

1943

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Recommended Citation

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MINNESOTA LAW REVIEW

Journal of the State Bar Association

VOLUME 27

MARCH, 1943

No. 4

THE AUTOMOBILE GUEST AND THE RATIONALE OF ASSUMPTION OF RISK

By RALPH S. RICE*

Increasing complexity of economic and social problems during the past forty years has done much to revolutionize previously accepted legal concepts, particularly in the field of torts. Through techniques involving the concept of "contributory negligence as a matter of law" courts have often staked out the boundary lines of legal fault within which a jury might determine whether the conduct of litigating parties had met the standard of care required of a reasonably prudent individual confronted with similar circumstances. It long since has been accepted that, particularly in tort cases, legal techniques arising from accepted precedents are often applied by courts in reaching conclusions ultimately predicated on the attitude of the judicial body toward social, economic and equitable considerations implicit in the facts in the controversy at hand. If this be true (and few practitioners will deny it), it well may be said that the doctrine of assumption of risk has become one of the more clumsy tools in the judicial kit.

The use of the term "assumption of risk" has involved a variety of factual situations, in which judicial techniques have not always been similar. In the following pages it is sought to examine the problem through a general survey of the fields in which the term has been employed, its relation to the doctrine of contributory negligence, the sources out of which the doctrine emerged, and the prerequisites to an application of the rule in current litigation. Since the use of the doctrine has most recently become general in litigation involving the automobile host and guest rela-

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tionship, a detailed analysis of the use of the assumption of risk concept in that field may be illustrative of problems inherent in the contemporary use of the concept.

I. THE EXTENSION OF THE USE OF THE TERMS "ASSUMPTION OF RISK" AND "VOLENTI NON FIT INJURIA"

The roots of the doctrine so far as it embodies the maxim "*volenti non fit injuria*" stretch deep into Continental jurisprudence and the English common law. There is some indication that it was recognized by Aristotle.¹ "*Scienti et consentienti non fit injuria neque dolus*" was an accepted principle of the early canon law of Rome,² and the rule also obtained approval in Roman civil statutes embodied in the Justinian code.³ It was subsequently adopted very generally throughout Europe,⁴ and a record of its application is found as early as 1304 in England.⁵ The earlier Roman use of the doctrine seems to have been limited to cases in which actual consent to injury was shown, but the strong inclination of the courts to imply consent on the part of a plaintiff where it would seem unconscionable to allow recovery was exemplified in the earliest recorded English case on the subject,⁶ and the construction there affirmed was later illustrated by Bracton.⁷

¹N. G. L. Child, 18 Juridical Rev. (1906) 73, cited by 1 Street, Foundations of Legal Liability, (1906) 162, and see 1 Bevan, Negligence, (1908) 632. Literally interpreted, the maxim simply means that "To him who consents, no wrong is done."

²Sext. v. De Regulis Juris 28.

³Both 1 Street, Foundations of Legal Liability, (1906) 162, and 1 Bevan, Negligence, (1928) 787, support this conclusion through reference to the rule that "*Nulla injuria est quae in volentem fiat*," in the Justinian code, D. 47, 10, 1, sec. 5. See also Lord Watson's decision in *Smith v. Baker & Sons*, [1891] A. C. 325, 60 L. J. Q. B. 683, 65 L. T. 467, 55 J. P. 660, 7 T. L. R. 679, where it is said at 355 that the maxim was originally borrowed from the civil law, citing the familiar example of an individual who sold himself as a slave and thereby was precluded from later objecting to his status.

⁴Cf. Valin, "Du Capitaine," Art. 12. Consol. del Mar. ch. 183, and *Richelieu & O. Nav. Co. v. St. Jean*, (1883) 28 L. C. J. (Q.B.) 91, applying the French law in Quebec.

⁵See *De Richmond's Case*, Y. B. 33-35 Edw. I (Horwood's ed. 1879) 8, where cattle were claimed to be held under an agistor's lien and where it was urged that a previous adverse decision concerning title to the land should be no bar to a further assertion of defendant's title to the land on the theory of adverse possession, to which counsel suggested that since the defendants had themselves brought the previous writ they could not complain—"volenti non fit injuria."

⁶*Ibid.*

⁷6 Bracton, *De Legibus Angliae* 263, Folio 413 b (Twiss Ed. 1883): "There are also certain writs which are called magisterial, and are often varied according to the variety of the cases and complaints, and some are personal and some are mixed according as the actions are diverse and

Meanwhile the rule was receiving approval in cases involving actual consent,⁸ not only in tort but in contract litigation.⁹ Certainly few principles in the law come closer to a realization of the "natural justice" concept of jurisprudence than that a litigant, who has in fact consented to an invasion of what might otherwise be termed a "right," cannot complain of conduct which he has specifically authorized. The most familiar use of the maxim and of the doctrine of assumption of risk concerns relationships involving employer and employee, the concept first being created in *Priestly v. Fowler*,¹⁰ which held in substance that a servant assumed the obvious incidental risks of his employment with the master. Chief Justice Shaw of the Massachusetts Supreme Court promptly made application of the rule,¹¹ and during the following twenty-five years the concept received repeated approval, especially in the English courts.¹²

The use of the maxim was, however, not new when the master and servant cases arose, even as to cases which involved an implied rather than an actual consent to injury. The standard case

varied, because there will be as many formulas of writs as there are kinds of actions, because a person cannot bring an action without a writ, since another person is not obliged to make answer to him without a writ, unless he has gratuitously been willing to do so, as to a person who is knowing and willing no injury is done." (In the Latin text, it is reported: "cum scientiae et volenti non fit injuria.")

⁸See *Duberly v. Gunning*, (1792) Durn. & E. 656, wherein Lord Kenyon cites *Cibber v. Sloper*, (1738) Bull. N. P. (5th Ed.) 27. See also *Norton v. Jason*, (1653) Sty. 398, applying the maxim in a seduction proceeding.

⁹See, e. g., *Rohr v. Kindt*, (1842) 3 Watts & S. (Pa.) 563, 39 Am. Dec. 53, as to circumstances under which one taking an insecure title "takes the risk on himself." The volenti maxim was also invoked in an early patent case involving an action on the case. See *Byam v. Bullard*, (C.C. Mass. 1852) 1 Curt. 100, Fed Cas. No. 2,262.

¹⁰*Priestly v. Fowler*, (1837) 3 M. & W. 1, Murp. & H. 305, 7 L. J. Ex. 42. This interpretation of the case was followed and applied in several later English cases prior to the adoption of the Employer's Liability Act. Some, but not all, of the cases relied on the volenti maxim. See, e. g., *Hutchinson v. York, N. & B. Ry.*, (1850) 5 Ex. 35, 19 L. J. Ex. 296, 15 L. T. O. S. 230; *Skipp v. Eastern Counties Ry. Co.*, (1853) 9 Ex. 223, 23 L. J. Ex. 23, 2 C. L. R. 185; *Bartonshill Coal Co. v. Reid*, (1858) 3 Macq. 277, 31 L. T. O. S. 255, 22 J. P. 560; and *Britton v. Great Western Cotton Co.*, (1872) L. R. 7 Ex. 130, 41 L. J. Ex. 99, 27 L. T. 125; *Senior v. Ward*, (1859) 1 El. & El. 385, 28 L. J. Q. B. 139, 32 L. T. O. S. 252. It has been thought, however, that the actual basis of the decision in *Priestly v. Fowler* was that a host owed a guest no duty as to dangers unknown to either. See *Kambour v. Boston & M. R. Co.* (1913) 77 N. H. 33, 86 Atl. 624, 45 L. R. A. (N.S.) 1188, and *Bohlen*, *Voluntary Assumption of Risk* (1906) 20 Harv. L. Rev. 14, 28-29, citing decision of *Pollock, C. J.*, in *Southcote v. Stanley*, (1856) 1 H. & N. 247, 25 L. J. Ex. 339, 27 L. T. O. S. 173, so considering the case.

¹¹*Farwell v. B. & W. R. R.*, (1842) 4 Metc. (Mass.) 57.

¹²See note 10 supra.

cited to establish legal fault under the maxim in host-guest cases has been that of *Hlott v. Wilkes*,¹³ where the plaintiff, a trespasser with knowledge of spring guns on defendant's premises, was precluded from recovering damages for injuries received from one of the weapons, and in which it seems clear that the court intended to define and limit the duty of the owner of the premises toward a person who came upon them with knowledge of present perils, through adoption of principles arising from the *volenti* concept.

The maxim has not infrequently been used in cases where the conduct of the guest, rather than the original duty of the host, was at issue. In the decision in *Clayards v. Dethick and Davis*,¹⁴ it seems to have been suggested that urgent necessity in the proper use of one's property suspends the operation of the maxim, and in *Lax v. Darlington Corporation*,¹⁵ Lord Bramwell discussed the doctrine at some length. The decision of the majority of the court in *Woodley v. Metropolitan District Railway Company*,¹⁶ decided in 1877, appears also to rest upon the *volenti* concept. The application of the doctrine to cases involving the conduct of a

¹³(1820) 3 Barn. & Ald. 304. The ruling was soon specifically abrogated by statute (Stat. 7 & 8 Geo. IV, ch. 18, 24 & 25 Vic., ch. 100, sec. 31) and was disapproved on the theory that a "trap" was created, in America. See *Johnson v. Patterson*, (1840) 14 Conn. 1, and *Palmer v. Gordon*, (1899). 174 Mass. 410, 53 N. E. 909. In so far as the use of the *volenti* maxim is concerned, however, the holding in the case has not been disputed except as to the application of the doctrine to the specific facts there involved. The maxim was subsequently referred to as inapplicable in a case where a trespasser was injured by a spring gun which he did not know was upon the premises. *Bird v. Holbrook*, (1828) 4 Bing. 628, 1 M. & P. 607, 2 Man. & Ry. M. C. 198.

¹⁴(1848) 12 Q. B. 439. The case was, however, criticized in *Lax v. Darlington Corporation*, (1879) 5 Ex. Div. 35, 49 L. J. Q. B. 105, 41 L. T. 489, 44 J. P. 312, and questioned in *M'Mahon v. Field*, (1881), 7 Q. B. D. 594, 50 L. J. Q. B. 552, 45 L. T. 381, 46 J. P. 245, it being suggested that the court under the circumstances in the *Clayards* case ought not have allowed the jury to decide whether plaintiff had persisted, notwithstanding express warning, in running upon a great and obvious danger.

¹⁵(1879) 5 Ex. Div. 35, 49 L. J. Q. B. 105, 41 L. T. 489, 44 J. P. 312.

¹⁶(1877) 2 Ex. Div. 384, 46 L. J. Q. B. 521, 36 L. T. 419, 42 J. P. 181. Plaintiff in this case, employee of an independent contractor, was injured by a passing train while working in a railroad tunnel with knowledge of all surrounding conditions. Even in the absence of a master-servant relationship with the defendant, it was held that he assumed the risk of injury. (But cf. *Heaven v. Pender*, (1883) 11 Q. B. D. 503, 52 L. J. Q. B. 702, 49 L. T. 357, 47 J. P. 709, where recovery was allowed against the third party where his equipment was defective.) Most American courts follow the principal case. See cases collected in annotation at 44 A. L. R. 1122.

guest, as a bar to an action by him against the host, was subsequently definitively made in 1888.¹⁷

While questions as to its application in highway cases generally had arisen before the beginning of the nineteenth century,¹⁸ the maxim was not called into use in host-guest relationships involving vehicular travel until the case of *Priestly v. Fowler*,¹⁹ in which this aspect of the concept is at best imperfectly set forth. It was suggested in 1888 by Grantham, J., that the defense of "assumption of risk" in relation to the conduct of the guest rather than the initial duty of the host was not applicable in vehicular cases,²⁰ and the doctrine was finally rejected for all purposes in automobile accident cases in England.²¹ In this country, reference to assumption of risk was first made in 1840, the federal court emphasizing in its charge to the jury that the passenger assumed the risk of accidents arising without negligence of the driver of a livery coach,²² and the doctrine was soon carried over

¹⁷In *Osborne v. L. & N. W. Ry. Co.*, (1888) 21 Q. B. D. 220, 57 L. J. Q. B. 618, 59 L. T. 227, 52 J. P. 806, 4 T. L. R. 591, wherein Wills J., set up the standard of care required by the defendant railroad, on whose icy steps plaintiff slipped, and suggested that where defendant sought to rely on the defense of assumption of risk after a finding by the jury that no contributory negligence was present, defendants "must obtain a finding that plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it."

¹⁸See note 27 *infra*, and text.

¹⁹Cited at note 10 *supra*. But see *Southcote's case*, (1601) 4 Co. Rep. 83, wherein the term is casually mentioned in a dictum.

²⁰"For instance, in the case of a stage coach, if a passenger sees that one of the horses is vicious, is he bound to stay at home and give up his journey, or if he does not do so, and suffers injury, is he to lose all remedy?" *Osborne v. L. & N. W. Ry. Co.*, (1888) 21 Q. B. D. 220, 57 L. J. Q. B. 618, 59 L. T. 227, 52 J. P. 806, 4 T. L. R. 591.

²¹*Dann v. Hamilton*, [1939] 1 K. B. 509, 55 L. T. R. 297, 108 L. J. K. B. 255, 160 L. T. 433, per Asquith, J. But actual consent to placing of property in a dangerous position on the deck of a ship may debar the owner thereof from later complaining of damage suffered thereby. See *Gould v. Oliver*, (1837) 4 Bing. N. C. 134, 3 Hodg. 307, 5 Scott 445, 7 L. J. C. P. 68, wherein Tridal, C. J., refers to "the general rule of English law, that no one can maintain an action for a wrong, where he has consented or contributed to the act which occasions his loss."

²²*McKinney v. Neil*, (C.C. Ohio 1840) 1 McLean 540, Fed. Cas. No. 8865, the court saying: "We are surrounded with dangers at home and abroad; and they are greater when we travel than while we remain stationary. In some modes of traveling these dangers are greater than in others. They may be greater on water than on land; on a fast line of stages than on a slow one. And every passenger must make up his mind to meet the risks incident to the mode of travel he adopts, which cannot be avoided by the utmost degree of care and skill in the preparation and management of the means of conveyance."

into railroad²³ and ferry cases.²⁴ It was in this same sense that it was used in a case decided in 1918, involving the automobile guest-host relationship.²⁵

The *volenti* maxim, used in measuring the standard of care required of a plaintiff, seems originally to have been used also in determining the respective rights of strangers using public ways before the courts had made any effort to determine the extent of the dichotomy between the doctrine of assumption of risk and that of contributory negligence.²⁶ The doctrine was suggested in *Cruden v. Fentham*²⁷ decided in 1799, where one was killed by collision with a chaise as he wilfully drove to his lawful side of the highway in order to assert what he termed the right of the road, and recovery was denied because the deceased "was putting himself voluntarily into the way of danger, and the injury was of his own seeking." Other early cases made use of the "assumption of risk" phraseology in defining the rights of parties using streets and highways, both in determining the duty owed to injured parties,²⁸ and in establishing a standard of care to which an injured party must conform.²⁹ The use of the term in cases in-

²³See, e. g., *Galena & C. U. R. R. Co. v. Fay*, (1855) 16 Ill. 558, and *Chicago B. & Q. R. Co. v. Hazzard*, (1861) 26 Ill. 373. In the latter case it was suggested that "... a passenger takes all the risks incident to the mode of travel, and the character of the means of conveyance which he selects, the party furnishing the conveyance being only required to adapt the proper care, vigilance and skill to that particular means." And where an employee with limited powers permitted the plaintiff's intestate to ride on the employer's train, without the knowledge of the employer, plaintiff was debarred from recovery because "the intestate was in the position of one consenting to bear a risk as a volunteer, a guest, a servant, or a bare licensee; and the principle on which cases relating to those classes are determined apply to him" and that intestate "voluntarily assumed the risk from which he suffered." *Morris v. Brown*, (1888) 111 N. Y. 312, 18 N. E. 722.

²⁴*Selp v. Dunn*, (1871) 42 Ga. 528.

²⁵*Avery v. Thompson*, (1918) 117 Me. 120, 103 Atl. 4. The case contains numerous references to cases establishing the general rules for liability of a host to an automobile guest.

²⁶As to the distinction between assumption of risk and contributory negligence, see notes 50-107 *infra*, and text.

²⁷(1799) 2 Esp. 685. *Clay v. Wood*, (1803) 5 Esp. 44, involved substantially similar circumstances, although in that case the plaintiff was on the wrong side of the road, having voluntarily put himself into a position of danger. Lord Ellenborough failed to apply the defenses of assumption of risk or contributory negligence because of the wanton nature of the defendant's act.

²⁸See, e. g., *Illedge v. Goodwin*, (1831) 5 C. & P. 190, wherein the court held that "if a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done," and *Clayards v. Dethick & Davis*, (1848) 12 Q. B. 439.

²⁹Where the defense of assumption of risk was urged where plaintiff was injured in attempting to board a train, the court cited and adopted the decision in *Fitzgerald v. Connecticut River Paper Co.*, (1891) 155 Mass. 155, 29 N. E. 464, to the effect that "One who knows of a danger from the negli-

volving rescues seems to have arisen from an early decision of the New York court.³⁰ The Massachusetts court specifically adopted and applied the doctrine in 1898 in denying recovery to a spectator injured by explosives at a fireworks exhibition,³¹ thus

gence of another, and understands and appreciates the risk therefrom, and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure" (said with reference to the master-servant relationship). *Robinson v. Manhattan Ry. Co.*, (1893) 5 Misc. Rep. 209, 25 N. Y. S. 91. And where plaintiff's horse shied while crossing a railroad track, and the defense of assumption of risk was urged, the jury having found that no contributory negligence existed, the court concluded that "It cannot be held . . . as a matter of law, that a person who travels over a defective street, with knowledge of the defects therein, or who drives by an obvious obstruction in a public thoroughfare, thereby assumes the risk of injury and is precluded from recovering against one who is responsible for the defect, or who has negligently caused the obstruction." *Chicago & N. W. Ry. v. Prescott*, (C.C.A. 8th Cir. 1893) 59 Fed. 237. And see *Dayton v. Taylor's Adm'r*, (1900) 62 Oh. St. 11, 56 N. E. 480, applying doctrines of both assumption of risk and contributory negligence. The Kansas court held, however, that a teamster standing on loose, narrow dump boards while going over a railroad track which had been in an unsafe condition for months, voluntarily incurred the danger and was barred from recovery, apparently making application of the doctrine of assumption of risk and that of contributory negligence. *Reynolds v. Mo. K. & T. Ry. Co.*, (1904) 70 Kan. 341, 79 Pac. 801. In many similar cases the terminology "assumes the danger" or "undertakes the risk" or similar phrases are used, but the ultimate basis for the decision has been upon classification of the conduct of the plaintiff as constituting (or failing to constitute) contributory negligence as a matter of law. See e. g., *McHugh v. City of St. Paul*, (1897) 67 Minn. 441, 70 N. W. 5; *Nichols v. Laurens*, (1895) 96 Ia. 388, 65 N. W. 335; and *Stearns v. Walpole*, (1898) 76 Mo. App. 213. See also *Wilson v. Charlestown*, (1864) 8 Allen (Mass.) 137. "If a person knows a way to be dangerous when he enters upon it, he cannot, in the exercise of ordinary prudence, proceed and take his chance, and, if he shall actually sustain damage, look to the town for indemnity," and *Reed v. Northfield*, (1832) 13 Pick. (Mass.) 94, upon which the case of *Wilson v. Charlestown* is ultimately based, which treats the problem as one of contributory negligence purely.

³⁰*Eckert v. Long Island R. Co.*, (1871) 43 N. Y. 502. While this case has almost universally been cited as establishing "assumption of risk" in these cases, the court here considered the problem solely on the basis of contributory negligence, as did the court in the next principal case (in point of time), of *Peyton v. Texas & P. Ry. Co.*, (1889) 41 La. Ann. 861, 6 So. 690; the standard of care of the intestate in the *Eckert* case being said to be for the jury concerning whether the deceased was reckless in voluntarily placing himself in a position where he might receive injury. See also *Corbin v. City of Philadelphia*, (1900) 195 Pa. St. 461, 45 Atl. 1070, and cases cited.

³¹*Scanlon v. Wedger*, (1892) 156 Mass. 462; 31 N. E. 642: "A voluntary spectator, who is present merely for the purpose of witnessing the display, must be held to consent to it, and he suffers no legal wrong if accidentally injured without negligence on the part of anyone, although the show was unauthorized. He takes the risk." It would seem that the rule here announced goes to the question of the "duty" of the operator of the amusement enterprise, as distinguished from the standard of conduct required of the plaintiff, which appears to be the basis in the rescue cases cited in the preceding note. There is no claim in any case that the plaintiff failed to measure up to any standard of conduct (excepting that he might have stayed at home) and the cases clearly deal with the "duty" of the defendant to insure that the plaintiff shall come to no harm. See

laying the foundation for the application of the concept in later cases involving onlookers and participants in diverse types of entertainment.

II. CREATION OF THE DOCTRINE OF ASSUMPTION OF RISK GENERALLY

The limitations on the operation of the doctrine of assumption of risk are substantially the same as those in the application of the *volenti* maxim, for it has been quite generally accepted that, at least in so far as the phrase "assumption of risk" concerns relationships beyond the field of master and servant, the doctrine arose from the maxim and is in fact presently used interchangeably with it.³² Under the maxim, of course, actual consent was

especially, *Potts v. Crafts*, (1935) 5 Cal. App. (2d) 83, 42 P. (2d) 87; *Connoly v. Palisades Realty and Amusement Company*, (1933), 11 N. J. Misc. 841, 168 Atl. 419, holding in substance that the operator owes a duty to the guest to see that other patrons obey the rules regulating the amusement; *Quinn v. Recreation Park Ass'n*, (1935) 3 Cal. (2d) 725, 46 P. (2d) 144; and *Ingersoll v. Onondaga Hockey Club*, (1935) 245 App. Div. 137, 281 N. Y. S. 505. But in the case of moving rides, the doctrine may go much more clearly to a measurement of the standard of care exercised by the plaintiff. See *Murphy v. Steeplechase Amusement Co.*, (1929) 250 N. Y. 479, 166 N. E. 173, in which the plaintiff had been engaged in riding "the Flopper." But in all cases, the essential problem discussed has been the negligence (or violation of duty) of the defendant, rather than the conduct of the plaintiff as demonstrating legal fault.

