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Informed Choice in the Law of Torts

*John H. Mansfield**

In a recent Massachusetts case the plaintiff sought to recover for injuries suffered as a result of being hit in the head by a golf ball driven by the defendant. The plaintiff, a ten-year old boy, was employed by a private golf club to pick up balls driven from a practice tee on the club's premises and was engaged in this work at the time of the accident. The defendant, a member of the club, was driving balls from the tee when one of them sliced to the right and struck the plaintiff. In overruling exceptions to a directed verdict for the defendant, the Supreme Judicial Court observed that, "We need not decide whether in the circumstances there was negligence on the part of the defendant or a causal connection between his failure to warn and the plaintiff's injury, since it is plain that there was an assumption by the plaintiff of the risk of being struck by balls driven from the practice tee."¹ By this statement the impression is given that the court in its disposition of the case has wisely avoided difficult and taxing questions of negligence and causation, and instead rested on the relatively simple and straightforward ground of assumption of risk. The truth is quite to the contrary. In holding as it did the court went out of its way to invoke a doctrine more difficult to understand and apply than almost any other in the law of torts. Only by failing to investigate the tangle of concepts underlying the doctrine was it possible for the court to cherish the illusion that it had taken the easy way out.

The Massachusetts court's manner of disposing of this case is a good illustration of why, some fifty years after Mr. Bohlen's landmark articles on assumption of risk,² we are not much beyond the point at which he left us in our understanding of the subject. A very great number of cases have been decided that involve the doctrine in one or another of its many manifestations, and yet the resulting deposit of cogent general thought is remarkably slight. There are several reasons for this. In many of the cases in which assumption of risk appears as a possible

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1. *Pouliot v. Black*, 170 N.E.2d 709, 710 (Mass. 1960).

2. Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 91 (1906).

ground for decision, a number of other grounds seeming to support the same result are also present. The phrase assumption of risk itself embraces not one but several separable concepts, but more often than not the application of any one of these concepts tends to the same result. As a consequence, there is often no particular incentive for a court to undertake the laborious task of untangling the different notions involved and pursuing each to its logical end. The result in the particular case seems clearly right and doubtless it is usually so. The court is willing to rely on a number of converging but only partially developed ideas. More often than not its decision is taken without any real appreciation of the total scope of the doctrine of assumption of risk and its relation to notions of contract and consent. Under these circumstances it is not surprising that we have numerous decisions weak in analysis and narrow in application.

But surely all this is not good enough. Results merely sensed to be right, even if they are right, lack that quality of reasonableness necessary for acceptable law-making. They contribute nothing to the upbuilding of a structure of general thought within which the solution of genuinely difficult problems can proceed. If "a good common-law argument begins, and can often be very nearly ended, by a penetrating exposition of the facts,"³ it is only because the facts are informed with significance by legal concepts of a general nature. When such concepts are not developed, the courts necessarily continue on a purely *ad hoc* basis, with the injustices that this mode of decision can breed. It may be helpful, therefore, as an adjunct to the specialized inquiries to which this symposium is largely devoted, to consider assumption of risk in its most general setting, to explore lines of thought common to it and other legal doctrines, and to bring to bear on assumption of risk insights gathered from a broad range of legal problems. In this effort at perspective, some rather elementary notions will necessarily be reconsidered.

I

Many cases in which the plaintiff is said to have assumed the risk can be explained simply on the ground that the defendant has not been negligent at all. Resort to assumption of risk as a distinct concept is quite unnecessary. Because of the im-

