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The Place of Assumption of Risk in the Law of Negligence

John W. Wade*

The "doctrine" of assumption of risk is a controversial one, and there is considerable disagreement as to the part which it should play in a negligence case.¹ On the one hand it has a beguiling simplicity about it, offering the opportunity of easily disposing of certain cases on a single issue without the need of giving consideration to other, more difficult, issues. On the other hand it overlaps and duplicates certain other doctrines, and its simplicity proves to be misleading because of its failure to point out the policy problems which may be more adequately presented by the other doctrines.

Courts disagree as to the scope of the doctrine, some of them confining it to the situation where there is a contractual relation between the parties,² and others expanding it to any situation in which an action might be brought for negligence.³ Text-writers and commentators commonly criticize the wide application of the doctrine, and not infrequently suggest that the doctrine is entirely tautological.⁴ Like Mr. J. S. Ewart on the subject of waiver,⁵ they would completely "distribute" the subject of assumption of risk to certain other topics where they contend the analysis would make the problems more accurately understood and handled.

Volume Two of the *Restatement of Torts*, which covers the subject of "Negligence," contains no separate treatment of assumption of risk. Section 466, defining the "types of contributory negligence," includes as the first type plaintiff's "intentional and unreasonable exposure of himself to danger . . . of

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1. There is not even agreement on the name. The British frequently use the maxim, *volenti non fit injuria*. For origins of the two expressions, see Rice, *The Automobile Guest and the Rationale of Assumption of Risk*, 27 MINN. L. REV. 323, 324-34 (1943).

2. See, e.g., *Conrad v. Springfield Consol. Ry.*, 240 Ill. 12, 88 N.E. 180 (1909), confining the application to the relationship of master and servant.

3. This, of course, is the majority rule; many cases might be cited.

4. See, e.g., 2 HARPER AND JAMES, TORTS § 21.8 (1956); Editorial, 73 N.J.L.J. 346 (1950).

5. EWART, WAIVER DISTRIBUTED (1917).

which [he] knows or has reason to know."⁶ The comments make it clear that the drafters were aware of the fact that this is frequently called assumption of risk, and they also refer to the use of the phrase to cover the situation where the defendant was under no duty to do more than warn the plaintiff of a dangerous condition.⁷ The omission of a separate treatment of the subject was therefore intended and deliberate. This is somewhat remarkable in view of the fact that Professor Francis H. Bohlen, the Reporter, had earlier written two extensive articles on assumption of risk and on contributory negligence⁸ in which he had attempted to differentiate sharply between the two, indicating that the "differences between [them] are many and fundamental" and that they have "essentially dissimilar character."⁹ Apparently he changed his mind.¹⁰ And apparently the drafters of the *Restatement* had second thoughts too, because in the final closing sections of the *Restatement*, in Volume Four, they inserted Section 893, restoring the "defense of assumption of risk."¹¹ This mind-changing process is apparently endemic to reflective contemplation of the subject of assumption of risk over a period of years. On the basis of oral statements, many luminaries in the field of Tort-thinkers have fallen victim to the malady.

During recent years, the preparation of *Restatement Second on Torts* has been proceeding slowly but steadily. Not long ago,

6. "The plaintiff's contributory negligence may be either (a) an intentional and unreasonable exposure of himself to danger created by the defendant's negligence of which danger the plaintiff knows or has reason to know, or (b) conduct which, in respects other than those stated in Clause (a), falls short of the standard to which the reasonable man should conform in order to protect himself from harm." RESTATEMENT, TORTS § 466 (1934).

7. *Id.* Comment d.

8. Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 91 (1906); Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233 (1908). The two articles are reprinted in BOHLEN, *STUDIES IN THE LAW OF TORTS*, at 441 and 500 (1926).

9. BOHLEN, *STUDIES IN THE LAW OF TORTS* 516, 518 (1926). The differences are set out in detail *id.* at 516-18; see also *id.* at 445-47.