³²*Denver & R. G. R. Co. v. Norgate*, (C.C.A. 8th Cir. 1905) 141 Fed. 247; *Southern Cotton Oil Co. v. Walker*, (1909) 164 Ala. 33, 51 So. 169; *McGeever v. O'Byrne*, (1919) 203 Ala. 266, 82 So. 508; *Valencia v. San Jose Scavenger Co.*, (1937) 21 Cal. App. (2d) 469, 69 P. (2d) 480; *Denver & R. G. R. Co. v. Gannon*, (1907) 40 Colo. 195, 90 Pac. 853; *Belevicze v. Platt*, (1911) 84 Conn. 632, 81 Atl. 339; *Ross v. Chicago R. I. & P. R. Co.*, (1909) 243 Ill. 440, 90 N. E. 701; *White v. McVicker*, (1933) 216 Iowa 90, 246 N. W. 385; *Reid v. Eastern S. S. Co.*, (1914) 112 Me. 34, 90 Atl. 609; *O'Maley v. So. Boston Gas Lt. Co.*, (1893) 158 Mass. 135, 32 N. E. 1119; *Fotheringill v. Washoe Copper Co.*, (1911) 43 Mont. 485, 117 Pac. 86; *Buckingham v. Eagle Warehouse & Storage Co.*, (1919) 189 App. Div. 760, 179 N. Y. S. 218; *M. R. & L. E. R. Co. v. Barber*, (1856) 5 Oh. St. 541; *Choctaw, O., & G. R. Co. v. Jones*, (1906) 77 Ark. 367, 92 S. W. 244; and an unusual discussion of the maxim in *Carleton v. E. & T. Fairbanks and Co.*, (1915) 88 Vt. 537, 93 Atl. 462, confining the application of *volenti* to risks arising from the negligence of the employer, to which the servant understandingly exposes himself. See also *Bohlen, Voluntary Assumption of Risk*, (1906) 20 Harv. L. Rev. 14-16; *Harper, The Law of Torts* (1933) 290; 3 *Labatt, Master and Servant* (1913) 3610-3613; *Prosser, Torts* (1941) 117; *Shearman and Redfield, The Law of Negligence* (1913) 391; 1 *Street, Foundations of Legal Liability* (1906) 162. Of course, the English courts specifically adopted the *volenti* doctrine to form the basis for assumption of risk where applicable. See *Smith v. Baker & Sons* [1891] A. C. 325, 60 L. J. Q. B. 683, 65 L. T. 467, 55 J. P. 660, 7 T. L. R. 679, and *Thomas v. Quartermaine*, (1887) 18 Q. B. D. 696, 65 L. J. Q. B. 340, 57 L. T. 537, 51 J. P. 516, 3 T. L. R. 495. It should be noted, however, that many American cases involving master and servant relationships are bottomed on a basis of implied contract between the parties and not on the maxim. For a collection of case references dealing with the subject, see 4 *Words & Phrases* (Per. Ed.) 607, ff., on "Assumption of Risk" and 44 *Words & Phrases* (Per. Ed.) 369-71 on *Volenti Non Fit Injuria*. See also note 37, *infra*.

originally necessary. In the development of the rule between master and servant, consent to incur risk might easily be implied from the contract, whether through the medium of the maxim or without it, thus precluding recovery by the employee. And in cases where there was neither contract nor actual consent, it was natural for the courts to imply, as a matter of law, either a contract by the injured party releasing the defendant from liability for certain risks, or a consent by the injured party that the injurer should be released from legal fault, and that he would himself "assume the risk" of certain known dangers.³³ But this rationale was not universally accepted, and an understanding of the refusal of some jurisdictions to accept this extension of the rule involves reference to the doctrine as applied in the master-servant relationship. State adoption of Workmen's Compensation acts,³⁴ and recent amendments to the Federal Employers' Liability Act,³⁵ have rendered the study of the doctrine in cases of master and servant largely academic.

The bases suggested for the rule in the master-servant field varied, and such variance was later determinative of the adoption of the doctrine in other fields. The ultimate principles governing application of the rule in master and servant cases in the United States, generally considered to have arisen more or less independently of the *volenti* maxim, are substantially identical with those prevailing in England after the shift of the English courts from reliance on the doctrine expressed in *Priestly v. Fowler* to that of *volenti non fit injuria*.³⁶ But notwithstanding the development of the assumption of risk-*volenti* doctrine abroad, some state courts refused to recognize that the *volenti* maxim was an all pervasive principle, and held that the doctrine of assumption of

³³Both Professor Harper, *The Law of Torts*, (1933) 290, and Labatt, *Master and Servant*, (1913) 3610, have suggested that the courts have not clarified the theory of "implied agreement," and Labatt suggests that the basis for the doctrine of assumption of risk in the absence of specific contractual agreement must be sought in the *volenti* maxim. But there would seem to be no more objection, either in theory or practice, to inventing an implied agreement upon which duty is based than to creating an implied "consent" establishing similar conditions regarding duty.

³⁴Only Mississippi has no such statute. See Prosser, *Torts*, (1941) 519.

³⁵45 U. S. C. sec. 54. In a few cases, the distinction between assumption of risk and contributory negligence in such cases may yet become important. See Note, (1939) 53 *Harv. L. Rev.* 341.

³⁶See discussion of the subject by Professor Warren in *Volenti non Fit Injuria*, (1908) 8 *Harv. L. Rev.* 457, 468, 469.

risk could be applied only to contractual cases involving the relationship of master and servant.³⁷

Courts, seeking to justify the application of the maxim to fields where it had not traditionally been applied, fortified their decisions with diverse arguments. Many of them adopted a theory, often implicit and unexpressed, that the consent forming the basis of the maxim was to be found in the voluntary conduct of the plaintiff in view of the relationship between the parties. Obviously a limitation of this nature was indispensable to effective use of the doctrine, or else, as Mellish, J., had suggested,³⁸ a pedestrian acquainted with the consistent misconduct of the driver of a vehicle would be barred from recovering for damages suffered in consequence of such misconduct. This extension of the doctrine met with little favor in England, though the conclusion in *Ilott v. Wilkes* must be considered to rest in part on the relationship of the parties as owner and trespasser. Pollock, in criticising

³⁷See Note, (1905) 9 Law Notes 89; *Conrad v. Springfield Consol. R. Co.*, (1909) 240 Ill. 12, 88 N. E. 180; *Walsh v. Moore*, (1929) 244 Ill. App. 458; *Reed v. Zellers*, (1933) 273 Ill. App. 18; *Columbia Creosoting Co. v. Beard*, (1909) 44 Ind. App. 310, 89 N. E. 321; (but see *Munson v. Rupker*, (1923) 96 Ind. App. 15, 148 N. E. 169 holding that a guest takes the driver of an automobile as he finds him, in substance applying the doctrine as a measure of the duty of the host); *Lexington R. Co. v. Cropper*, (1911) 142 Ky. 39, 133 S. W. 968; (but compare *Standard Oil Co. v. Titus*, (1920) 187 Ky. 560, 219 S. W. 1077); *Broseau v. Kellogg Switchboard and Supply Co.*, (1909) 158 Mich. 312, 122 N. W. 620; *Fish v. Chicago, R. I. & P. R. Co.*, (1914) 263 Mo. 106, 172 S. W. 340; (but see *Burt v. Nichols*, (1915) 264 Mo. 1, 173 S. W. 681); *Kambour v. Boston & M. R. R.*, (1913) 77 N. H. 33, 86 Atl. 624; *Dubiver v. City R. Co.*, (1904) 44 Or. 227, 74 Pac. 915; *Carter v. Kansas City So. R. Co.*, (Tex. Civ. App. 1913) 155 S. W. 638; *Buick Automobile Co. v. Weaver*, (Tex. Civ. App. 1914) 163 S. W. 594; *Curtiss-Wright Flying Service v. Williamson*, (Tex. Civ. App. 1932) 51 S. W. (2d) 1047; *Chicago & N. W. Ry. v. Prescott*, (C.C.A. 8th Cir. 1893) 59 Fed. 237, *semble*; *Hallstein v. Pennsylvania R. Co.*, (C.C.A. 6th Cir. 1929) 30 Fed. (2d) 594; *So. Pac. R. Co. v. McCready*, C.C.A. 9th Cir 1931) 47 Fed. (2d) 673.

³⁸In *Woodley v. Metropolitan S. R. Co.*, (1877) 2 Ex. Div. 384, 46 L. J. Q. B. 521, 36 L. T. 419, 42 J. P. 181, Lord Mellish says: "Suppose this case: a man is employed by a contractor for cleansing the street, to scrape a particular street, and for the space of a fortnight he has the opportunity of observing that a particular hansom cabman drives his cab with extremely little regard for the safety of the men who scrape the streets. At the end of a fortnight the man who scrapes the streets is negligently run over by the cabman. An action is brought in the county court, and the cabman says in his defence: 'You know my style of driving, you had seen me drive for a fortnight, I was only driving in my usual style.' 'Yes, but your usual style of driving is a very negligent style, and my having seen you drive a fortnight has nothing to do with it.' It will not be disputed that the scraper of the streets in the case I have supposed is entitled to maintain his action, and in my opinion his case does not differ from the one we have to determine, there being no contract between the defendants and the plaintiff any more than between the cabman and the scraper of the streets."

the rule, conceived that the theory ought to be that "the doctrine of voluntary exposure to risk has no application as between parties on an equal footing of right, of whom one does not go out of his way more than the other," which would seem to permit the application of the rule to "relational" interests, though he then remarks that "A man is not bound at his peril to fly from a risk from which it is another's duty to protect him, merely because the risk is known."³⁹ In an English decision in 1938, the court refused to extend the "relational" concept to include automobile guests within the doctrine of assumption of risk.⁴⁰

In this country, courts specifically passing upon the question have for the most part limited the doctrine by applying it primarily to "relational" interests, although the doctrine has unaccountably also been applied between strangers.⁴¹ In an early article on the subject, Professor Warren expressed this limitation on the *volenti* maxim in suggesting that "where plaintiff and defendant are simply members of the same general community, occupying no specific relation to each other, then each is bound to use ordinary care toward the other, and the fact that the plaintiff knows that the defendant negligently does something which may bring him an injury, is not conclusive that the plaintiff has assumed the risk of the danger from the negligence."⁴² In Wisconsin the transition from the strict contractual conception of the doctrine in master and servant cases to include that of a relational interest was at first accomplished by a *tour de force*, although subsequently it was explained that "While the relation of guest and host is not contractual, it is consensual."⁴³ Some commentators and courts have concluded that even with respect to the master and servant relationship, the doctrine is consensual,⁴⁴ and the theory that the doctrine is based upon consent in the absence of other contractual requirements has been suggested with reference particularly to the field of the automobile guest.⁴⁵ In discussing the problem in 1906, Street combined both the consensual and contractual conceptions of limitations on the operation of the doctrine, pointing

³⁹1 Pollock, *The Law of Torts* (1923) 169, 170.

⁴⁰*Dann v. Hamilton*, [1939] 1 K. B. 509, 55 T. L. R. 297, 108 L.-J. K. B. 255, 160 L. T. 433.

⁴¹See *infra*, notes 163-5, 176, and text.

⁴²Warren, *Volenti Non Fit Injuria*, (1908) 8 Harv. L. Rev. 457, 471.

⁴³Cf. *Biersach v. Wechselberg*, (1931) 206 Wis. 113, 238 N. W. 905 with *Switzer v. Weiner*, (1939) 230 Wis. 599, 284 N. W. 509.

⁴⁴See Prosser, *Torts*, (1941) 385 and cases cited; see also text statements cited in note 32 *supra*.

⁴⁵White, *Liability of an Automobile Driver to a Non-Paying Passenger*, (1934) 20 Va. L. Rev. 326, 348.

out that in substance they were identical.⁴⁶ The "relational" limitation of the doctrine is equally apparent in cases treating the concept as a limitation of the duty of the host. This is apparent in the holdings in automobile guest cases that the guest must take "the automobile and the driver as he finds them,"⁴⁷ that the operator of an automobile does not guarantee that he is an expert driver and that the guest is bound to know "that his host may not be an expert driver,"⁴⁸ or that the responsibility of the host is to use such skill as he possesses or leads the guest reasonably to believe that he possesses.⁴⁹

It seems established, therefore, that the position of the courts has shifted from the original theory that assumption of risk and the *volenti* maxim were based on contractual relations, to the more subtle exegesis that the doctrine is bottomed on "relational interests" which by their very existence imply consent of the parties to encounter a known risk. It will be noted that under such an interpretation, the scope of the doctrine may be made to vary with changes in the degree of interdependence among individuals and in the complexity of social organization.

III. THE CONFUSION BETWEEN ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE

A. THE IMPORTANCE OF THE DISTINCTION

Judicial interpretation of the concept of assumption of risk, in its relation to other doctrines in the law, must of course be examined with reference to the two separate senses in which it is

⁴⁶1 Street, *Foundations of Legal Liability* (1906) 157: "It may be said that the law raises an implied assumpsit of risk on the part of the licensee, servant, and guest, in view of the benefit which accrues to these persons by reason of the license, employment, or entertainment. The benefit with the corresponding detriment to the other party, supplies a sort of legal consideration for the implied assumpsit to bear the risk—the affinity to the contract theory is manifest."

⁴⁷*Munson v. Rupker* (1923) 96 Ind. App. 15, 148 N. E. 169, aff'd 151 N. E. 101.

⁴⁸*Burch, J., in Howse v. Weinrich*, (1931) 133 Kan. 132, 298 Pac. 766. See also *Mayberry v. Sivey*, (1877) 18 Kan. 291, in a similar case: "The confidence accepted is an adequate consideration to support the duty."

⁴⁹*Hall v. Hall*, (1935) 63 S. D. 343, 258 N. W. 491, concurring opinion of Campbell, J. This measure of care varies somewhat from that suggested in the early case of *Siegrist v. Arnot*, (1881) 10 Mo. App. 197, where it is said that ". . . whenever a person undertakes an employment which requires care or skill, whether he undertakes it for reward or gratuitously, a failure to exert the measure of skill and care appropriate to such employment is culpable negligence. . . ." Note, also, the suggestion that the measure of care required of the host must vary according to "the trust reposed" by the guest, in *Harris v. Perry & Co.*, [1903] 2 K. B. 219, 72 L. J. K. B. 725, 89 L. T. 174.

applied. When considered (as in most of the host-guest cases regarding real property) in determining the scope of the duty of the defendant, it may amount to little more than saying that injuries befalling the guest from specified risks which may arise through the conduct of the host are not compensable; in short, that as to those risks the guest is in the same position as though there were no negligence at all, the host owing him no duty of care. In such cases the term is not, strictly speaking, used in the sense of a "doctrine," though courts and commentators usually so describe it, and such designation will be followed here. Where the term "assumption of risk" is thus used as descriptive of the duty of the defendant, no confusion arises between the phrase and the doctrine of contributory negligence. But where the term is used as relating to a standard of conduct, some fault is discernible in the plaintiff: he has "voluntarily" encountered a "known" and "appreciated" danger. It is thus patent that these two doctrines will overlap in many fields, and that the same type of factual situation may be classified for treatment by the courts under either or both of the principles. This in itself creates confusion. But it is even more important to ascertain when each of the doctrines has traditionally been applied to factual situations in which either would be logically applicable. An exploration of the application of the two theories is not, to paraphrase a trenchant remark of Professor Powell, "negligence on stilts." As will be discussed hereafter, rights of litigants vary as either doctrine is applied where such principles as comparative or concurrent negligence, last clear chance, "guest statutes," and contribution are involved.

B. SOURCES OF THE CONFUSION

The difficulties arising from the use of the term "assumption of risk" to indicate a specialized concept of the law, implying certain legal rights and duties not only between the parties, but also as to third persons, are illustrated in the cases using that term or its equivalent in the same manner as "contributory negligence." Entirely apart from the *volenti* maxim and the specialized use of the term, the words "assumption of risk" may mean that without "voluntary" exposure of himself to a "known" or "appreciated" risk within the restriction of the rule, a party has in fact put himself in a position of danger. In such case, the technique available to the court in determining whether his conduct constitutes a bar to his recovery, is to classify such conduct as con-

tributory negligence as a matter of law. Thus, relatively recent cases in two jurisdictions have discussed the doctrines (in cases not concerned with the master and servant relation) as being identical.⁵⁰ In each of them the doctrine was sought to be applied as a measure of the conduct of the plaintiff rather than with respect to the duty of the defendant. In describing the conduct of the plaintiff, and while apparently intending to limit its effect to such consequences as might be involved in holding it to be contributory negligence, the courts sometimes have described it in a non-specialized sense by saying that the plaintiff "assumed the risk,"⁵¹ and courts have been slow to adopt the careful distinction of the Missouri court that "Whenever a man does anything dangerous, he encounters the risk; but it by no means follows that

⁵⁰McGeever v. O'Byrne, (1919) 203 Ala. 266, 82 So. 508, ". . . as the practical equivalent of the term 'contributory negligence' one frequently finds in the cases the expression 'assumption of risk'" (case involving automobile host and guest); Schleif v. Grigsby, (1927) 88 Cal. App. 174, 263 Pac. 255: ". . . conceding that the theory underlying the doctrine of assumption of risk may have application to cases outside of this particular relationship of employment, it goes no farther than the accepted standard of ordinary care under the circumstances. In other words, the doctrine of assumption of risk in other cases does not absolve the wrongdoer of all blame but places upon the party injured a higher duty if he voluntarily enters a position of known danger." (Plaintiff, while standing in back end of open truck, was injured by low hanging telephone wire which he knew was there.) The latter case was approved in Valencia v. San Jose Scavenger Co., (1937) 21 Cal. App. (2d) 469, 69 Pac. (2d) 480, in a case involving suit by an automobile guest against a third party with whose automobile the vehicle operated by the host collided. See also Smith v. Centennial Eureka Mining Co., (1904) 27 Utah 307, 75 Pac. 749, an employer-employee case holding that contributory negligence as a matter of law is established by the *volenti maxim*.

⁵¹Illustrations of this practice by the courts could be multiplied. A representative selection of the cases ought to include Senior v. Ward, (1859) 1 El. & El. 385, 28 L. J. Q. B. 139, 32 L. T. O. S. 252, involving the master and servant relationship, (as to which the distinction between the two doctrines is well considered by 1 Labatt, Master and Servant (1913) 670, ff.) the court saying: "although the negligence of the defendant might have been an answer to the defence that the accident was chiefly caused by the negligence of a fellow servant, the negligence of the plaintiff himself which materially contributed to the accident, would upon well established principles, have deprived him of any remedy. *Volenti non fit injuria*"; Franco v. Vakares, (1929) 35 Ariz. 309, 277 Pac. 812: "A guest who rides in an automobile knowing that the driver is intoxicated is guilty of contributory negligence. He knows, or ought to know, that a drunken or intoxicated driver is apt to be a careless and reckless driver, and should be held to accept an invitation to ride with such a driver at his own risk"; Kebbee v. Connecticut Co., (1912) 85 Conn. 641, 84 Atl. 329; City of Columbus v. Griggs, (1901) 113 Ga. 597, 38 S. E. 953; Robinson v. American Ice Co., (1928) 292 Pa. St. 366, 141 Atl. 244: "Where a person assumes a position of danger when there is another safe place to which he may go, and by reason of this position is injured, ordinarily, there can be no recovery against another who may be negligent, the injured person's position in itself being a contributing cause," furnishing a basis upon which the court in Zimmer v. Little, (1940) 138 Pa. Super. 374, 10 Atl. (2d) 911

legally speaking, he assumes that risk."⁵² In cases where the term is loosely used, it might be said that the courts are in effect holding that the defenses of contributory negligence and assumption of risk are identical, or at least that the assumption of risk rule is a part of the doctrine of contributory negligence.

Still other courts have confused the doctrines, at least as to the distinction in cases involving master and servant, by suggesting that the difference is one of degree and not of kind,⁵³ but this theory has apparently been limited to the peculiar factual situations arising in the employer-employee relationship and appears never to have been accepted in other fields in which the two doctrines have been used.

C. GENERAL ATTEMPTS TO SUGGEST DISTINCTIONS BETWEEN ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE

As it became clear that actual consent was not imperative to invoke the *volenti* maxim, and before the question of a limitation of the maxim was sufficiently presented to receive any definitive treatment, it may well have been thought that any conduct of a litigant other than that of a reasonably prudent man expressed an implied consent to and assumption of a risk. It was in this sense that the doctrine was used at an early date by a federal

apparently measured the contributory negligence of the plaintiff in his conduct in "voluntarily assuming a position of danger in riding in the car with knowledge of a defective door"; *Lagerman v. New York Central & H. R. Co.*, (1900) 53 App. Div. 283, 65 N. Y. S. 764; *Kovar v. Beckius*, (1937) 133 Neb. 487, 275 N. W. 670; *Joyce v. Metropolitan St. R. Co.*, (1909) 219 Mo. 344, 118 S. W. 21. See also *infra* cases cited at notes 91 and 105.

The most amazing case in the field is that of *Loettker v. Chicago City Ry. Co.*, (1909) 150 Ill. App. 69, decided after the Illinois courts had concluded that assumption of risk arose from contract only (*Shoniger Co. v. Mann*, (1905) 219 Ill. 242, 76 N. E. 354) in which the court said as to the standard of conduct of a policeman hit by a trolley car assumed to be negligently operated, that "A person employed in surroundings of the character which confronted plaintiff at his post of duty is presumed to understand the nature and dangers of his employment when he accepts it by entering upon the discharge of its duties, and to assume all the ordinary hazards of the service . . ." and held that the officer was contributorily negligent as to the street car company.

