



1968

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Recommended Citation

Fleming James Jr., *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. (1968).
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The Yale Law Journal

Volume 78, Number 2, December 1968

Assumption of Risk: Unhappy Reincarnation

Fleming James, Jr.†

The second *Restatement of Torts* states that implied assumption of risk should be recognized as a separate defense.¹ In a leading article over sixty years ago, Bohlen² took the contrary position. A plaintiff's *reasonable* assumption of risk would not bar him unless the risk was one which defendant had a legal right to put up to plaintiff; and in such a case defendant breached no relevant duty.³ A plaintiff's *unreasonable* assumption of risk would constitute contributory negligence on his part; and this would be a defense without the need to invoke any separate doctrine.⁴ Bohlen was the reporter for the original part of

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1. RESTATEMENT (SECOND) OF TORTS §§ 496A-496G (1965).

2. Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 91 (1905), reprinted in F. BOHLEN, *STUDIES IN THE LAW OF TORTS* 441 (1926).

3. This is the way I have always read the article. For a different reading, see Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5, 6 (1961). Dean Wade concludes that Bohlen had apparently "changed his mind" between the time of writing the earlier article and the time of his work as Reporter to the first *Restatement*. *Id.* In a footnote Dean Wade concedes, however, that in the earlier article Bohlen took the position that assumption of risk "negatives the existence of any duty on the defendant's part by the breach of which he could be a wrongdoer," and states that this was the principal reason why the doctrine was given no separate treatment in the *Restatement*. *Id.* n.10.

4. This statement, which was mine, not Bohlen's, is an oversimplification. Where defendant's conduct is wilful or wanton, or entails strict liability, ordinary contributory negligence is not a defense, but the deliberate and voluntary assumption of an unreasonable risk may be. See, e.g., RESTATEMENT (SECOND) OF TORTS § 402A, comment n, § 496A, comment d (1965); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 454, 455 (3d ed. 1964) [hereinafter cited as PROSSER, *TORTS*—the edition will be noted]. In such a situation there will be need to distinguish what may be called the unreasonable assumption of risk from ordinary contributory negligence.

Under a rule of proportional or comparative negligence, the question will arise whether the unreasonable assumption of a risk constitutes a complete defense or whether damages are to be apportioned. Different answers have been given to this question. See, e.g., *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 62 *et seq.* (1943) (describing the situation under the Federal Employers' Liability Act both before and after the 1939 amendment which

the first *Restatement of Torts*, which reflected his view by giving no separate treatment to the doctrine of assumed risk.⁵

Bohlen's analysis has never been universally accepted. Some courts and commentators continued to talk about assumption of risk as though it constituted a separate defense;⁶ and in the closing sections of the first *Restatement*, after Bohlen had left the helm,⁷ assumption of risk was introduced in Section 893.⁸

Harper and I have always been inclined to accept, in the main, Bohlen's analysis,⁹ as our textbook on torts shows.¹⁰ In the decade which followed that book's publication in 1956 there came to be substantial

abolishes the defense of assumption of risk); *Baird v. Cornelius*, 12 Wis. 2d 284, 107 N.W.2d 278 (1961); *McConville v. State Farm Mut. Auto. Ins. Co.*, 15 Wis. 2d 374, 113 N.W.2d 14 (1962). The better view is clearly that such assumption of risk is a form of contributory negligence to be compared with defendant's breach of duty. PROSSER, *TORTS* 455 (3d ed. 1964); *RESTATEMENT (SECOND) OF TORTS* § 496A, comment *d*, illustration 3, at 564.

This article will not be concerned with the unreasonable assumption of a risk.

5. See note 3 *supra*. Cf. *Malone, Foreward—The Kid Who Got Left Out*, 22 LA. L. REV. 1 (1961).

6. See, e.g., *Sullivan v. Shell Oil Co.*, 234 F.2d 733 (9th Cir.), *cert. denied*, 352 U.S. 925 (1956); *Morton v. California Sports Car Club*, 163 Cal. App. 2d 685, 329 P.2d 967 (1958); *Bouchard v. Sicard*, 113 Vt. 429, 35 A.2d 439 (1944); R. Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122 (1961); R. Keeton, *Assumption of Products Risks*, 19 Sw. L.J. 61 (1965); Note, 26 TENN. L. REV. 565 (1959).

The progression of Dean W. L. Prosser's ideas is interesting. In the first edition of his *Handbook of the Law of Torts* he seemed to accept the Bohlen analysis pretty completely. PROSSER, *TORTS* § 51 (1st ed. 1941). His second edition contains no substantial change in treatment but does expressly take note of my position that the doctrine serves no useful purposes since it introduces nothing which is not fully covered either by the idea of absence of duty or by that of contributory negligence. Prosser comments: "This is no doubt true; but the term does serve to focus attention upon the element of consent to take a chance, or of voluntary acceptance of a known risk, which is sometimes, but not always, involved in both of the other ideas." *Id.* 305 (2d ed. 1955).