10. Even in his early articles, however, Mr. Bohlen took the position that assumption of risk "negatives the existence of any duty on the defendant's part by the breach of which he could be a wrongdoer." *Id.* at 446. This is the principal reason why no separate treatment was given to assumption of risk in the *Restatement*.

11. "A person who knows that another has created a danger or is doing a dangerous act or that the land or chattels of another are dangerous, and who nevertheless chooses to enter upon or to remain within or permit his things to remain within the area of risk is not entitled to recover for harm unintentionally caused to him or his things by the other's conduct or by the condition of the premises, except where the other's conduct constitutes a breach of duty to him or to a third person and has created a situation in which it is reasonably necessary to undergo a risk in order to protect a right or avert a harm." RESTATEMENT, TORTS § 893 (1939).

the Reporter and his advisers reached the subject of contributory negligence. When a proposal was made that a treatment of assumption of risk should be inserted at this place, it is not exaggerating to say that a difference of opinion took place. Arguments continued past the time of the meeting and took the form of exchanged memoranda which occasionally afforded more light (to receptive minds) than heat. The issues of whether there should be a separate treatment of assumption of risk at this place, and if so, what it should say, are still in the due deliberative process of the American Law Institute. This makes it inappropriate to cite the position taken by individual persons in the discussion. Nor is there point in using this occasion to repeat the arguments as to how far the drafters of the *Restatement* are controlled by the language of the opinions and how far they are justified in using their own ideas of accurate analysis so long as it explains the actual holdings of the courts. But there is value in setting down some of the viewpoints as to what is accurate and logical analysis of the subject of assumption of risk in negligence. Or so it appeared to Professor Wex Malone, who persuaded three of the advisers to write on the subject and added three other well-known writers in the field. This paper is in a measure an introduction to the other five in the symposium. It will offer little that is new, but may perhaps assist in lending some order to a confused and confusing subject. As an introduction, it will be brief, to the point of producing an over-simplification, and at the expense of omitting discussion of many points of importance.

ASSUMPTION OF RISK AND CONSENT

In the field of intentional torts plaintiff's consent to the tortious invasion has long been recognized as a defense. Consent has not been an established rubric in the law of negligence, but there is no reason why it cannot exist here too. Consent to what? In both intentional torts and negligence the consent is to defendant's conduct. In the intentional tort this involves consent to the actual invasion of the plaintiff's interest in person or property. In negligence it involves only his agreement to being subjected to a danger of possible invasion. In other words the plaintiff "assumes the risk." Consent to the intentional tort is normally given prior to the defendant's action and may influence that action. "Assumption of risk" to defendant's negligence may take place under circumstances where defendant is aware of it and

it can affect his conduct, and also under circumstances where the defendant knows nothing of it or can no longer act. The first of these is sufficiently similar to the recognized concept of consent to be identified with it and treated like it. The second raises somewhat different problems.¹²

An express consent or assumption of risk is quite generally recognized, and whether written or oral, will constitute a good defense to a negligence action unless there is a statute or established public policy against it.¹³

Just as a contract may be implied as well as express, so may assumption of risk in the consent sense. There are two ways in which the courts have held an implied assumption of risk to exist. The first is to imply an unexpressed clause or provision into an existing contract. Thus, early cases involving assumption of risk involved the master-and-servant relationship, and the courts implied into the employment contract a provision that the servant assumed the risks which were normal to the activity.¹⁴ This technique has also been used in many other situations, such as a social guest accepting an invitation to visit a home¹⁵ or a baseball fan purchasing a ticket to a game.¹⁶

The second is to imply an assumption of risk from the plaintiff's conduct. A true contract may be indicated by conduct as well as by express language. So may actual consent or actual willingness on the part of the plaintiff to take on himself or assume the risk created by defendant's dangerous conduct. But as in the case of a contract implied in fact there must be a real contract between the parties, so in the case of implied assumption of risk there should be actual willingness to accept the risk.¹⁷