⁵²*Tinkle v. St. Louis & S. F. R. Co.*, (1908) 212 Mo. 445, 110 S. W. 1086.

⁵³See *Johnson v. Mammoth Vein Coal Co.*, (1908) 88 Ark. 243, 114 S. W. 722, for a detailed discussion of this theory, citing numerous cases. See also *Barker v. Kansas City M. & O. Ry. Co.*, (1913) 88 Kan. 767, 129 Pac. 1151, *semble*; *Stogner v. Great A. & P. Tea Co.*, (1937) 184 S. C. 406, 192 S. E. 406, and cases cited; and *Rogers v. Valk*, (1913) 72 Wash. 579, 131 Pac. 231, *semble*.

court⁵⁴ and by a number of the English judges.⁵⁵ But the limitation of the doctrine to certain specified relational interests amply illustrates that in so far as assumption of risk and contributory negligence apply to the same factual situations (and regardless of other distinctions that may obtain between them) the doctrine of contributory negligence is the more comprehensive of the two, applying in all conditions and situations to conduct of a standard less than that of a reasonably prudent man. At no time has it ever been suggested that under some factual situations both doctrines may not be equally applicable. Only in Wisconsin has it been said that the rule regarding assumption of risk is a part of the doctrine of contributory negligence,⁵⁶ and in that state a clear distinction between the two is now made, especially in the cases involving the automobile guest.⁵⁷ The two doctrines are treated together as contributory negligence in the Restatement of Torts,⁵⁸ but the separate nature and effect of each is emphasized.⁵⁹ Almost all decisions directly bearing on the subject in recent years, in what-

⁵⁴See *Byam v. Bullard* (Mass. C.C. 1852) 1 Curt. 100, Fed. Cas. No. 2,262, involving suit for violation of a patent right in 1852, where it was stated by Judge Curtis: "As to the injury, the general rule of the common law is 'volenti non fit injuria' and, in accordance with this maxim, no one can maintain an action for a wrong, where he has consented or contributed to the act of which he complains."

⁵⁵See 3 Labatt, *Master and Servant* (1913) 3616, and cases cited.

⁵⁶See *Compure v. Standard Mfg. Co.*, (1908) 137 Wis. 155, 118 N. W. 633, and cases cited. Note, however, that while the doctrine of assumption of risk is considered to be a part of the contributory negligence rule, "absolute identity for all purposes and under all circumstances . . . is nowhere asserted." Later cases, including *Keller v. City of Port Washington*, (1929) 200 Wis. 87, 227 N. W. 284 reach the same result.

⁵⁷In *Walker v. Kroger Grocery & Baking Co.*, (1934) 214 Wis. 519, 252 N. W. 721, the doctrines of assumption of risk and contributory negligence were discussed on the theory that assumption of risk was not a part of the doctrine of contributory negligence, the court holding under a comparative negligence statute that assumption of risk was a complete and not a partial bar to an action against the host by the guest. This would clearly indicate the intention of the court (not expressed in terms) to overrule the holding in *Krueger v. Krueger*, (1929) 197 Wis. 588, 222 N. W. 784, holding that assumption of risk was a part of the contributory negligence theory. See Comment, (1937) 12 Wis. L. Rev. 376.

⁵⁸2 Restatement, Torts (1934).

⁵⁹In making such classification of the two doctrines, the editors of the Restatement have apparently attempted to reconcile the cases and obviate the confusion existing in the treatment by the courts of the doctrine of assumption of risk. However, the writer has been able to discover no cases in which the classification made therein had been adopted prior to the publication of the Restatement, and it seems doubtful that a complete abolition of the differences (whatever they may be considered to be) between the effects of the two doctrines can be materially changed in view of the quite substantial entrenchment of the *volenti* maxim and assumption of risk in the decided cases. As heretofore suggested, the classification of the two doctrines together under the head of contributory negligence would be unexceptionable if the results reached by the courts were the same under either doctrine. But in cases involving comparative negligence,

ever field the doctrine has been used, have emphasized the existence of a distinction between assumption of risk and contributory negligence, going to the nature and application of each rule. It has long been recognized as impossible to reconcile the cases,⁶⁰ and suggestions as to the nature of the distinction have been many and varied, only a few of which can be suggested here. It has been stated that the essence of contributory negligence is carelessness and that of assumption of risk is venturesomeness;⁶¹ that the doctrine of assumption of risk⁶² or the *volenti* maxim⁶³ involves cases where deliberation precedes action, whereas contributory negligence implies action without deliberation; or that the "practical difference of the two ideas is in the degree of their proximity to the particular harm";⁶⁴ that contributory negligence is conduct which contributes to cause a particular accident which occurs, while assumption of risk involves voluntarily incurring the risk of an accident which may or may not occur, and which a person may be careful to avoid after starting;⁶⁵ that the assumption of risk changes the duty of the defendant to "one of imperfect obligation no longer recognized by law";⁶⁶ that assumption of risk exists only as to apparent dangers when the servant accepts employment;⁶⁷ that assumption of risk relates to intelligent acquiescence in a known danger while contributory negligence relates to conduct;⁶⁸ or that assumption of risk goes to the contract rela-

rights of infants, joint tort feasons, the doctrine of last clear chance, guest statutes, and other concepts, the differences between the effect of the doctrine of assumption of risk and that of contributory negligence have been so canalized (whether or not for socially justifiable ends) that the expediency of an attempt to so restate the doctrine may be questioned.

⁶⁰The first case in which it may be conjectured that the distinction was recognized is that of *Gould v. Oliver* (1837) 4 Bing. N. Cas. 134, in which Tridal, C. J., suggests that ". . . no one can maintain an action for a wrong, where he has consented or contributed to the act which occasioned his loss." (Italics supplied.)

⁶¹*Hunn v. Windsor Hotel Co.*, (1937) 119 W. Va. 215, 193 S. E. 57.

⁶²*Edwards v. Kirk*, (1940) 227 Ia. 684, 288 N. W. 875, citing *Cooley* on Torts, Throckmorton's Student Edition, (1930) 658.

⁶³*Thomas v. Quartermaine*, (1887) 182 Q. B. D. 696, per Bowen, L. J.

⁶⁴*Schlemmer v. Buffalo, R. & P. Ry. Co.*, (1907) 205 U. S. 12, 27 Sup. Ct. 407, 51 L. Ed. 681, per Holmes, J.

⁶⁵*Warner v. Markoe*, (1937) 171 Md. 351, 189 Atl. 260; statement reaffirmed in *Gordon v. Maryland State Fair*, (1938) 174 Md. 466, 199 Atl. 519.

⁶⁶1 Street, *Foundations of Legal Liability* (1906) 169.

⁶⁷*Patrum v. St. Louis & S. F. R. Co.*, (1914) 259 Mo. 109, 168 S. W. 622.

⁶⁸*Wheeler v. Tyler*, (1915) 129 Minn. 206, 152 N. W. 137; *Dean v. St. Louis Woodenware Works*, (1904) 106 Mo. App. 179, 80 S. W. 292. See also *Lee v. St. Louis M. & S. E. R. Co.*, (1905) 112 Mo. App. 386, 87 S. W. 12; *Alko-Nak Coal Co. v. Barton*, (1923) 88 Okla. 212, 212 Pac. 591; and *Miller v. White Bronze Monument Co.*, (1908) 141 Ia. 701, 118 N. W. 518, 18 Ann. Cas. 957, and note.

tionship while contributory negligence goes to conduct.⁶⁹ Frequently the more general "distinction" is made that the doctrine of assumption of risk arises from contract, while contributory negligence arises from tort.⁷⁰

A very general way of explaining the distinction between the two is to suggest, as did Professor Warren in 1895, that "It may be consistent with due care to incur a known danger voluntarily and deliberately."⁷¹ Almost without exception, the distinctions sought to be made, and the definitions enunciated, arose out of cases involving the master and servant relationship.

The difficulty, of course, with all of the distinctions suggested above is that they are neither complete nor exclusive. They suggest, but do not define. Especially is this true when the "distinctions" relate to subjective qualities in the actor. A differentiation between the two doctrines, based on plaintiff's apprehension and knowledge of danger, can be supported only by conclusions of law as to his mental condition under stated circumstances, since such a differentiation is impossible of proof, and it would seem more definitive to describe such circumstances and establish the legal consequences of such conduct without the interposition of a highly attenuated theory founded on mental qualities incapable of objective proof. Moreover, a differentiation between the two theories (and the consequences of conduct under them) based on a distinction between deliberation and nondeliberation or the proximity of the plaintiff's conduct to the harm seems to reveal no socially justifiable variance in theory. To say that assumption of risk arises from venturesomeness is to disregard the entire

⁶⁹Cleveland, C. C. & St. L. R. Co. v. Bossert, (1909) 44 Ind. App. 245, 87 N. E. 158, and cases cited.

⁷⁰St. Louis Cordage Co. v. Miller, (C.C.A. 8th Cir. 1903) 126 Fed. 495; Chicago & E. R. Co. v. Ponn, (C.C.A. 6th Cir. 1911) 191 Fed. 682; Swanson v. Miami Home Milk Producers' Ass'n, (1934) 117 Fla. 110, 157 So. 415; Swick v. Aitna Portland Cement Co., (1907) 147 Mich. 454, 111 N. W. 110; Choctaw O. & G. R. Co. v. O'Nesky, (1905) 6 Ind. T. 180, 90 S. W. 300; Wintermute v. Oregon-Washington R. & Nav. Co., (1921) 98 Or. 431, 194 Pac. 420; Montgomery v. Seaboard Airline Ry., (1906) 73 S. C. 503, 53 S. E. 987. But cf. Rase v. Minneapolis, St. P. & S. S. M. R. Co., (1909) 107 Minn. 260, 120 N. W. 360, where it is quite properly suggested that assumption of risk cannot rest on contract alone; that both defenses are equally peculiar to the law of tort, and that both are usually implied from conduct.

⁷¹Warren, *Volenti non Fit Injuria*, (1908) 8 Harv. L. Rev. 461. For courts expressing this distinction, see, e. g., Porter v. Louisville & N. R. Co., (1918) 201 Ala. 469, 78 So. 375; Lively v. Chicago, R. I. & P. Ry. Co., (1924) 115 Kan. 784, 225 Pac. 103; Westcott v. Chicago Great Western R. Co., (1923) 157 Minn. 325, 196 N. W. 272; and the standard case cited to support this point of view, Narramore v. Cleveland, C., C. & St. L. Ry. Co., (C.C.A. 6th Cir. 1899) 96 Fed 298.

background of the doctrine in its application to employees unwilling to encounter a risk but forced to do so by economic pressure; and in any event venturesomeness is clearly classifiable as contributory negligence when the risk taken would not have been encountered by a reasonably prudent man.

Further, a description that contributory negligence involves "lack of care and hence the absence of deliberate choice" ignores the concept that one driving at an excessive rate of speed, for instance, does so by deliberate choice and still may be guilty of a lack of care. And the distinction based on the theory that contributory negligence relates only to an accident which *occurs* seems too tenuous to support differentiation, for in each case the legal fault of the plaintiff is the measure of the right of recovery. And a "duty" of the defendant to the plaintiff ought be said to exist or not exist; if it is an "imperfect obligation," the duty does not exist at all. To say that contributory negligence relates to conduct and that assumption of risk relates to intelligent acquiescence in a known risk, while maintaining that there is a distinction between the two theories, is in itself a contradiction in terms, for "intelligent acquiescence" is in itself "conduct," and intelligent acquiescence in a known risk is in many cases considered as contributory negligence. To say that assumption of risk goes to the contract relationship while contributory negligence goes to the conduct of the plaintiff is to overlook more recent developments in the application of the rule which have quite well established that the doctrine of assumption of risk arises from "relational," not merely "contractual" interests of the parties; and in any event, the doctrine of assumption of risk has often been conceived to arise from the "conduct" of the plaintiff, which forms the basis for the "contractual" or "consensual" fictions upon which courts have said that the contract of employment is the basis for the application of the rule.

Similar objections may be raised to the distinction that assumption of risk arises from contract and contributory negligence arises from tort; but the additional observation ought be made that a sterile classification of the effect of conduct as tortious or contractual does little to establish a logical or socially significant line of delimitation between the two doctrines. Even Professor Warren's distinction between the two on the basis that there must be a difference because "It may be consistent with due care to incur a known danger voluntarily and deliberately" seems limited in its application to the master-servant cases, and the dis-

distinction has been quite emasculated by the courts in suggesting that where an individual uses due care to avoid a known danger encountered for a socially justifiable purpose he is not in fact *volens*, an element generally considered indispensable in the application of the maxim.⁷² If the risk were encountered for a purpose not socially justifiable, it would seem logically correct (though the cases have not put it thus) to classify assumption of risk as merely a part of the doctrine of contributory negligence as done in the Restatement⁷³—although the effect of application of the doctrine of assumption of risk has often been to limit the right of the plaintiff much more extensively than that of contributory negligence.

Still other courts have emphasized the distinction between the doctrines without reference to essential dissimilarity in the nature of the defenses, but rather by reference to the requirements of the doctrine of assumption of risk that there be a voluntary assumption of a known and appreciated peril.⁷⁴ A differentiation based solely on such a distinction seems inadequate in view of the many factual situations in which one voluntarily encountering a known danger has been held guilty of contributory negligence.

D. THE DISTINCTION THAT ASSUMPTION OF RISK RELATES TO THE "DUTY" OF THE DEFENDANT, WHILE CONTRIBUTORY NEGLIGENCE RELATES TO A "DEFENSE" AGAINST THE PLAINTIFF

Other attempts to create a more critical and definitive differentiation between the two doctrines have resulted in the quite gen-

⁷²As to the theory that one may not be "volens" in accepting a socially justifiable risk, see cases and materials cited at notes 176, 184-192, *infra* and text.

⁷³Restatement of Torts, (1934) Sec. 466. While the decided cases do not support the analysis of the Restatement, the classification therein seems justified because of the inability of the courts to distinguish between the two doctrines.

⁷⁴No attempt has been made to collect the authorities on this point, which is evident from the decisions themselves concerning such requirements. The ideology suggested is followed in many of the cases cited in notes 177 to 221 *infra*, dealing with recognition of the requirements of "voluntary" assumption of a "known" and "appreciated" danger. The concept is exemplified in *Buckingham v. Eagle Warehouse & Storage Co.*, (1919) 189 App. Div. 760, 179 N. Y. S. 218, where one was injured in riding on a trailer attached to an auto truck: "It cannot be disputed that in voluntarily and needlessly riding on the trailer the plaintiff assumed the added risks due to such method of transportation. As to such risks, such assumption is often considered as equivalent to contributory negligence. . . . However it seems to me that assumption of risk and contributory negligence are not the same thing, although they may have the same effect on a plaintiff's right to recover. Assumption of risk is the voluntary acceptance of a hazard, and under the doctrine 'volenti non fit injuria' one has no cause for action for injury due to a hazard so assumed. . . ."

erally accepted concept that the doctrine of assumption of risk relates to the "duty" of the defendant toward the plaintiff, while contributory negligence relates to a "defense" of the defendant, where it is conceded that a "duty" has been violated.

In order properly to examine the use of the "duty" concept, it may be advisable to outline the factual situations in which it has been held applicable. The designation of the doctrine as one including the duty of the defendant was made when the earlier cases concerning master and servant were decided in England, although some of the cases seemed to regard the defense as one which arose because the voluntary action of the servant in exposing himself to risk constituted a bar to an action against the negligent defendant, and even Labatt conceived that the proper view was that the servant was in effect barred by the defense of contributory negligence,⁷⁵ notwithstanding that almost all courts had conceded that a distinction existed between the two.⁷⁶ Most courts denominated the distinction as arising from the fact that while assumption of risk operated as a limitation on the duty of the defendant, contributory negligence operated as a defense by the defendant in a suit for violation of a duty.⁷⁷ In host-guest cases relating to the use of land, the theory that assumption of risk is founded on a limitation of the duty of the defendant is well established—better established, perhaps, than in the other areas in which the doctrine is used. The term is largely used there in describing the "duty" of the landowner toward one coming on the land, as distinguished from the "conduct" of the guest. Hence the uncomfortable division of the assumption of risk doctrine into two theories respectively relating to policy limitations on the responsibility which ought to attach to the host, and the awareness of the guest of peril and a continuing course of conduct

⁷⁵ Labatt, *Master and Servant* (1913) 3623-3626, and cases cited.

⁷⁶ *Ibid.*

⁷⁷ For decisions of English courts, see *ibid.* See also the earliest Scotch case on the subject, refusing to apply the doctrine and apparently considering the doctrine as going to the duty of the defendant. *Sword v. Cameron*, (1839) 1 *Dunl. (Ct. of Sess.)* 493. As to American courts adopting the "duty" theory see, e. g., *Chesapeake & O. R. Co. v. Nixon*, (1926) 271 *U. S.* 218, 36 *Sup. Ct.* 495, 70 *L. Ed.* 914; *Dempsey v. Sawyer* (1901) 95 *Me.* 295, 49 *Atl.* 1035; *O'Maley v. South Boston Gaslight Co.*, (1893) 158 *Mass.* 135, 32 *N. E.* 1119, 47 *L. R. A.* 161, and cases cited; *Hotchkin v. Erdrich*, (1906) 214 *Pa. St.* 460, 63 *Atl.* 1035; *Hunn v. Windsor Hotel Co.*, (1937) 193 *S. E.* 57, 119 *W. Va.* 215. See, also, as to the theory that the employer was not negligent and that no duty rested upon him, *Maloney v. Florence & C. C. R. Co.*, (1907) 39 *Colo.* 384, 89 *Pac.* 649, and *Kentucky Lbr. Co. v. Nicholson*, (1914) 157 *Ky.* 812, 164 *S. W.* 84.

with such understanding, has in part been obviated.⁷⁸ In cases where the guest is rightfully on the premises of the owner or occupier and the host is under a duty to use reasonable care for his safety, however, the doctrine of assumption of risk is sometimes used to prevent recovery by the guest. In such cases, the conduct of the plaintiff and its relation to the doctrine of assumption of risk comes into importance, and such cases for the most part deal with the doctrine as a limitation of the duty of the defendant,⁷⁹ thus creating further confusion.

Other cases relating to the vehicular guest consider the doctrine as relating to the duty of the operator of the vehicle. Some cases appear to reach the conclusion without detailed discussion of the distinction,⁸⁰ while others merely point out that the defendant may admit his own negligence and the plaintiff's lack of contributory negligence and still *prevail*;⁸¹ that the limitation of duty arises in the same manner as in the master and servant cases;⁸² or that the duty is limited by a transfer of the host-guest

⁷⁸See 1 Street, Foundations of Legal Liability (1906) 155: "Where mischief happens to a trespasser by reason of the defective or dangerous condition of the premises upon which he trespasses, he is very properly held to assume the risk, and no recovery can be had against the keeper of those premises. As it is commonly and somewhat more artificially put, the implied duty to prevent harm from unsafe premises does not exist in favor of a trespasser." For one of the earlier English cases, see Gautret v. Egerton, (1867) L. R. 2 C. P. 371, 36 L. J. C. P. 191, 15 W. R. 638 limiting the duty of the defendant toward a licensee. In the basic case on this subject, Ilott v. Wilkes (1820) 3 Barn. & Ald. 304, the duty of a landowner defendant toward a trespasser was so limited. As will be noted hereafter, the entire question of the liability of an owner or occupier of property toward those coming on the property with or without permission has been discussed on the theory that the one coming on the premises "assumes the risk" of certain dangers; that is, the duty of the defendant owner or occupier toward him is limited. See 3 Restatement of Torts (1934) Sec. 333, using the term in this sense, and notes 127 to 142 and text *infra*.

⁷⁹See Note, (1936) 21 Iowa L. Rev. 650, 651, and cases cited. The problem is often presented in cases involving injury to a patron at an amusement enterprise, and the theory adopted by the courts in such cases usually relates to the limitation of the duty of the defendant. See also notes on this subject at (1936) 17 B. U. L. Rev. 485, and (1937) 14 N. Y. U. L. Q. 540.

⁸⁰*Cf.*, e. g., Chesapeake & O. Ry. Co. v. Needham, (C.C.A. 4th Cir. 1917) 244 Fed. 146, and Carpenter v. Thomas, (1931) 164 Wash. 583, 3 Pac. (2d) 1001. The doctrine was also so treated in Dann v. Hamilton, [1939] 1 K. B. 509, 55 T. L. R. 297, 108 L. J. K. B. 255, 160 L. T. 433, where Lord Asquith refused to apply it.

⁸¹E. g., Freedman v. Hurwitz, (1933) 116 Conn. 283, 164 Atl. 647.

⁸²Biersach v. Wechselberg, (1931) 206 Wis. 113, 238 N. W. 905. The source of the doctrine of assumption of risk in automobile cases is discussed in connection with the original use of the doctrine in the master-servant cases in notes 112 to 126 *infra*, and text. As to the prior holding of the Wisconsin court relating the doctrine to the real property cases, however, see note 83 *infra*.

concept from the real property cases to the motor vehicle cases.⁸³ The obvious criticism of this distinction is that while in some cases the term assumption of risk is used to suggest a limitation of what is generally considered to be the "duty" of the defendant (as in saying that a licensee "assumes the risk" of dangers on the premises of the host which the host ought to but did not in fact know existed), in most cases the term is in fact used to designate legal fault of the plaintiff, arising from his "conduct" in voluntarily encountering a known and appreciated danger, which is in practice and effect a "defense" to the action. The attempted distinction is illusory, for it propounds no standard through which it may be determined whether "conduct" of the plaintiff in specific circumstances shall be considered as a "defense," or a limitation of the "duty" of the defendant, or both.