In his third edition, Prosser develops at some length the position which is reflected in the second *Restatement*. PROSSER, *TORTS* § 67 (3d ed. 1964). As I see it this position differs from the one taken in *Harper and James* principally in two respects: (1) It stresses the need to distinguish the *unreasonable* assumption of a risk from ordinary contributory negligence in some situations. *Id.* 451-52. This point is well taken. See note 4 *supra*. (2) It maintains that the voluntary but reasonable assumption of a known risk is a defense to an action based on defendant's negligence even where that negligence consists in the breach of a duty not to confront the plaintiff with the very risk which injures him. *Id.* 451-54. This is the bone of contention between us and the subject of the present article.

7. See 4 *RESTATEMENT OF TORTS* vi-viii (1939).

8. Voluntary Exposure to Risk as a Defense:

A person who knows that another has created a danger or is doing a dangerous act or that the land or chattels of another are dangerous, and who nevertheless chooses to enter upon or to remain within or permit his things to remain within the area of risk is not entitled to recover for harm unintentionally caused to him or his things by the other's conduct or by the condition of the premises, except where the other's conduct constitutes a breach of duty to him or to a third person and has created a situation in which it is reasonably necessary to undergo a risk in order to protect a right or avert a harm.

9. F. HARPER, *A TREATISE ON THE LAW OF TORTS* §§ 130, 131 (1933); James, *Assumption of Risk*, 61 YALE L.J. 141 (1952).

10. 2 F. HARPER & F. JAMES, *LAW OF TORTS* ch. xxi (1956).

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judicial¹¹ and scholarly¹² support for the point of view it espoused, namely, that the doctrine deserves no separate existence (except for

11. The leading case is *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90 (1959). Here plaintiff, an invitee, was injured when he fell on the ice in defendant's skating rink. The evidence tended to show negligence in letting skaters of ordinary ability skate on ice which was unusually hard and brittle, hence dangerous to one without unusual skill. Defendant had a verdict at the trial. The judge had charged the jury on the defense of assumption of risk. The appellate division found this instruction confusing and this, with other errors, was held to call for a reversal. *Meistrich v. Casino Arena Attractions, Inc.*, 54 N.J. Super. 25, 148 A.2d 199 (1959). The supreme court affirmed this judgment with modifications. It construed the charge as declaring "that assumption of risk may be found if plaintiff knew or reasonably should have known of the risk, notwithstanding that a reasonably prudent man would have continued in the face of the risk." 31 N.J. at 48, 155 A.2d at 92. The court found the instruction, as so construed, to be erroneous. In doing so it adopted substantially the reasoning set forth in the first paragraph of this article. If the risk is produced by defendant's breach of duty to plaintiff, then plaintiff is not barred by encountering it knowingly and voluntarily if a reasonably prudent man would have incurred the risk despite that knowledge. See 31 N.J. at 53, 155 A.2d at 95.

This decision was reaffirmed in *McGrath v. American Cyanamid Co.*, 41 N.J. 272, 196 A.2d 238 (1963). In a per curiam opinion the court said: "In *Meistrich* . . . , we pointed out that assumption of risk was theretofore used in two incongruous senses: in one sense it meant the defendant was not negligent, while in its other sense it meant the plaintiff was contributorily negligent. We said that in truth there are but two issues—negligence and contributory negligence—both to be resolved by the standard of the reasonably prudent man, and that it was erroneous to suggest to the jury that assumption of risk was still another issue." 41 N.J. at 274, 196 A.2d at 239-40. The opinion ended with these strong words: "Experience . . . indicates the term 'assumption of risk' is so apt to create mist that it is better banished from the scene. We hope we have heard the last of it. Henceforth let us stay with 'negligence' and 'contributory negligence.'" 41 N.J. at 276, 196 A.2d at 240-41. The clarity of thought which results when assumption of risk is eliminated and reasoning is confined to the issues of duty (negligence) and contributory negligence is illustrated in *Totten v. Gruzen*, 52 N.J. 202, 245 A.2d 1 (1968).

