

University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 100

MARCH, 1952

No. 5

PERSONAL INJURIES RESULTING FROM OPEN AND OBVIOUS CONDITIONS

By PAGE KEETON †

INTRODUCTION

A Statement of the Problem. It is not uncommon for a person entering business property with the permission or invitation of the occupier to be injured thereon as a result of a condition which would ordinarily be noticed by a user and the danger from which would ordinarily be appreciated. In a majority of the instances when suit has been brought under such circumstances, the injured party has been unsuccessful, but relief has not always been denied. Because in some instances relief has been given and because in many other instances in denying it the courts have not agreed on the reason for so doing, it seems profitable to discuss again some of the legal problems raised by this kind of accident.¹

For convenience let us suppose that the plaintiff was hurt by slipping and falling on the floor of the defendant's establishment which the plaintiff had entered on a business errand. The floor had special linoleum covering. It had been waxed and afterwards highly polished. The day was rainy and the floor was wet from the water of umbrellas and rubbers of persons who had visited the place earlier than the

† Dean and Professor of Law, University of Texas School of Law.

1. Some other articles and textual material bearing on this subject are as follows: Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14 (1906); Warren, *Volenti Non Fit Injuria in Actions of Negligence*, 8 HARV. L. REV. 457 (1895); Keeton, *Assumption of Risk and the Landowner*, 20 TEXAS L. REV. 562 (1942); Rice, *The Automobile Guest and the Rationale of Assumption of Risk*, 27 MINN. L. REV. 329 (1943); Malone, *Contributory Negligence and the Landowner Cases*, 29 MINN. L. REV. 61 (1945); 19 U. OF CIN. L. REV. 407 (1950); PROSSER, TORTS §§ 51, 79 (1941); HARPER, TORTS §§ 97, 130 (1933); SOLMOND, TORTS 43 (8th ed. 1934); WINFIELD, TORTS 592-600 (1937); RESTATEMENT, TORTS §§ 343, 340 (1934); RESTATEMENT, TORTS § 893 (1939).

plaintiff. The plaintiff brings an action to recover for the personal injuries sustained, on the theory that the defendant was negligent. It might seem to one who has neither studied nor tried cases of this character that it ought to be relatively easy to arrive at a solution and that the charge to the jury in such a case should be comparatively simple and easy for any juror to understand. It is an understatement to say that this is far from the truth. On the supposition that the evidence warrants a finding of negligence, a list of some of the problems to be considered which justify the assertion just made is as follows: Assuming that there is evidence to warrant the finding that the plaintiff knew of the exact nature of the condition and realized the full danger involved in the use of the floor, is he to be denied relief regardless of the justification, exigency or emergency under which he was acting? If it be recognized that under some circumstances the exigency or emergency may be of such a coercive nature as to justify the plaintiff in encountering the danger without depriving himself of relief for injuries received, is it sufficient that he be acting reasonably and non-negligently? Must the exigency or emergency be of such a nature as to deprive the plaintiff's conduct of its so-called voluntary character, and if so what meaning is to be attributed to the term "voluntary" as used in this connection? Is it material whether or not the plaintiff has a right or privilege to use the defendant's facilities without his consent, and if so why? If there is evidence to justify a finding that plaintiff was not looking where he was going and therefore did not see the condition, is he to be charged with notice of that which he would see if he were looking or that which the defendant or occupier would ordinarily expect a user to see, or is he justified in believing that the premises are safe enough to use without looking for dangers? If a person is ordinarily required to look where he is going, are there distracting circumstances that would justify him in not discovering that which would be obvious if he were looking? Is it material that he once knew about the slippery condition but shortly thereafter "momentarily forgot" the same or rather failed to advert to the knowledge that he had? Is it important that the plaintiff may not have been in quite so favorable a position as was the defendant to appreciate the full extent of the risk as long as the plaintiff was aware of some danger and its general nature?

If the only ultimate issues in an accident of this nature were the negligence of the defendant and the contributory negligence of the plaintiff, it would be a relatively simple matter to submit the case to the jury under a charge defining negligence in general terms. There would often be close questions of negligence and contributory negli-

gence, to be sure, and frequently courts would disagree on substantially the same fact situations as to whether the jury's findings on negligence and contributory negligence should be disregarded, but at least the law suit would not be unduly complicated and the uncertainties that would exist are those which inhere in the negligence concept, which Holmes referred to as a featureless generality. The source of most of the confusion and complexity derives from the view generally followed that although the defendant may be regarded as at fault in the sense of negligence and the plaintiff may be regarded as having been free from fault in the sense of contributory negligence, yet the plaintiff may be denied relief either because of the absence of a duty of protection from conditions of such a nature or because of the defense commonly referred to as "voluntary assumption of risk."

Meaning of Terms. In the decisions related to this subject, the terms "negligence," "duty," "contributory negligence," and "assumption of risk" are so frequently used with interchangeable and indefinite meanings² that it seems desirable to give the reader a very definite understanding of the meaning the author attributes to each. The term "negligence" is used herein and is of course used normally to serve only one purpose and that to describe conduct that is regarded as involving an undue or unreasonable risk of harm and therefore to be considered as anti-social conduct. It was necessary to have such a concept as soon as it was decided that fault should be a prerequisite to liability. Obviously the fact that the danger of a particular condition is as obvious to the plaintiff as it is to the defendant who created it is an important factor on the issue of the defendant's negligence as well as on the issue of the plaintiff's contributory negligence. But it is equally true that it is not conclusive. The justification that the defendant might give for creating or permitting the danger, such as the extra cost of eliminating it, or the fact that an occasional person might get hurt as a result of its existence, are both material on the question of the reasonableness of his conduct or his negligence, but it has no bearing on the issue of the reasonableness of the plaintiff's conduct or his contributory negligence. Likewise, the justification that the plaintiff might give for encountering a danger, such as the purchase of a bargain and the saving of expense, has an important bearing on the reasonableness of

2. *Caron v. Grays Harbor County*, 18 Wash.2d 397, 139 P.2d 626, 148 A.L.R. 626 (1943) (Plaintiff injured using defective ladder. Relief denied, court saying assumption of risk and contributory negligence have reference to the same thing in cases where knowledge by injured party of obvious danger is involved); *Mudrich v. Standard Oil Co.*, 153 Ohio St. 31, 90 N.E.2d 859 (1950) (contributory negligence and assumption of risk used interchangeably); *Smith v. City of Cuyahoga Falls*, 73 Ohio App. 22, 53 N.E.2d 670 (1943) (contributory negligence used to mean assumption of risk).

his actions but little, if any, on the reasonableness of the defendant's actions in creating the danger.³