A further difficulty with the distinction lies in the fact that it is founded upon the mental state of the parties; that the duty of the defendant is limited because the plaintiff knew and appreciated the danger. The refinement has been carried even further in some of the cases relating to the automobile guest: not only is the duty of the defendant limited by the plaintiff's state of mind, but by the state of mind of the defendant as well; that is, if the host is incompetent and does not know he is incompetent, he has no "duty" not to be incompetent; on the other hand, if he is incompetent and knows that he is so, he has a "duty" not to be incompetent. Such refinements make the distinction complicated in theory and difficult of application in practice.⁸⁴ A number of cases have held that the doctrine of assumption of risk does not apply where the plaintiff undertakes a risk for a socially justifiable purpose.⁸⁵ Ought it be said that the "duty" of a drunken host is any more or any less whether the plaintiff guest is going to a beer parlor for his thirst or a hospital for his health? To put the question is to answer it. No more ought it be said in the cases involving a pedestrian crossing a dangerous way that the "duty" of the governmental subdivision responsible for the maintenance of roads ought to vary between those who find it more expedient to use a highway because it is a shorter route to the hospital and those who find it a shorter route to a saloon.

⁸³Cf., e. g., *O'Shea v. Lavoy*, (1921) 175 Wis. 456, 185 N. W. 525, and *White v. McVicker*, (1933) 216 Iowa 90, 246 N. W. 385. The source of the doctrine relating to the cases involving vehicular travel as arising from the host-guest concept in real property cases is discussed in notes 146 to 162 *infra*, and text.

⁸⁴*Eisenhut v. Eisenhut*, (1933) 212 Wis. 467, 248 N. W. 440.

⁸⁵See cases cited *infra* notes 176, 184 to 192, and text.

A further difficulty arises from this indeterminate use of the word "duty" as it relates to differentiation between contributory negligence and assumption of risk. Legal responsibility for conduct—the true measure of "duty"—ought for many reasons suggested by Dean Green,⁸⁶ be a question for the court. Yet the determination of whether the conduct of the plaintiff has been such as to relieve the defendant of his "duty" is one which has normally been decided by a jury,⁸⁷ except of course where the weight of the evidence is conclusive, in which case, as with the doctrine of contributory negligence, the court determines it as a matter of law. Moreover, accurate measurement of the "duty" of the defendant is here made impossible, since the conduct and the mental condition of the plaintiff determine the application of the doctrine by the jury, and confusion of the jury must inevitably result from the instructions of the court. "An act which changes its quality completely, according as the servant is or is not aware of the physical consequences which it may entail, is, we think, a conception altogether too subtle or refined to be comprehended by the average juror."⁸⁸

It has heretofore been suggested that the doctrine arises out of "relational" interests. This leaves the scope of the "duty" to be determined by the relations of the parties. The result is that there are in effect almost as many "duties," with consequent qualifications in factual situations, as there are decisions in courts of last resort. Moreover, it seems clear that normally the facts justifying the application of the assumption of risk doctrine must be pleaded and proved by the defendant.⁸⁹ If assumption of risk goes to the "duty" of the defendant, it seems contrary to

⁸⁶In discussing the necessity for having rules of conduct and duties definitely stated by the courts, with respect to establishing proximate causation, Dean Green in his *Rationale of Proximate Cause*, (1927) 68, 69 and 70, suggested: "But it is inconceivable that rules relied on in other classes of wrongs should have boundaries and limits while here they should not, or that a court is required in other cases to define such limits while here the court has no such duty . . . the determination of whether a hazard falls within the protection of a rule of law calls for [profound considerations] . . . it calls for all of those considerations involved in the lawmaking process whether it be by judicial or legislative sanction. How a court shall know the law—how it shall know when an interest is protected, or protected against a specific risk by a certain rule—is the most comprehensive of inquiries involved in the administration of justice." If it is sought to establish the "duty" of the defendant, by reference to the doctrine of assumption of risk, it would seem that these considerations ought to apply.

⁸⁷See *infra* Section VI, subsection d.

⁸⁸3 Labatt, *Master and Servant*, (1913) 3636.

⁸⁹See Prosser, *Torts*, (1941) 376, 377 and cases cited.

established practice to make him assume the burden of disproving it, for the existence of the "duty" in all other branches of tort law is a matter upon which the burden of proof rests with the plaintiff.

E. ILLUSTRATIONS OF EXISTING CONFUSION

A compilation of the decisions concerning the application of the concepts of assumption of risk and contributory negligence to substantially similar factual situations reveals a "veritable chaos of conflicting precedents." In the master and servant relationships, of course, all ordinary risks of the employment are assumed by the employee.⁹⁰ But as to extraordinary risks—where there is a breach of duty owed by the master to the servant—and the servant "voluntarily" assumes the risk of injury by continuing in the employment in the face of a "known" and "appreciated" danger, the application of the two rules is not clear. "The difficulties of the inquiry begin when an attempt is made to extract from the reports a consistent and scientific theory as to the apportionment of the territory between the defenses based on the servant's assumption of the risk and on his want of care,"⁹¹ and it is clear that in this field courts have often used both doctrines to apply to substantially similar factual situations.⁹²

In cases involving the automobile guest, substantially similar factual situations have been treated by application of both principles interchangeably in different courts⁹³ and even in the same jurisdiction.⁹⁴ Courts have very generally held that one accompanying a driver who proceeds at an excessive rate of speed, without protest of the guest, assumes the risk of injury, and that he has been guilty of contributory negligence as a matter of law.⁹⁵ Both theories have been applied in cases which turn upon

⁹⁰See textual discussion and cases cited in 2 Labatt, *Master and Servant*, (1913) 3092.

⁹¹Labatt, *Assumption of Risks and Contributory Negligence*, (1897) 31 *Am. L. Rev.* 667, 668.

⁹²*Ibid.*, *passim*.

⁹³*Infra*, notes 94-107 and text

⁹⁴*Cf.*, e. g., *Kurz v. Kuhn*, (1929) 198 *Wis.* 172, 223 *N. W.* 412, with *Eisenhut v. Eisenhut* (1933) 212 *Wis.* 467, 248 *N. W.* 440, and *Poneitowcki v. Harres*, (1929) 200 *Wis.* 504, 228 *N. W.* 126.

⁹⁵Much cited cases in which the doctrine of assumption of risk is discussed in this connection include *McKinley v. Dalton*, (1932) 128 *Cal. App.* 298, 17 *Pac.* (2d) 160; *Miller v. Stevens*, (1934) 63 *S. D.* 10, 256 *N. W.* 152; and *Krause v. Hall*, (1928) 195 *Wis.* 565, 217 *N. W.* 290. Other courts, however, have refused to hold that this conduct constitutes a basis for application of the doctrine, considering such conduct as contributory negligence: *New York Indemnity Co. vs. Ewen*, (1927) 221 *Ky.* 114, 298 *S. W.* 182; *Norfleet v. Hall*, (1933) 204 *N. C.* 573, 169 *S. E.* 143; and *Buick Automobile Co. v. Weaver*, (*Tex. Civ. App.* 1914) 163 *S. W.* 594. A great number of cases have held that such conduct constitutes contributory

the question of the known sleepiness of the host,⁹⁶ and in those involving the so-called "range of vision" rule, requiring that the defendant be able to stop his car within the range of the assured clear distance ahead.⁹⁷ A similar situation is presented when a passenger is injured by reason of riding in an exposed position on a motor vehicle. In such cases some courts have held that plaintiff's contributory negligence really involved assumption of risk of the increased peril;⁹⁸ others have based their decisions on the doctrine of contributory negligence alone,⁹⁹ while still others have considered the problem as purely one of assumption of risk.¹⁰⁰ A similar division of the courts has occurred in cases

negligence, without discussing the application of the assumption of risk doctrine. The most adequate compilation of such cases seems to be arranged in the American Digest System under the topic, Automobiles, at Key Number 224 (5) and (6).

⁹⁶Generally cited cases discussing the doctrine of assumption of risk in such cases include *Freedman v. Hurwitz*, (1933) 116 Conn. 283, 164 Atl. 647; *Krueger v. Krueger*, (1929) 197 Wis. 588, 222 N. W. 784; and *Markovich v. Schlafke*, (1939) 230 Wis. 639, 284 N. W. 516. A compilation of cases on this subject, dealing with the problem as one of contributory negligence, may be found in 86 A. L. R. 1147, and annotations supplementary thereto, relating to the conduct of the driver. As to the effect of the acquiescence of the guest as contributory negligence or assumption of risk, see the cases collected in the Third and Fourth Decennial Digests and General Digest under the topic Automobiles, Key Number 224 (5) and (6).

⁹⁷As to application of this theory by denominating it as assumption of risk, see *Kovar v. Beckius*, (1937) 133 Neb. 487, 275 N. W. 670; *Walker v. Kroger Grocery & Baking Co.*, (1934) 214 Wis. 519, 252 N. W. 721, 92 A. L. R. 680; and *Helgestad v. North*, (1940) 233 Wis. 349, 289 N. W. 822. As in the other factual situations preceding, the great majority of the courts have held that inability to stop within the range of vision is, as to the host, contributory negligence. See cases collected in 37 A. L. R. 587, with annotations cited and supplementary annotations, relating to the conduct of the driver as contributory negligence, and the cases collected in American Digest System under the topic, Automobiles, Key Number 224 (5) and (6), holding that the conduct of the guest under such circumstances is contributory negligence.

⁹⁸*Stout v. Lewis*, (1929) 11 La. App. 503, 123 So. 346. This approach was adopted also in the cases of *McMahon v. Hamilton*, (1928) 204 Cal. 228, 267 Pac. 546; *Vandell v. Sanders*, (1931) 85 N. H. 143, 155 Atl. 193; *Robinson v. American Ice Co.* (1928) 292 Pa. St. 366, 141 Atl. 244; and *Verrone v. Rhode Island S. R. Co.*, (1905) 27 R. I. 370, 62 Atl. 512.

⁹⁹See cases cited in 80 A. L. R. 553, annotations cited and supplementary annotations, and the cases collected in the Third and Fourth Decennial Digests and General Digest under the topic, Automobiles, Key Number 224 (7), especially *Kryger v. Panaszky*, (1937) 123 Conn. 353, 195 Atl. 795, and *Murphy v. Omwake*, (1930) 14 Pac. D. & C. 179.

¹⁰⁰*McGeever v. O'Byrne*, (1919) 203 Ala. 266, 82 So. 508; *Graff v. United Railroads of San Francisco*, (1918) 178 Cal. 171, 172 Pac. 603; *Gornstein v. Priver*, (1923) 64 Cal. App. 249, 221 Pac. 396; *Strong v. Olsen*, (1925) 74 Cal. App. 518, 241 Pac. 107; *Elliott v. Coreil* (La. App. 1935) 158 So. 698; *Moody v. Springfield St. R. Co.*, (1902) 182 Mass. 158, 65 N. E. 29; *Burns v. Boston El. R. Co.*, (1903) 183 Mass. 96, 66 N. E. 418; *Guile v. Greenberg*, (1934) 192 Minn. 548, 257 N. W. 649; *Paquin v. St. L. & S. R. Co.*, (1901) 90 Mo. App. 118; *Nies v. Brooklyn H. R. Co.*, (1902) 68 App. Div. 259, 74 N. Y. S. 41; and *Wiese v. Polzer*, (1933) 212 Wis. 337, 248 N. W. 113.

involving the conduct of one trying to board a vehicle in motion¹⁰¹ and the decisions are also in confusion as to the application of the respective doctrines in cases involving overcrowding of passengers in an automobile.¹⁰²

The standard reference made by commentators to illustrate the confusion in the application of the two doctrines in automobile cases is to defenses arising when the guest accepts the hospitality of an intoxicated automobile host. Although most of the courts have discussed this conduct as contributory negligence,¹⁰³ others have concluded that it comes within the doctrine of assumption of risk.¹⁰⁴ The Kentucky court has enunciated the doctrine that since the conduct of the guest shows contributory negligence,

¹⁰¹Contributory negligence and assumption of risk considered as the same doctrine: *Joyce v. Metropolitan St. R. Co.*, (1909) 219 Mo. 344, 118 S. W. 21; conduct considered as evincing assumption of risk: *Gunn v. United Rys. Co. of St. Louis* (1917) 270 Mo. 517, 193 S. W. 814, rev'g (1913) 177 Mo. App. 512, 160 S. W. 540, citing *Booth, Street Railways*, (1892) sec. 336; *Murphy v. North Jersey St. Ry. Co.*, (1904) 71 N. J. L. 5, 58 Atl. 1018; conduct considered as contributory negligence: *Harrison v. Graham*, (Tenn. App. 1937) 107 S. W. (2d) 517; *Osborne v. Texas Traction Co.*, (Tex. Civ. App. 1911) 134 S. W. 816.

¹⁰²*Cf.*, e. g., *McIntyre v. Pope*, (1937) 326 Pa. St. 172, 191 Atl. 607, holding such conduct to be contributory negligence, with *Hawthorne v. Gunn*, (1932) 123 Cal. App. 462, 11 Pac. (2d) 411, and *Kalamian v. Kalamian*, (1927) 107 Conn. 86, 139 Atl. 635, suggesting that both doctrines may be applicable in a proper case. See also cases collected in Third and Fourth Decennial Digests and General Digest under the topic Automobiles, Key Number 224 (2).

¹⁰³*Franco v. Vakares*, (1929) 35 Ariz. 309, 277 Pac. 812; *Keller v. White*, (1927) 173 Ark. 885, 293 S. W. 1017; *Sparks v. Chitwood Motor Co.*, (1936) 192 Ark. 743, 94 S. W. (2d) 359; *Lewis v. Chitwood Motor Co.*, (1938) 196 Ark. 86, 115 S. W. (2d) 1072; *Lynn v. Goodwin*, (1915) 170 Cal. 112, 148 Pac. 927; *Johnson v. So. Pac. Co.* (1930) 105 Cal. App. 340, 288 Pac. 81; *Yates v. Brazelton*, (1930) 108 Cal. App. 533, 291 Pac. 695; *Connor v. Johnson*, (1933) 132 Cal. App. 449, 22 P. (2d) 760; *McMahon v. Schindler*, (1941) 38 Cal. App. (2d) 642, 102 Pac. (2d) 378; *Powell v. Berry*, (1917) 145 Ga. 696, 89 S. E. 753; *French v. Tebben*, (1933) 53 Idaho 701, 27 Pac. (2d) 475; *Beaserman v. Hines*, (1920) 210 Ill. App. 606; *Livaudais v. Black*, (1930) 13 La. App. 345, 127 So. 129; *Richard v. Canning*, (La. App. 1935) 158 So. 598; *Clinton v. West Monroe*, (La. App. 1939) 187 So. 561; *Richards v. Neault*, (1926) 126 Me. 17, 135 Atl. 524; *Bubar v. Fisher*, (1935) 134 Me. 10, 180 Atl. 923; *McKeon v. Iverson*, (1921) 47 N. D. 132, 180 N. W. 805; *Schwartz v. Johnson*, (1926) 152 Tenn. 586, 280 S. W. 32; *Hicks v. Herbert*, (1938) 173 Tenn. 1, 113 S. W. (2d) 1107; *Jensen v. Chicago M. & St. P. Ry. Co.*, (1925) 133 Wash. 208, 233 Pac. 635; *Wayson v. Rainier Taxi Co.*, (1925) 136 Wash. 274; 239 Pac. 559; *Trotter v. Bullock*, (1928) 148 Wash. 516, 269 Pac. 825; *Wold v. Gardner*, (1932) 167 Wash. 191, 8 Pac. (2d) 975. Under circumstances suggested in the cases, the decisions vary as to the conditions under which such conduct will in fact be contributory negligence as a matter of law.

¹⁰⁴*McGeever v. O'Byrne*, (1919) 213 Ala. 266, 82 So. 508; *Nardone v. Milton Fire Dist.*, (1941) 261 App. Div. 717, 27 N. Y. S. (2d) 489; *Biersach v. Wechselberg*, (1931) 206 Wis. 113, 238 N. W. 905; *Markovich v. Schlafke*, (1939) 230 Wis. 639, 284 N. W. 516; *Schubring v. Weggen*, (1940) 234 Wis. 517, 291 N. W. 788.

he thereby assumed the risk of injury,¹⁰⁵ and the Connecticut court has applied the two doctrines alternately to substantially the same factual situations.¹⁰⁶ The general confusion between the two rules led the California court, on the basis of a prior holding that one riding with an intoxicated driver was guilty of contributory negligence as a matter of law, to say that one "assumed the risk" of riding with a (literally) one armed driver.¹⁰⁷

The ultimate result of the cases and comments concerning the distinction between assumption of risk and contributory negligence is to demonstrate that as yet neither logical nor practical differentiation between the two has been established, and the inadequacy of the distinctions sought to be drawn between the two doctrines is emphasized by the indiscriminate application of either doctrine to substantially identical factual conditions. Whether such a distinction can be made requires an examination of the development of the doctrine of assumption of risk in various factual situations and an investigation of traditional prerequisites for the application of the doctrine: that there be a "voluntary" encounter with a "known" and "appreciated" peril.

IV. SOURCE AND DEVELOPMENT OF THE DOCTRINE IN SPECIFIC FIELDS

The source of the doctrine is shrouded in confusion. In view of the inaccessibility of the cases, questions concerning the proper application of the rule have doubtless seldom been squarely presented or adequately briefed for the consideration of the trial and appellate courts, and the nature of the record presented on appeal may have limited judicial analysis of the doctrine still further.

¹⁰⁵Winston's Adm'r v. City of Henderson, (1918) 179 Ky. 220, 200 S. W. 330; Archer v. Bourne, (1927) 222 Ky. 268, 300 S. W. 604; Toppass v. Perkins' Adm'r, (1937) 268 Ky. 186, 104 S. W. (2d) 423; Rennolds' Adm'r v. Waggener, (1938) 271 Ky. 300, 111 S. W. (2d) 647; Mahin's Adm'r v. McClellan, (1940) 279 Ky. 595, 131 S. W. (2d) 478. The rationalia of these cases is explained in the case of Poole v. Lutz & Schmidt, (1938) 273 Ky. 586, 117 S. W. (2d) 575, relating to the connection between assumption of risk and contributory negligence in cases involving suit by the servant for injuries suffered through the negligence of an independent contractor, suit being brought against the independent contractor, in which the court suggested that where the term is used outside the relation of master and servant and is equivalent to contributory negligence: "It is always the duty of one to exercise ordinary care for his own safety, and facts showing that he did not may also prove that, in its broader sense, he assumed the risk, that is, that he took the chance of being hurt."

¹⁰⁶Cf. Dickerson v. Connecticut Co., (1922) 98 Conn. 87, 118 Atl. 518, with Fitzpatrick v. Cinitis, (1927) 107 Conn. 91, 139 Atl. 639.

¹⁰⁷Doggett v. Lacey (1932) 121 Cal. App. 395, 9 P. (2d) 257.

As has been noted, the doctrine arose out of the maxim "*volenti non fit injuria*,"¹⁰⁸ and subsequent interpretations of the maxim as including "consensual" or "relational" interests as well as those purely contractual.¹⁰⁹

A. MASTER AND SERVANT

As heretofore indicated, the term has been used in cases involving master and servant to indicate a limitation on the "duty" of the defendant (in that the servant "assumes the risk" of the ordinary dangers of the employment, whether known or unknown to him) as well as to establish legal fault in the "conduct" of the plaintiff (as where the defendant creates a known dangerous condition which the plaintiff willingly encounters).¹¹⁰ Under the Federal Employers' Liability Act, the doctrine received considerable attention in the early transportation cases, and although statutory enactments have very generally circumscribed the doctrine, it remains at least historically significant.¹¹¹

Analogies between the rule as applied in master-servant and automobile guest cases readily appear. It has often been said that the duty of the employer is not to increase by negligence the dangers (other than "ordinary risks") to which the employee subjects himself and which it is said he assumes,¹¹² and the standard of care of the operator of an automobile to his guest (upon which it is said that other risks are assumed by the guest) is that the host owes him the duty not to increase the normal dangers incident to the transportation,¹¹³ the rule sometimes being stated that the guest does not assume the risk of the negligence of the host.¹¹⁴

¹⁰⁸Supra note 32, and text.

¹⁰⁹Supra, notes 36 to 49, and text.

¹¹⁰The analysis is accepted among all commentators. See Prosser, Torts, (1941) 379, 513; 2 Labatt, Master and Servant, (1913) 3092, 3095; Harper, Torts, (1933) 291; 1 Street, Foundations of Legal Liability (1906) 166; and cases cited in accord. See also supra notes 90, 91 and text.

¹¹¹See supra, notes 34 and 35. Under the Act, the fellow servant rule was abolished; contributory negligence was a pro tanto defense depending on causation, but the defense of assumption of risk was retained to the employer except in cases involving violations of safety statutes by him. It was, of course, necessary to show negligence on the part of the employer in order to justify a recovery against him. In 1939, as indicated at note 34 supra, the defense of assumption of risk was abolished altogether.

¹¹²3 Labatt, Master and Servant, (1913) 3110, 3111, 3143, and especially 3164; Bohlen, Voluntary Assumption of Risk, (1906) 20 Harv. L. Rev. 30; Hough v. Texas and P. R. Co., (1879) 110 U. S. 213, 25 L. Ed. 612.

¹¹³While this statement of the rule is generally accepted, there is some deviation from it. See notes 159 to 184 infra, and text.

¹¹⁴E. g., Marks v. Dorkin, (1927) 105 Conn. 521, 136 Atl. 83, and Williamson v. Fitzgerald, (1931) 16 Cal. App. 79, 2 Pac. (2d) 201.