Other cases are *Frellick v. Homeopathic Hosp. Ass'n of Del.*, 51 Del. 568, 571, 150 A.2d 17, 19 (Super. Ct. 1959) (plaintiff injured by dangerous condition of premises: "In this type of case, where a risk has been created by a breach of duty toward the plaintiff, the problem of voluntary assumption of risk overlaps the contributory negligence problem, or rather, is a phase of that problem"); *Bulatao v. Kauai Motors, Ltd.*, 49 Hawaii 1, 15, 406 P.2d 887, 895 (1965) (plaintiff injured by defect caused to auto by repairman; court directed on new trial to charge on contributory negligence but to make no separate submission of assumption of risk issue: "[W]e join the growing number of courts which decline to permit reliance on both of these defenses where one would serve"); *Baltimore County v. State, Use of Keenan*, 232 Md. 350, 193 A.2d 30 (1963) (guest-host auto case in which parties had been drinking together. Plaintiff's judgment reversed for failure to charge on contributory negligence but not for failure to charge on assumption of risk, which is here the same issue); *Felgner v. Anderson*, 375 Mich. 23, 133 N.W.2d 136 (1965) (hunting accident; separate existence of assumption of risk in Michigan traced and rejected except for master-servant and express assumption); *Bolduc v. Crain*, 104 N.H. 163, 166-67, 181 A.2d 641, 644 (1962) (bystander helping to prepare horse-pulling event at fair; failure to charge assumption of risk upheld because not applicable on facts and *also because doctrine entitled to no existence separate from contributory negligence*); *Ritter v. Beals*, 225 Ore. 504, 358 P.2d 1080 (1961) (employee not under workmen's compensation not barred by assumption of risk of obvious condition unless negligent in encountering risk); *Siragusa v. Swedish Hospital*, 60 Wash. 2d 310, 373 P.2d 767 (1962) (employee does not assume risk unless negligent); *McConville v. State Farm Mut. Auto. Ins. Co.*, 15 Wis. 2d 374, 378, 113 N.W.2d 14, 16 (1962) (guest-host auto case in which parties had been drinking together; guest's implied assumption of risk "is no longer a defense separate from contributory negligence"); *Colson v. Rule*, 15 Wis. 2d 387, 113 N.W.2d 21 (1962) (farm laborer does not assume risk unless negligent); See also Annot., 82 A.L.R.2d 1218 (1962).

12. See, e.g., P. Keeton, *Assumption of Risk and the Landowner*, 22 LA. L. REV. 103 (1961); Mansfield, *Informed Choice in the Law of Torts*, *id.* 17; Wade, *The Place of*

express assumption of risk) and is simply a confusing way of stating certain no-duty rules or, where there has been a breach of duty toward plaintiff, simply one kind of contributory negligence.

In the course of the discussion of the second *Restatement*, the Reporter proposed to the advisors the adoption of new sections which would refine Section 893 of the first *Restatement*. What happened is well told by Justice Greenhill in *Halespeska v. Callihan Interests, Inc.*:

In preparing Restatement of the Law of Torts, Second, the advisers sharply divided. A group mainly of distinguished deans and professors, favored striking the entire chapter of Assumption of Risk. They would use contributory negligence. The group includes Deans Page Keeton and Wade, and Professors James, Malone, Morris, Seavey and Thurman. Mr. Eldredge prepared a "dissent" for this group. The group is referred to in the notes to the draft as "The Confederacy." Others including Prosser, Professor Robert Keeton, and Judges Fee, Flood, Traynor and Goodrich supported the existence of the defense of assumed risk. The distinguished scholars refer to the debate, among themselves, as "The Battle of the Wilderness." The Reporter, Prosser, states in the draft that the American Law Institute Council voted unanimously to follow the recommendations of the sections on assumption of the risk.¹³

The upshot was adoption by the American Law Institute of Sections 496A-496G of the second *Restatement*.¹⁴

By far the most serious difference between these sections and my position concerns the question whether a defendant who has breached his duty of care toward plaintiff may nevertheless defend an action for injury resulting to plaintiff from that breach on the ground that plain-

Assumption of Risk in the Law of Negligence, *id.* 5. Cf. Green, *Assumed Risk as a Defense*, *id.* 77; Pedrick, *Taken for a Ride: The Automobile Guest and Assumption of Risk*, *id.* 90.

13. 371 S.W.2d 368, 378 n.3 (Tex. 1963). See also *City of Tucson v. Holliday*, 3 Ariz. App. 10, 411 P.2d 183, 188 (1966).

14. Section 496A states the general principle that plaintiff's voluntary assumption of a risk arising from defendant's negligent or reckless conduct bars his recovery for harm resulting from that risk.

Section 496B deals with express assumption of risk.

Section 496C states that a plaintiff who fully understands a risk caused by defendant's conduct, or the condition of defendant's land or chattels, "and who nevertheless voluntarily chooses to enter or remain . . . within the area of that risk, under circumstances that manifest his willingness to accept it," is barred from recovery "for harm within that risk." The section also covers plaintiff's things, but it excepts situations where express assumption of risk "would be invalid as contrary to public policy."

Section 496D makes plaintiff's knowledge and appreciation of the risk conditions to the doctrine's application.

Section 496E requires that the assumption be voluntary. See note 15 *infra*.

Section 496F deals with the assumption of a risk created by defendant's breach of statute.

Section 496G states that if defendant "would otherwise be subject to liability to the plaintiff," defendant has the burden of proving plaintiff's assumption of risk. See also pp. 195-96 *infra*.