12. See page 11 *infra*.

13. See PROSSER, TORTS 305-07 (2d ed. 1955); 2 HARPER & JAMES, TORTS § 21.6 (1956).

14. "But if a servant enters into an employment knowing there is danger and is satisfied to take the risk, it becomes part of the contract between him and his employer, that the servant shall expose himself to such risks as he knows are consistent with the employment." Saxton v. Hawksworth, 26 L.T. 851, 853 (Ex. Ch. 1872). See also Farwell v. Boston & Worcester R.R., 4 Metc. 49 (Mass. 1842); 3 LABATT, MASTER AND SERVANT § 1186 (1913).

15. "A guest enjoying by invitation unrecompensed hospitality at the house of another must be presumed to accept such generous entertainment with an understanding that he accommodates himself to the conditions of his host." Comeau v. Comeau, 285 Mass. 578, 579, 189 N.E. 588, 589-90, 92 A.L.R. 1002 (1934). See also Southcote v. Stanley, 1 H.&N. 247, 156 Eng. Rep. 1195 (Ex. 1856).

16. The baseball cases are treated at length in Note, *The Liability of the Proprietor of a Baseball Park for Injuries to Spectators Struck by Batted or Thrown Balls*, 1951 WASH. U. L. Q. 434.

17. As Bowen, L. J., put it in Thomas v. Quartermaine, 18 Q.B.D. 685, 696

It should be readily apparent that both of these types of implied assumption of risk are easily subject to undue extension. When a contractual relation exists between the parties, courts may and on occasion do freely insert provisions which they think are desirable for policy reasons, regardless of any actual agreement to this effect.¹⁸ Plaintiff's conduct may be characterized as assumption of risk regardless of his willingness or consent. The policy reasons for holding no recovery in these cases may be meritorious, but they should be brought out into the open and not hidden behind a fiction involving the misleading use of the expression, assumption of risk.

Using the term, assumption of risk, may perhaps be more conducive to this abusive expansion than using the term, consent, with its connotation of subjective agreement.¹⁹

ASSUMPTION OF RISK AND DEFENDANT'S DUTY TO USE CARE

A landowner is not always under a duty to use care to make the condition of his premises safe. To a licensee, for example, he owes only the limited duty to warn of a known, latent dangerous condition.²⁰ Where the defect is apparent, many courts hold for the defendant, not by stating that the defendant was not guilty of a breach of duty, but only by stating that the licensee assumed the risk of all apparent defects.²¹

This approach has not been confined to the limited-duty situation. Even in the case of an invitee the landowner may

(1887), "The maxim, be it observed, is not '*scienti non fit injuria*,' but '*volenti*.' It is plain that mere knowledge may not be a conclusive defence."

18. "In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned, under given circumstances." Shaw, C. J., in *Farwell v. Boston & Worcester R.R.*, 4 Metc. 49, 58 (Mass. 1842). See also *Chicago & N.W.R.R. v. Moranda*, 93 Ill. 302, 320 (1879).

19. This is not to suggest that the concept of conduct may not also be unduly enlarged by use of a fiction. Compare, for example, the explanation sometimes given that physical contacts in normal social intercourse do not constitute a battery because they are consented to. Consent here may be completely fictitious. The *Restatement* treats this problem more realistically by saying that the touching must be harmful or offensive to constitute a battery. See *RESTATEMENT, TORTS* §§ 13, 18 (1934).

20. See *RESTATEMENT, TORTS* § 342 (1934); *PROSSER, TORTS* § 77 (2d ed. 1955).

21. See generally Keeton, *Assumption of Risk and the Landowner*, 20 *TEXAS L. REV.* 562 (1942). For the similar situation regarding automobile guests, see Rice, *The Automobile Guest and the Rationale of Assumption of Risk*, 27 *MINN. L. REV.* 323, 429 (1943).

satisfy his duty to use care if the defective condition of the premises is entirely apparent or if he warns the invitee of its presence.²² Here, too, it is often stated that the invitee assumed the risk and cannot recover for this reason. Perhaps this is one way of emphasizing that a defendant is not an insurer, and that safety can often be achieved only by a modicum of cooperation by the plaintiff in not deliberately subjecting himself to a known avoidable danger; after all, the defendant's duty is only to make the premises reasonably safe and he often may reasonably assume that the plaintiff would see the danger and appreciate it.

