere\textsuperscript{137} it is for the court to determine what rules of law are appropriate to the circumstances of a given case, and whether those rules impose on the defendant a full duty to use care towards plaintiff, or only the truncated duty which is the counterpart of assumption of risk (as the term is used here).\textsuperscript{138} The court decides, for example, where the loss is caused by negligence. Missouri P. R. Co. v. Fuqua, 150 Ark. 145, 233 S.W. 926 (1921); McMullin v. Lyon F.S. Co., 74 Cal. App. 87, 239 Pac. 422 (1925); Eckel v. Trencher Furs, 191 Misc. 14, 76 N.Y. S.2d 829 (N. Y. Munic. Ct. 1947). \textit{But cf.} Healy v. N.Y. Cent. R. Co., 153 App. Div. 516, 138 N.Y. Supp. 287 (3d Dep't 1912) aff'd 210 N.Y. 646, 105 N.E. 1086 (1914); Taccetta v. Chauncey Rice & Rogovin, 75 F.Supp. 373 (S.D.N.Y. 1947).

\textsuperscript{133} Jacobus v. St. Paul & C. R. Co., 20 Minn. 125, 130 (1873).
\textsuperscript{135} This is true at least of passes authorized by the (federal) Hepburn Act. Francis v. So. Pac. Co., 333 U.S. 445 (1948). There is, however, excellent reason in the context of the modern accident problem, to disallow waivers of liability for negligence, and where the federal law is not thought to govern, there is judicial authority for their disallowance. Jacobus v. St. Paul & C.R. Co., 20 Minn. 125, 130 (1873); Williams v. Oregon S. L. R. Co., 18 Utah 210, 54 Pac. 991 (1898); see Donnelly v. So. Pac. Co., 18 Cal.2d 863, 866, 118 P.2d 465, 468 (1941).
\textsuperscript{136} WILLIAMS, \textbf{JOINT TORTS \& CONTRIBUTORY NEGLIGENCE} 295 (1951). See also \textit{id} at 295-316.
\textsuperscript{137} See, e.g., James, \textit{Functions of Judge \& Jury in Negligence Cases}, 58 YALE L.J. 667, 676 (1949).
\textsuperscript{138} Any doubt there may be, for instance, as to the proposition dealt with in note 25 \textit{supra} (See article by Keeton, cited therein), would be resolved by the court, as matter of law. And it has been the \textit{courts} that have adopted the rules governing the duties of proprietors in the baseball cases. See notes 44, 46, 47 \textit{supra}. And notoriously it was the \textit{courts} that fashioned the rule in master and servant cases. Text at note 69 \textit{et seq.}, \textit{supra}. 
ample, whether a storekeeper must use care to make his store reasonably safe for customers or whether his duty is satisfied if dangerous defects are sufficiently obvious. But the application of that rule to the specific facts in evidence is properly a jury function, subject to the usual limit that a jury verdict may not stand if it necessarily involves a finding that the court believes reasonable men could not make. Thus in the storekeeper's case the jury would decide whether the claimed defect existed and was dangerous, and also whether it was obvious. Here, as elsewhere in the law of negligence, the courts have probably exercised an increasing restraint over their own function so as to enlarge the jury's sphere of decision.

Pleading and burden of proof. Assumption of risk has come to be thought of as a defense and as time has progressed a disfavored defense. Modern books are full of statements that the burden of pleading and proving assumption of risk is upon the defendant. And in many of the ways in which the term is used, this is undoubtedly the general rule. Where, for instance, defendant claims that plaintiff has expressly agreed to waive a liability which would (except for the agreement) exist, defendant would have to make that claim good by affirmative pleading and proof. And where the phrase "assumption of risk" is used to refer to contributory negligence—plaintiff's unreasonable assumption of a risk defendant is bound not to put to him—then the rule for

139. The cases cited in note 110 supra, exemplify the division of function between judge and jury in these cases. In each of them the court lays down the general rule and holds that its application to the facts of the case was for the jury under appropriate instructions. Blodgett v. B. H. Dyas & Co., 4 Cal. 2d 511, 59 P.2d 801 (1935), illustrates what happens when a court feels that the danger is so obvious that defendant had no further duty with reference to it. And cf. cases cited in note 11 supra.