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tiff reasonably but voluntarily encountered that risk. The *Restatement* and its adherents concede that most of the situations enumerated in Bohlen's original article¹⁵ and in *Harper and James*¹⁶ do not involve the *voluntary* assumption of a risk. These are cases in which defendant's wrong may be said to restrict unduly plaintiff's freedom of choice or to put him under a kind of duress;¹⁷ in them a plaintiff will not be barred simply because he knowingly incurs the risk¹⁸ (unless his conduct is *unreasonable* under the circumstances). On the other hand, where injury comes from use of defendant's land or chattels, there are (as all concede) large though diminishing areas wherein defendant's only duty to plaintiff is one of care to acquaint him with risks inherent in the land or chattel. Here no duty is owed to such a plaintiff who encounters the condition with full knowledge of its risks, however carefully he does so. And here again both sides are in agreement.¹⁹

15. See Bohlen, *supra* note 2, 20 HARV. L. REV. at 19-21, STUDIES IN THE LAW OF TORTS at 447-50.

16. 2 F. HARPER & F. JAMES, LAW OF TORTS 1165-68 (1956) (list adapted from Bohlen). This list enumerates: the use of a highway by a traveler; use of public utility premises by a patron; use of an improperly impeded access to plaintiff's own property; cases where defendant's wrong injures plaintiff where he has a right to be without regard to defendant's consent; where plaintiff moves to a nuisance; and where plaintiff is injured in rescuing a third person endangered by defendant's negligence.

17. See R. Keeton, *supra* note 6, 22 LA. L. REV. 122, 154-59; PROSSER, TORTS 465-68 (3d ed. 1964).

18. RESTATEMENT (SECOND) OF TORTS § 496E(2) (1965) provides that "plaintiff's acceptance of a risk is not voluntary if the defendant's tortious conduct has left him no reasonable alternative course of conduct in order to

(a) avert harm to himself or another, or
(b) exercise or protect a right or privilege of which the defendant has no right to deprive him."

Gf. id. § 496C(1), comment a.

See also R. Keeton, *supra* note 6, 22 LA. L. REV. 122, 154-59; PROSSER, TORTS 465-68 (3d ed. 1964).

The second *Restatement* takes the view that if defendant's conduct leaves plaintiff a reasonable and safe alternative, plaintiff assumes the risk of the alternative made dangerous by defendant's tortious conduct even where that conduct faces the plaintiff with a choice which defendant had no right to impose. RESTATEMENT (SECOND) OF TORTS § 496E, comment d & illustrations 7, 8, 9 (1965). The comment states that if plaintiff "acts unreasonably in making his choice, he may be barred from recovery either by his assumption of risk or by his contributory negligence in failing to exercise reasonable care for his own safety." Apparently the *reasonable* choice of the more dangerous alternative will not bar recovery. The illustrations are unilluminating on this point, but the apparent meaning of the comment's text is fortified by a passage and a note in the Reporter's treatise. "[W]here a reasonable alternative is left open . . . [plaintiff's] unreasonable insistence upon unnecessarily encountering danger becomes contributory negligence; and under one name or the other the choice of a dangerous highway . . . will bar his recovery. In this area it is reasonably clear that assumption of risk and contributory negligence always coincide, and that it is relatively unimportant which the defense is called." PROSSER, TORTS 467-68 (3d ed. 1964). "The existence of a reasonable alternative does not necessarily make the plaintiff's choice unreasonable. It depends upon the apparent danger. *Willets v. Butler Township*, 1940, 141 Pa. Super. 394, 15 A.2d 392." *Id.* 468 n.56.

19. RESTATEMENT (SECOND) OF TORTS § 496C, comment d (1965); PROSSER, TORTS 451 (3d ed. 1964).

The difference between the *Restatement* view and that taken here is significant only in that narrow area in which defendant's wrong "does not cause the plaintiff's choice to be made under duress,"²⁰ but in which defendant does not have the right to withhold or condition the plaintiff's use of land or chattels or the other terms of a mutually voluntary association. A hypothetical case posed by Keeton illustrates the difference. Black and Blue "are persons to whom the purchaser of a defectively designed motorcycle lends it, after discovering the defect and with full warning to Black but not to Blue, the plaintiffs having need of a vehicle and reasonably choosing to take this, the only vehicle available."²¹ Both Keeton and I would no doubt agree that Black would not recover against the *lender* for injury caused by the defect. Under prevailing law the lender has fully discharged his duty to Black;²² alternatively the result might be described in terms of Black's assumption of risk. But Keeton, and presumably the *Restatement*,²³ would also bar Black's recovery *against the maker* even where Black's knowing acceptance of the risk was reasonable and even where the maker's duty to a foreseeable user of the motorcycle was not satisfied by warning.²⁴