The two approaches — no breach of duty, and assumption of risk — may appear to be traveling the opposite two sides of a rectangle, reaching the same result in the end. In most cases, perhaps, the same result is reached. But the trouble is that the figure is not always a rectangle, and the two routes may lead to different destinations. In the limited-duty situation involving the licensee, for example, the duty is met and the defendant is not liable when the defective condition is apparent, whether the licensee knew of it or not; assumption of risk would come into play only if the plaintiff actually knew of and appreciated the danger.²³ Again, in the case of the invitee, the defendant's duty to use care may not be satisfied by a warning and he may be required to take further action to make the premises safe;²⁴ assumption of risk would lay the emphasis solely on the plaintiff's knowledge of the condition and his encountering it. Once again, the plaintiff may have been not competent to bind himself by assumption of risk, and still the defendant may not have breached his limited duty if he was not aware of the defective condition himself.²⁵ In each of these situations the breach-of-duty route reaches the correct destination and indicates the proper way to get there; but the assumption-of-risk route, while it often reaches the right destination, here winds up in the wrong place without letting the traveler

22. See, e.g., *Illinois Central R.R. v. Nichols*, 173 Tenn. 602, 118 S.W.2d 213 (1938). See generally Keeton, *Personal Injuries Resulting From Open and Obvious Conditions*, 100 U. PA. L. REV. 629 (1952).

23. The baseball cases provide a good illustration of this. See discussion in Malone, *Contributory Negligence and the Landowner Cases*, 29 MINN. L. REV. 61, 75-80 (1945); Note, 1951 WASH. U. L. Q. 434.

24. This is now recognized in the *Restatement*. See RESTATEMENT (SECOND), TORTS § 343A (Tent. Draft No. 5, 1960).

25. See, e.g., Campbell, Book Review, 26 MINN. L. REV. 137, 140 (1941), discussing *O'Shea v. Lavoy*, 175 Wis. 456, 185 N.W. 525 (1921); and *Eisenhut v. Eisenhut*, 212 Wis. 467, 248 N.W. 440 (1933).

know how he went astray. Defendant's duty and plaintiff's assumption of risk are not correlative and it is misleading to define one in terms of the other.

It has been strongly urged that even in the case of assumption of risk in the sense of actual consent, the true explanation of the holding for the defendant is that the defendant did not breach his duty to use care toward the plaintiff.²⁶ If the plaintiff's willingness to incur the risk, whether set out in express language or implied from conduct, has been indicated to the defendant and has thus influenced his conduct, there is much to be said for the argument. But observe that the argument might also be regarded as effective in the case where the plaintiff did not actually give consent but acted in such a fashion as to lead the defendant reasonably to believe that he consented, and so influenced the defendant's conduct.

On the other hand, both consent and assumption of risk have been regarded as affirmative defenses, with the burden of proof on the defendant. When defendant relies on plaintiff's consent to restrict the scope of his duty, it is unlikely that the problem will be treated otherwise than as an affirmative defense. If, however, defendant can contend that he did not breach his duty without having to rely upon express or implied consent of the plaintiff, then the issue is normally treated as a part of the plaintiff's case, on which he has the burden of proof.²⁷

ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE

Should assumption of risk be available as a separate defense in a case where defendant is negligent²⁸ and contributory negligence is presented as an issue? Many cases and authorities answer in the affirmative. They suggest that contributory negligence involves inadvertence or unintentional failure to measure up to a proper standard of self-protection, while assumption of risk involves the conscious and deliberate decision to encounter a known risk.²⁹ Again it is suggested contributory negligence

26. See, e.g., BOHLEN, *STUDIES IN THE LAW OF TORTS* 443 (1926).

27. See, generally, 2 HARPER & JAMES, *TORTS* 1190-91 (1956). Assumption of risk is normally treated as an affirmative defense. See, e.g., *Freedman v. Hurwitz*, 116 Conn. 283, 164 Atl. 647 (1933); *Jackson v. Chicago, M.S.P. & P. R.R.*, 238 Iowa 1253, 30 N.W.2d 97 (1947).