It has generally been conceded that the doctrine is inapplicable in cases involving master and servant where the servant has protested against an unsafe condition, and the master promises to remedy the defect,¹¹⁵ just as it is held in the automobile cases that a protest by the guest against misconduct of the host will operate to relieve him from the application of the doctrine¹¹⁶—in each case the consent implied by law is counteracted by the actual showing of non-consent by the parties. But where the damage to the plaintiff arises from the concurrence of two factors under the control of the defendant, the risk of only one of which was assumed by him, it has been suggested that in the master-servant relationship cases the employee might recover for his damage,¹¹⁷ while the contrary has been asserted in cases involving the automobile guest.¹¹⁸ It has been generally accepted in each field that it is immaterial whether the danger was known when the plaintiff entered the relation, or arose subsequent to the time that the relation was created, if other elements of the doctrine are present.¹¹⁹ It was established at an early date, and has since not been doubted, that there is no presumption that a servant accepts, as an implied term of his contract, the hazards arising from the negligence of a stranger,¹²⁰ and for the most part it has been similarly held in automobile cases involving the right of the guest to recover against a third party.¹²¹ Certainly the application of the doctrine in both situations is analogous in that each arises from the connection between the parties. In the master and

¹¹⁵See Prosser, *Torts*, (1941) 389, and cases cited; 3 Labatt, *Master and Servant*, (1913) 3242, and cases cited. This doctrine involves one of the earliest limitations on the theory of assumption of risk, being enunciated in *Clarke v. Holmes*, (1862) 7 H. & N. 937, 21 L. J. Ex. 356, 9 L. T. 178, 8 Jur. N. S. 992. But see the criticism of the holding in this case by Bohlen, *Voluntary Assumption of Risk*, (1906) 20 Harv. L. Rev. 91, 92, 93.

¹¹⁶The effect of the protest by a guest will be considered in the second section of this article, at notes 269 to 287, and text.

¹¹⁷*Shearman and Redfield, Law of Negligence* (1913) 293, 294, and cases cited.

¹¹⁸Causation and assumption of risk in the automobile cases is discussed in the second section of this article, at notes 322 to 328, and text.

¹¹⁹As to the enunciation of this principle in cases involving master and servant, see 3 Labatt, *Master and Servant*, (1913) 3656-3659; as to the operation of the doctrine in cases involving the automobile guest, see the discussion in the second section of this article at notes 274 to 281, and text.

¹²⁰*Thrussel v. Handyside*, (1888) 20 Q. B. D. 359, 57 L. J. Q. B. 347, 58 L. T. 344, 52 J. P. 279, *Brewer v. New York L. E. & W. R. Co.*, (1891) 124 N. Y. 59, 26 N. E. 324.

¹²¹There is some division of authority on this question in the automobile cases, and some confusion in the decisions. The rule, however, appears to be generally accepted. See notes 320, 321 *infra*, and text, in the second section of this article.

servant cases, the rule must, of course, be based upon contract, or consent arising from the relation of the parties; in the automobile cases also the rule is founded on the concept of a "relational" interest between host and guest.¹²²

Yet decisions relating to the automobile guest and treating the concept as referable to the doctrine in the master-servant field have been relatively few. Some have noticed the claimed analogy but have refused to apply the doctrine to the automobile guest;¹²³ others have treated the doctrine in vehicular cases (in some respects) as similar to but not arising from a transfer of the theory from the relationship of employer and employee;¹²⁴ others have noted that the doctrine as applied to motor vehicle guest cases arose both from the master-servant and the licensor-licensee limitations on legal fault.¹²⁵ The Wisconsin court, has alternately suggested that the doctrine arose from the licensor-licensee cases and those involving master and servant.¹²⁶ In no jurisdiction has it

¹²²See notes 44 to 49 *supra*, and text.

¹²³*Reed v. Zellers*, (1933) 273 Ill. App. 18; *Kambour v. Boston & M. R. R.*, (1913) 77 N. H. 33, 86 Atl. 624: "Although the cases in which assumption of risk has been elaborated are well calculated to introduce confusion into the law, they have no great tendency to sustain the defendant's contention that passengers assume the risk of all injuries that are caused by known dangers; and in so far as their contention depends for its validity on the proposition that passengers assume the risk of such injuries because servants assume the risk of all injuries caused by the known dangers of the service, it is fallacious . . ."; *Buick Automobile Co. v. Weaver*, (Tex. Civ. App. 1914) 163 S. W. 594: "The relation of master and servant not existing between appellee and appellant, neither any contractual relations, and appellee further being inexperienced and without knowledge in the operation of automobiles, a request that appellant's driver test the speed of the car, if held to be assumed risk, would be to say that appellee assumed the risk of the driver's negligence. . . ."

¹²⁴*McGeever v. O'Byrne*, (1919) 203 Ala. 266, 82 So. 508: "Technically speaking, the doctrine of 'assumption of risk' is founded upon contractual undertakings, and is applicable only to servants in relation to the dangers of their employment" The court then goes on to make application of the principle to the facts presented, deciding that the facts did not justify the application of the rule. See also *Hall v. Hall*, (1935) 63 S. D. 343, 258 N. W. 491: "Strictly speaking, perhaps, this doctrine of assumption of risk as applied to nonpaying passenger cases is comparable to the original doctrine of 'assumption of risk' referred to in the case of *Maher v. Wagner*, (1934) 62 S. D. 227, 242 N. W. 647. . . ." The last cited case relates to an action by a servant against his master.

¹²⁵*Freedman v. Hurwitz*, (1933) 116 Conn. 283, 164 Atl. 647, and *White v. McVicker*, (1933) 216 Iowa 90, 246 N. W. 385. It is possible that the latter case was intended to be based on the master-servant relationship, for the cases cited by the court relate to problems arising from such connection, though reference is also made to materials dealing with the application of the *volenti non fit injuria* maxim generally.

¹²⁶Compare the concept of the doctrine as related to master and servant cases in Judge Rosenberry's opinion in *Biersach v. Wechselberg*, (1931) 206 Wis. 113, 238 N. W. 905, and Judge Fowler's dissent in *Scory v. LaFave*, (1934) 215 Wis. 21, 254 N. W. 643, with the suggestion of the

been specifically suggested that the doctrine as used in automobile cases arose solely and directly from the use of the concept in cases involving employer and employee.

B. POSSESSOR OF REAL PROPERTY AND THOSE COMING
ON THE PREMISES

1. GENERALLY

In connection with the responsibility of a landowner to one coming on his premises the term "assumption of risk" or its equivalent has often been used to denote a limitation of the legal liability of the host. Sometimes the term is casually and inaccurately used to limit the responsibility of a host to persons coming on his property, in the absence of any conduct on the part of the guest evincing a knowledge and appreciation of a specific danger and a voluntary assumption of risks incident to such danger. Some cases spring from the theory that a trespasser takes the premises as he finds them, and it may thus be said, in the popular use of the term, that the trespasser "assumes the risk." However, where the term is used in fixing the scope of a duty of the occupier to the trespasser, it has rested rather on equitable, social and ethical considerations arising from the host-guest relationship than a strict reliance on actual or implied consent. As Professor Prosser says: "in a civilization based on private ownership, it is considered a socially desirable policy to let a man use his own land in his own way, without the burden of watching for and protecting those who come there without permission or right."¹²⁷ Although the relative rights and duties of the parties arising as one individual comes onto the land of another (without reference to actual knowledge or appreciation of a dangerous condition) can hardly be said to be outlined in the old common law on the basis of the *volenti* concept, the courts frequently have discussed

court in *O'Shea v. Lavoy* (1921) 175 Wis. 456, 185 N. W. 525, and re-affirmed thereafter in *Cleary v. Eckart*, (1926) 191 Wis. 114, 210 N. W. 267, and *Eisenhut v. Eisenhut*, (1933) 212 Wis. 467, 248 N. W. 440. It seems probable, under all the decisions, that the cases last cited, suggesting that the source of the doctrine relating to the automobile guest was to be found in the host-guest cases relating to real property, is the view intended to be adopted. See also, Campbell, *Work of the Wisconsin Supreme Court for the August 1933 and January 1934 Terms*, ch. VIII, *Negligence*, (1934) 10 Wis. L. Rev. 67, 69, 70 in which analogy to the master-servant cases is drawn to justify the limitation of the duty of the automobile host.

¹²⁷Prosser, *Torts*, (1941) 611.

the problem in terms of "assumption of risk."¹²⁸ Taken in its context in the trespasser cases the phrase appears to have no special significance, and to mean simply that where by established precedents the host owes only a restricted duty to the guest to preserve his premises according to a limited standard of care, the risk of such dangers as may arise from conditions outside of that scope of duty are "assumed" by the guest. It would be equally definitive, and less confusing, simply to state that the plaintiff was precluded from recovery because the defendant owed him no duty as to the conditions which caused his damage.

With respect to the relationship between the host and a guest who comes upon the premises by consent, the doctrine is subject to the same criticism. So far as the "duty" of the owner or occupier is concerned, it is generally said that he has a responsibility to a business guest to take reasonable care to discover the actual condition of the premises and either make them safe or warn him of existing dangers, while as to a "mere," "bare," or "naked" licensee he has only the duty to warn of defects which are actually known.¹²⁹ Regarding this fundamental duty owed by the owner or occupier, it may well be said that concerning risks other than those as to which the courts have imposed a duty upon him, the licensee and business guest each "assume the risk." As in the trespasser cases, this is only another way of denominating the existence or non-existence of defendant's duty. When both licensee and business guest know of the existence of potential or actual dangers, it has been suggested that "Since the defendant is under no duty to warn the plaintiff of dangers which are known or obvious to him, the plaintiff must choose at his own risk whether or not he shall avail himself of the defendant's consent and has no legal ground of complaint against the defendant if his choice proves unfortunate. Thus, by deciding to act upon the defendant's consent with knowledge of the dangers involved therein, the plaintiff may not improperly be said to have assumed the

¹²⁸1 Street, *Foundations of Legal Liability* (1906) 155; Prosser, *Torts*, (1941) 610, 611; Harper, *The Law of Torts* (1933) 214, 215; 3 *Restatement of Torts* (1934) sec. 333, limiting the duty of the landowner, excepting in cases where the owner or occupier knew or should have known of the presence of the trespasser, and other qualifications not here important; and *Foley v. Farnham Co.*, (1936) 135 Me. 29, 188 Atl. 708: "He who suffers himself to trespass assumes all risks incident to it."

¹²⁹3 *Restatement of Torts* sec. 342, 343; Prosser, *Torts*, (1941) 625, 635; Harper, *The Law of Torts* (1933) 221, 222, 225, and 229; Bohlen, *Duties of a Landowner* (1921) 29 U. of Pa. L. Rev. 142.

risk."¹³⁰ The suggestion has been made both as to dangerous conditions known to the licensee and negligent conduct of the possessor of the premises, known to the licensee at the time he comes on the premises.¹³¹ Here the doctrine of a "voluntary" acceptance of a "known" and "appreciated" danger, as relating to the conduct of the guest, becomes of substantial importance, for under such doctrine (subject to the distinctions hereinbefore made) it is often suggested that the possessor has no "duty" to the guest, although it is clear that the responsibilities of the parties are measured rather by the "conduct" of the plaintiff than a limitation of the "duty" of the host.

Some of the early English cases relating to the duties of the possessor of the premises to those coming on them illustrate that the doctrine was first used with reference to the conduct of the plaintiff toward a known and appreciated peril. As heretofore suggested, the doctrine was applied to a trespasser having reason to foresee the existence of spring guns on the premises and it was held that, as to the possessor, the conduct of the trespasser came within the maxim "*volenti non fit injuria*."¹³² No definitive standard of care required of a possessor of property to one coming on the property had then been set out, and the case involved both the "conduct" of the plaintiff in encountering a known peril, and the "duty" of the defendant toward a trespasser. Thirty-five years later, the English courts decided the first of three cases relating to the duty of a possessor of property to one coming on the premises,¹³³ in which Pollock, C. B., and Alderson, B., said that since under the doctrine of *Priestly v. Fowler*¹³⁴ a master had no more duty to take care of a servant than he might be expected to exercise to take care of himself, no duty was owed a visitor-licensee in an inn. Thereafter, in *Indermaur v. Dames*,¹³⁵ it was suggested that the rule applied to the visitor-licensee was to be distinguished from that applicable to a business guest who was an

¹³⁰3 Restatement of Torts sec. 466; Harper, *The Law of Torts* (1933) 229; Prosser, *Torts* (1941) 631, 642; 1 Street, *Foundations of Legal Liability* (1906) 157.

¹³¹3 Restatement of Torts sec. 340, 341.

¹³²*Hott v. Wilkes*, (1820) 3 B. & Ald. 304.

¹³³*Southcote v. Stanley*, (1865) 1 H. & N. 247, 25 L. J. Ex. 339, 27 L. T. O. S. 173.

¹³⁴(1837) 3 M. & W. 1, Murp. & H. 305, 7 L. J. Ex. 42. Bramwell, B., concurred on the ground that only acts of omission rather than those of commission were shown, suggesting the distinction between "active" and "passive" negligence later considered by the courts.

¹³⁵(1866) 1 C. P. 281, Har. & Ruth. 243, 35 L. J. C. P. 134, 14 L. T. 484.

employee of a contractor doing work for the possessor of the premises, and in 1883, in the widely cited case of *Heaven v. Pender*,¹³⁶ the earlier cases were exhaustively discussed and the rule definitely adopted that a landowner was under a duty to use reasonable care to provide safe and adequate premises and appliances for the benefit of a business guest.

It will be noted that none of the three latter cases, usually cited in discussions of the liability of the owner or occupier of land to those coming on the property, relate to the conduct of the guest toward dangers which he knew or had reason to know existed on the premises.¹³⁷ In no one of these cases was the concept of "*volenti non fit injuria*" or that of assumption of risk suggested. In this type of case, the court quite properly adopted the theory that the maxim had nothing to do with establishing the original "duty" of the possessor toward those coming on the premises.

But where the guest was shown to have actual knowledge of peril whatever his classification as trespasser, licensee, or business guest, his conduct in encountering the danger was not infrequently said to show that he had voluntarily encountered the risk and hence came within the maxim.¹³⁸ This concept of the

¹³⁶(1883) 11 Q. B. D. 503, 52 L. J. Q. B. 702, 49 L. T. 357, 47 J. P. 709.

¹³⁷It was, however mentioned in *Indermaur v. Dames*, (1866) 1 C. P. 281, Har. & Ruth. 243, 35 L. J. C. P. 134, 14 L. T. 484, that since the employee of the contractor was not familiar with the sugar refining industry, he could not be expected to anticipate that an aperture would exist on the floor of the building, used as a chute for transporting sugar within the premises.

¹³⁸See *Britton v. Great Western Cotton Co.*, (1872) L. R. 7 Ex. 130, 41 L. J. Ex. 99, 27 L. T. 125, 20 W. R. 525; *Woodley v. Metropolitan Dist. R. Co.*, (1877) 2 Ex. Div. 384, 46 L. J. Q. B. 521, 36 L. T. 419, 42 J. P. 181; and *Membery v. Great Western Ry. Co.*, (1889) 14 App. Cas. 179, 58 L. J. Q. B. 563, 61 L. T. 566, 54 J. P. 244, 5 T. L. R. 468. A number of early American cases helped establish the doctrine suggested in those cases, that an employee of a contractor or another third party, who was doing work on the premises of defendant pursuant to his employment is barred from recovery against the defendant because of his knowledge of the dangerous and defective condition or operation of the business conducted in the premises: *Wood v. Lock*, (1888) 147 Mass. 604, 18 N. E. 578; *Miner v. Conn. River R. Co.* (1891) 153 Mass. 398, 26 N. E. 994; *Wagner v. Boston Elevated R. Co.*, (1905) 188 Mass. 437, 74 N. E. 919; *Stevens v. United Gas & Electric Co.*, (1905) 73 N. H. 159, 60 Atl. 848.

But cf. *Thrussel v. Handyside*, (1883) 20 Q. B. D. 359, 57 L. J. Q. B. 347, 58 L. T. 344, holding in effect that the element of "voluntary" action was not present because the employee was forced to face the danger in order to continue his employment with the third person, and comments upon the case by Professor Warren, *Volenti Non Fit Injuria*, (1895) 8 Harv. L. Rev. 457, 471.

application of the doctrine in the real property cases was adopted and applied in the American decisions.¹³⁹

2. DISTINCTION BETWEEN "ACTIVE" AND "PASSIVE"

NEGLIGENCE

Whether the one on the premises of the possessor is a trespasser or a licensee, it must be clear that under the real property cases the host, knowing of the presence of the guest, has a duty not negligently to injure him or, as has sometimes been said, the injured party does not assume the risk of the "active" negligence of the defendant¹⁴⁰ and on this basis some commentators have suggested generally that the plaintiff can not assume the risk of any negligence of the defendant.¹⁴¹

The distinction in the real property cases seems to have been suggested first by Lord Bramwell in *Southcote v. Stanley*¹⁴² and has been considered in many of the discussions of the duty of the possessor of property to those whom he knows may be on the premises. Whatever may have been the motivation for such a distinction in the early cases, the distinction between

¹³⁹E. g. *Wood v. Lock*, *Miner v. Conn. River R. Co.*, *Wagner v. Boston Elevated R. Co.*, and *Stevens v. United Gas & Electric Co.*, cited *supra* note 138; *Harobine v. Abbott*, (1900) 177 Mass. 59, 58 N. E. 284; *Clark v. Mich. Cent. R. Co.*, (1897) 113 Mich. 24, 71 N. W. 327; *Massey v. Seller*, (1904) 45 Ore. 267, 77 Pac. 397; *McGinn v. French*, (1900) 107 Wis. 54, 82 N. W. 724. Later decisions include *Batson v. W. U. Tel. Co.*, (C.C.A. 5th Cir. 1935) 75 F. (2d) 154; *Paubel v. Hitz*, (1936) 339 Mo. App. 274, 96 S. W. (2d) 369; *Hunn v. Windsor Hotel Co.*, (1937) 119 W. Va. 215, 193 S. E. 57; and see *Kroger Grocery & Baking Co. v. Monroe*, (1931) 237 Ky. 60, 34 S. W. (2d) 929, treating contributory negligence as coexistent with assumption of risk by conduct.

¹⁴⁰As to the existence of such a duty to trespassers, see Harper, *The Law of Torts* (1933) 229; 3 *Restatement of Torts* sec. 337; Prosser, *Torts* (1941) 613, 614. As to licensees, see Harper, *ibid.*: "Whether the persons are trespassers, persons on the land by mere toleration, by permission gratuitously given, or by invitation for the mutual advantage of the parties, the possessor must save them harmless from wilful or intentional harm and from active negligence (misfeasance) after their presence is known, or should be known"; *Restatement, Torts*, sec. 341: "A possessor of land is subject to liability to licensees, whether business visitors or gratuitous licensees, for bodily harm caused to them by his failure to carry on his activities with reasonable care for their safety, unless the licensees know or from facts known to them, should know of the possessor's activities and of the risk involved therein"; and Prosser, *Torts*, (1941) 630: "It is now generally held that as to any active operations which the occupier carries on, there is an obligation to exercise reasonable care for the protection of a licensee. He must run his train, operate his machinery, or back his truck with due regard for the possibility that the permission given may have been accepted and the guest must be present."

¹⁴¹See Bevan, *Negligence* (1928) 796: "... the maxim . . . clearly does not apply where there is negligence." (Citing earlier commentators), and Pollock, *The Law of Torts* (1923) 169.

¹⁴²(1856) 1 H. & N. 247, 25 L. J. Ex. 339, 27 L. T. O. S. 173.

an act of commission and an act of omission seems not to be significant under present economic and social conditions, and it was ignored by the editors of the Restatement.¹⁴³ Moreover, the general tenor of the cases which have discussed the distinction in recent years denominates the conduct of the host in actively changing the original conditions encountered by the guest as the essence of the active negligence concept.¹⁴⁴ In so far as the real property cases furnish an analogy for the application of the rule in the automobile cases, it would seem that the doctrine would have no place where (a) the presence of the licensee was known, (b) the host actively changed the situation to increase the risk to the licensee, and (c) the increased risk was not known, appreciated, and voluntarily incurred by the guest. In short, as Bevan and Pollock have suggested, the guest in the real property cases does not "assume the risk" of the negligence of the host unless he voluntarily encounters the specific risk which causes the damage, and his mere position as a guest is insufficient in itself to establish that he did so encounter the risk. Or, to expand the concept still further, the doctrine is not broad enough to prevent recovery by a guest for damages caused by the negligence of the possessor unless the guest knew of specific risks in addition to the general area of danger involved in going on the premises or in the automobile of another. After the presence of the guest is known to the host, the guest need not anticipate that, as to dangers not known to him, the host will act other than as a reasonably prudent person would have acted.

Akin to the liability of the host for active negligence after the presence of the guest on the premises is or ought to be known to him, is the doctrine that he is responsible for damages suffered even by a mere licensee when the damages arise out of hidden perils which may be in the nature of a trap, and of which the

¹⁴³Restatement of Torts (1934) sec. 337, 341.

¹⁴⁴The rule has been succinctly stated by Bohlen, *Studies in the Law of Torts*, (1926) 171, as follows: ". . . while a licensee takes the risk of the physical condition of the premises he does not take the risk of dangers super-added by the active misconduct of his host." A comprehensive collection of the early English cases on the subject is made in an annotation, *Liability to Trespasser or Bare Licensee as Affected by Distinction between Active and Passive Negligence*, 49 A. L. R. 778; and a group of the more important modern cases has been collected also in Green, *The Judicial Process in Tort Cases*, (1939) 561. The subject has never been exhaustively and critically treated by commentators, but even a casual survey of the cases collected reveals the validity of Professor Prosser's suggestion that more recent decisions support the view that "as to any active operations which the occupier carries on, there is an obligation to exercise reasonable care for the protection of a licensee." Prosser, *Torts*, (1941) 630.

host is aware. The term "trap," used in a vague and indeterminate sense to include almost all hidden perils unknown to the guest, was utilized in extending the responsibilities of a host in the early English cases, and this concept of liability for defective premises (as distinguished from negligent operations on the premises) is now well established.¹⁴⁵

The classification, in the real property cases, of a social guest as a mere licensee, was also first recognized in 1856 in the case of *Southcote v. Stanley*,¹⁴⁶ and has a direct bearing on the status of the automobile guest. The parallel is particularly pointed in automobile cases where the duty of the host to prepare the vehicular "premises" for safe conduct of the guest is at issue.¹⁴⁷ The conclusions of the principal case have been, in this respect, widely adopted by the courts, and commentators on the subject have agreed not only that a social guest has the status of a licensee,¹⁴⁸ but also that such status prevails whether the guest was an invitee or was self invited.¹⁴⁹

The above general principles relating to the application of the doctrine in the real property cases are, of course, those most pertinent in application to the automobile cases. The social background of the doctrine in each case is somewhat similar, and the analogy between the two factual situations has in fact been utilized by the courts in delineating respective duties in the relationship of automobile guest and host in this country. In many cases where the doctrine of assumption of risk is not specifically mentioned, the general rule of determining the liability of the operator of an auto-

¹⁴⁵As to the early English cases, see *Corby v. Hill*, (1858) 4 C. B. N. S. 556, 27 L. J. C. P. 318, 31 L. T. O. S. 181, 22 J. P. 386; *Southcote v. Stanley*, (1856) 1 H. & N. 247, 25 L. J. Ex. 339, 27 L. T. O. S. 173; *Indermaur v. Dames*, (1866) L. R. 1 C. P. 274, Har. & Ruth. 243, 35 L. J. C. P. 184, 14 L. T. 484. And see discussion of this subject of defective premises with reference to *Priestly v. Fowler*, in note 10 supra.