While statements are frequently made that without a duty there can be no negligence, this is misleading and not in accordance with the usage herein. A driver of a car can be negligent as a matter of law in failing to give a proper signal when turning to the left or right and yet not be liable to a passenger-guest who is hurt in precisely the manner that should have been anticipated. This is because for various reasons of policy, other than the need for limiting liability in some manner, courts have concluded in view of the relationship between the parties to restrict the defendant's duty of care.⁴ Thus, conduct more reprehensible than negligence must be found to justify the imposition of liability on a defendant to a passenger-guest in an automobile or to a trespasser on land. The lack of a duty in such instances does not mean and should not mean that the defendant has acted prudently.⁵ It simply means that even though he was guilty of anti-social conduct and conduct that should be discouraged, the achievement of other socially desirable ends or objectives that will be hindered by shifting the loss from the defendant to the plaintiff is a weightier consideration. Admittedly, a judge will often say that there was no duty to do something when in reality he means that it could not be said that it was negligence not to do it. This is unobjectionable since there is no liability without fault, *i.e.*, negligence, but the lack of duty in such a case is covered by the general requirement of fault, whereas there are numerous examples of non-liability even though the fault or negligence requirement of liability is satisfied.

This distinction between the problem of restricting liability to a negligent party and the problem of restricting the liability of the defendant even though he was negligent is one that is fundamental to an understanding of the cases involving personal injuries from open and obvious dangers. No attempt will be made herein to discuss all the ramifications of the negligence or fault concept as applied to litigation

3. This fundamental truth about negligence and contributory negligence has not always been recognized. In *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 29 N.E. 464, 31 Am. St. Rep. 537 (1891), the court thought it would be inconsistent to find the defendant negligent unless plaintiff was found to be so in exposing himself to the danger.

4. See Green, *The Duty Problem in Negligence Cases*, 28 COL. L. REV. 1014 (1928); 29 COL. L. REV. 255 (1929).

5. The case of *Blaugrund v. Paulk*, 203 S.W.2d 947 (Tex. Civ. App. 1947), is an example of confusion that can result in error. There, the plaintiff fell on a slippery floor that had recently been waxed. The jury found defendant was negligent in having a slippery floor but also found that plaintiff had been warned that the floor was slippery as he got off an elevator. The court concluded that those answers were inconsistent.

of this character, but an attempt will be made to ascertain the nature of the limitation, if any, of the duty of the occupier or landowner to the business visitor.

"Assumption of risk" is another term that needs to be used in a discriminating manner in order to avoid misunderstanding. Often a court will use the term to mean simply that no negligence or fault could be attributed to the defendant; for example, the statement that an employee assumes the risk of injury from dangers that are a necessary part of the activity simply means that the defendant is not negligent in failing to eliminate the danger. The statement that a spectator at a baseball game assumes the risk of injury from a foul ball if he chooses to sit in the unscreened bleachers when a seat in the screened stands is obtainable is another illustration. Again, a court will frequently use assumption of risk to mean one type of contributory negligence, as when the statement is made that plaintiff exposed himself *unreasonably* and therefore assumed the risk.⁶ Used with the two meanings given to it above, assumption of risk has no distinctive meaning and could not be regarded as a concept separate and distinct from either negligence or contributory negligence. The meaning attributed to the phrase herein is that assumption of risk is a *defense* distinct from contributory negligence and excusing a defendant whose negligent conduct caused injury to the plaintiff. An effort will be made herein to discuss the nature and limits of this defense as it applies to the occupier or landowner.

Thus, the objective is to examine and criticize the boundaries of the defense of assumption of risk and the duty of the occupier or landowner to a business visitor with respect to open and obvious conditions. In that connection, some effort will be made to determine to what extent, if any, such boundaries do not coincide.

ENCOUNTERING AN APPRECIATED DANGER

Restatement Position. The position is taken in the *Restatement of Torts* that one who voluntarily enters business property without a right to do so save that derived from the occupier's consent and encounters a condition thereon the danger of which he appreciated at the time is not entitled to recover for injuries accidentally resulting from the occupier's negligent conduct. In such a situation it is said that the occupier has no greater duty than to inform the business guest

6. *Wallace v. Great Atlantic & Pacific Tea Co.*, 85 F. Supp. 296 (N.D. W.Va. 1949); *Smith v. City of Cuyahoga Falls*, 73 Ohio App. 22, 53 N.E.2d 670 (1943) (Elderly lady fell on icy sidewalk; court reversed trial court judgment for plaintiff on ground that one who goes voluntarily on ice and snow is contributorily negligent. This is assumption of risk with a false label of contributory negligence).

of the danger of which the occupier is aware or should be aware, and if the business guest discovers the existence of such danger, a breach of duty by the defendant in failing to notify him of it does not cause him to be liable.⁷ This is based on the notion that the true ground upon which the occupier's liability for personal injuries arising from dangerous conditions on his land rests is his *superior knowledge* of the dangers thereon.⁸ His duty of protection is limited. As long, then, as there is no reliance on a tacit misrepresentation of the condition of the property there is no liability, even though a jury might justifiably conclude that the occupier was acting unreasonably in exposing patrons to a particular hazard. It will be noted that the defense of assumption of risk serves a purpose here, not served by the limitation of the defendant's duty. The defendant may be guilty of a breach of duty in failing to eliminate or give notice of a danger of which the visitor is not charged with notice. Even so, if the visitor should become aware of the danger no recovery will be allowed. This idea that the occupier is liable only where his knowledge of the danger was superior to that of the customer can be found expressed in a host of decisions. Usually, however, in those cases where the statement is found recovery could have been denied either on the ground that there was no evidence of negligence sufficient to justify such a finding or on the ground that contributory negligence was established from the facts as a matter of law. In many, if not most, jurisdictions the actual result reached in many cases is inconsistent with the notion either that the occupier's duty is in any way limited other than by the requirement of negligence or that there is such a defense as assumption of risk or *volenti non fit injuria* which is distinct from contributory negligence.⁹ Often in those instances there is no discussion either of assumption of risk or of the necessity for a breach of duty, the court being content to say that there was evidence sufficient to justify the findings of the jury on

7. RESTATEMENT, TORTS § 893 (1939).

8. *Lindquist v. S. S. Kresge Co., et al.*, 345 Mo. 849, 136 S.W.2d 303 (1940) (Plaintiff fell down stairs made of marble and worn to depth of three-eighths inch by constant use. She had used stairs before. Held, defendant not liable since true ground of liability must be proprietor's superior knowledge); *Ambrose v. Moffat Coal Co.*, 358 Pa. 465, 58 A.2d 20 (1948); *Paubel v. Hitz*, 339 Mo. 274, 96 S.W.2d 369 (1936) (postman injured while delivering mail by falling on runway covered by melting snow and ice); *Funari v. Gravem-Ingles Baking Co.*, 40 Cal.App.2d 25, 104 P.2d 44 (1940) (Slippery condition on elevator floor. Plaintiff injured while delivering sugar).