3. Gardner, *An Inquiry Into the Principles of the Law of Contracts*, 46 HARV. L. REV. 1, 3 (1932).

portance of the interest the defendant sought to pursue, the burden of acting otherwise, the degree of risk and the gravity of the threatened injury, in short because of the usual considerations that are the constitutive elements of the standard of care, the defendant did not act unreasonably. It may not be negligence to carry on certain activities involving great risks because they are of still greater utility. It may not be negligence to carry on other activities if stringent precautions are taken. Among the factors that enter into the determination of negligence may be the circumstance that one in the defendant's position could reasonably have thought that persons exposed to the risk created by his conduct would appreciate their peril and take steps to reduce it. The foreseeability of such self-protective measures reduces the risk reasonably apparent to such a point that the defendant is not negligent in creating it. If, as it turns out, a particular plaintiff does not appreciate the risk and therefore does not take steps to protect himself, this circumstance will not render negligent conduct already appraised as nonnegligent on the basis of the reasonably apparent risks. If informed choice on the part of the plaintiff, or, more precisely, the probability of informed choice, enters into the decision of a case only in this fashion, to reduce the risk of harm because of the likelihood that the plaintiff will take self-protective action, it serves only the cause of confusion to speak of the plaintiff's having "assumed the risk," as if some independent legal principle, distinct from the nonnegligence of the defendant, was operating to defeat liability. It is better not to use the phrase at all if this is the only idea sought to be expressed.⁴

4. The failure to distinguish between "assumption of risk" to indicate that the defendant has not been negligent at all, and other meanings of the phrase, was the cause of confusion in *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54 (1943). There Mr. Justice Black, construing the 1939 amendment to the FELA, 53 Stat. 1404 (1939), 45 U.S.C. § 54 (1952), found that the amendment had "released the employee from the burden of assumption of risk by whatever name it was called," and that cases under the act are to be "handled as though no doctrine of assumption of risk had ever existed." 318 U.S. at 64. But obviously Congress had no intention of abolishing the doctrine insofar as it merely described the nonnegligence of the defendant, unless of course it meant to abolish the requirement of negligence itself. As Mr. Justice Frankfurter put it, concurring, "'assumption of risk,' in the sense that the employer is not liable for those risks which it could not avoid in the observance of its duty of care, has not been written out of the law." 318 U.S. at 72.

The baseball cases provide examples of where the defendant may not be negligent because of a reasonable likelihood that those exposed to the risk will take steps to protect themselves. In spite of a considerable risk of foul balls, a defendant may not be negligent in failing to screen in portions of the stands if he reasonably supposes that spectators will be aware of the danger and ready to dodge. See *Brisson v. Minneapolis Baseball Ass'n*, 185 Minn. 507, 509, 240

Throughout the cases and comments on assumption of risk there runs a continuing note of confusion as to whether assumption of risk involves a determination that the defendant has committed no breach of duty to the plaintiff or whether, admitting a breach of duty, the plaintiff is nevertheless barred on some independent ground. Persistent discussion of the point suggests that it may be of some importance. Mr. Bohlen was quite clear that, "Neither knowledge of a danger voluntarily encountered nor consent is a defense which, while admitting the breach of a duty, justifies or excuses it, or which debars the plaintiff from recovering because himself a wrongdoer." And again, "Voluntary subjection to a known risk negatives the existence of any duty on the defendant's part by the breach of which he could be a wrongdoer."⁵ It is fair to say that this is the position taken by most of those who have had occasion to speak on the subject.⁶

"Breach of duty" and "wrongfulness" presumably mean the same thing. To these may be added "fault." It could be said that "negligence" is another term of equivalent meaning; that a determination that there has been no breach of duty is the same as a determination that there has been no negligence. Even if the only reason for finding that there has been no breach of duty is that the plaintiff appreciated the risk and chose to encounter it, even in such a case it might be said that necessarily the defendant has not been negligent; negligence is the creation of an unreasonable risk, and the unreasonableness of the risk

N.W. 903, 904 (1932); Malone, *Contributory Negligence and the Landowner Cases*, 29 MINN. L. REV. 61, 75-79 (1945).