140. The cases referred to in note 138 supra, furnish examples of this. As to the general trend in accident cases, see Nixon, Changing Rules of Liability in Automobile Accident Litigation, 3 Law & Contemp. Prob. 476 (1936); Searl, Automobile Liability Law Development & Trend, 39 Best's Ins. News 583 (Fire & Cas. ed. 1933); James, Functions of Judge & Jury in Negligence Cases, 53 Yale L.J. 667 (1949); James, Chief Justice Malbie & the Law of Negligence, 24 Conn. B.J. 61, 63 et seq. (1950).


141. Witness the almost complete repudiation of it in master and servant cases. See notes 83, 84 supra.

142. See, e.g., CLARKE, CODE PLEADING 303 n. 77 (2d ed. 1947); PROSSER, TORTS 376-7 (1941); 65 C.J.S. 921 (1950); 2 ROBERTS, FEDERAL LIABILITIES OF CARRIERS § 1021 (2d ed. 1929) (under FELA before 1939 amendment).

143. This seems to be generally assumed. See, e.g., remarks of Best, C. J., in Riley v. Horne, 5 Bing. 217, 223 (C.P. 1828) (implying that the carrier must prove plaintiff's knowledge of the notice limiting the risk), and the pleadings in Porteous v. Adams Exp. Co., 115 Minn. 281, 132 N.W. 296 (1911); Francis v. So. Pac. Co., 162 F.2d 813 (1947).
pleading or proving contributory negligence should apply.\textsuperscript{144} As we are using the term here, however, assumption of risk in the primary sense does not, analytically, describe a defense at all. It is simply a left-handed way of describing a lack of duty. And it can be urged with considerable logical force that it is plaintiff's burden to plead and show a breach of duty towards him.\textsuperscript{145} So it is not surprising that whenever the kind of situation dealt with in this study is analyzed in terms of duty, the courts do assign to plaintiff the burden to negative what, upon a different approach, would be regarded as assumption of risk. Thus the licensee on land \textsuperscript{146} (or the borrower of an automobile)\textsuperscript{147} must show as part of his case that his licensor (or lender) knew of the concealed defect which caused the injury, yet failed to disclose it. It is not enough in either case to show that the defect was dangerous and could be discovered by a reasonable inspection. In other words plaintiff must take the risk that injured him out of the class of those he assumed.

On the other hand it might well be pointed out that wherever assumption of risk, in the primary sense, applies, this means that there is an exceptional curtailment of defendant's duty below the generally prevailing one to take care to conduct oneself so as not to cause unreasonable danger to others. From this, it could be urged that a defendant who would escape the general rule requiring due care should plead and prove facts which bring him within an exception to it. This could be urged the more strongly since these exceptions represent a doubtful policy indeed and are back eddies in a rising tide of liability at least for the injurious consequences of unreasonably dangerous acts and omissions, \textit{i.e.} of negligence. And if such a result is thought desirable perhaps it is more likely to be reached here through the back door of assumption of risk—which makes a lack of duty look like a defense—than through a more straight-forward analysis.

\textit{Appraisal}

The doctrine of assumption of risk, however it is analyzed and defined, is in most of its aspects a defendant's doctrine which restricts liability and so cuts down the compensation of accident victims. It is a heritage of the extreme

\textsuperscript{144} Under modern law the burden of pleading and proving contributory negligence is generally on defendant. \textit{Clark, Code Pleading} 619 (2d ed. 1947).

\textsuperscript{145} See, \textit{e.g.}, the reasoning in \textit{Martin v. Des Moines E. L. Co.}, 131 Iowa 724, 106 N.W. 359 (1906); \textit{Rosedoff v. Consolidated R. Co.}, 94 N.H. 114, 47 A.2d 574 (1946); \textit{Labatt}, § 1608. A distinction was sometimes made in master and servant cases between ordinary risks (which the servant had to plead and prove that he did \textit{not} assume) and extraordinary risks (assumption of which was an affirmative defense). \textit{Cf.} text, at notes 86 \textit{et seq.}, supra.


\textsuperscript{147} \textit{Johnson v. H. M. Bullard Co.}, 95 Conn. 251, 111 Atl. 70 (1920); \textit{Dickason v. Dickason}, 84 Mont. 52, 274 Pac. 145 (1929).