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Negligence—Assumption of Risk—Duplication of Scope of Duty or Contributory Negligence*

Courts generally follow the view that assumption of risk and contributory negligence are distinct and separate defenses;[1] yet, the decisions that attempt to distinguish between these doctrines have resulted in general confusion.[2] The purpose of this Comment is to clarify the doctrine of assumption of risk and show that it is merely a duplication of the more widely understood concepts of scope of duty and contributory negligence.[3]

The phrase, "assumption of risk," refers to the principle that one who voluntary assumed, either expressly or impliedly through his action, the risk of injury from a known danger is barred from recovery for injuries incurred from that danger.[4] The defense of contributory negligence rests on the rule that there can be no recovery of damages for the defendant's negligence if the plaintiff, by his own negligence, proximately contributed to his injury.[5]

Illustrative of the finely drawn and sometimes unconvincing distinctions which the courts make between the two doctrines are that

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* Skeet v. Wilson 76 N.M. 697, 417 P.2d 889 (1966).

1. Foster v. Buckner, 203 F.2d 527 (6th Cir. 1953), *cert. denied,* 346 U.S. 818 (1953); Krolikowski v. Allstate Ins. Co., 283 F.2d 889 (7th Cir. 1960); Florez v. Groom Development Co., 53 Cal. 2d 347, 348 P.2d 200 (1959); Duell v. Coyle, 22 Conn. Supp. 332, 171 A.2d 427 (App. Div. 1961); Reed v. Styron, 69 N.M. 262, 365 P.2d 912 (1961); Silva v. Waldie, 42 N.M. 514, 82 P.2d 282 (1938); LeFleur v. Vergilia, 280 App. Div. 1035, 117 N.Y.S.2d 244 (1938); Haarmeyer v. Roth, 113 Ohio App. 74, 177 N.E.2d 507 (1960); Ferguson v. Jongsma, 10 Utah 2d 179, 350 P.2d 404 (1960); Roberts v. Gray, 119 Vt. 153, 122 A.2d 855 (1956).

2. Zimmer v. California Co., 174 F. Supp. 757 (D. Mont. 1959); Byers v. Gunn, 81 So. 2d 723 (Fla. 1955); Schleisner Co. v. Birchett, 202 Md. 360, 96 A.2d 494 (1953); Kirby Lumber Corp. v. Murphy, 271 S.W.2d 672 (Tex. Civ. App. 1954); Walsh v. West Coast Coal Mines, Inc., 31 Wash. 2d 396, 197 P.2d 233 (1948).

See generally James, Assumption of Risk, 61 Yale L.J. 141 (1952); Payne, Assumption of Risk and Negligence, 35 Can. Bar Rev. 950 (1957); Wade, The Place of Assumption of Risk in the Law of Negligence, 22 La. L. Rev. 5 (1961).

3. *See generally* Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90 (1959).

4. The elements necessary to bar recovery under the doctrine in New Mexico are that the plaintiff must (1) know of the defect, (2) appreciate the danger, and (3) voluntarily assume the risk arising from that danger. Padilla v. Winsor, 67 N.M. 267, 354 P.2d 740 (1960).

5. E.g., Saeter v. Harley-Davidson Motor Co., 186 Cal. App. 2d 248 (1960). New Mexico defines contributory negligence as "conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection and which is a legally contributing cause, co-operating with the negligence of the defendant in bringing about the plaintiff's harm." Silva v. Waldie, 42 N.M. 514, 82 P.2d 282, 285 (1938).

assumption of risk is concerned with "venturousness," while contributory negligence is aimed at carelessness.[6] Assumption of risk is said to involve a mental state of willingness and pertains to the preliminary conduct of getting into a dangerous relation while contributory negligence is said to be based on careless conduct and leads more immediately to a specific accident.[7] In contributory negligence the negligence of the plaintiff is a proximate cause of injury, while assumption of risk will bar recovery even though it plays no part in the causation of an accident except the plaintiff's voluntary exposure to a known dangerous condition.[8]

Distinctions have also been made in the type of action in which each doctrine is available and in their limitatons as a bar to recovery. Originally, the defense of assumption of risk was allowed only in cases arising between a master and his servant,[9] or possibly actions involving a contract for services; today the defense is available in any appropriate negligence action.[10]

Contributory negligence also is allowed as a defense in any negligence action[11] with a limitation in some jurisdictions on actions that charge the defendant with willful, wanton, or reckless conduct.[12] Historically, in states that apportioned damages between plaintiff and defendant, contributory negligence was applied to reduce the amount of the plaintiff's recovery while assumption of risk was a complete defense which barred the plaintiff's action.[13] Today, most

6. Kleppe v. Praul, 181 Kan. 590, 313 P.2d 227 (1957); Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947); Mudrich v. Standard Oil Co., 153 Ohio St. 31, 90 N.E.2d 859 (1950).