28. In the cases now being considered, it is assumed that the defendant has breached a duty to use care, and the plaintiff has not indicated a consent in such a fashion as to influence defendant's conduct.

29. See, e.g., *Porter v. Toledo Terminal R.R.*, 152 Ohio St. 463, 90 N.E.2d 142

is measured by the objective standard of the reasonable man while assumption of risk is controlled by the subjective intent of the plaintiff himself.³⁰

On the other hand it may be pointed out that no such distinction is taken regarding negligence of the defendant. It includes inadvertence as well as deliberate "taking a chance." The defendant is negligent whether he deliberately goes 40 miles per hour through a red light in a 30 m.p.h. speed zone, or whether he inadvertently reached the higher speed because he had something else on his mind and failed to watch the speedometer or to see the red light. If a light fixture fell from the ceiling in his store, the test is the same whether he failed to discover the defective condition, or he discovered it and decided it would be all right to let customers come in for a week or two until his electrician could find time to fix it. In the same fashion, it may be urged, contributory negligence should include both inadvertence and deliberate "taking of a chance," so long as the action is not that of a reasonable prudent man.

Perhaps the difference in viewpoint is best illustrated by the well-known case of *Eckert v. Long Island R.R.*³¹ There, plaintiff's intestate successfully rescued a small child from the railroad tracks in front of defendant's train, but was himself struck and killed. The jury found the defendant negligent in its operation of the train and the intestate not contributorily negligent, and judgment was entered for the plaintiff. The New York Court of Appeals divided on the appeal, the majority affirming on the ground that the jury were justified in finding the conduct negligent, and the minority sharply dissenting on the ground that the intestate voluntarily subjected himself to the danger and must take the consequences of his act. One opinion spoke in terms of contributory negligence,³² the other

(1950), 19 U. CIN. L. REV. 407 (1950); *Hunn v. Windsor Hotel Co.*, 119 W. Va. 215, 193 S.E. 57 (1937).

30. See, e.g., *Schrader v. Kriesel*, 232 Minn. 238, 45 N.W.2d 395 (1950); *Landrum v. Roddy*, 143 Neb. 934, 12 N.W.2d 82 (1943); cf. Comment, *Distinction Between Assumption of Risk and Contributory Negligence in Wisconsin*, 1960 WIS. L. REV. 460.

31. 43 N.Y. 502, 3 Am. Rep. 721 (1871).

32. "For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent unless such as to be regarded as either rash or reckless." 43 N.Y. at 506.

of assumption of risk;³³ neither referred to the argument of the other.

Some courts and other authorities which use the assumption-of-risk approach would hold that the plaintiff could recover under the facts of the *Eckert* case on the ground that the decedent's assumption of the risk was not "voluntary."³⁴ Defendant's negligence had created a situation in which it was reasonably necessary for the decedent to act as he did in order to save the child. The choice was therefore forced on the decedent, and his action was not voluntary. It should be apparent that this approach uses the term "voluntary" to pass on the reasonableness of a plaintiff's conduct — and to determine whether the goal which he was seeking to attain justified the taking of the risk. This is the test of negligence again — balancing of magnitude versus utility of risk — and the test is much better perceived and evaluated by the use of the negligence terminology.