9. *Mudrich v. Standard Oil Co.*, 153 Ohio St. 31, 37, 90 N.E.2d 859, 862 (1950) (The court said, ". . . since the jury held that this particular plaintiff, . . . was not guilty of contributory negligence it is difficult to perceive how, under any correct charge, it could have found that such plaintiff assumed the risk"); *Caron v. Grays Harbor County*, 18 Wash.2d 397, 139 P.2d 626, 148 A.L.R. 626 (1943); *Dickinson v. Rockford Van Orman Hotel Co.*, 326 Ill. App. 686, 63 N.E.2d 257 (1945) (hotel).

the issues of negligence and contributory negligence.¹⁰ Those results can be taken as some indication of dissatisfaction with the idea that a non-negligent customer should be denied relief simply because he chose to encounter a known danger caused by the occupier's negligent conduct. It is safe to say that in many such instances the defense argued the absence of any duty but the judge who wrote the opinion chose to ignore a discussion of the problem. Occasionally a court will do as the New Hampshire Supreme Court has done and will in clear language reject any notion that the defendant's duty of protection is in any way limited other than by the requirement of negligence or fault.¹¹ Occasionally, also, a court will say that, save in the master and servant cases, assumption of risk is but a phase of contributory negligence,¹² and others arrive at substantially the same result in a more confusing manner. Thus, in one case where a female customer in a grocery store slipped on an oiled floor, the court said that she had a *right* as an invitee to walk on the floor while making her purchase, that the floor was the only means provided by the proprietor for the purpose, and that "the danger of falling was not such an obvious one that an ordinarily prudent person exercising ordinary care for his own safety would not have walked on it." This simply means that as long as the plaintiff is acting reasonably, *i.e.*, non-negligently, recovery will not be denied.¹³

The results of many cases, therefore, indicate substantial dissatisfaction with the position that the occupier's responsibility for negligence to the customer should be in any manner limited. Unfortunately, however, a court seldom meets the issue squarely, and therefore one cannot predict with any degree of certainty what such court would do later in a similar case. There is a dearth of judicial comment on the

10. *Ventromile v. Malden Electric Co.*, 317 Mass. 132, 57 N.E.2d 209 (1944) (Plaintiff fell on a recently waxed floor. Court seems to assume liability follows if defendant was negligent); *Walgreen-Texas Co. v. Shivers*, 137 Tex. 493, 154 S.W.2d 625 (1941) (Plaintiff recovered for injuries received from fall in getting down from raised platform); *Blanks v. Southland Hotel*, 229 S.W.2d 357 (Tex. Sup. Ct. 1950) (Plaintiff fell on stairs which he had used many times before and recovery allowed); *Wood v. Tri-States Theatre Corp.*, 237 Iowa 799, 23 N.W.2d 843 (1946) (Plaintiff tripped on floor mat in lobby theatre. Court reversed trial court judgment for defendant *non obstante veredicto*, on the ground that negligence of the defendant was a jury question).

11. *Williamson v. Derry Electric Co.*, 89 N.H. 216, 196 Atl. 265 (1938) (Fact situation similar to the one assumed at the beginning of this article. Court said, "The invitation to enter a dangerous place was extended, and the responsibility for the damage was not, as a matter of law, discharged by the plaintiff's notice and appreciation of it.")

12. *Peyla v. Duluth M. & I. Range R. Co.*, 218 Minn. 196, 15 N.W.2d 518, 154 A.L.R. 505 (1944); *Rutherford v. James*, 33 N.M. 440, 270 Pac. 794, 63 A.L.R. 237 (1928) (landlord and tenant relationship with landlord under obligation to keep in repair).

13. *Kroger Groc. & Baking Co. v. Monroe*, 237 Ky. 60, 34 S.W.2d 929 (1931).

justification for limiting the occupier's responsibility or recognizing assumption of risk as a defense. Whether the occupier's responsibility is limited by denying the existence of a duty or by creating a defense, the restriction on liability has been developed from the idea expressed in the Latin maxim *volenti non fit injuria*, which means "That to which a person assents is not deemed in law an injury."¹⁴ The doctrine of assumption of risk as it concerns the master and servant relationship, first applied in *Priestly v. Fowler*,¹⁵ grew out of this maxim, and in the course of time the denial of relief was justified on the ground that there was an implied term of the contract relieving the master of responsibility.

In some jurisdictions, the defense called "assumption of risk" is limited to the master-servant cases and perhaps to other contractual relationships, but recognition is usually given to another defense for other voluntary relationships called *volenti non fit injuria*; and the effect of both defenses is the same, *i.e.*, to deny relief to the person who deliberately exposed himself to danger.¹⁶ Occasionally a court finding that assumption of risk is limited to the master-servant relationship is misled into thinking that, therefore, there is no other defense having the same effect.¹⁷

Consent as a Reason for Denying Relief. Since the limitation of responsibility seems to be based on a vague sort of "consent" it is important that two observations be made about consent; one is that the concept may be given different meanings, and the second is that coercion of one kind or another may vitiate its effect. When a person proposes to make an invasion of a particular kind on another and the latter manifests a *desire* to receive it, then obviously that kind of consent normally bars recovery because either the conduct is not regarded

14. Bohlen, *supra* note 1; Keeton, *supra* note 1.

15. 3 M. & W. 1, Murph & H. 305, 7 L.J. Ex. 42 (1837). See Rice, *supra* note 1, for a discussion of the development of the idea that assumption of risk is a defense distinct from the defense of *volenti non fit injuria*.

16. Walsh v. West Coast Coal Mines, 31 Wash.2d 396, 197 P.2d 233 (1948). Seavey observes in Notes for Instructors to Seavey, Keeton & Thurston's *Cases on Torts* that plaintiff was free from moral compulsion whereas the same is not true in the rescue cases. Zurich General Acc. Liab. Ins. Co. v. Childs Co., 253 N.Y. 324, 171 N.E. 391 (1930).

17. Rutherford v. James, 33 N.M. 440, 270 Pac. 794, 63 A.L.R. 237 (1928) (Plaintiff sought recovery for property damage caused by fire resulting from defective stove. Defendant was furnishing room to plaintiff and was under contractual obligation to keep stove in repair. Held for plaintiff on ground that assumption of risk normally confined to the contractual relation of master and servant).