The latter result, it is submitted, is unfortunate. The maker has, by hypothesis, put out a product which is unreasonably dangerous even to one who knows of the defect. Whether he is held strictly or only for negligence, why should he be freed of liability merely because the plaintiff knew of the defect but used the thing carefully? If the individualism embodied in assumption of risk is to be justified by the unwillingness to inhibit the maker's activities in such a way as to diminish or defeat the flow of advantages to plaintiff's class (customers and users), then surely it is unrealistic to think that in the case put the withholding of liability will materially promote that objective.²⁵ The maker, negligent by hypothesis, will be subject to liability to plaintiffs ignorant of the risk, and if the fear of this liability does not keep him from producing the product, it is unlikely indeed that he will go out of production to avoid the prospect of additional liability to the occasional informed victim. Except where products are extremely dan-

20. R. Keeton, *supra* note 6, 22 LA. L. REV. 122, 156.

21. *Id.* 157.

22. See 2 F. HARPER & F. JAMES, LAW OF TORTS 1163-64, 1181 (1956). *But cf.* Pfaffenbach v. White Plains Express Corp., 17 N.Y.2d 132, 135-36, 269 N.Y.S.2d 115, 116-17, 216 N.E.2d 324, 325 (1966).

23. RESTATEMENT (SECOND) OF TORTS § 496C, comments e, f & g (1965).

24. R. Keeton, *supra* note 6, 22 LA. L. REV. 122, 157-59.

25. See Mansfield, *Informed Choice in the Law of Torts*, 22 LA. L. REV. 17, 67-68 (1961).

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gerous, liability in both instances is more likely to induce care in manufacture than cessation of production.

Although the difference between the second *Restatement* position and mine is a narrow one, its scope is widening and will probably continue to grow in importance. The two views will produce the same result wherever the defendant's duty to plaintiff will be fulfilled by adequate warning. Then if the plaintiff has full knowledge and appreciation of the risks inherent in the condition or the conduct which injures him, he is not hurt by the hazard (ignorance) which underlay the duty to warn him of these risks.²⁶ The two views will produce different results only in those situations where defendant's duty to plaintiff goes beyond mere warning or full disclosure and includes the taking of some additional precaution for plaintiff's safety. But the tendency of courts today is to require (or to let a jury require) additional precautions in many situations where a warning of the danger, or its obviousness, was held to satisfy defendant's duty of care a generation ago.

Examples come readily to mind. The traditional view was that an occupier of land would in most cases satisfy his duty of care to an invitee by full disclosure of the dangers of his premises.²⁷ Similarly, the maker of goods had only to acquaint the user of the dangers of the goods (and he had this duty only when the dangers were not obvious²⁸). Today courts are increasingly reluctant to abide by such rules of thumb; there is a substantial tendency to recognize that circumstances may call for precautions in addition to warning.²⁹ The second

26. See Malone, *Contributory Negligence and the Landowner Cases*, 29 MINN. L. REV. 61, 83 n.45 (1945); Seavey, *Swift & Co. v. Schuster—Liability to One Aware of Danger*, 65 HARV. L. REV. 623, 625-26 (1952). Cf. McGrath v. American Cyanamid Co., 41 N.J. 272, 275, 196 A.2d 238, 240 (1963).

27. This was the position of the first *Restatement*. See RESTATEMENT OF TORTS §§ 340, 343 (1934).

28. A leading case is *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950).

29. See 2 F. HARPER & F. JAMES, LAW OF TORTS § 27.13 (1956) (criticizing first *Restatement* position limiting occupier's duty to invitee and citing cases where it was not followed); *id.* § 28.5 (criticizing *Campo* case and citing decisions contrary to it).

Some recent cases dealing with the land occupier's liability for obvious dangers are *Cummings v. Prater*, 95 Ariz. 20, 386 P.2d 27 (1963) (modern analysis used; obvious condition found not unreasonably dangerous); *Murphy v. El Dorado Bowl, Inc.*, 2 Ariz. App. 341, 409 P.2d 57 (1965) (jury could find obvious condition unreasonably dangerous under circumstances); *Chance v. Lawry's, Inc.*, 58 Cal. 2d 368, 24 Cal. Rep. 209, 374 P.2d 185 (1962) (whether duty to give specific warning or take other precaution with reference to open and obvious planter box in foyer likely to become crowded with patrons, held for jury). See also P. Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. PA. L. REV. 629 (1952); PROSSER, TORTS 404 (3d ed. 1964) ("In any case where the occupier, as a reasonable man, should anticipate an unreasonable risk of harm to the invitee notwithstanding his knowledge, warning, or the obvious nature of the condition, something more in the way of precautions may be required").