Other situations can be suggested in which the circumstance of informed choice goes to the nonnegligence of the defendant. The applicable standard of care may be affected by "customs reflecting a repeated course of bilateral dealings between parties in an approximately equal position." HART & SACKS, *THE LEGAL PROCESS* 435 (tentative ed. 1958) (discussing the bearing of custom on the standard of unseaworthiness). In this case the informed choice of an experienced class of persons to encounter the risks created by the kind of conduct as the defendant has engaged in is taken as germane to the question of whether that conduct is unreasonable. In determining the legal standard of care, the court takes what light it can from any proper source, including the informed judgment of those who customarily accept the risk without any compelling necessity to do so. As long as the result in the case does not turn on the circumstance of informed choice by the particular plaintiff who was exposed to the risk, there seems no need to invoke a special concept of assumption of risk. The result can be explained best in terms of nonnegligence.

5. Bohlen, *supra* note 2, at 16 and 18.

6. *E.g.*, 2 HARPER & JAMES, *TORTS* 1162-65 (1956); Page Keeton, *Assumption of Risk and the Landowner*, 20 TEXAS L. REV. 562, 568 (1942). *But see* Rice, *The Automobile Guest and the Rationale of Assumption of Risk*, 27 MINN. L. REV. 329, 342-47 (1943).

is determined not only by its magnitude, the seriousness of the harm threatened, and the importance of the defendant's activity, but also by the circumstance that the plaintiff knew of the risk and chose to encounter it. This is a perfectly respectable way of speaking about the matter. And yet there are advantages that come from using negligence and breach of duty as concepts of different scope, especially in a discussion of assumption of risk. If the circumstance that the plaintiff made an informed choice affects the outcome of a case, it does so often for reasons quite different from those normally considered in determining whether the defendant has been negligent. It is useful to adopt a terminology that reflects this fact and casts into relief these special reasons. Therefore, except in cases like that already mentioned, where the plaintiff's awareness is likely to lead to self-protective measures and a consequent reduction of the risk, it seems appropriate to speak of a defendant's having been negligent towards a plaintiff and yet having violated no duty owing to him. He conducted himself in a way that would have resulted in liability but for some reason arising out of the informed choice of the plaintiff to encounter the risk.

If it is agreed that assumption of risk does not necessarily mean that there has been no negligence, does it at least mean that there has been no breach of duty on the part of the defendant? This question cannot be answered without a tolerably clear idea of what we mean by a breach of duty. Although difficult to define, the notion is a useful one and has a meaning different from the ultimate issue of liability. There is strict liability involving no breach of duty. On the other hand, the defendant may violate a duty owing the plaintiff and still not be liable to him. Of the reasons that prevent liability from arising, all do not necessarily negate the breach of a duty; the condemnation of the law is broader than the sanctions it imposes, its reach exceeds its grasp. Contributory negligence is an obvious example. When recovery is denied on the ground that the plaintiff failed to exercise sufficient care for his own safety, it would not occur to us to say that the defendant violated no duty owing to him. He violated a duty, but recovery is denied for some independent reason. A possible test for when nonliability is grounded in the absence of a breach of duty is whether the reason for which the plaintiff cannot recover destroys any judgment we might make that the defendant acted otherwise than he ought to have. This may be merely recasting the question in

different terms, but there is something to be said for using words of slightly different meaning in an effort to express the essential idea. There are cases where the reason defeating recovery, because it does not look to what the defendant intended or foresaw or ought to have foreseen, or to the circumstances confronting him at the time he acted, clearly does not mitigate our judgment that he acted otherwise than he ought to have. Whether the circumstance of informed choice on the part of the plaintiff is such a reason is a question that will recur throughout this article; it cannot be answered without reference to the various factual contexts in which the circumstance of informed choice occurs.