Peyla v. Duluth M. & I. Range R. Co., 218 Minn. 196, 15 N.W.2d 518, 154 A.L.R. 505 (1944) (Plaintiff crossed track in front of train. Held for plaintiff denying assumption of risk as a defense because, except in master and servant cases, assumption of risk is but a phase of contributory negligence). Alamo National Bank of San Antonio v. Hazlitt, 92 S.W.2d 315 (Tex. Civ. App. 1936) (error dismissed).

as socially undesirable,¹⁸ as when one consents to an operation, or, if undesirable, each party is equally to blame,¹⁹ as when a woman consents to an abortion. But obviously one who uses a slippery floor or walks down a flight of stairs not equipped with proper handrails does not desire an impact resulting from a fall. Again, one who knows that an invasion of a particular kind is certain or substantially certain to result from conduct in which another is engaged cannot normally recover if he could avoid subjecting himself to such conduct but instead manifests a willingness to submit to it.²⁰ Under such circumstances he assents to the invasion resulting from the conduct. But, clearly, the assent that one manifests when encountering a dangerous place involving an appreciable risk but not a certainty of falling is not an assent to the impact resulting from the fall if it should occur. The distinction from the plaintiff's standpoint between assent to a course of conduct that will of necessity result in a particular invasion and assent to a course of conduct that only creates a risk of such invasion finds its counterpart in the distinction from the standpoint of the defendant between conduct that he knows will result in an invasion and conduct that only creates a risk of such invasion. In the former instance, the defendant is liable for the intentional invasion unless a privilege is recognized; in the latter, he is not liable in the absence of negligence. So also the plaintiff should be denied relief in one instance unless there is such coercion as to vitiate the consent, because, as has been observed, the harm is self-inflicted;²¹ but permitted relief in the other in the absence of contributory negligence.

Coercion. The point has already been made that consent to an intentional invasion may be obtained under coercion of such a nature as to render the consent inoperative. Rape can, of course, be accomplished without overpowering force but as the result of using threats of physical violence. A threat of physical violence is only one form of duress. Modern cases, for example, have recognized that the assent to a restraint will not deprive the plaintiff of recovery in an action for false imprisonment if the plaintiff was forced to choose between re-

18. *O'Brien v. Cunard Steamship Co.*, 154 Mass. 272, 28 N.E. 266, 13 L.R.A. 329 (1891).

19. *Hudson v. Craft*, 33 Cal.2d 654, 204 P.2d 1 (1949) (illegal boxing match), noted, 63 HARV. L. REV. 175 (1949); 2 OKLA. L. REV. 108 (1949); *Bowlan v. Lunsford*, 176 Okla. 115, 54 P.2d 666 (1936) (abortion). There is, of course, a conflict. See RESTATEMENT, TORTS § 60 (1934); *Bohlen, Consent as Affecting Civil Liability for Breaches of the Peace*, 24 COL. L. REV. 819 (1924); PROSSER, TORTS § 18 (1941).

20. RESTATEMENT, TORTS 95, scope note to c. 3 (1934).

21. See introductory comments by Seavey to c. 3, § B of SEAVEY, KEETON, THURSTON, CASES ON TORTS (1950).

straint and separation from his property.²² The requirement in the assumption of risk doctrine that the plaintiff's exposure to an appreciated danger must be "voluntary" involves a problem similar to that of consent obtained under coercion in the field of intentional invasions. It is always voluntary in the sense that the plaintiff's will directed his course of action. Recognition is given to the fact that plaintiff may be acting under such an exigency, as saving a life, as to justify his encountering the danger.²³ This is another source of uncertainty and confusion. It was economic coercion that resulted in the enactment of workmen's compensation acts and the abolition of assumption of risk as a defense. Where the defendant has by a negligent act put the plaintiff in a position where it is necessary for him to make a choice of alternatives between the protection of a right and the risk of an injury, then according to the *Restatement of Torts* the plaintiff does not have the freedom of choice which the defense of assumption of risk assumes.²⁴ Thus, one who encounters a danger in the course of using a city sidewalk, a city street, or a waiting room of a railroad station would not assume the risk because his right to the use of the property is not dependent upon the consent of the owner or proprietor.²⁵ This reason is seldom given in cases of this character, and in most jurisdictions it is doubtful if a court consciously deals in a different way with city streets and public utility premises from the ordinary business establishment.²⁶ It has been suggested that where the plaintiff is put into a dilemma by defendant's wrongful conduct he is not free to choose and, although he knows the risk, is not barred unless the choice

22. *Griffin v. Clark*, 55 Idaho 364, 42 P.2d 297 (1935) (Plaintiff went with defendant in order to remain with baggage); *National Bond & Investment Co. v. Whithorn*, 276 Ky. 204, 123 S.W.2d 263 (1938) (Wrecker hauled plaintiff's car down street and plaintiff remained with car), noted, 17 TEXAS L. REV. 492 (1939).

23. The rescue cases are frequently explained on this basis. See PROSSER, *TORTS* 390 (1941); HARPER, *THE LAW OF TORTS* 294, 295 (1933); Rice, *supra* note 1.

24. RESTATEMENT, *TORTS* § 893 (1939); *Seelbach Inc. v. Mellman*, 293 Ky. 790, 170 S.W.2d 18 (1943) (Plaintiff injured as descending stairway of hotel. She was employed in office of hotel).

25. *Clayards v. Dethick*, 12 Q.B. 439, 116 Eng. Rep. 932 (1848) (Plaintiff had legal right without respect to consent of defendant to get horse from stable to street by means of only exit).