7. Edwards v. Kirk, 227 Iowa 684, 288 N.W. 875 (1939); Cassidy v. Quisenberry, 346 S.W.2d 304 (Ky. 1961); Morris v. Cleveland Hockey Club, Inc., 157 Ohio St. 225, 105 N.E.2d 419 (1952).

8. Saeter v. Harley-Davidson Motor Co., 186 Cal. App. 2d 248 (1960); Warner v. Markoe, 171 Md. 351, 189 A. 260 (1937).

9. *See, e.g.,* Priestly v. Fowler, 3 M.&W. 1, 150 Eng. Rep. 1030 (1837); Rutherford v. James, 33 N.M. 440, 270 P. 794 (1928). *See generally* 3 C. Labatt, Master & Servant § 1186a (2d ed. 1913).

10. *See, e.g.,* Bugh v. Webb, 231 Ark. 27, 328 S.W.2d 379 (1959); Cassady v. Billings, 135 Mont. 390, 340 P.2d 509 (1959); Reed v. Styron, 69 N.M. 262, 365 P.2d 912 (1961); Wilson v. Moudy, 22 Tenn. App. 356, 123 S.W.2d 828 (1938).

11. Looney v. Metropolitan R.R., 200 U.S. 480 (1906).

12. *See, e.g.,* Alabam Freight Lines v. Phoenix Bakery, 63 Ariz. 101, 166 P.2d 816 (1946); Cawog v. Rothbauer, 165 Cal. App. 2d 577, 331 P.2d 1063 (1958).

13. Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947); Scory v. La Fave, 215 Wis. 21, 254 N.W. 643 (1934). This result has been strongly criticized as defeating the intention of apportioning statutes. Dean Prosser suggests that the legislature would scarcely have intended to permit partial recovery to a plaintiff who has been so negli-

states that have comparative negligence statutes permit the plaintiff a partial recovery even where there is assumption of risk.[14]

Judicial application of these numerous limitations and distinctions between assumption of risk and contributory negligence has resulted in much confusion. The recent New Mexico case of *Skeet v. Wilson*[15] has added to the uncertainty in this area of the law. *Skeet* was an action for damages for injuries incurred when the defendant's automobile struck the plaintiff as he was walking along the right side of a highway. One of the issues the jury had to resolve was whether the plaintiff was contributorily negligent in failing to walk on the left side of the highway as required by a New Mexico statute;[16] if that negligence contributed proximately to the accident, he could not recover.[17] The jury returned a verdict for the plaintiff. On appeal, the defendant asserted as error the trial court's refusal to instruct the jury on the doctrine of assumption of risk. The New Mexico Supreme Court, *held,* Affirmed; the testimony did not support the defense of assumption of risk and the trial court did not err when it refused to submit that instruction to the jury.[18] The court also noted that because the defense of contributory negligence was pleaded and submitted to the jury, there was little reason to require a "second or duplicative instruction"[19] on assumption of risk.

If an instruction on assumption of risk is repetitive of an instruction on contributory negligence, then the former should not be submitted to the jury. Yet it is a contradiction to then hold that testimony that supports the defense of contributory negligence does not sustain a defense of assumption of risk.

The apparent confusion in this decision and in other jurisdictions results because assumption of risk is a term of several meanings.[20]

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gent as not to discover his peril (contributory negligence), and to deny recovery to a plaintiff who has discovered his peril, yet, by a mistake of judgment proceeded to encounter the danger (assumption of risk). *See generally* W. Prosser, Law of Torts § 67 (3rd ed. 1964).

14. *See, e.g.,* Neb. Stat. § 39.1129 (1941); Landrum v. Roddy, 143 Neb. 934, 12 N.W.2d 82 (1943); Wis. Stat. Ann. § 331.045 (1958); McConville v. State Farm Mut. Auto Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962).

15. 76 N.M. 697, 417 P.2d 889 (1966).

16. N.M. Stat. Ann. § 64-18-38(b) (1953).

17. Skeet v. Wilson, 76 N.M. 697, 417 P.2d 889, 890 (1966).

18. *Id.* at 891.

19. *Id.* at 892.