Some recent cases dealing with a maker's liability for obvious defects in his product are

Restatement itself adopts the newer view in these cases, though guardedly.³⁰

The adoption of this view represents a judgment that the dangers of the premises or the product are unreasonable ones *even to those who are fully aware of them*. Thus, if the maker of an appliance with obvious and exposed moving parts is held to the duty to equip it with some safety appliance, then the law no longer accepts the user's ability to take care of himself as an adequate safeguard of interests which society seeks to protect; the law has put some of the burden of looking out for the plaintiff on the defendant. If now the law should relieve the defendant from liability for breach of that duty because plaintiff encountered the unreasonable danger voluntarily but carefully, then indeed the law would defeat itself. It would be applying a doctrine born of the notion that an actor owes no duty of affirmative care for the protection of others to a situation in which the law has imposed just such a duty. The increasing judicial rejection of the assumption of risk doctrine reflects a recognition that this defense is inconsistent with newer policies which underlie the imposition of a duty to take care of others that extends beyond merely warning them. As we have seen, this repudiation has attained substantial proportions during recent years.

There was of course some judicial authority to support the *Restatement* position and a great deal of loose judicial language which could be construed to support it. If all this is lumped together it may well have represented the weight of authority when the Institute adopted Sections 496A-496G. On the other hand, if carefully read, many of the cases cited do not actually support the *Restatement* position *to the extent that it differs from that taken here*. Thus Section 496C, Comment g, which states that plaintiff's assumption of risk may bar him from recovering for injuries caused by defendant's negligence toward

Jamieson v. Woodward & Lothrop, 247 F.2d 23 (D.C. Cir. 1957) (modern analysis used; obvious condition held not unreasonably dangerous, four judges dissenting); Messina v. Clark Equipment Co., 263 F.2d 291 (2d Cir. 1959) (discussion and application of *Campo* case, Clark, J., dissenting); Brandon v. Yale & Towne Mfg. Co., 342 F.2d 519 (3d Cir. 1965) (verdict holding maker liable for lack of guards on forklift upheld, two judges dissenting); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 81, 207 A.2d 314, 320 (1965) (purchaser's knowledge of defect does not necessarily preclude maker's causal negligence). Cf. Campbell v. Siever, 253 Minn. 257, 91 N.W.2d 474 (1958); Totten v. Gruzen, 52 N.J. 202, 245 A.2d 1 (1968).

See also Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 836-41 (1962); Noel, *Recent Trends in Manufacturers' Negligence As To Design, Instructions or Warning*, 19 Sw. L.J. 43, 46-47 (1961).

30. RESTATEMENT (SECOND) OF TORTS § 343A, & comments & illustrations (1966); *id.* Appendix 233-35 (1966) (Reporter's Notes) (dealing with occupier's liability for obvious dangers); *id.* § 389 & comments *d*, *e* & *f*.

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him even though "plaintiff's conduct may be entirely reasonable under the circumstances," is followed by Illustration 1, which supposes that *A* is illegally and dangerously setting off fireworks on his land near a highway, thereby endangering people on the highway. *B*, fully aware of the risk, stands nearby to watch the spectacle and is injured by a defective rocket. The illustration concludes: "*B* may be found to have assumed the risk." This illustration is said to be "based on *Scanlon v. Wedger*."³¹ Although the illustration does not specify that *B* was in the exercise of reasonable care, no doubt that is implied by the context. Moreover, it was stated in the report in *Wedger* that the plaintiffs "were in the exercise of due care."³² But the illustration departs radically from the decision in a most significant respect. In *Wedger* the jury made a special finding that *defendant in firing the bomb exercised reasonable care* and found for the defendant.³³ The court upheld this verdict saying that the voluntary spectator must be held to consent to the display "and he suffers no legal wrong if accidentally injured *without negligence on anyone's part*, although the show was unauthorized. He takes the risk."³⁴

Johnson v. City of New York,³⁵ another case cited by the *Restatement*, is similar. A willing spectator at an automobile race was not allowed to take advantage of its mere illegality when she participated in that illegality (obstruction of the highway). But the court said, this holding "does not preclude a recovery . . . if the injury to her was caused by the misconduct or fault of the defendants."³⁶

In each of these cases defendant's conduct was illegal because its authorization by local authority contravened a statute, not because it involved the risk of unreasonable harm to plaintiff—not, that is, because it involved any breach of the duty of care toward plaintiff. This

31. 156 Mass. 462, 31 N.E. 642 (1892). See RESTATEMENT (SECOND) OF TORTS § 496C (1965); *id.* Appendix 414 (1966) (Reporter's Notes); *cf. id.*, § 496A, illustration 1; *id.* Appendix 411 (1966).

32. 156 Mass. at 463, 31 N.E. at 642.

33. 156 Mass. at 462, 31 N.E. at 642.

34. 156 Mass. at 464, 31 N.E. at 642.

35. 186 N.Y. 139, 78 N.E. 715 (1906).

36. 186 N.Y. at 149, 78 N.E. at 718.