In cases where the defendant is guilty of wanton or reckless misconduct, contributory negligence is normally not treated as a defense, but assumption of risk may be a defense.³⁵ This has been an argument for differentiating the two defenses. But when assumption of risk is made a defense, plaintiff has deliberately subjected himself to the danger created by defendant's reckless conduct. Plaintiff's conduct may be treated as on the same level or plane as defendant's conduct and therefore a proper bar on this basis.³⁶ In addition, if plaintiff's conduct amounts to a consent, this is a defense which is available even against an intentional tort. Similar reasoning can be applied to the case of strict liability being imposed on the defendant, as when he keeps a wild animal.³⁷ Plaintiff's consciously ex-

33. "It is a well established rule, that no one can maintain an action for a wrong, when he consents or contributes to the act which occasions his loss. One who with liberty of choice, and knowledge of the hazard of injury, places himself in a position of danger, does so at his own peril, and must take the consequences of his act. . . . The defendant may have been running the train improperly, and perchance illegally, and so as to create a legal liability in respect to any one sustaining loss solely from such cause, but the company is not the insurer of, or liable to those who, of their own choice and with full notice, place themselves in the path of the train and are injured." *Id.* at 507-08.

34. See, PROSSER, *TORTS* 311-13 (2d ed. 1955); cf. 2 HARPER & JAMES, *TORTS* § 21.3 (1956).

35. See, e.g., *White v. McVicker*, 216 Iowa 90, 246 N.W. 385 (1933); *Schubring v. Weggen*, 234 Wis. 517, 291 N.W. 788 (1940).

36. See RESTATEMENT, *TORTS* § 503 (1934); *Brown v. Barber*, 26 Tenn. App. 534, 174 S.W.2d 298 (1943).

37. See 2 HARPER & JAMES, *TORTS* § 22.7 (1956).

posing himself to the animal is certainly on as high a plane as the conduct of defendant in keeping the animal.

This reasoning will not explain, however, certain cases involving statutes eliminating one of the two defenses in which the other has been held still applicable. These cases have frequently been criticized and may simply indicate the mix-up arising from the court's analysis.

CONCLUSION

The expression, assumption of risk, is a very confusing one. In application it conceals many policy issues, and it is constantly being used to beg the real question. Accurate analysis in the law of negligence would probably be advanced if the term were eradicated and the cases divided under the topics of consent, lack of duty, and contributory negligence. Then the true issues involved would be more clearly presented and the determinations, whether by judge or jury, could be more accurately and realistically rendered.

But the term appears to be here to stay. There is little indication that the courts have shown any tendency to relinquish its use.³⁸ Though it overlaps other fields there is a unifying idea in the cases coming within its circle — the idea that the plaintiff has deliberately subjected himself to the danger. To speak of assumption of risk in this situation is a natural thing to do. Persons with no legal background often use the term when speaking of factual situations like those in which the courts use it.

The advantages of the use of the expression, assumption of risk, are forensic and administrative. Assumption of risk often affords a quick and easy way of talking about the issue without undertaking an analysis of the total problem. It offers the court another legal device for use in handling a negligence case and thus increases the freedom of action of the deciding agency — whether trial judge, jury, or appellate court. Much of the time it does not prevent the court from reaching the correct result.

38. In *Klinsky v. Hansen Van Winkle Munning Co.*, 38 N.J. Super. 439, 119 A.2d 166 (1955), *aff'd mem.*, 20 N.J. 534, 120 A.2d 661 (1956), Clapp, J., carefully considered the arguments for eliminating the defense and decided that it should be retained in the landowner cases because it places the burden of proof on the defendant.

Professor Street suggests that in England, assumption of risk "is no longer an important defense in the tort of negligence." STREET, TORTS 174 (1955).

Its disadvantages lie primarily in its obfuscatory nature. It may either prevent an accurate analysis by the court of the real problems involved in reaching the decision, or permit the court to write an opinion which elides or covers up the real basis of the decision.

Do the advantages outweigh the disadvantages? Is it better to have more devices available for the free and unhampered use of the court or to set forth rules and principles in such a fashion that they afford more definite directions as to what the decision should be?