20. *See* W. Prosser, Law of Torts § 67 (3rd ed. 1964); Keeton, *Assumption of Risk in Products Liability Cases,* 22 La. L. Rev. 122 (1961).

These meanings largely overlap and often produce the same legal result.[21] In one sense, called its "primary sense," assumption of risk is an alternate expression for the proposition that the defendant was not negligent, he either owed no duty or did not breach the duty owed. In this sense a plaintiff may not recover even if he were reasonable in encountering the risk that caused his injury.[22] The gist of the defense is the voluntary character of the association and not the reasonableness of the risk. The plaintiff takes a risk voluntarily when the defendant can say "take it or leave it"—when the defendant is under no duty to make the conditions of their association safer than they appear to be. If the defendant cannot place the plaintiff in that dilemma of "taking or leaving it," then the voluntary character is taken away; for example, that is the situation where workmen's compensation statutes and other safety appliance statutes exist.[23]

In its other sense, called its "secondary sense," assumption of risk is an affirmative defense to an established breach of duty by the defendant. Here the plaintiff is barred from recovery only if he was unreasonable in encountering the risk under the circumstances. This is treated as contributory negligence.[24] In this secondary sense it is

21. *See* 2 F. Harper & F. James, The Law of Torts 1162 (1956).

Placed beyond discussion is the problem raised by a contract not to sue for injury or loss. This area is not discussed because courts generally have little difficulty in analyzing express agreements to assume a risk; also, the interpretation of these agreements to assume a risk is related more to contract theory than negligence principles.

Parties can expressly agree that the defendant is under no obligation to care for the benefit of the plaintiff and is not liable for conduct which would otherwise be negligent. Where the parties have equal bargaining power there is usually no public policy that prevents the parties from contracting as they see fit. *See* Broecker v. Armstrong Cork Co., 128 N.J.L. 3, 24 A.2d 194 (1942); Brucker v. Matsen, 18 Wash. 2d 375, 139 P.2d 276 (1943).

Also placed beyond discussion is the situation in which the plaintiff, in advance, has given his consent to possible injury, as, for example, participation in a contract sport. *See* McLeod Store v. Vinson, 213 Ky. 667, 281 S.W. 799 (1926); Klinsky v. Hanson Van Winkle Munning Co., 38 N.J. Super. 439, 119 A.2d 166 (1955).

22. A person may be reasonable in encountering a risk. For example, it may be reasonable for a woman, whose car has broken down at night, to accept a ride in an automobile even though it has no lights. She has assumed the risk of traveling without lights and cannot later complain that she was injured as a result of the driver's violation of statute. *See* W. Prosser, Law of Torts § 67, 465 (3rd ed. 1964).

23. 45 U.S.C. § 54 (1939).

24. Peyla v. Duluth M. & I.R.R., 218 Minn. 196, 15 N.W.2d 518 (1944), stating that assumption of risk is but a phase of contributory negligence; Castino v. Di Menzo, 124 N.J.L. 298, 11 A.2d 738 (1940), stating that assumption is barely distinguishable from contributory negligence.

incorrect to say that the plaintiff assumed the risk whether or not he was at fault in that if he was unreasonable in encountering the risk, he fell below the standard of care of a reasonable man and was therefore at fault.[25]

These two distinct meanings developed from the common law action of a servant against his master.[26] The master owed a duty to provide a reasonably safe place to work. Once that duty was fulfilled, he was not liable for damages resulting from the inherent (ordinary) risks that remained; as to these risks the master had breached no duty.[27] Assumption of risk was not treated in that situation as an affirmative defense and was not required to be affirmatively pleaded.[28] The servant had the burden of proving that his injury was caused by a risk that was not inherent in a well-run business. He had to prove that the master was negligent. If the servant proved that his injury was caused by the master's negligence in failing to furnish a reasonably safe place to work, then assumption of risk in the primary sense was necessarily negated because the violation of a duty is a required element for negligence. Yet, the master could still possibly argue as an affirmative defense, with the burden of pleading and proof on him, that the plaintiff should nonetheless fail in his action because he voluntarily exposed himself to the risk created by the master's negligence.[29] This affirmative defense was also labeled assumption of risk. Two separate theories were thus given the same name and this created inevitable confusion.[30] This confusion was furthered by the practice of pleading assumption of risk as a defense with no indication of whether the purpose was to deny the defendant's negligence, or to grant the defendant's negligence and then assert the plaintiff's negligence as an affirmative defense.[31]

25. See note 24 *supra.*

26. See note 9 *supra.*

27. The master might be held liable if he failed to warn the inexperienced workman of those inherent risks. *See* 3 C. Labatt, Master & Servant § 1151 (2d ed. 1913).