The quoted passage occurs in this context: the court had pointed out that the acts of the defendant though "illegal were illegal as against the public and travelers on the highway, not as against the plaintiff." A hypothetical analogy is then put, after which the court continues: "as between the plaintiff and these defendants the legality or illegality of the exhibition given and witnessed, so far as that illegality depends on the obstruction and appropriation of the highway, was not the material factor. It did not create a liability against the defendants if they were at fault in the conduct of the race in no other respect. It does not preclude a recovery by the plaintiff if the injury to her was caused by the misconduct or fault of the defendants."

comes a long way from holding that a careful plaintiff assumes the risk of a defendant's negligence toward him.

The same is true of all but two of the twelve other cases with which the Reporter invites comparison. The two are *Morton v. California Sports Car Club*³⁷ and *Shafer v. Tacoma Eastern Railroad*³⁸ which tend, though not unequivocally, to support the *Restatement* position on the narrow point in issue. The other cases include some where the victim was the knowing guest of a drunken driver, so that his own participation in the risk amounted to more than ordinary contributory negligence,³⁹ and some golf cases wherein there was clearly no breach of duty toward plaintiff.⁴⁰ In the other golf cases cited by the Reporter, defendant was negligent toward plaintiff, either in playing prematurely or in failing to shout "fore," and the court held that there was no assumption of risk.⁴¹

Thus, most of the cases cited by the *Restatement* do not support its broad assumption of risk doctrine and can more appropriately be considered in terms of the no-duty analysis proposed here. In a thoughtful article, Professor Robert Keeton criticizes this no-duty analysis on the ground that it will introduce confusion because the same act of the defendant may constitute negligence to one ignorant of its risk and yet due care to one who knows.⁴² This of course is true, but it is quite familiar and need give no trouble. The act which is negligent toward a child may not be so toward an adult; and when an occupier creates a condition on land he often cannot tell whether it will constitute actionable negligence until he knows whether it will injure a child or an adult intruder.

To me all this is less confusing than talk about assumption of risk

37. 163 Cal. App. 2d 685, 329 P.2d 967 (1958).

38. 91 Wash. 164, 157 P. 485 (1916).

39. *Mountain v. Wheatley*, 106 Cal. App. 2d 333, 234 P.2d 1031 (1951); *Bohnsack v. Driftmier*, 243 Iowa 383, 52 N.W.2d 79 (1952). In each of these cases the question was whether plaintiff's conduct barred him from recovery for defendant's wilful and wanton misconduct. See note 4 *supra*.

40. *Stober v. Embry*, 243 Ky. 117, 47 S.W.2d 921 (1932); *Schlenger v. Weinberg*, 107 N.J.L. 130, 150 A. 434 (1930).

41. *Everett v. Goodwin*, 201 N.C. 734, 161 S.E. 316 (1931); *Slotnick v. Cooley*, 166 Ten. 373, 61 S.W.2d 462 (1933); *Alexander v. Wrenn*, 158 Va. 486, 164 S.E. 715 (1932).

Also cited are *Klinsky v. Hanson Van Winkle Munning Co.*, 38 N.J. Super. 439, 119 A.2d 166 (1955), *certification denied*, 20 N.J. 534, 120 A.2d 661 (1956); *Dusckiewicz v. Carter*, 115 Vt. 122, 52 A.2d 788 (1947). In both these cases the court held that a jury would be warranted in imposing upon the proprietor of a place of amusement a duty to take precautions against danger. Assumption of risk was mentioned as applicable where no such duty existed.

42. R. Keeton, *supra* note 6, 19 Sw. L.J. 61. The different results for knowing and ignorant victims may particularly arise when defendant's conduct occurs long before an injury, so that defendant could not tell when he acted whether the consequences of his conduct would at some future time constitute negligence.

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(which invokes so many different images). This is a matter of intellectual aesthetics, however, and I quite agree with Professor Keeton that the difference in the no-duty cases is essentially a semantic one, that courts often prefer the language of assumption of risk, and that all of us should learn to be bilingual. What I fear from his usage is that it may lead others, as it has led him,⁴³ to adopt a substantive result that would bar the knowing but careful plaintiff from recovering for harm caused by defendant's negligence, thus neutralizing the judgment (made on the negligence issue) that the situation produced by the negligence is unreasonably dangerous even to one who has full knowledge of its risks.

Finally, some commentators have argued for retaining a separate doctrine of assumption of risk because it is recognized as an affirmative defense to be pleaded and proved by defendant, whereas plaintiff has the burden to plead and prove defendant's breach of duty toward him; therefore plaintiffs will benefit from adoption of the assumption of risk formulation. This ingenious argument calls for several comments:

(1) The argument is valid only if assumption of risk is used strictly as a correlative of defendant's lack of duty toward plaintiff. If the term "assumption of risk" could be confined to such cases and *if* it would indeed be effective in getting courts to put the pleading and proof burdens on defendant in those cases, its use might be justified in the eyes of those who wish to facilitate plaintiff's recovery.