26. *Porter v. Toledo Terminal Road Co.*, 152 Ohio St. 463, 90 N.E.2d 142 (1950), noted, 19 U. OF CIN. L. REV. 407 (1950) (Railroad crossing rough and out of repair and plaintiff was injured when wheel of bicycle broke. There was an alternative route. Court reversed judgment for plaintiff on ground that trial court erred in refusing a charge on assumption of risk). *Smith v. City of Cuyahoga Falls*, 73 Ohio App. 22, 53 N.E.2d 670 (1943) (Court said plaintiff was guilty of contributory negligence but it is rather assumption of risk that court is using because reasonableness of plaintiff's actions not considered). Recovery is often allowed in cases of this character after concluding that plaintiff was not guilty of contributory negligence without discussing the question as to the applicability of assumption of risk. *Ahern v. City of Des Moines*, 234 Iowa 113, 12 N.W.2d 296 (1943); *Cato v. City of New Orleans*, 4 So.2d 450 (La. App. 1941).

is unreasonable in view of the alternative.²⁷ But the difficulty here is over the meaning of "dilemma." In *Bowater v. Rowley Regis Borough Council*,²⁸ one of the judges said that a person cannot be said to be truly "willing" unless he is in a position to choose freely, and freedom of choice predicates not only full knowledge of the circumstances but the absence from his mind of any feeling of constraint. It may be argued that the doctrine of assumption of risk does not apply where the plaintiff undertakes the risk for a socially desirable purpose and if so it should not apply to many relationships where it cannot be said that the plaintiff is in the exercise of a legal right at the time he encounters the danger. Perhaps it means that the plaintiff has no *reasonable* alternative,²⁹ but if so this is attributing to the defense "assumption of risk" a meaning closely resembling contributory negligence. There is, however, some difference between saying that the plaintiff had no reasonable alternative and saying that the plaintiff acted reasonably in encountering the danger and, therefore, non-negligently.³⁰ This is so because the plaintiff may be faced with alternatives either one of which it would be reasonable for him to take. Therefore, it could be said that assumption of risk does not apply where there is only one reasonable alternative and that is to encounter the danger. This would be an issue of law and not one of fact as is contributory negligence. It appears that in most cases where the plaintiff was not considered as acting in a voluntary manner he was acting in the exercise of a legal *right*. Examples are where he was making use of the facilities of a public utility, where he as a tenant was using a common passageway or leased premises that the landlord was under the obligation of keeping in repair,³¹ and where he was injured in rescuing life or property.³² Therefore, the position can be taken that the boundaries of assumption of risk and the defendant's obligation in this respect are not coextensive. Apparently, the defendant's legal obliga-

27. PROSSER, TORTS 389 (1941). See also Seavey's comments on *Clayards v. Dethick*, 12 Q.B. 439, 116 Eng. Rep. 932 (1848) in Notes for Instructors to SEAVEY, KEETON, & THURSTON, CASES ON TORTS (1950).

28. *Bowater v. Rowley Regis Borough Council*, [1944] 1 K.B. 476.

29. PROSSER, TORTS 389 (1941).

30. *Hunn v. Windsor Hotel Co.*, 119 W.Va. 215, 193 S.E. 57 (1937) (Plaintiff fell on hotel stairs. Court emphasized freedom of the will as the important question and distinguished assumption of risk from contributory negligence. There was another way reasonably convenient).

31. *Ahern v. City of Des Moines*, 234 Iowa 113, 12 N.W.2d 296 (1943) (sidewalk); *Cato v. City of New Orleans*, 4 So.2d 450 (La. App. 1941) (sidewalk); *Rutherford v. James*, 33 N.M. 440, 270 Pac. 794, 63 A.L.R. 237 (1928) (landlord and tenant relationship).

32. *Carney v. Buyea*, 271 App. Div. 338, 65 N.Y.S.2d 902 (4th Dep't. 1946), 32 CORNELL L.Q. 605 (1947) 45 MICH. L. REV. 918 (1947), 25 TEXAS L. REV. 688 (1947), *Rushton v. Howle*, 79 Ga. App. 360, 53 S.E.2d 768 (1949).

tion or duty of care with respect to conditions on property has been determined by most courts without reference to the exigencies of the particular situation of which he has no knowledge. That being so, and since defendant's legal obligation to one who comes on lawfully only as a result of the defendant's consent is that of notifying him of dangers not otherwise known and appreciated, the coercion under which the plaintiff is acting at the time of his intrusion is important only on the defense of assumption of risk. But, as has been pointed out, the basis for limiting the defendant's obligation and the defense of assumption of risk seems to be the notion of consent. The dilemma, therefore, with which the plaintiff is sometimes faced in the use of public utility facilities which he has a privilege to use without consent may be no different in substance from that which he is often required to face in the use of ordinary business property. It is not, therefore, surprising to find courts ignoring the duty question and justifying the plaintiff in exposing himself to a danger in like manner as if he had a privilege to enter.³³

In a previous article, the author indicated a trend in the direction of holding an occupier of an amusement or entertainment center liable for his negligence to a non-negligent patron, notwithstanding the latter's appreciation of the danger.³⁴ The proprietor of a baseball park who screens in a sufficient space to take care of the normal demand for seats, with that protection and at a price stipulated, is not liable to one who is injured in an unscreened part of the park.³⁵ Liability of the proprietor to those who selected the unscreened portion under such circumstances would be difficult to justify. His conduct is not commonly regarded as unethical. If, however, the patron is forced to a choice of seeing the game in an unscreened place or not at all, there is authority supporting liability when negligence has been found by the jury. For example, failure to screen the exit to the screened portion of the stands has resulted in liability.³⁶ A person operating an amusement center is in a line of business that is likely to attract people

33. *Kroger Groc. & Baking Co. v. Monroe*, 237 Ky. 60, 34 S.W.2d 929 (1931); *Walgreen-Texas Co. v. Shivers*, 137 Tex. 493, 154 S.W.2d 625 (1941); *Blanks v. Southland Hotel*, 229 S.W.2d 357 (Tex. 1950); *Ventromile v. Malden Electric Co.*, 317 Mass. 132, 57 N.E.2d 209 (1944).

34. Keeton, *supra* note 1.

35. *Keys v. Alamo City Baseball Co.*, 150 S.W.2d 368 (Tex. Civ. App. 1941); *Lorino v. New Orleans Baseball and Amusement Co.*, 16 La. App. 95, 133 So. 408 (1931); *Brisson v. Minneapolis & Athletic Ass'n*, 185 Minn. 507, 240 N.W. 903 (1932).

36. *Olds v. St. Louis National Baseball Club*, 232 Mo. App. 897, 104 S.W.2d 746 (1937). See also *Cincinnati Baseball Club Co. v. Eno*, 112 Ohio St. 175, 147 N.E. 86 (1925) (In that case the court reversed a trial court judgment for defendant on a directed verdict. Plaintiff was injured in unscreened portion of stands. Defendant permitted practicing by team in close proximity to stands).

in large numbers. Sometimes he is making a profit by catering to a desire on the part of people to get a thrill; and often he either has a monopoly, or his service is unique and there is no adequate substitute for it. It has been suggested that 'when an invitee or business visitor *pays for the privilege of entering* the defendant should have the premises reasonably safe; but that when the business visitor does not pay for his entry then a warning would be sufficient.³⁷ There would seem to be some justification for such a distinction in view of the fact that the normal person may feel that he has placed himself more under the occupier's protection when an admission charge is exacted.