Should the "doctrine" of assumption of risk be kept intact or distributed to other parts of the law of negligence? Would it be better to compromise by speaking of assumption of risk in the sense of consent, assumption of risk in the sense of no breach of duty by defendant, and assumption of risk in the sense of contributory negligence?

Whatever may be the answers to these questions, it is safe to predict that the immediate future will see little change in the use of the defense by the courts. Perhaps the articles in this symposium will eventually have some effect on the judicial treatment of the "doctrine."³⁹

39. There have been numerous other treatments of the subject.

The classic treatment is found in the two articles of Bohlen: *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 91 (1906); and *Contributory Negligence*, 21 HARV. L. REV. 233 (1906). They are reprinted in BOHLEN, *STUDIES IN THE LAW OF TORTS*, at 441 and 500 (1926).

Earlier articles are Labatt, *The Relation Between Assumption of Risks and Contributory Negligence*, 31 AM. L. REV. 667 (1897); and Warren, *Volenti Non Fit Injuria in Actions of Negligence*, 8 HARV. L. REV. 457 (1895).

The most ambitious treatment is Rice, *The Automobile Guest and the Rationale of Assumption of Risk*, 27 MINN. L. REV. 323, 429 (1943). This 97-page article covers the whole subject and is not confined to the automobile-guest situation. On the latter, see also White, *Liability of an Automobile Driver to a Non-Paying Passenger*, 20 VA. L. REV. 326 (1934).

James, *Assumption of Risk*, 61 YALE L. J. 141 (1952) has been included in HARPER AND JAMES, *TORTS* (1956) as Chapter 21.

On the landowner cases, there are several valuable articles: Keeton, *Assumption of Risk and the Landowner*, 20 TEXAS L. REV. 562 (1942); Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. PA. L. REV. 629 (1952); Malone, *Contributory Negligence and the Landowner Cases*, 29 MINN. L. REV. 61 (1945); cf. Seavey, *Swift & Co. v. Schuster — Liability to One Aware of Danger*, 65 HARV. L. REV. 623 (1952).

Articles on the English law include the following: Goodhart, *Rescue and Voluntary Assumption of Risk*, 5 CAMB. L.J. 192 (1934); Gordon, *Wrong Turns in the Volens Cases*, 61 L.Q. REV. 140 (1945); Gow, *The Defense of Volenti Non Fit Injuria*, 61 JURID. REV. 37 (1949); Paton, *Some Problems Relating to Volenti Non Fit Injuria*, 9 BROOKLYN L. REV. 132 (1940).

Dominion articles: Blackburn, "*Volenti Non Fit Injuria*" and the Duty of Care, 24 AUST. L. J. 351 (1951); Morison, *The Suppressed Reference in the "Volens" Principle*, 1 SYDNEY L. REV. 77 (1953); Payne, *Assumption of Risk*

and Negligence, 35 CAN. B. REV. 950 (1957); Sykes, *The Drunken Motorist and the Guest Passenger*, 24 AUST. L. J. 444 (1951).

Comment, 1960 WIS. L. REV. 460; Editorial, 73 N.J.L.J. 346 (1950); Note, 1951 WASH. U.L.Q. 434; 17 BOSTON U.L. REV. 485 (1937); 27 NOTRE DAME LAW. 468 (1952); 26 TEMP. L.Q. 206 (1952); 26 TENN. L. REV. 565 (1959); 19 U. CIN. L. REV. 407 (1950).

Significant text treatments include the following: FLEMING, TORTS, c. 10 (1957); HARPER, TORTS §§ 130-31 (1933); 2 HARPER & JAMES, TORTS, c. 21 (1956); POLLOCK, TORTS 112-21 (15th ed., London, 1951); PROSSER, TORTS § 55 (2d ed. 1955); SALMOND, TORTS §§ 10-12 (11th ed., Heuston, 1953); 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 162-71 (1906); STREET, TORTS 167-74 (1955); WINFIELD, TORTS § 13 (4th ed. 1948).