(2) The *Restatement* rule, however, would extend the *substance* of assumption of risk so as to make the *reasonable* assumption of a risk a defense to an action based on defendant's *negligent* creation of that risk.⁴⁴ To this extent the rule recognizes a defense where none would exist under the analysis proposed here. And the raising of an additional substantive defense cannot possibly be a boon to plaintiff even if the defendant has the burden of proof on the issue.

(3) A decision to use the term "assumption of risk" to characterize a no-duty situation (which might be of help to plaintiffs) would not logically require the recognition of a substantive defense in a situation where defendant has been negligent toward plaintiff (which could only disadvantage plaintiffs). There is no reason, therefore, why "the friends of the plaintiff"⁴⁵ should accept the bane to get the unrelated boon.

43. R. Keeton, *Assumption of Products Risks*, 19 Sw. L.J. 61, 63 (1965); cf. R. Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 160-64 (1961).

44. RESTATEMENT (SECOND) OF TORTS § 496C, comments *e*, *f* & *g* (1965).

45. PROSSER, TORTS 452 (3d ed. 1964).

(4) While the assumption of risk formulation is *theoretically* more likely to induce courts to put the burden of proof on defendant than is the no-duty formulation of the same problem, this is not likely to be the result in practice. Courts rarely lose sight of the duty issue where burden of proof is concerned, though they may *also* use the language of assumption of risk for other purposes. Dean Prosser does give a hypothetical case where the outcome could depend on the theory chosen—assumption of risk or no-duty: “If . . . there is a crash of a private airplane in which everyone is killed, including a passenger, and it appears that the plane was defective and the pilot knew it, treating disclosure to the passenger and his consent as a matter of duty means that he will lose; but if it is a matter of assumption of risk he will recover.”⁴⁶ But the sole decision cited to support the proposition⁴⁷ involves a plane crash caused by the pilot’s *active negligence* which was sufficiently proved by plaintiff’s evidence. The case is not an instance where the choice of theory in a no-duty case actually brought a shift in the burden of proof, nor are any other cases cited in Dean Prosser’s text, nor do I know of any. The cases he cites⁴⁸ amply support his statement that assumption of risk is a defense “which the defendant is required to plead and prove.” But in all of them save one defendant’s negligence toward plaintiff was amply shown and the court was dealing either with unreasonable assumption of risk⁴⁹ or assumption of risk in the special *Restatement* sense (*i.e.*, the reasonable assumption of a risk negligently created).⁵⁰ These are not “no-duty” cases.⁵¹ In the one exception the court held that “the plaintiff, upon whom the burden of non-assumption of the risk rested, has failed to show that he did not know and appreciate the danger incurred in driving the cattle.”⁵²

(5) As suggested in *Harper and James*,⁵³ adoption of the no-duty formulation will not necessarily involve placing on plaintiff the burden of showing all the facts which would be relevant to show breach of duty when his evidence suffices to show defendant’s unreasonably

46. *Id.* 453.

47. *Bruce v. O’Neal Flying Service*, 231 N.C. 181, 56 S.E.2d 560 (1949).

48. PROSSER, *TORTS* 453 n.25 (3d ed. 1964). See also *RESTATEMENT (SECOND) OF TORTS* § 496G (1965); *id.* Appendix 419-20 (1966) (Reporter’s Notes, citing same cases).

49. That is, the *unreasonable* assumption of a risk which is a kind of contributory negligence. See note 4 *supra*.

50. See note 6 & pp. 188-89 *supra*.

51. See p. 185 *supra*.

52. *Rosedoff v. Consolidated Rendering Co.*, 94 N.H. 114, 115, 47 A.2d 574, 575 (1946). To similar effect is *Bouchard v. Sicard*, 113 Vt. 429, 35 A.2d 439 (1944). See also *RESTATEMENT (SECOND) OF TORTS* § 496G, comments *b* & *c* (1965).

53. 2 F. HARPER & F. JAMES, *LAW OF TORTS* 1190-91 (1956).

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dangerous conduct. Procedural principles are not as rigid and inflexible as Dean Prosser's argument supposes.⁵⁴

A trend toward wider compensation of at least *innocent* victims of *negligent* conduct and toward a clarification of tort theory was clearly discernible in the decade preceding the appearance of the second *Restatement*.⁵⁵ A reversal of this trend because of the generally deserved prestige of the *Restatement* would, I submit, be a minor tragedy.

54. See, e.g., F. JAMES, CIVIL PROCEDURE §§ 2.9, 4.7, 7.8 (1965).

55. See, e.g., *Demarest v. T.C. Bateson Constr. Co.*, 370 F.2d 281 (10th Cir. 1967) (N.M. law); *City of Tucson v. Holliday*, 3 Ariz. App. 10, 411 P.2d 183 (1966); *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368 (Tex. 1963).