The true explanation for the confusion and uncertainty now existing is the near total eclipse which the doctrine of *laissez-faire* has suffered in recent decades.³⁸ In 1907 Bohlen suggested that the maxim *volenti non fit injuria* was "a terse expression of the individualistic tendency of the common law. . . . Each individual is left free to work out his own destinies; he must not be interfered with from without but in the absence of such interference he is held competent to protect himself."³⁹ Many of the original rules in the field of tort law which were developed and blossomed in the nineteenth century and which were based on the notion that a man of full age should look after himself have undergone considerable adjustment, and this is particularly noticeable in the law of fraud where the duty of disclosure is ever increasing⁴⁰ and where contributory negligence or foolish credulity does not necessarily deprive one of recovery.⁴¹

Impracticability of Leaving Issues to Jury as a Reason for Denying Relief. There may be justification for a limitation of the defendant's duty or obligation because of the impracticability of passing upon the very close questions of negligence and contributory negligence that are involved when accidents result from obvious dangers. There is hardly any condition from which an accident occurs that could not have been made safer by a different method of construction. It is easy, therefore, for the plaintiff to argue that negligence was involved in the method of construction or the manner in which the property

37. See *Hall v. Brooklands Auto Racing Club*, [1933] 1 K.B. 205, 213 (C.A.). See also the following English cases: *Liddle v. Yorkshire County Council*, [1934] 2 K.B. 101, 109 (C.A.); *Purkis v. Walthamstow Borough Council*, [1934] 177 L.T. 257.

38. See *Bowater v. Rowley Regis Borough Council*, [1944] 1 K.B. 476.

39. Bohlen, *supra* note 1.

40. *Simmons et ux. v. Evans et ux*, 185 Tenn. 282, 206 S.W.2d 295 (1947), 20 TENN. L. REV. 392 (1948); *Feist v. Roesler*, 86 S.W.2d 787 (Tex. Civ. App. 1935), 14 TEXAS L. REV. 556 (1936).

41. *Bishop v. Strout Realty Agency*, 182 F.2d 503 (4th Cir. 1950); *Fausett & Co. v. Bullard*, 217 Ark. 176, 229 S.W.2d 490 (1950).

is used. Perhaps in most instances where the plaintiff encounters a known danger the fact that the danger is obvious makes it clear that the defendant is not negligent; and in many other instances the rightness of his conduct is extremely doubtful. There is basis for concluding that, because of the known propensities of the jury, the issue of the defendant's negligence should not be tried and the plaintiff in all cases should be denied relief. Moreover, a plaintiff has a greater opportunity because of his knowledge to feign an accident than he has if the risk is hidden.⁴² There are numerous illustrations of cases coming to the appellate courts with a jury finding of negligence on the part of the defendant and a further finding of an absence of contributory negligence on the part of the plaintiff when both findings are highly questionable. Either, therefore, the defendant's obligation of due care must be limited, or judges must not be so reluctant to exercise their supervisory powers over the jury. As one California judge has observed, juries are competent to determine facts but are mere amateurs at applying law to the facts.⁴³ The application of the negligence standard by the jury to occurrences of the kind discussed herein may be an unsatisfactory process and, certainly, this is so unless judges, trial and appellate, can and are willing to disregard jury findings more frequently.

ENCOUNTERING AN UNAPPRECIATED DANGER

Test for Charging a Visitor with Notice. It is frequently asserted that there is no duty to protect customers against hazards which are known to the customer *or which are so apparent that he may reasonably be expected to discover them and be able to protect himself.*⁴⁴ This is the view of the *Restatement* and is apparently intended to be an objective test.⁴⁵ But there is perhaps no condition the danger of which is so obvious that all customers under all circumstances would necessarily see and realize the danger in the absence of contributory negligence, and this is particularly true if the further principle so often repeated is accepted that the customer or business invitee is entitled to assume that the premises are reasonably safe for his use. One

42. In *Western Union Telegraph Co. v. Blakeley*, 162 Miss. 854, 140 So. 336 (1932), it appeared in evidence that after the plaintiff left the office she went to a lawyer's office and there telephoned the Western Union Telegraph Company to send a car to carry her home, and the car was sent. She telephoned a physician from the lawyer's office.

43. *Doty v. Southern Pac. Co.*, 186 Ore. 308, 356, 207 P.2d 131, 151 (1949).

44. PROSSER, *TORTS* 642 (1941). *Anderson v. Sears Roebuck & Co.*, 223 Minn. 1, 26 N.W.2d 355 (1947) (Floor level at different heights and not noticed. Held for defendant on ground that plaintiff should have reasonably expected to discover them).

45. *RESTATEMENT, TORTS* § 343 (1934).

interpretation to put on this statement is that if it is only in an exceptional and occasional instance that a customer would fail to notice or realize the danger, then the defendant will have no duty under any circumstances, however unreasonable the defendant might be in the maintenance of the condition. It would seem that this is the only way that the *Restatement* qualification of the occupier's responsibility for maintaining an unreasonable danger makes sense. Otherwise the test should be one as to whether or not the customer was justified in not noticing the condition rather than one relating to the occupier's expectations. Certainly a test based on whether the defendant-occupier could reasonably expect the particular customer to discover and realize the danger is one that can be applied more easily and with fewer complications than a test which depends upon the state of mind of the plaintiff-customer and the justification which he asserts for not noticing or realizing a danger. Under the former test the court would not be concerned about the particular circumstances leading up to the customer's injury, whereas in the latter case "distracting" circumstances and the customer's statement, which may or may not be true, that he did not notice the danger would be material,⁴⁶ and the jury would normally determine the adequacy of the distraction. Moreover, if a customer who deliberately encounters a realized danger cannot recover but one who alleges that he, with justification, was not looking and did not see can convince the jury and recover, then certainly there is created an opportunity for fabrication of how the accident happened, and an unscrupulous customer who saw and realized the danger can generally establish to the satisfaction of the jury that he was not looking. Indeed, it is believed that only a small percentage if advised as to the law would admit seeing the condition. If, therefore, it is sound to deny relief to one who is injured while encountering a known danger, it is probably sound to charge the particular plaintiff with notice if the condition is one that would be ordinarily noticed. From the standpoint, therefore, of administrative convenience and avoidance of fraud, an objective test based on defendant's reasonable expectations is to be preferred to a test based in large part upon the subjective state of mind of the injured party.