As to more recent enunciations of the rule, see 1 Street, *Foundations of Legal Liability*, (1906) 157: "But they [licensees] do not assume extraordinary risk such as is incident to a defect in the nature of a concealed trap"; Harper, *The Law of Torts*, (1933) 222; ". . . anything in the nature of a trap or hidden peril, highly dangerous to life or limb, is a risk that comes within the duty of care imposed upon the possessor"; 3 *Restatement of Torts*, (1934) sec. 342, 345.

¹⁴⁶(1866) L. R. 1 C. P. 274, Har. & Ruth. 243, 35 L. J. C. P. 184, 14 L. T. 484.

¹⁴⁷The rule will be discussed more fully in the second section of this article. See notes 264 to 273 and text, discussing the status of the automobile guest as a licensee, and the duty of the host as to defects in the mechanical condition of the vehicle.

¹⁴⁸3 *Restatement of Torts*, (1934) sec. 331; Prosser, *Torts*, (1941) 627; Harper, *The Law of Torts*, (1933) 224.

¹⁴⁹Harper, *ibid.*; Prosser, *ibid.*

mobile toward his guest is established through reference to the principles of licensor and licensee in the real property cases. Indeed, the standard rule adopted in almost all states is based upon cases specifically referring to the duty of a host to take reasonable care for the presence of one properly on the premises, even though he be a mere licensee,¹⁵⁰ notwithstanding that in some states it was

¹⁵⁰Cf. *McGeever v. O'Byrne*, (1919) 203 Ala. 266, 82 So. 508, suggesting that the doctrine had been used in cases other than master and servant and conceding that the requirement of reasonable care existed to the guest, with the earlier case of *Perkins v. Galloway*, (1915) 194 Ala. 265, 69 So. 875, relying on *Lygo v. Newbold*, (1854) 9 Ex. 302, 2 C. L. R. 449, 23 L. J. Ex. 108, 22 L. T. O. S. 226, which set up the requirement that the host exercise reasonable care, and *Crider v. Yolande Coal & Coke Co.*, (1921) 206 Ala. 71, 89 So. 285, which suggested that a gratuitous guest was a "mere licensee" and that no duty was owed to him except to refrain from wanton and intentional wrong. The latter case was overruled in the case of *Wurtzburger v. Oglesby*, (1930) 222 Ala. 151, 130 So. 9, setting up the distinction between the real property and automobile cases on social grounds: "If the plaintiff is only entitled to protection against wanton injury, then it may happen that if a person requests gratuitous transportation for himself and also for a basket of apples, the gratuitous private carrier may be liable for injury to the property, but not for injury to him, although he committed his person to the keeping of the carrier as fully as he did the property"; *Dickerson v. Connecticut Co.*, (1922) 98 Conn. 87, 118 Atl. 518; *Munson v. Rupker*, (1923) 96 Ind. App. 15, 148 N. E. 169, aff'd 151 N. E. 101, in which the theory that under the real property cases the host was liable only for wanton misconduct to the guest was renounced: "The rule as to trespassers and licensees upon real estate with all its niceties and distinctions, is not to be applied to one riding in an automobile at the invitation of, or with the knowledge and tacit consent of the owner and operator of the automobile"; *Beard v. Klusmeier*, (1914) 158 Ky. 153, 164 S. W. 319, declaring that a duty to exercise reasonable care existed in automobile cases to an invited guest because that duty also existed in the real property cases; *Jacobs v. Jacobs*, (1917) 141 La. 272, 74 So. 992, relying on *Beard v. Klusmeier*, supra, and *Fitzjarrel v. Boyd*, infra; *Avery v. Thompson*, (1918) 117 Me. 120, 103 Atl. 4, which collects many of the cases and relies on this theory among others; *Fitzjarrel v. Boyd*, (1914) 123 Md. 497, 91 Atl. 547, citing cases adopting the licensor-licensee concept of the duty; *Roy v. Kirn*, (1919) 208 Mich. 571, 175 N. W. 475, citing *Jacobs v. Jacobs*, supra, and *Avery v. Thompson*, supra; *Monsour v. Farris*, (1938) 181 Miss. 803, 181 So. 326; ". . . the relation between the parties is that of licensor and licensee . . ."; *Liston v. Reynolds*, (1924) 69 Mont. 480, 223 Pac. 507, holding that the duty of reasonable care was owed to an invitee; *Bauer v. Griess*, (1920) 105 Neb. 381, 181 N. W. 156, relying on *Beard v. Klusmeier*, supra; *Lutvin v. Dopkus*, (1920) 94 N. J. L. 64, 108 Atl. 862, acknowledging the correlation between the doctrines but refusing to require the standard of reasonable care toward a self-invited guest; *MacKenzie v. Oakley*, (1920) 94 N. J. L. 66, 108 Atl. 771, applying the requirement of reasonable care on the basis of the real property case of *Phillips v. Library Co.*, (1893) 55 N. J. L. 307, 27 Atl. 478; *Patnode v. Foote*, (1912) 153 App. Div. 494, 138 N. Y. S. 221, citing the earlier real property case of *Birch v. City of New York*, (1907) 190 N. Y. 397, 83 N. E. 51; *Carroll v. Yonkers*, (1920) 193 App. Div. 655, 184 N. Y. S. 847; *Amann v. Thurston*, (1928) 133 Misc. Rep. 293, 231 N. Y. S. 657; *Grabeau v. Pudwill*, (1920) 45 N. D. 423, 178 N. W. 124; *Stewart v. Houk*, (1928) 127 Ore. 589, 271 Pac. 998; *Pettys v. Leith*, (1933) 62 S. D. 149, 252 N. W. 18; *Tennessee C. R. Co. v. Vanhoy*, (1920) 143 Tenn. 312, 226 S. W. 225; *Marpie v. Haddad*, (1927) 102 W. Va. 508, 138 S. E. 113; *O'Shea v. Lavoy*,

thought that the only duty owed by the host in real property cases was to abstain from wilfully injuring such a guest.¹⁵¹ Closely akin to this type of case are those automobile cases which suggest that the host is under a duty not to lay a "trap" for a guest, following this rationale in the real property cases.¹⁵² In many states, the common law rule that the host is under a duty to exercise reasonable care for the protection of his guest has been limited by the so-called guest statutes, which will receive more specific attention hereafter.

It has often been said that the duty of the host is to refrain from increasing the danger to the guest.¹⁵³ If, thus, the analogy to the real property cases is to be adopted in the automobile cases, it must be said that here also the guest accepts the risk of known dangers in the premises, but not the risk of the "active" negligence of the host. Again the question arises as to the distinction between "active" and "passive" negligence. Is it a wrong of commission when a host drives too fast, or a wrong of omission because he fails to drive properly? His duty is to drive properly; failure to do so might appear to be an omission; but certainly driving an automobile is "action" as compared to the individual who simply allows a defective condition of his premises to continue. Some cases are directly in point in holding that the improper operation of an automobile is "active" negligence toward a licensee guest in an automobile.¹⁵⁴ The course of the English

(1921) 175 Wis. 456, 185 N. W. 525: "Whether or not the established rules of liability existing between licensor and licensee are applicable in the matter of the 'management' of the automobile, they plainly are applicable so far as the 'condition' of the automobile is concerned"; the acceptance by the guest of the condition of the driver or the "management" of the automobile, being made a part of the limitation of the duty of the host in *Cleary v. Eckart*, (1926) 191 Wis. 114, 210 N. W. 267, on the basis of the *O'Shea Case*; *Ingerick v. Mess*, (C.C.A. 2d Cir. 1933) 63 F. (2d) 233.

¹⁵¹*Crider v. Yolande Coal & Coke Co.*, *ibid*; *Munson v. Rupker*, *ibid*; *Grabeau v. Pudwill*, *ibid*; cf. *Stewart v. Houk*, *ibid*, with *Peters v. Johnson*, (1928) 124 Ore. 237, 264 Pac. 459. This concept of the host-guest relation obtained at an early date in Massachusetts, *West v. Poor*, (1907) 196 Mass. 183, 81 N. E. 960, but has since been abandoned. See *Massaletti v. Fitzroy*, (1917) 228 Mass. 487, 118 N. E. 168.

¹⁵²As to use of this technique in extending the liability of the automobile host, see *Albers v. Shell Co. of California*, (1930) 104 Cal. App. 733, 286 Pac. 752; *Higgins v. Mason*, (1930) 255 N. Y. 104, 174 N. E. 77; *Marple v. Haddad*, (1927) 102 W. Va. 508, 138 S. E. 113; *O'Shea v. Lavoy*, (1921) 175 Wis. 456, 185 N. W. 525; *Harris v. Perry & Co.* [1903] 2 K. B. 219, 72 L. J. K. B. 725, 89 L. T. 174.

¹⁵³The subject is considered in detail in the second section of this article at notes 242 to 263 and text.

¹⁵⁴The principle is most exhaustively discussed in the case of *Pigeon v. Lane*, (1907) 80 Conn. 237, 67 Atl. 886, which established that in such

courts in dealing with the 'passenger cases has been most confusing. After first holding that a guest could recover for ordinary negligence of the host even though he were a gratuitous bailee,¹⁵⁵ then holding that a gratuitous bailee must show gross negligence to justify recovery against the bailor-host,¹⁵⁶ and then reaffirming that a mere licensee could recover upon a showing of lack of ordinary care,¹⁵⁷ it was finally held that the doctrine of assumption of risk had no application to cases involving an automobile guest, since the guest never assumed the risk of the negligence of his host.¹⁵⁸

3. DEFECTIVE CONDITIONS IN PREMISES OR EQUIPMENT

Particularly analogous to the real property principles referring to the doctrine are those automobile cases involving defective mechanical equipment. In cases involving the automobile guest, as well as in those involving real property, no distinction is made between a social invitee and a permissive licensee or self-invited guest.¹⁵⁹

cases "active" negligence would be required to impose liability. The term was later considered by the same court in *Dickerson v. Connecticut Co.* (1922) 98 Conn. 87, 118 Atl. 518. See also *Gay v. Cadwallader-Gibson Co.*, (1931) 34 Cal. App. (2d) 566, 93 P. (2d) 1051; *Babcock & Wilcox Co. v. Nolton*, (1937) 58 Nev. 133, 71 P. (2d) 1051; *Grabeau v. Pudwill*, (1920) 45 N. D. 423, 178 N. W. 124; and *Brigman v. Fiske-Carter Const. Co.*, (1926) 192 N. C. 791, 136 S. E. 125.

¹⁵⁵*Lygo v. Newbold*, (1854) 9 Ex. 300, 23 L. J. Ex. 108, 22 L. T. O. S. 226, per Parke, B.

¹⁵⁶*Moffatt v. Bateman*, (1869) 3 P. C. 115, 22 L. T. 140, per Lord Chelmsford: "... a person offering another a seat in a carriage which he is driving . . . if liable at all for an accident afterwards occurring, could only be so for negligence of a gross description." The case was quoted with approval in *Coughlin v. Gillison*, [1899] 1 Q. B. 145, 68 L. J. Q. B. 147, 79 L. T. 627.

¹⁵⁷*Harris v. Perry & Co.*, [1903] 2 K. B. 219; 72 L. J. K. B. 725, 89 L. T. 174; *Karavias v. Callinicos*, [1917] 143 L. T. J. 237. The case of *Harris v. Perry & Co.*, however, was apparently decided on the theory that *Southcote's Case*, (1601) 4 Co. Rep. 83, related to a gratuitous undertaking; the case in fact referred to carriage for hire.

¹⁵⁸*Dann v. Hamilton*, [1939] 1 K. B. 509, 108 L. J. K. B. 255, 55 T. L. R. 297, 160 L. T. 433.

¹⁵⁹*Black v. Goldweber*, (1927) 172 Ark. 862, 291 S. W. 760; *Roberson v. Roberson*, (1938) 193 Ark. 669, 101 S. W. (2d) 961; *Grassie v. American La France Engine Co.*, (1928) 95 Cal. App. 384, 272 Pac. 1073; *Greene v. Miller*, (1931) 102 Fla. 767, 136 So. 532; *Lasley v. Crawford*, (1923) 228 Ill. App. 590; *Munson v. Rupker*, (1925) 96 Ind. App. 15, 148 N. E. 169; *Chanson v. Morgan's La. & T. R. & S. S. Co.*, (1932) 18 La. App. 602, 136 So. 647; *Roy v. Kirn*, (1919) 208 Mich. 571, 175 N. W. 475; *Green v. Maddox*, (1935) 168 Miss. 171, 151 So. 160; *Amann v. Thurston*, (1928) 133 Misc. Rep. 293, 231 N. Y. S. 657; *Grabeau v. Pudwill*, (1920) 45 N. D. 423, 178 N. W. 424; *Conroy v. Commercial Casualty Ins. Co.*, (1928) 292 Pa. St. 219, 140 Atl. 905, and *Ferrell v. Solski*, (1924) 278

It has been noted that a separate division of the factual situations to which the doctrine was applied in real property cases related to the "conduct" of the guest, as distinguished from the "duty" of the host. The same division may appropriately be made in cases involving the automobile guest. Principles discussed above relate to limitations on the duty of the host in such cases; the principles following relate to the conduct of the guest in encountering known and appreciated dangers voluntarily. The cases decided upon this concept can in turn be sub-divided into two groups: first, where risk is assumed by engaging in the journey where the risk is apparent, and second, where risk is assumed in continuing in a journey where risk becomes apparent after the journey is begun. Since the conduct of the guest in such cases is the essence of the non-liability of the defendant, and since in most cases the factual situations are such that it might equally well be said that the guest was guilty of contributory negligence, confusion between the two concepts is here inevitable. But whether both defenses are applicable to one state of facts, the use of the assumption of risk analogy to the doctrine in the real property cases is clear. It has been said quite often that one who accepts a ride in a motor vehicle when he knows that the mechanism is defective assumes the risk of injury thereby,¹⁶⁰ and the affinity to the theory that recovery is barred to one who voluntarily encounters apparent perils in defective premises is manifest. And if the doctrine is to be extended to defects in the automobile, there is nothing illogical, as the Wisconsin and South Dakota courts have suggested,¹⁶¹ in extending the doctrine to include defects in the driver—that is to say, his known propensity to act other than a reasonably prudent man would have acted, or his known lack of skill or experience. Whatever may be said concerning the social

Pa. St. 565, 123 Atl. 493, which apparently establish the rule, once rendered doubtful by the case of *Cody v. Venzie*, (1919) 263 Pa. St. 541, 107 Atl. 383; *Holdhusen v. Schaibel*, (1932) 60 S. D. 275, 244 N. W. 392; *Robinson v. Leonard*, (1926) 100 Vt. 1, 134 Atl. 706; *Mitchell v. Raymond*, (1923) 181 Wis. 591, 195 N. W. 855; *Sommerfeld v. Flury*, (1929) 198 Wis. 163, 223 N. W. 409; *Harris v. Perry & Co.*, [1903] 2 K. B. 219, 72 L. J. K. B. 725, 89 L. T. 174.

The New Jersey court has consistently held against the weight of authority since its decision in *Lutvin v. Dopkus*, (1920) 94 N. J. L. 64, 108 Atl. 862, through a series of cases up to and including *Myers v. Sauer*, (1937) 117 N. J. L. 254, 182 Atl. 634.

¹⁶⁰The rule is discussed in the second section of this article in notes 269-271, and text.

¹⁶¹*Hall v. Hall*, (1935) 63 S. D. 343, 258 N. W. 491; *Cleary v. Eckart*, (1926) 191 Wis. 114, 210 N. W. 267.

desirability of imposing two different measures of the conduct of the guest through application of the doctrine of assumption of risk and contributory negligence (with attendant variations in the effect of the two doctrines on the right of the guest to recover damages), it must be conceded that the doctrine of assumption of risk in the automobile cases springs logically enough from the real property field. Courts have consistently applied the doctrine to situations involving known incompetence and lack of skill of the driver.¹⁶² Whether these cases conflict with the conclusions of the courts in real property cases that the guest never assumes the risk of the negligence of the host will be discussed hereafter.

C. "NON-RELATIONAL" CASES CONCERNING TRAVEL

The early cases dealing with accidents on the highways, whether damage was due to the conduct of other users of the highway or the defective condition of the way, are not enlightening in ascertaining the source of the doctrine. As has been suggested, commentators have agreed that the doctrine is based on "relational" interests between the parties and is not properly applicable in the absence of such connection. Obviously, no "relation" exists (in the sense in which the word has heretofore been used by the courts) between two motorists on the highway, and the existence of a "relational" interest between the user of a highway and the individual or governmental subdivision charged with maintenance of the highway never has been judicially suggested or approved. The doctrine is sometimes loosely suggested in the opinions relating to the liability of a governmental subdivision that one who comes to a defective condition in a highway and realizes the danger "assumes the risk" of injury therefrom, but the cases with two exceptions¹⁶³ are in fact founded upon the defense of contributory negligence.¹⁶⁴ The same situation prevails in the older cases which referred to "assumption of risk" in cases

¹⁶²Various illustrations of this application of the doctrine are indicated in the second section of this article in notes 290, 291, 294, 296-315, and text. The theory that a guest may "assume the risk" of known dangers on the premises of the possessor is discussed in notes 138, 139, *supra*, and text.

¹⁶³*Pomeroy v. Westfield*, (1891) 154 Mass. 462, 28 N. E. 899, per Holmes, J.; and *Williams v. Main Island Creek Coal Co.*, (1919) 83 W. Va. 464, 98 S. E. 511.

¹⁶⁴See, e. g., *Holliday v. Athens*, (1912) 10 Ga. Ap. 709, 74 S. E. 67; *McHugh v. City of St. Paul*, (1897) 67 Minn. 441, 70 N. W. 5; and *City of Dayton v. Taylor's Adm'r*, (1900) 62 Ohio St. 11, 56 N. E. 480.

concerning the respective rights of operators of vehicles.¹⁶⁵ None of the automobile guest decisions rests on an analogy to these cases.

D. LIABILITY OF CARRIERS FOR DAMAGE SUSTAINED BY PASSENGERS

The decisions relating to passengers on railroads and steamships afford little more enlightenment as to the basis of the concept in the automobile cases. In so far as the obligation of the carrier company to its passengers is concerned, it is clear that a "relational" interest is present. The term was occasionally used in the earlier cases to designate a limitation of the "duty" of the carrier, pointing out that it was not an insurer of the safety of the passenger, but was liable only for some degree of negligence,¹⁶⁶ and that

¹⁶⁵E. g., *Illedge v. Goodwin*, (1831) 5 C. & P. 190; *Borden's Condensed Milk Co. v. Mosby*, (C.C.A. 2d Cir. 1918) 250 Fed. 839: "In taking the wrong side of the road, the driver assumed the risk of his experiment, and it was for him to use greater care than would have been required of him if he had kept on the right side"; *Reynolds v. Mo. K. & T. Ry. Co.*, (1904) 70 Kan. 340, 78 Pac. 801, where a teamster lost his balance while driving over a defective railroad crossing: ". . . he voluntarily incurred danger and failed to exercise ordinary care for his safety by standing in his wagon under such circumstances"; *Collins v. Hustis*, (1929) 79 N. H. 446, 111 Atl. 286, relating to a railroad crossing accident, where it was said: "If . . . O'Brien observed the train and attempted to cross in front of it, and the collision resulted from his miscalculation of the speed of the train . . . he voluntarily put himself in a place of danger of his own motion, and cannot recover from the results of his own act." This might be thought to be an application of the doctrine, except that the New Hampshire court had specifically held in the case of *Kambour v. Boston & M. R. R.* (1913) 77 N. H. 33, 86 Atl. 624, that the doctrine did not exist outside of contract in that state, and the court in the *Collins* case cited other authorities which held that facts stated established prima facie proof of negligence. An exhaustive discussion of the application of the doctrine to cases involving a crossing accident is had in *Gover v. Central Vermont R. Co.*, (1922) 96 Vt. 208, 118 Atl. 874, in which the court found that the doctrine is applicable where there has been a voluntary exposure to a known and comprehended danger (no reference being made to the "relational" interests of the parties) but refused to apply the doctrine in the absence of a showing of voluntary action by the plaintiff; and see, to the same effect, *Warren v. Boston & M. R. R.* (1895) 163 Mass. 484, 40 N. E. 895, refusing to apply the doctrine where actual knowledge of peril did not exist, but not discussing the absence of "relational" interests between the parties.

In *Coca-Cola Bottling Co. v. Brown*, (1918) 139 Tenn. 640, 202 S. W. 926, the term "assumes the risk" was apparently used to illustrate the principle that the accident was unavoidable and that no duty was owed by the driver of an automobile toward the driver of a horse which took fright at the vehicle, unless the driver of the car was negligent in permitting the motor to remain running while the car was parked.