28. Taylor v. Chicago Ry., 186 Iowa 506, 170 N.W. 388 (1919). The modern treatment of assumption of risk places the burden of pleading and proving assumption of risk upon the defendant. *See* Fed. R. Civ. P. 8(c); N.M. Stat. Ann. § 21-1-1(8)(c) (1953).

29. Singer v. Swartz, 22 N.M. 84, 159 P. 745 (1916); Van Kirk v. Butler, 19 N.M. 597, 145 P. 129 (1914).

30. James, *Assumption of Risk,* 61 Yale L.J. 141 (1952).

31. See note 29 *supra.* No distinction between primary sense and secondary sense is made under the Fed. R. Civ. P. or the New Mexico rules of procedure.

Assumption of risk in its primary sense does not, analytically, describe a defense at all.[32] It simply describes a lack of duty, and it is usually the plaintiff's burden to plead and prove a defendant's breach of duty toward him.[33] Under this reasoning a gratuitous borrower of an automobile, who is injured due to a defect in the automobile,[34] must show that the lender knew of the concealed defect which caused the injury, and did not disclose it. The plaintiff would fail in his action if he merely proved that the defect was dangerous and could be discovered by a reasonable inspection. The plaintiff, in other words, must show that his injuries resulted from a risk that was not in the class of those he assumed as a borrower or licensee.

Courts that fail to disinguish assumption of risk in its primary sense from its secondary sense have avoided confusing these separate thoughts only by an unintentional application of the doctrine of contributory negligence.[35] When these courts are faced with a factual situation that is in reality one of assumption of risk in its secondary sense, they apply the same objective standard used in contributory negligence cases. Thus, a servant is held to have assumed the risk of a negligently created hazard if he knew or ought to have known of the hazard,[36] even though he is guilty of no fault beyond continuing to work. In the application of the doctrine of assumption of risk in New Mexico, the plaintiff is "presumed to know the obvious risks and [is] bound to take notice of patent defects."[37] The plaintiff's actions are judged by the objective standard used in contributory negligence: that which he ought to have known and is presumed to know is the applied test, rather than the usual test for assumption of risk that asks if the plaintiff subjectively knew and in fact understood the risk.[38]

Applying the test of the doctrine of contributory negligence while

32. See the reasoning in Martin v. Des Moines Co., 131 Iowa 724, 106 N.W. 359 (1906).

33. Hopkins v. E. I. DuPont de Nemours & Co., 212 F.2d 623 (3rd Cir. 1954), *cert. denied,* 348 U.S. 872 (1954). The other side of the argument points out that wherever assumption of risk, in the primary sense, applies, the defendant's duty has possibly been curtailed below the standard of care he is usually held to and the defendant should therefore have the burden of proving that his duty has been lowered from the general rule.

34. Dickason v. Dickason, 84 Mont. 52, 274 P. 145 (1929).

35. *E.g.,* Seaboard Air Line Ry. v. Horton, 233 U.S. 492 (1914).

36. Cetola v. Lehigh Valley R.R., 89 N.J.L. 691, 99 A. 310 (1916).

37. Padilla v. Winsor, 67 N.M. 267, 274, 354 P.2d 740, 744 (1960).

38. Barakos v. Sponduris, 64 N.M. 125, 325 P.2d 712 (1958); Sierra Pacific Power Co. v. Anderson, 77 Nev. 68, 358 P.2d 892 (1961).

discussing the issue in terms of assumption of risk is obviously a questionable approach. These courts should recognize that they are applying assumption of risk in its secondary sense which is identical to contributory negligence. They should place their analysis clearly under the doctrine of contributory negligence, with the issue being whether a reasonably prudent man in the exercise of due care would have incurred the known risk and conducted himself in the same manner as did the plaintiff.

When a plaintiff has unreasonably incurred a risk and the defendant owed a duty to eliminate that risk, the terminology of assumption of risk should not be used. Rather, the analysis should be predicated on the concept of contributory negligence. And unless the defendant can discharge his duty to the plaintiff by a complete disclosure of the danger, the plaintiff has not assumed the risk in the primary sense even if the plaintiff knows and understands the danger. "The primary sense is not applicable where the plaintiff has a statutory right to protection, or . . . a common right or individual right at law to have a premise or appliance free from danger. . . ."[39] Whether the defendant can discharge his duty by disclosure of the danger depends upon the relationship between the parties and the duty owed to plaintiff under the circumstances. An example of this type of relationship, where the defendant can discharge his duty by disclosure of known dangers, is the invitor and invitee and, formerly, master and servant.