It might be urged that a test based upon whether under the particular circumstance the customer in the exercise of ordinary care

46. In *Anderson v. Sears Roebuck Co.*, 223 Minn. 1, 26 N.W.2d 355 (1947), the court after adopting the *Restatement* idea nevertheless discussed a distracting circumstance contention as if there might be some distracting circumstances that would justify a visitor in not noticing a changed floor level. *Kingsul Theatres v. Quillen*, 29 Tenn. App. 248, 196 S.W.2d 316 (1946) (plaintiff looking back as leaving theatre for daughter and granddaughter and fell at entrance).

would have discovered the condition is objective and, therefore, the subjective state of mind is not controlling. If, however, as is so often stated, the customer is not required to look where he is going but can assume that the floor is safe enough to use without guarding against possible dangers; or if various kinds of distracting circumstances such as recognition of a friend in a different part of the establishment can be brought up in justification, then the question of whether the plaintiff actually saw and realized the danger becomes one of the most important considerations, since negligence in not discovering may be difficult to establish especially in view of the known propensities of the jury and in view of the reluctance of most courts to review the findings of the jury on the issues of negligence and contributory negligence.

Apparently, in cases adopting the view that the situation must be examined from the standpoint of the customer at the time he received the injury—and this seems to be the view of a majority of the more recent cases⁴⁷—the plaintiff must not only plead and prove that he did not see and realize the danger but also that he exercised ordinary care in looking out for dangers on the property. He must establish his own care in looking out for dangers in order to establish a breach of duty, since the defendant's duty extends only to warning of conditions that plaintiff by the exercise of ordinary care would not discover for himself.⁴⁸ It is not therefore to be treated like the normal issue of contributory negligence. In those instances where the courts have said that plaintiff is entitled to assume that the premises are reasonably safe for use, about all that is necessary for the plaintiff to show is that he was not looking and therefore did not see.⁴⁹ Some courts have required that the plaintiff keep a lookout in the absence of some excuse for not so doing in order to avoid a directed verdict for the defendant or a reversal of a jury finding in his favor, but there

47. *Surface v. Safeway Stores*, 169 F.2d 937 (8th Cir. 1948) (Customer's absorption in shopping justified him in not noticing danger); *Matherene v. Los Feliz Theatre*, 53 Cal.App.2d 660, 128 P.2d 59 (1942); *Houston National Bank v. Adair*, 146 Tex. 387, 207 S.W.2d 374 (1948) (Plaintiff slipped and fell on marble stairway which had no handrails that could be grasped. Plaintiff charged with notice but on ground that must have seen it if ordinary care exercised); *Caron v. Grays Harbor County*, 18 Wash.2d 397, 139 P.2d 626, 148 A.L.R. 626 (1943). *Lane Drug Stores v. Story*, 72 Ga. App. 886, 35 S.E.2d 472 (1945).

48. *Lane Drug Stores v. Story*, *supra* note 47 (Plaintiff fell over a stool in the aisle. Appellate court reversed trial court judgment for plaintiff because of plaintiff's failure to put in affirmative evidence to show that she could not have seen the stool by the exercise of ordinary care).

49. *Cartier v. Hoyt Shoe Corp.*, 92 N.H. 263, 29 A.2d 423 (1942) (failure to investigate however simple and easy not an omission of care); *Lyle v. Megerle*, 270 Ky. 227, 109 S.W.2d 598 (1937) (Customer injured by fall resulting from accumulation of ice and snow. Court said in nearly every case question should be submitted to jury as to whether paying reasonable attention).

is no unanimity about what will be a sufficient "distracting" circumstance.⁵⁰ In *Matherne v. Los Feliz Theatre*,⁵¹ for example, plaintiff indicated that she was looking to see if her husband was in front of the theatre with the car when she fell on the slippery terrazzo floor, but the court nevertheless charged the plaintiff with knowledge of the condition; and in *Lane Drug Stores v. Story*,⁵² a jury verdict for plaintiff who had been injured by falling over a stool in the aisle of the drug store was reversed because the plaintiff failed to show that she could not have seen the stool by the exercise of ordinary care. The latter decisions are inconsistent with the view that one is entitled to assume the premises are safe enough for use without looking. On the other hand, in *Lyle v. Megerle*⁵³ it was said that a customer who slipped on a floor made dangerous by an accumulation of ice and snow could normally assume that the floor would be free from obstructions and that it was error to fail to submit to the jury the question of whether he was giving reasonable attention to his surroundings. Here is, therefore, another source of doubt and uncertainty in cases involving injuries from open and obvious dangers.

Negligent Failure to Discover as a Sufficient Reason for Denying Relief. If the jury finds that plaintiff failed to exercise ordinary care in ascertaining the dangerous condition as a result of which an injury was received, it seems to be generally assumed that there would be no recovery. However, this should depend upon whether or not an injured party would necessarily be denied relief if he deliberately encountered the danger under the same circumstances. As has been previously indicated, the customer may be justified in some jurisdictions and under certain circumstances in deliberately encountering a known danger. Perhaps the same reason which would have caused a normal person to encounter the danger should be considered before denying relief because of a failure to notice a danger. If that be true, then it can be argued with some reason that the accident could have happened even if he had discovered the danger and under circumstances where recovery would be allowed. His failure to discover, therefore, might not be considered as a cause of the occurrence. No doubt, the balance of probabilities in most instances would be that injury would have been avoided if the danger had been discovered, but there is at least room for arguing that a negligent failure to discover ought not to

50. *Matherne v. Los Feliz Theatre*, 53 Cal.App.2d 660, 128 P.2d 59 (1942); *Lane Drug Stores v. Story*, 72 Ga. App. 886, 35 S.E.2d 472 (1945).

51. *Matherne v. Los Feliz Theatre*, *supra* note 50.

52. *Lane Drug Stores v. Story*, 72 Ga. App. 886, 35 S.E.2d 472 (1945).

53. 270 Ky. 227, 109 S.W.2d 598 (1937).

prevent relief if, had he discovered the danger, he was still at liberty to take the risk and recover if harm ensued.