¹⁶⁶*McKinney v. Neil*, (C.C. Ohio 1840) 1 McLean 540, Fed. Cas. No. 8865: "There are certain risks which are incurred by every stage passenger, and for which the proprietor is not responsible. These are those casualties which human sagacity cannot foresee, and against which the utmost prudence cannot guard. . . . And every passenger must make up his mind to meet the risks incident to the mode of travel he adopts . . ."; see also *Galena & C. U. R. Co. v. Fay*, (1855) 16 Ill. 558.

the transportation agency did not owe the same duty of care to one riding on a freight train as to one riding on a train for the use of passengers.¹⁶⁷ With respect to the "conduct" of the guest, factual situations seem to be somewhat correlative to those involved in the real property and the automobile guest cases. The term was used where a passenger attempted to cross between cars after alighting from a train;¹⁶⁸ where he took a dangerous way to reach a meal station, after leaving the train;¹⁶⁹ and where he was injured because of the absence of proper equipment in sleeping quarters.¹⁷⁰ However, none of the cases involving the automobile guest refer to the application of the doctrine in the carrier cases as a basis for the adoption of the rule.

Earlier cases involving the conduct of persons in boarding, leaving and riding on street railways often referred to the conduct of the passengers in certain circumstances as constituting an assumption of risk of injury. Here also the "relational" interest between the parties is present, and the factual situation seems analogous to that of the automobile guest riding on the outside of an automobile or in an overcrowded vehicle.¹⁷¹ However, only one

¹⁶⁷Chicago, B. & Q. R. Co. v. Hazzard, (1861) 26 Ill. 373: Assumption of risk due to riding in a caboose, "an inferior mode of conveyance," arises from an implied agreement to accept and be satisfied with such accommodations as that particular car afforded—"a passenger takes all the risks incident to the mode of travel, and the character of the means of conveyance which he selects, the party furnishing the conveyance being only required to adapt the proper care, vigilance and skill to the particular means." See also Chesapeake & O. Ry. Co. v. Needham, (C.C.A. 4th cir. 1917) 244 Fed. 146, (passenger assumes risk of swaying of car consistent with proper operation); Central of Georgia Ry. Co. v. Lippman, (1900) 110 Ga. 665, 36 S. E. 202, (risk of usual jolts and jars on freight train assumed); Symonds v. Minneapolis & St. L. R. Co., (1902) 87 Minn. 408, 92 N. W. 409, (casual risks and discomforts incident to movement of mixed trains assumed); Steele v. Southern Ry. Co., (1899) 55 S. C. 389, 33 S. E. 509, (additional risk of riding in caboose assumed); Lovett v. Gulf, C. & S. F. R. Co., (1904) 97 Tex. 436, 79 S. W. 514, (risk of riding in gravel train assumed as to ordinary methods of operating the conveyance); Millers Creek R. Co. v. Blevins, (1918) 181 Ky. 800, 205 S. W. 911, (casual risks of handling of mixed trains assumed); Harvey v. Deep River Logging Co., (1907) 49 Ore. 583, 90 Pac. 501, (risks naturally incident to the character and equipment of a logging train assumed). A shipper tending livestock on a train assumes risks of dangers resulting from his peculiar duties, but not the risk of the carrier's negligence. Chicago, B. & Q. R. Co. v. Trovee (1905) 70 Neb. 293, 103 N. W. 680.

¹⁶⁸Kriwinski v. Penn. R. Co., (1900) 65 N. J. L. 293, 47 Atl. 447.

¹⁶⁹Duvernet v. Morgan's La. & T. R. R. & S. S. Co., (1897) 49 La. Ann. 484. See also Hopkins v. West Jersey & S. R. Co., (1909) 225 Pa. St. 193, 73 Atl. 1104.

¹⁷⁰International M. M. Co. v. Smith, (C.C.A. 3d Cir. 1906) 145 F. 891.

¹⁷¹As to automobile cases involving overcrowding and riding on the outside of the vehicle, see the second section of this article at notes 316 to 319, and text.

case appears to indicate specifically a distinction between the doctrine of assumption of risk and that of contributory negligence under such circumstances,¹⁷² and the distinction sought to be made is confusing. A perusal of the cases,¹⁷³ all of which discuss the negligence of the plaintiff guest in some degree, leads to the conclusion that the courts were using the terminology of assumption of risk because it afforded a more simple method of saying that the conduct of the plaintiff must have been a contributing factor to his damage in order to bar a recovery. After discussing the negligence of the defendant, the courts were inclined to suggest that the plaintiff assumed the risk of some damage from riding on the outside of the car, or trying to board a moving car, but did not assume the risk of negligent management of the vehicle. The same result might also have been reached by classifying the conduct of the plaintiff as negligent, but asserting that the conduct of the operator of the street car in suddenly accelerating speed was the proximate cause of the accident. Here, as in many cases, it is difficult to ascertain whether the courts in using the term "assumption of risk" or words of like import intended in doing so to use them as simply descriptive of a condition classified legally as contributory negligence, or to indicate a definitive doctrine in establishing legal fault.¹⁷⁴ The technique of limiting the risks assumed to matters other than the negligence of the defendant¹⁷⁵ seems to indicate that the courts considered the doctrine as one separate and independent from that of contributory negligence. The decisions relating to the automobile guest have not relied on the use of the doctrine in the street railway cases to support that later application of the rule.

E. USE OF THE DOCTRINE WITH REFERENCE TO RESCUES

Another field in which the term "assumption of risk" has become widely used relates to cases in which the plaintiff seeks to

¹⁷²*Kebbee v. Connecticut Co.*, (1912) 85 Conn. 641, 84 Atl. 329.

¹⁷³*Lauterer v. Manhattan R. Co.*, (C.C.A. 2d Cir. 1904) 128 F. 540; *Graff v. United Railroads of San Francisco*, (1918) 178 Cal. 171, 172 Pac. 603; *Burns v. Boston El. R. Co.*, (1903) 183 Mass. 96, 66 N. E. 418; *Gunn v. United Rys. Co. of St. Louis*, (1917) 270 Mo. 517, 193 S. W. 814; *Paquin v. St. L. & S. R. Co.*, (1901) 90 Mo. App. 118; *Joyce v. Metropolitan St. R. Co.*, (1909) 219 Mo. 344, 118 S. W. 21; *Murphy v. North Jersey St. Ry. Co.*, (1904) 71 N. J. L. 5, 58 Atl. 1018; *Nies v. Brooklyn H. R. Co.*, (1902) 68 App. Div. 259, 74 N. Y. S. 41, *semble*; *Burns v. Johnstown Pass. Ry. Co.*, (1906) 213 Pa. St. 143, 62 Atl. 564; *Verrone v. Rhode Island S. R. Co.*, (1905) 27 R. I. 370, 62 Atl. 512.

¹⁷⁴*See, e. g.*, *Graff v. United Railroads of San Francisco*, *ibid.*; *Gunn v. United Railways Co. of St. Louis*, *ibid.*; *Paquin v. St. L. & S. R. Co.*, *ibid.*; and *Verrone v. Rhode Island S. R. Co.*, *ibid.*

¹⁷⁵*Ibid.*

preserve life or property at some risk to himself, with knowledge of the danger involved. Assuming that the doctrine of assumption of risk need not be based on a "relational" interest between the parties, it is clear that a rescuer dashing into a burning building to save his child does so voluntarily and with full knowledge of the risk he runs. It has been generally said that in such cases the act of the defendant does not come within the doctrine because the conduct was not "voluntary," if the risk involved in the rescue was reasonably encountered.¹⁷⁶ In so far as the courts have attempted to apply the doctrine in these cases it is clearly inconsistent with the requirement heretofore suggested that a "relational" affinity must exist before the rule becomes properly applicable. In any event, none of the automobile guest cases refer to the rescue cases, and because of the dissimilar factual situations, analogies appear inapplicable.

V. THE REQUIREMENT THAT THERE BE A "VOLUNTARY" ASSUMPTION OF A "KNOWN" AND "APPRECIATED" RISK

A. ELEMENTS OF "VOLUNTARY" ASSUMPTION OF RISK AS INDISTINGUISHABLE FROM CONTRIBUTORY NEGLIGENCE

The prerequisite of the doctrine which seems to have caused the most confusion in the courts is that which requires the action of the plaintiff to be "voluntary." It has been generally conceded by commentators that the requirement exists as to all cases in which the doctrine is used.¹⁷⁷ Since the term essentially has reference to a state of mind concerning which the defendant would be unable to introduce proof, courts generally have set up specific standards by which to measure the conduct of the plaintiff under the doctrine as voluntary or involuntary. For instance, when a servant faces an extraordinary risk created by the master, his conduct in continuing his employment has generally been said to show that the danger was voluntarily encountered, or that "the consent is

¹⁷⁶See Prosser, *Torts*, (1941) 390; Harper, *The Law of Torts*, (1933) 294, 295; and cases cited. Bohlen, however, has suggested that the rationale for the rule arises from the fact that the rescuer has the right to find the premises free from danger. See Bohlen, *Voluntary Assumption of Risk*, (1906) 20 *Harv. L. R.* 20, 21, and 22. See also general discussion in Note: (1936) 21 *Ia. L. Rev.* 650, and note 30, *supra*.

¹⁷⁷Bohlen, *supra* note 10 at 21; Gregory, *Legislative Loss Distribution in Negligence Actions*, (1936) 134; Pollock, *The Law of Torts*, (1936) 166; Prosser, *Torts* (1941) 388, 389; 3 *Restatement of Torts* sec. 466; 1 Street, *Foundations of Legal Liability*, (1906) 166; Warren, *Volenti Non Fit Injuria*, (1908) 20 *Harv. L. R.* 461.

found in going ahead with full knowledge of the risk."¹⁷⁸ On the other hand, a risk is not "voluntarily" encountered when an employer has promised to remedy a defective condition and has failed to do so, at least until it appears that he will not make the promised repair,¹⁷⁹ though it is so encountered where the employee has a choice of ways to perform his work and does it in the more dangerous way,¹⁸⁰ or receives extra pay for more hazardous employment.¹⁸¹ Within the limitation of this requirement, it is held that seamen and convicts do not assume the risks of their respective employments, for obedience to direction or continuance of employment in such cases cannot be said to be voluntary.¹⁸² It is usually assumed in cases involving the possessor of property and his guest, that the conduct of the guest on the premises, after knowledge of peril, is "voluntary" within the meaning of the doctrine.¹⁸³ A limitation on the doctrine of assumption of risk has been presented in the cases and suggestions of commentators that if the purpose for which the injured party acts is socially justifiable, and he is constrained so to act by the pressure of necessity, his conduct in encountering a known peril is not "voluntary" because he is given no actual choice of conduct. This interpretation of the requirement of the doctrine received considerable attention in cases where it was claimed that the servant was not *volens* because he had no actual freedom of choice in encountering a risk on the premises of the master, for the alternative was a loss of his means of existence.¹⁸⁴ The same rule was adopted with reference to conduct of an individual attempting

¹⁷⁸Prosser, *Torts*, (1941) 384, 513, and cases cited. See also Labatt, *Master and Servant*, (1913) 3630, with reference to the American rule. The early English cases (including *Yarmouth v. France*, (1887) 19 Q. B. D. 647, 57 L. J. Q. B. 7, 36 W. R. 281, and dicta in *Britton v. Great Western Cotton Co.*, (1872) L. R. 7 Ex. 130, 41 L. J. Ex. 99, 27 L. T. 125) had so held, but later cases (*Thomas v. Quartermaine*, (1887) 18 Q. B. D. 645, 56 L. J. Q. B. 340, 57 L. T. 537, and *Smith v. Baker & Sons*, (1891) A. C. 325, 60 L. J. Q. B. 683, 65 L. T. 467) established the rule that mere knowledge of danger and continuance in the employment was not sufficient to invoke the maxim, and further proof that the servant was *volens* was required under the English rule. See Labatt, *ibid.* at 3622; 1 Street, *Foundations of Legal Liability* (1906) 169.

¹⁷⁹Prosser, *ibid.* 389; Labatt, *ibid.* 3242.

¹⁸⁰Labatt, 3097.

¹⁸¹*Ibid.* 3645, 3646.

¹⁸²*Ibid.* 3246-3250.

¹⁸³See cases cited in first paragraph of note 138, *supra*; and see *Osborne v. London & North Western Ry. Co.*, (1888) 21 Q. B. D. 220, 57 L. J. Q. B. 618, 59 L. T. 227, 52 J. P. 806.

¹⁸⁴See extended discussion and quotations from cases dealing with this problem in Labatt, *Master and Servant*, (1913) 3946, 3950, and Prosser, *Torts*, (1941) 391.

a rescue,¹⁸⁵ and to cases involving defective ways.¹⁸⁶ That is not to say that every attempt to complete a rescue, nor every adventure in passing over a dangerously defective way because it might be more convenient than any other way, is considered as an involuntary action excepted from the operation of the doctrine. It has been variously stated that the risk must not be "unreasonably" undertaken,¹⁸⁷ or must arise from "necessity,"¹⁸⁸ or that the plaintiff must be able to "reasonably elect"¹⁸⁹ whether to encounter the danger or not. The theory is implicit in Pollock's suggestion that the doctrine is properly applicable only when a "man goes out of his way to a dangerous action or state of things."¹⁹⁰

Does not this variation of the doctrine essentially destroy what Professor Warren and all the earlier writers declared to be the distinction between contributory negligence and assumption of risk that "It may be consistent with due care to incur a known danger voluntarily and deliberately"?¹⁹¹ If the above suggestion made by courts and commentators is correct, the danger ceases to be encountered voluntarily when "due care" is used, or the risk taken is "reasonable" or "necessary." If it may be said that one may "reasonably" encounter a known and appreciated danger without application of the doctrine of assumption of risk and "reasonableness" is the essence of the doctrine (as contributory negligence is normally dependent on the care of a "reasonable"

¹⁸⁵See text statements cited at note 176, *supra*, and cases noted therein; and see 3 Restatement of Torts sec. 472.

¹⁸⁶See cases cited at note 163, *supra*. As to the same result where the doctrines of assumption of risk and contributory negligence have been confused, see cases cited at note 164, *supra*, and Harper, *The Law of Torts* (1933) 295, 296.

¹⁸⁷See Bohlen, *Voluntary Assumption of Risk*, (1906) 20 *Harv. L. R.* 21: ". . . one who has the legal right or legal or social duty to act as he has done under the conditions created by the defendant's wrong does not act voluntarily; his action is caused by the coercion of the circumstances which the defendant's wrong has created. In all, the plaintiff had a right to do what he did or be where he was injured which was in no way dependent upon the mere consent of the defendant, a consent which he was free to give or withhold." It would seem that once the consent had been given, however, the plaintiff had a legal right to act as he did in all cases, unless he acted unreasonably. The standard of "reasonableness" has been generally accepted: See 3 Restatement of Torts sec. 468, 472, 473; the early case of *Clayards v. Dethick & Davis*, (1848) 12 *Q. B.* 439; *Gover v. Central Vermont Ry. Co.*, (1922) 96 *Vt.* 208, 118 *Atl.* 874; Harper, *The Law of Torts*, (1933) 294, 295.

¹⁸⁸*Williams v. Main Island Creek Coal Co.*, (1919) 83 *W. Va.* 464, 98 *S. E.* 511.

¹⁸⁹*Thomas v. Quartermaine*, (1887) 18 *Q. B. D.* 645, 56 *L. J. Q. B.* 340, 22 *L. T.* 125; *Chicago, R. I. & P. R. Co. v. Lewis*, (1912) 103 *Ark.* 99, 145 *S. W.* 898.

¹⁹⁰Pollock, *The Law of Torts*, (1923) 164.

¹⁹¹Warren, *Volenti Non Fit Injuria*, (1908) 20 *Harv. L. R.* 461.

man), then the entire doctrine is nothing more nor less than contributory negligence itself, in so far as it relates to the conduct of the plaintiff as distinguished from an unqualified limitation of the duty of the defendant. The servant of a third party working on the premises of the possessor and encountering a dangerous condition thereon; the licensee slipping on the icy steps of the licensor's building; and the rescuer attempting to save his home or his family, it would seem, are subject to the doctrine only if they act "unreasonably," for only then is their action "voluntary" within the requirement of the doctrine. In short, the answer to the question of whether the conduct of the plaintiff was "voluntary" involves weighing the factors of probability of harm, choice of other conduct, and social justifiability of plaintiff's act, and balancing them against the conduct of the reasonably prudent man. The ultimate result appears to be that before the doctrine of assumption of risk can be applied, in cases relating to the "conduct" of the plaintiff, the requirements of the doctrine of contributory negligence must first be satisfied. The overlapping between the two doctrines arising from the interpretation of the requirement of "voluntary" action has been noted by other commentators.¹⁹²

Of course, the very term "voluntary" suggests an element of compulsion, in the light of which the actor proceeds as he makes a "reasonable" or "unreasonable" choice as to his mode of conduct. But the theory of compulsion varies from the extreme expounded by Lord Bramwell,¹⁹³ who conceived everything done by an actor as voluntary if not done under physical constriction, and that of Mr. Justice Holmes, who held that mere inconvenience was sufficient to prevent the application of the rule.¹⁹⁴ A more realistic approach would be to permit the matter to be decided in all cases on the basis of the reasonableness of the conduct of the plaintiff and eliminate in theory what courts have already eliminated in fact: the element of compulsion in the requirements of the doctrine that the action of the plaintiff be "voluntary."

The requirement of "voluntary" action by the plaintiff has not been critically considered as an element in the application of the doctrine in cases relating to the automobile guest, although the con-

¹⁹²Harper, *The Law of Torts*, (1933) 294, 295; Prosser, *Torts*, (1941) 378, 379.

¹⁹³See *Ogden v. Rummens*, (1863) 3 F. & F. 751, wherein Lord Bramwell said concerning the statement of a workman that he feared loss of employment and hence did not complain of a dangerous condition: "What is volens? Willing; and a man is willing when he wills to do a thing and does it."

¹⁹⁴*Pomeroy v. Westfield*, (1891) 154 Mass. 462, 28 N. E. 899.

nection between the "voluntary" action of the plaintiff and his consent to incur the risk has been emphasized.¹⁹⁵ In cases setting out the requirements of the rule, it has been suggested that the voluntary action of the plaintiff is a prerequisite to the application of the doctrine,¹⁹⁶ and the Connecticut court, adopting the analogy of other cases, has held that the term "voluntary" is used in the sense of an unreasonable election to encounter a risk, refusing to apply the doctrine in the case of two women passengers aged 16 and 60, who failed to get out of the car at night after knowledge that the driver was tired and was afraid he would go to sleep.¹⁹⁷ Some courts apparently have dropped the requirement that the action of the guest must be "voluntary" and have suggested that the evidence must show an "acquiescence or willingness to proceed in the face of danger."¹⁹⁸ The requirement for "voluntary" action in such case, of course, is almost exactly the same as that well recognized rule of contributory negligence which classifies acquiescence in the reckless management of an automobile as contributory negligence as a matter of law. The affinity of the two doctrines seems thus manifest both in principle and in practice.

Illustrative of the interpretation of the term "voluntary" in the automobile cases, it may be noted that it has been held, con-

¹⁹⁵White, *Liability of an Automobile Driver to a Non-Paying Passenger*, (1934) 20 Va. L. R. 326, 348: "In its application to the passenger, the foundation or major premises of the assumption of risk theory is that in so far as the driver is concerned, the passenger voluntarily takes his place as a passenger in the car. If the passenger has no right to enter the car without the driver's consent, and no coercion is exerted to cause him to enter the car, or to remain in it, then by entering or remaining in the car, the passenger impliedly, if not in words, consents to all of those things of which he has notice. Having consented to them, he assumes in so far as the driver is concerned the risk of injury that flows from them."

¹⁹⁶The idea seems to be implicit in the case of *Cruden v. Fentham*, (1799) 2 Esp. 685, and is specifically expressed in *McGeever v. O'Byrne*, (1919) 203 Ala. 266, 82 So. 508 and *Guile v. Greenberg*, (1934) 192 Minn. 548, 257 N. W. 649.

¹⁹⁷*Freedman v. Hurwitz*, (1933) 116 Conn. 283, 164 Atl. 647. And apparently the question as to whether the plaintiff acted voluntarily in remaining in a vehicle with knowledge of reckless driving by the host has been considered as a question of her "reasonableness" in continuing the journey. See *Hemington v. Hemington*, (1922) 221 Mich. 206, 190 N. W. 203.

¹⁹⁸*Knipfer v. Shaw*, (1933) 210 Wis. 617, 246 N. W. 328. This interpretation seems to have been generally adopted. See *Wright v. Sellers*, (1938) 25 Cal. App. (2d) 590, 78 P. (2d) 209; *White v. McVicker*, (1933) 216 Iowa 90, 246 N. W. 385; *Edwards v. Kirk*, (1940) 227 Iowa 684, 288 N. W. 875; *Pinckard v. Pease*, (1921) 155 Wash. 282, 197 Pac. 49; *Young v. Nunn, Bush & Weldon Shoe Co.*, (1933) 212 Wis. 403, 249 N. W. 278; *Switzer v. Weimer*, (1939) 230 Wis. 599, 284 N. W. 509, and especially the case of *Helgestad v. North*, (1940) 233 Wis. 349, 289 N. W. 822, emphasizing this requirement of the doctrine.

formable to the rule in the master and servant cases, that a person in the custody of law enforcement officers assumes no risk of injury arising from the incompetence of the driver,¹⁹⁹ or defects in the mechanical condition of the vehicle.²⁰⁰ And in an eminently sensible decision, the Wisconsin court has suggested that it was unreasonable for a passenger to continue transportation with a drunken, sleepy driver when it was possible for him to disembark and spend the remainder of the night at a tavern.²⁰¹

B. ELEMENTS OF "KNOWLEDGE" AND "APPRECIATION" OF PERIL AS INDISTINGUISHABLE FROM CONTRIBUTORY NEGLIGENCE

It must be obvious that in order to have an assumption of a risk there must be knowledge, actual or implied, of the existence of the risk itself, and courts have so held. But what kind of "knowledge" must be shown? A man taking a journey upon a railroad train knows when he leaves the station that some element of risk is attached to the adventure; a man crossing the street knows that there is a possibility that in the movement of traffic an untoward occurrence may take place which will cause him damage; a man getting into a bath tub realizes that certain risks are involved in his bathing activities. So, also, a man accepting the hospitality of a drunken, reckless driver knows that some risk is present. The knowledge may be a part of the actor's general intellectual inheritance, or it may be a present foreboding of danger accompanied by a determination to encounter whatever risk may be involved. In any of the cases suggested, it might properly be said that "knowledge" of the risk was present in the mind of the actor. But the question of the quantum of "knowledge" necessary, and the distinction, if any there be, between the knowledge of peril necessary to support the doctrine of assumption of risk and that necessary to support of a finding of contributory negligence has not received the specific attention of the courts.