By using this analysis the courts can eliminate the confusion between assumption of risk and contributory negligence. The confusion in the New Mexico decision of *Skeet v. Wilson*[40] can accordingly be clarified. The New Mexico Supreme Court was correct in holding that the trial testimony did not support the defense of assumption of risk[41] if they were using assumption of risk in its primary sense. By walking along the edge of a highway in a rural area, a plaintiff does not relieve a defendant of the duty to drive carefully;[42] he does not assume the risk of being hit by a negligent driver. The plaintiff did not voluntarily enter into a relationship of free association which he was at liberty to take or leave at will merely because he happened to be on the same highway as the negligent defendant. The danger of walking along a highway was not a

39. Thomas v. Quartermaine, 18 Q.B.D. 685 (C.A. 1887).
40. Skeet v. Wilson, 76 N.M. 697, 417 P.2d 889 (1966).
41. *Id.* at 891.
42. Brief for Appellee, p. 23, Skeet v. Wilson, 76 N.M. 697, 417 P.2d 889 (1966).

risk which the plaintiff and not the defendant must guard against.[43] And, although there is great risk in walking along the edge of a busy highway, the risk must be balanced against the utility and necessity of that type of conduct and the possible alternatives.[44] Negligence is relative to the need and the occasion and a plaintiff does not relieve a defendant of a duty merely because some risk exists in a situation.[45] The plaintiff in *Skeet* did not assume the risk in the primary sense of a negligent driver; an instruction on assumption of risk in the primary sense was therefore not applicable and was properly refused.

The defendant could still raise the affirmative defense of the plaintiff's contributory negligence by his failure to walk on the left side of the highway as required by a New Mexico statute.[46] Thus, even though the defendant had a duty to exercise the care of a reasonable man in operating his automobile and to avoid colliding with a pedestrian,[47] and had not been relieved of that duty, he could still bar the plaintiff's recovery if the plaintiff had been contributorily negligent. The plaintiff could not recover if he had assumed the risk in its secondary sense.

The testimony at the trial disclosed that on the left side of the highway there was a culvert and debris and on the right side, a cliff six feet from the highway.[48] Under these circumstances it was proper for the trial court to leave the issue of contributory negligence to the jury.

When the court in *Skeet* held that there was little reason to require a second or duplicative instruction on assumption of risk, they were in actuality applying assumption of risk in its secondary sense. Since assumption of risk in its secondary sense is identical to contributory negligence, and since that issue had been pleaded and was decided by the jury, the defendant's requested instruction was obviously a duplication.

The doctrine of assumption of risk, however it is analyzed and defined, has been the subject of much controversy and the tendency

43. See text accompanying note 41 *supra.*

44. Saetz v. Braun, 116 N.W.2d 628 (N.D. 1962); *see generally* W. Prosser, Law of Torts 151 (3rd ed. 1964).

45. Restatement (Second) of Torts § 291, comment *a* at 55 (1963); Osborne v. Montgomery, 203 Wis. 223, 234 N.W. 372 (1931).

46. N.M. Stat. Ann. § 64-18-38 (b) (1953).

47. *Id.*

48. Brief for Appellee, p. 40, Skeet v. Wilson, 76 N.M. 697, 417 P.2d 889 (1966).

in many courts is to limit or abrogate the defense.[49] It is a product of the extreme individualism of the early industrial revolution[50] and for the most part is outmoded as ancient law. The term adds nothing to modern law except confusion and, except for express assumption of risk, should be abolished. The concepts it represents are better expressed in other language.

Each case should be analyzed to determine whether the issue is defendant's negligence or plaintiff's contributory negligence. If the former, what has been called assumption of risk is merely a denial that there was a breach of duty, and the burden of proving a breach is on the plaintiff. If the doctrine is raised to defeat the plaintiff's recovery despite a proven breach of duty by the defendant, it constitutes the affirmative defense of contributory negligence and the burden of proof is on the defendant.

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49. *E.g.*, Ritter v. Beals, 225 Ore. 504, 358 P.2d 1080 (1961); Siragusa v. Swedish Hospital, 60 Wash. 2d 310, 373 P.2d 767 (1962); New Hampshire has abolished assumption of risk except as a form of contributory negligence; Bolduc v. Crain, 104 N.H. 163, 181 A.2d 641 (1962); *see also* Note, 38 Wash. L. Rev. 349 (1963).

50. 2 F. Harper & F. James, The Law of Torts 1191 (1956).