Momentary Forgetfulness. It has been said that once the plaintiff fully understands the risk, the fact that he has momentarily forgotten it will not protect him.⁵⁴ Many courts in recent years, however, have imposed liability on the proprietor of a business establishment where the business visitor at the time of the initial use of the property or at the time of admission was aware of the existence of a particular danger but, thereafter, in the course of user "momentarily forgot" about it.⁵⁵ The Texas Supreme Court was faced with a typical situation of that kind in *Walgreen-Texas Co. v. Shivers*.⁵⁶ There, the defendant was operating a retail store in the City of Beaumont and maintained a soda fountain therein. To serve the customers a counter twenty-four feet long was provided, and in order to be served at the counter, it was necessary for a person to step up on a raised platform. The platform was about nine and three-fourths inches above the floor level of the drug store. The female plaintiff stepped up on the platform to be served as she had once done before, thus obviously noticing the condition of the floor. When she attempted to leave, after being served coffee, she failed to advert to her position on the platform and in getting down fell to the floor and was injured. On a special issue finding by the jury of negligence of the defendant and absence of contributory negligence on the part of the plaintiff, the Texas Supreme Court upheld a trial court judgment for the plaintiff without discussing the duty or obligation of the defendant and without discussing the defense of *volenti non fit injuria*. The Texas court recognizes that such inadvertence may show such a want of care as to justify or even compel a finding of contributory negligence, but recovery is not denied because the plaintiff had once been aware of the danger and, moreover, consideration is given to distracting circumstances. Several observations should be made about such cases. First, liability has not been limited to situations where the plaintiff had a privilege or right to enter without regard to the defendant's consent. Second, such results are inconsistent with the position that the defendant's duty or obligation is based solely upon superiority of knowledge, because

54. *Jacobs v. Southern Ry.*, 241 U.S. 229 (1916); *New York C. & St. L. R. v. McDougal*, 15 F.2d 283 (6th Cir. 1926).

55. *Neel v. Mannings*, 19 Cal.2d 647, 122 P.2d 576 (1942) (Plaintiff injured while walking up stairway when his head struck a sharp board on edge of the ceiling bordering stair well. Held (4-3) for plaintiff on ground that forgetfulness of known danger will not operate to bar recovery unless it shows a want of ordinary care); *Gibson v. Mendocino County*, 16 Cal.2d 80, 105 P.2d 105 (1940) (Fire siren distracted plaintiff's attention).

56. 137 Tex. 493, 154 S.W.2d 625 (1941).

the plaintiff had the knowledge.⁵⁷ Third, the nature of the condition before the accident would never determine conclusively ultimate responsibility since inadvertence could be claimed at the moment of the accident. Finally, if the same court denies recovery to one who appreciated the danger at the time of use, then the legal situation is somewhat anomalous. One who admits appreciation of danger is not entitled to go to the jury on the issue of contributory negligence but is denied relief on the ground that he has consented. One who claims that he "momentarily forgot" can go to the jury on the question of whether or not he was justified in his inadvertence. This not only seems theoretically unsound; more importantly, it raises an issue that cannot be very satisfactorily tried because there is no satisfactory way of disproving the plaintiff's claim that he forgot, and the jury is left either to believe or to disbelieve the plaintiff's testimony. The latter objection can be partially met by a requirement that the plaintiff show some objective circumstance of a distracting nature.⁵⁸

Appreciation of Some Danger But Not All. One method that has been employed by some courts to sabotage the defense of assumption of risk and the rule that the defendant's legal duty or obligation is limited is to conclude that the plaintiff did not and should not necessarily be expected to realize the full extent of the danger.⁵⁹ The idea is sometimes advanced that, for relief to be denied, the full extent of the danger must be as open and obvious to the plaintiff as it is to the defendant. Apparently, therefore, the mere fact that the plaintiff is in a position to be aware of the existence of an appreciable chance of falling is not sufficient to deny relief if the defendant was in a better

57. This is clearly pointed out by Traynor in his dissenting opinion in *Neel v. Mannings*, 19 Cal.2d 647, 122 P.2d 576 (1942).

58. *Neal v. Cities Service Oil Co.*, 306 Mich. 605, 11 N.W.2d 259 (1943) (Momentary forgetfulness was regarded as contributory negligence as a matter of law. There plaintiff fell into opening which he noticed five minutes previously and there was no evidence of any unusual distraction); *Mayor and Alderman of Knoxville v. Cain*, 128 Tenn. 250, 159 S.W. 1084 (1913) (Plaintiff fell over some stakes the presence of which he knew about but "forgot." It was held that the trial court should have directed a verdict for the city. The court said that many distractions, even the hail of an acquaintance across the street, may divert the attention but said the court, "We do not see how a person can be excused when he says he simply forgot").

59. *Surface v. Safeway Stores*, 169 F.2d 937 (8th Cir. 1948) (jury question as to whether comprehension of danger sufficient); *Thomas v. Quartermaine*, 18 Q.B. 685 (1837) (Master-servant case. There may be perception of the existence of danger without comprehension of the risk. There must be qualitative knowledge); *Dawes v. Penney & Co.*, 236 S.W.2d 624 (Tex. Civ. App. 1951) (Plaintiff slipped and fell at entranceway to defendant's department store. Tile slippery due to mud and water and court held plaintiff might not notice mud to the extent that employees had opportunity to do so); *Loney v. Laramie Auto Co.*, 36 Wyo. 339, 255 Pac. 350, 53 A.L.R. 73 (1927) (Plaintiff injured by blowing off of the back rim of an auto tire. Comprehension of some risk insufficient to bar recovery where there was not full appreciation of the risk).

position to understand the full extent of the damage. It is doubtful that this idea has been fully utilized. It would seem generally that proprietors ought to know more in most instances about the dangers of a particular kind of construction or a particular type of floor than most users and that there would be very few cases where recovery would be denied as a matter of law on the ground of assumption of risk.

CONCLUSION

I would like to draw certain conclusions from what has been said heretofore with which, it is admitted, one may reasonably disagree. First, the notion that the responsibility of the occupier of business property for negligence should be in any manner limited because of any vague sort of consent cannot be justified. If the defendant is not to be liable for taking a chance unless he is negligent, then the plaintiff should not in theory be denied relief for taking a chance unless he is contributorily negligent. Second, the only reasonable justification for limiting the occupier's duty of care to conditions that are not "open" and "obvious" is the difficulty that would be experienced in the administration of the negligence and contributory negligence concepts, particularly in the light of the known propensities of juries to find for the plaintiff. Third, it is not believed that the difficulties thus to be encountered are sufficient, particularly in view of the availability of insurance to the occupier, if the appellate courts would exercise more often the power which they have to disregard jury findings when there is no reasonable basis therefor. Fourth, if, however, the defendant's duty is to be limited, then it should be done without reference to the reason the plaintiff might have had for encountering the danger, without reference to whether the plaintiff noticed or did not notice the condition, without reference to distracting circumstances, without reference to momentary forgetfulness, and without reference to whether he did or did not actually appreciate the danger. Those should only be factors for consideration on the issue of the plaintiff's contributory negligence. Liability should be limited, if at all, as apparently the *Restatement* would limit it, by looking at the problem from the standpoint of the defendant. The defendant's duty would then be limited to conditions which would not *ordinarily* be noticed or the full extent of risk from which would not *ordinarily* be appreciated.