It is obvious, of course, that as a matter of proof it is impossible to show that the individual against whom the doctrine is sought to be invoked had actual knowledge of the peril. While a limited number of courts, under peculiar circumstances presented by individual cases, have held that actual knowledge must be

¹⁹⁹*Kuhle v. Ladwig*, (1941) 237 Wis. 147, 295 N. W. 41.

²⁰⁰*Russo v. State*, (1938) 166 Misc. Rep. 316, 2 N. Y. S. (2d) 350.

²⁰¹*Markovich v. Schlafke*, (1939) 230 Wis. 639, 284 N. W. 516.

proved,²⁰² it has been said in most jurisdictions that the requirements of the doctrine have been satisfied when it appears that the plaintiff (regardless of his mental state) had or should have had knowledge of the existence of the dangerous condition.²⁰³ In either case, an objective standard must be set up by which to measure the knowledge of the plaintiff. Courts have not been clear as to the nature of the standard, and the decisions are of little assistance in establishing the circumstances under which it must be said that knowledge of the danger is apparent. Nor is there any way of distinguishing this requirement from the general requisite in the contributory negligence doctrine that one must act as a reasonably prudent man. The distinction which immediately presents itself suggests that under the doctrine of assumption of risk the plaintiff is under a duty to know the facts before him, but not (as sometimes obtains in the doctrine of contributory negligence) to engage in an exploration to ascertain what specific dangers may be encountered, or to investigate potential perils. But such a distinction concerns verbiage rather than substance.

²⁰²*Gentzkow v. Portland Ry. Co.*, (1909) 54 Or. 114, 102 Pac. 614, (licensor-licensee); *National Motor Vehicle Co. v. Kellum*, (1915) 184 Ind. 457, 109 N. E. 196, (semble: where mechanic riding in racing car was killed because of latent defect in the track and his representative sued the owner of the track and mechanic's employer, it was held that the mechanic did not assume the risk where he did not know and had no opportunity of learning of the defect since it was not his duty to inspect the roadway, but the principle adopted might properly be classified also as a refusal to find that the deceased had acted other than a reasonably prudent man would have acted); *Hathaway v. New York N. H. & H. R. Co.*, (1902) 182 Mass. 286, 65 N. E. 387; *Warren v. Boston & M. R. R.*, (1895) 163 Mass. 484, 40 N. E. 895.

²⁰³As to cases involving master and servant, see those collected by Labatt, *Master and Servant*, (1913) 3620, 3621, and his suggestion: "Where direct proof of the servant's knowledge is not obtainable, the problem for solution is whether the circumstances are such that constructive notice of the danger must be imputed to him. The point to be determined is whether the servant ought, as a reasonably careful man, to have ascertained the nature and extent of the perils to which he was exposed"; see also *Beatman v. Miles*, (1921) 27 Wyo. 481, 199 Pac. 933; *Seaboard Airline R. Co. v. Horton*, (1914) 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, rev'g (1913) 162 N. C. 424, 78 S. C. 494; *Yazoo & M. V. R. Co. v. Wright*, (1914) 235 U. S. 375, 59 L. Ed. 277, 35 Sup. Ct. 130; as to licensee-licensor cases, see *Hanley v. Eastern Steamship Corp.*, (1915) 221 Mass. 125, 109 N. E. 167; cases cited in note 138, supra; *Kroger Grocery & Baking Co. v. Monroe*, (1931) 237 Ky. 60, 34 S. W. (2d) 929; *Lorenzo v. Atlantic etc. R. Co.*, (1915) 101 S. C. 409, 85 S. E. 964; *Hopkins v. West Jersey & S. Ry. Co.*, (1909) 225 Pa. St. 193, 73 Atl. 1104; as to cases involving defective ways, see *City of Columbus v. Griggs*, (1901) 113 Ga. 597, 38 S. E. 953; semble: *Williams v. Main Island Creek Coal Co.*, (1919) 83 W. Va. 464, 98 S. E. 511, and cases cited. And see *Lee v. B. & O. R. Co.*, (1914) 246 Pa. St. 566, 92 Atl. 719: "He assumed the risk of the danger he had reason to apprehend but not that of which he had neither knowledge nor means of knowledge. . . ."

It is assumed in either situation that a greater or lesser degree of peril exists and that the actor knows of it: under neither doctrine can it be said that one is guilty of legal fault, if, seeing what is obvious, there is no indication of danger in a course of conduct subsequently pursued; and if danger is discernible in the circumstances there is "knowledge" for the purpose of assumption of risk and that of contributory negligence as well. Although it is occasionally suggested that the peril must be more immediate, or of a more dangerous nature to invoke the doctrine of assumption of risk than that of contributory negligence, courts seldom have accepted this conclusion, and a distinction between classifications of legal fault based upon the degree of observability of a danger was found to be a quicksand when applied in the early cases relating to slight, ordinary and gross negligence.

The only general rule which would seem to apply in measuring the quantum of peril which must be known to justify the application of the doctrine of assumption of risk is that the doctrine is involved when such knowledge of the risk is apparent that a reasonably prudent man would not have encountered it under all the circumstances. In view of the use of that standard in the contributory negligence cases, it would seem improper to require less care; the standard is substantially that which is now applied in the cases relating to assumption of risk,²⁰⁴ and, in any event, no more definitive standard of measurement of the amount of risk necessary to impute "knowledge" appears to be available.

It has often been suggested that not only must the circumstances out of which the potential perils arise be "known," but the danger involved must also be "appreciated" by the actor. As in cases involving "knowledge" of peril, the courts in ascertaining the existence of "appreciation" of the risk seek to establish an essentially subjective standard of conduct by reference to objective circumstances. Hence the observations above, made with reference to the requirement of the doctrine that the risk be "known," apply with additional force to interpretation of the term "appreciated" as an element of the concept. Especially does the measurement of legal fault here depend on factors completely incapable of proof except by conclusions of the courts that specified conduct shows the nature of the state of mind of the actor. Here also the affinity to the contributory negligence theory is manifest.

²⁰⁴Ibid. See, especially, *Yazoo & M. V. R. Co. v. Wright*, (1914) 235 U. S. 376, 59 L. Ed. 277, 35 Sup. Ct. 130, and *Lorenzo v. Atlantic etc. R. Co.* (1915) 101 S. C. 409, 85 S. E. 964, for well articulated techniques in ascertaining the existence of "knowledge."

Since the law takes no account of a mental attitude, except in so far as it may express itself in overt acts, the investigation of whether the danger has been "appreciated" must be determined on the same circumstances as those which suggest the inquiry whether the plaintiff was guilty of contributory negligence.²⁰⁵

C. THE REQUIREMENTS OF "KNOWLEDGE" AND "APPRECIATION"
IN THE AUTOMOBILE CASES

Where, in automobile cases, the doctrine is used to limit the "duty" of the defendant, a showing of plaintiff's "knowledge" and "appreciation" of peril is obviously unnecessary.

Where the term is used in describing the "conduct" of the guest, the impact on the automobile cases of the requirements that the danger be "known" and "appreciated" is important. In these cases, the courts have had to meet a dilemma in application of the doctrine: If the requirements of the doctrine are that actual knowledge and appreciation of danger must be proved, the doctrine will in normal conditions be inapplicable, for proof of the mental state of the guest would be impossible without the legal fiction of constructive knowledge and appreciation; while if knowledge and appreciation of the risk were to be imputed to him from the facts surrounding the journey, the courts would be hard pressed to find a standard of conduct by which to measure the fault of the plaintiff and the legal consequences attendant thereto, distinguishable, as are the consequences of the application of the doctrine, from the concept of contributory negligence.

Here the essential question revolves around the area of risk which must be known before the doctrine must be invoked. Obviously, exact anticipation of the damage is not required; if damage through the misconduct of the host were a certainty, the guest would never embark on the adventure. Obviously also a mere foreboding of injury, unconnected with any of the characteristics of the host as a driver, or known defects in his vehicle, would be insufficient to justify the application of the rule. Thus the question in these cases is not ultimately *whether* the guest must know and appreciate the existence of a risk, but what *degree* of knowledge and understanding will suffice to invoke the doctrine. A jury may be instructed that to apply principles of assumption of risk, it must appear that the plaintiff knew and appreciated the danger, but the quantum of knowledge and appreciation of

²⁰⁵Cf. Labatt, *Master and Servant*, (1913) 3619, as to the same theory with reference to "volens."

peril will still be unmeasured. Some courts have suggested that the doctrine is applicable if the plaintiff knew and appreciated,²⁰⁶ or ought to have known and appreciated,²⁰⁷ the peril, while other courts have dealt with similar factual situations on the assumption that constructive knowledge and appreciation of peril is sufficient.²⁰⁸ Here the analogy to the doctrine of contributory negligence becomes pronounced. Where, as here, the question of constructive knowledge and appreciation is involved, it is unimportant whether the problem is posed as one of constructive knowledge and appreciation in the first place or whether the jury is asked to say that the plaintiff knew and appreciated, or *ought* to have known and appreciated the peril. Ultimately, the suggestions are only two ways of saying the same thing; and in either case the reference to be made by the jury essentially relates to whether the plaintiff knew and realized that which, as a reasonably prudent man, he should have known and realized.

Where the question has been raised as to whether the verdict of the jury is sustained by substantial evidence, the approach of the courts is substantially the same as where contributory negli-

²⁰⁶*Knipfer v. Shaw*, (1933) 210 Wis. 617, 246 N. W. 328, sets out the standard rule for automobile cases in that state, holding the doctrine to be applicable when the following is shown: "(1) a hazard or danger inconsistent with the safety of the guest; (2) knowledge and appreciation of the hazard by the guest; and (3) acquiescence or a willingness to proceed in the face of the danger." The measurement of the quantum of danger apparent in circumstances, by which actual and constructive knowledge and appreciation of the hazard is measured as a matter of law, is treated in an excellent Comment, (1937) 12 Wisc. L. R. 376, 378-380, and Wisconsin cases cited. See also *White v. McVicker*, (1933) 216 Iowa 90, 246 N. W. 385, and *Edwards v. Kirk*, (1940) 227 Iowa 684, 288 N. W. 875; *McGeever v. O'Byrne*, (1919) 203 Ala. 266, 82 So. 508; *Guile v. Greenberg*, (1934) 192 Minn. 548, 257 N. W. 649.

²⁰⁷*Marks v. Dorkin*, (1927) 105 Conn. 521, 136 Atl. 83: "Contributory negligence or assumption of risk in relation to the negligent driving of a car cannot arise until it is disclosed to, or ought to have been known to, the guest that the driver is driving negligently. . . ." and see *Freedman v. Hurwitz*, (1933) 116 Conn. 283, 164 Atl. 647, saying that the guest must or ought reasonably to have perceived that peril existed, before the doctrine is applicable.

²⁰⁸See *Hall v. Wilkerson*, (Mo. App. 1935) 84 S. W. (2d) 1063, holding that where an automobile had twice skidded on icy pavement and guest knew "something of the risk" she was taking and asked the host to "drive slow," "there was no evidence showing that plaintiff voluntarily exposed herself to a known and appreciated danger due to the wrongful act of the defendant; hence, she did not assume the risk." *Nardone v. Milton Fire Dist.*, (1941) 261 App. Div. 717, 27 N. Y. S. (2d) 489; *Pettys v. Leith*, (1933) 62 S. D. 149, 252 N. W. 18; *Krueger v. Krueger*, (1929) 197 Wis. 588, 222 N. W. 784; a case where the driver fell asleep on day following a night spent in the car due to a breakdown of the car: "She [plaintiff] was bound to know, as a matter of common knowledge, that a result such as did follow, viz., of the defendant dozing at the wheel, was reasonably to be expected as an aftermath of the experience which they had all undergone since the preceding noon, although she testified to the contrary. . . ."

gence as a matter of law is urged as a bar to the plaintiff's action. Factual situations slip into more or less conventional patterns, ultimately resulting in a very general rule of conduct said to constitute contributory negligence or assumption of risk. As with the doctrine of contributory negligence in the automobile accident field, however, a multitude of factors, never twice the same, must be weighed to determine the presence of knowledge and appreciation of peril in each case, and accurate prognostication as to the effect of the presence of one factor or set of factors is difficult. Nowhere is a general standard set forth to guide either the jury or the courts as to the quantum of knowledge necessary to invoke the doctrine.

Many of the cases, however, illustrate the extreme flexibility of the requirement of "knowledge" when applied in designating the scope of the area of conduct in which the doctrine is controlling. Where former recklessness of the host is known,²⁰⁹ it is sometimes said that this constitutes knowledge of a peril although it has also been suggested that knowledge of such a general nature is insufficient to support the doctrine.²¹⁰ It has been held that one permitting another to back out into the street without looking does not have such knowledge of peril as to justify the application of the doctrine.²¹¹ The decisions setting out the degree of knowledge necessary to show that the guest assumes the risk of the failure of the host to keep a proper lookout seem hopelessly confused,²¹² and amply illustrate that "knowledge" and "apprecia-

²⁰⁹Knowledge by a guest of former recklessness of his host is discussed in detail in the second section of this article, at notes 274-279.

²¹⁰See, e. g., *Marks v. Dorkin*, (1927) 105 Conn. 521, 136 Atl. 83.

²¹¹*Fischer v. London Guarantee and Accident Co.*, (1939) 230 Wis. 47, 283 N. W. 295: "She did testify that she looked to the rear and observed the position of the car with respect to the pavement and felt that there was no danger. The encroachment by her side of the car was considerably less than . . . by the left side of the car. She perhaps did not appreciate the fact that the position of the car was in an oblique position. She was . . . a guest . . . and the duty which rested on her was clearly not as great as . . . upon her husband."

²¹²Where host and guest were driving together in a heavy fog and host was watching his side and guest was watching hers, it was held that the guest assumed the risk of the journey because she had knowledge of how difficult it was for the host to see. *Knipfer v. Shaw*, (1933) 210 Wis. 617, 246 N. W. 328. But where the host was operating the automobile in a driving rain and overlooked warning signs on a road under construction and finally ran into a road barrier, the court set aside a verdict of the jury that the guest had assumed the risk. *Cummings v. Nelson*, (1933) 213 Wis. 121, 250 N. W. 759. And where the windshield of the guest was covered with snow so that he could not tell that the driver was in part on the wrong side of the road he did not assume the risks arising from such driving, for he could not see how the driver was operating the car. *Duss v. Friess*, (1937) 225 Wis. 406, 273 N. W. 547.

tion" are words of elastic import in fact measured (as under the doctrine of contributory negligence) by ascertaining what conduct may be reasonable under all the circumstances. In one case where the host had a tendency toward speeding, and on the trip in question speeded up more than usual, a new trial was granted upon a verdict for the guest where he knew of the general tendency of the host toward speeding;²¹³ and it has been held that where the guest had knowledge of excessive speed and protested, the guest could assume that the driver would heed the protest.²¹⁴ And in a case where the guest was teaching the host how to drive, it was held that "it might be inferred that the plaintiff would reasonably assume that there was no danger" in so doing, even though the incompetence of the host was clear.²¹⁵ It has been held also that one knowing of a defective door, which during the journey swung open and caused damage to the guest, did not voluntarily expose himself to a "known risk" by riding next to the door;²¹⁶ and that when the guest had an opportunity to leave the vehicle after knowledge of the recklessness of the driver she assumed no risk in law, for the driver had in fact made reckless use of the faculties which she had.²¹⁷ Other courts have said, where a guest was sitting in the front seat of the vehicle when vision was obscured, that he was²¹⁸ and was not²¹⁹ chargeable with knowledge that the driver would be unable to stop within the range of the assured clear distance ahead. Still another case has held that knowledge is not in fact required, making application of the doctrine in a case involving an individual so completely intoxicated as to be unable to comprehend that the host was in a drunken state.²²⁰

The method of interpretation of the requirements of the doctrine as above set forth amply illustrates the similarity of the judicial approach in the application of the doctrine of contributory negligence and that of assumption of risk. The rationalization of a distinction between the two theories rests upon the assumption that the plaintiff ought to be subjected to greater disability from recovery of the defendant where he knowingly en-

²¹³Fontaine v. Fontaine, (1931) 205 Wis. 570, 238 N. W. 410.

²¹⁴Ragland v. Snotzmeier, (1933) 186 Ark. 778, 55 S. W. (2d) 932.

²¹⁵Holland v. Pitocchelli, (1938) 299 Mass. 554, 13 N. E. (2d) 390.

²¹⁶Zimmer v. Little (1940) 138 Pa. Super. 374, 10 A. (2d) 911. The case treated the doctrines of assumption of risk and contributory negligence without distinction between the two.

²¹⁷Hemington v. Hemington, (1922) 221 Mich. 206, 190 N. W. 203.

²¹⁸Walker v. Kroger Grocery & Baking Company, (1934) 214 Wis. 519, 252 N. W. 721.

²¹⁹Helgestad v. North, (1940) 233 Wis. 349, 289 N. W. 822.

²²⁰Schubring v. Weggen, (1940) 234 Wis. 517, 291 N. W. 788.

counters a risk than where he carelessly or inadvertently encounters a risk. If a measurement of the subjective quality of plaintiff's actual "knowledge" were practicable, this distinction might be justified from an ethical standpoint. But such differentiation breaks down when it is noted that in decisions utilizing the "assumption of risk" concept, it is generally conceded that knowledge of peril may be constructive as well as actual. In neither doctrine may it be said that there is a definitive content in the basic rule of conduct: Whether a man should act as a reasonably prudent man, or whether a man must be said to know and appreciate an area of peril at the point when he ought, as a reasonably prudent man, to know and appreciate it. There seems to be no logical reason why the standard of measurement of the extent of the knowledge and appreciation of danger necessary to invoke an application of the rule of assumption of risk should not generally be announced to be the conduct of a reasonably prudent man in like circumstances—the same rule as now obtains in the field of contributory negligence.

D. QUESTIONS FOR THE JURY

One of the most confusing features about the doctrine of assumption of risk, at first examination, is that of determining what questions are to be decided by the jury. This arises from the dual nature of the use of the term "assumption of risk," which in one area refers to the "duty" owed by the defendant and at another point to the "conduct" of the plaintiff. Where it is said that a trespasser coming on to the land of another "assumes the risk" of the condition of the premises (meaning that no duty is owed the trespasser by the possessor to make the premises safe for his reception), the question relates to a standard of legal conduct, referable to legal principles principally in the absence of dispute of fact as to the status of the injured party as a trespasser, and must be determined by the court as a matter of legal duty.

But where the definitive standard of care constitutes a bar to an action by the plaintiff for misconduct of the defendant which in the absence of the exercise of such care by the plaintiff would give rise to a cause of action for damages, determination of specific factual conclusions within the framework of the legal principles enunciated is imperative. Where the doctrine requires, as it does in such cases, knowledge and appreciation of the risk involved, and volitional action by the plaintiff, the presence of such factors has been traditionally determined by the jury. Citations on the subject could be multiplied, but it is sufficient to say that

among many cases examined the writer has discovered no decision applying the doctrine in which this conclusion has been challenged.²²¹ It ought also be noted that not only are questions relating to the requirements of the doctrine matters for jury determination, but so also are questions of causation. In automobile cases especially, it has been noted that the question of whether the risk assumed, or another peril, caused the plaintiff's damage is properly a question for the jury.²²²

The division of duties between the court and jury in such cases is analogous to that in the case of contributory negligence. The degree of knowledge, appreciation or voluntary conduct which is sufficient to justify the application of the doctrine may be more or less precisely defined by one or more precedents set up by the same or other appellate courts. Where factual situations have recurred with an indeterminate amount of frequency, as has been suggested with reference to the cases involving the content of the requirement of "knowledge," it is possible to find some guide in the decisions to establish, as a matter of law, the realm within which the decision of the jury may be made. The extent of the restriction of the right of an appellate tribunal to reverse the findings of the trial jury has not been definitely stated. In theory the jury resolves all conflict in the testimony. Where the problem arises as to inferences to be drawn from admitted facts (i.e., whether the facts show that the guest acted with constructive knowledge, or voluntarily, or whether the damage resulted from the risk assumed or one not assumed), appellate courts have followed the general rule that if only one inference can reasonably be drawn, a verdict at variance with such inference must be set aside upon appeal. In a sense this sets up required standards of conduct to which the plaintiff must conform or it will be said that his acts preclude a recovery for damages otherwise recoverable.

(To be Continued)

²²¹See *Woodman v. Peck*, (1939) 9 N. H. 292, 7 A. (2d) 251 in which this theory was mentioned, but the doctrine of assumption of risk was not applied.

²²²While courts have not discussed the causation of the damage suffered as a question for the jury as often as consideration has been given the requirements of the doctrine as appropriate for jury determination, it is clear that this factor is a question of fact upon which the conclusion of the jury is final. *Coca-Cola Bottling Co. v. Brown*, (1918) 139 Tenn. 640, 202 S. W. 926; *Madden v. Peart*, (1930) 201 Wis. 259, 229 N. W. 57; *Koscuik v. Sherf*, (1937) 224 Wis. 217, 272 N. W. 8, unless, "the only permissible inference" (*Thomas v. Steppert*, (1930) 200 Wis. 388, 228 N. W. 513) is that the accident happened from the risk assumed and the jury found otherwise, or there is no evidence to sustain the finding of the jury concerning the relation of the risk assumed to the causation of the damage sustained, (*Schwab v. Martin*, (1938) 228 Wis. 45, 279 N. W. 699).