The energetic attack on assumption of risk as an independent liability-limiting doctrine has been directed mainly at those cases in which the defendant acted negligently and then, subsequently, the plaintiff, with knowledge of the risk created by the defendant's conduct, chose to encounter it. Although in a sense the simplest situation with which assumption of risk is associated, this is nevertheless the one in which it is most difficult to decide what consequences if any should follow from the plaintiff's choice. Here are stripped away all complications arising out of the need to adjust the relations between the parties and to provide the defendant with a practical guide to conduct. Here is determined not the least but the greatest weight that the circumstances of informed choice will be made to bear. Inquiry should begin, therefore, not with this difficult situation, but with those cases in which the defendant acted only because he believed that the plaintiff was willing to be exposed to the risk created by his conduct. Generally there will be agreement that in these cases the circumstance of choice ought to be decisive and that the plaintiff cannot recover. Once the reasons for this result are fully grasped, then it may be possible to consider the more difficult situation, where the defendant did not act because of any belief about the plaintiff's willingness, in order to determine which of these reasons survive and whether with sufficient persuasiveness to bar the plaintiff from recovery. This approach has the advantage of emphasizing the unwisdom of broad statements that condemn the doctrine of assumption of risk as a whole. The notion that choice in many situations makes the difference is dug too deep into the soil of our thinking to be rooted out by any easy generalization.

Why is it that the plaintiff cannot recover when the defendant acted on a reasonable belief that the plaintiff was willing to encounter the risk? "The maxim *volenti non fit injuria*," says Mr. Bohlen, "is a terse expression of the individualistic tendency of the common law, which, proceeding from the people and asserting their liberties, naturally regards the freedom of individual action as the keystone of the whole structure. Each individual is left free to work out his own destinies; he must not be interfered with from without, but in the absence of such interference he is held competent to protect himself. While therefore protecting him from external violence, from imposition, and from coercion, the common law does not assume to protect him from the effects of his own personality and from the consequences of his voluntary actions or of his careless misconduct."⁷ Terse the maxim is, but scarcely less terse is Mr. Bohlen's explanation of it. At the time he wrote, the prevailing climate of thought was so congenial to a doctrine that made individual choice decisive that any extended explanation of why this should be so seemed quite unnecessary. The doctrine was founded on a whole range of presuppositions thought to underlie a free society. Now that so many of these presuppositions have been called into question or altogether discarded, a fuller and more painstaking explanation is necessary.

All individual action bears mediately or immediately on the welfare of the community and any distinction between public and private interests is at best a matter of degree. Seizing on this truth, the law could define goals for individual and society and, in regard to all conduct, set forth rules judged likely to lead to their achievement. Not contenting itself with setting outer limits to individual choice, it could comprehensively catalogue the risks or injuries that a plaintiff ought to accept or reject in the pursuit of ends authoritatively approved. Of course the whole orientation of our law is otherwise and its ambitions, at least so far as the official organs of government are concerned, very much more modest. Embedded in our political philosophy is a fundamental judgment that events should be ordered according to individual choice. No comprehensive scheme of ends and means, either for the individual or for society, is attempted. Government is not thought competent to the task; it is too vast practicably to be executed, and experience has shown that men are insufficiently endowed with wisdom to be entrusted with

7. Bohlen, *supra* note 2, at 14.

such extensive law-making powers. The individual is closer to his own needs and better able to perceive the goals he ought to pursue and the steps necessary to attain them. He is thought capable of intelligent appraisal of these matters. Moreover, not only does the diversity of men make the imposition of uniform goals and patterns of conduct seem of doubtful wisdom, but it is a peculiarity of human nature that the value of ends achieved depends very largely on their having been freely defined and freely pursued.

Such, in any event, is the judgment to which the relatively restricted scope of our official law-making bears witness, and it is a judgment manifested not only in the relations between government and the citizen but also in the relations among the citizens themselves, where choice is habitually made a determining factor. When one considers the full range of human activities, it is apparent that, in specifying rules of conduct, government concerns itself with only a small, though doubtless important, fragment of the whole. No more is there ordinarily an authoritative view on what course it is best for an individual to pursue when confronted with the necessity of suffering an injury or encountering a risk to achieve some goal than there is an authoritative view on what provisions ought to be included in contracts. Reliance is placed for the most part on the choice of individuals, singly or freely grouped in organizations less than the whole community. Through this process it is thought the common good is more likely to result than by a comprehensive scheme of governmental regulation. The law rests in its self-denying ordinance on the fundamentals of our political philosophy.

The most obvious consequences to be drawn from these premises are that a plaintiff should not be compelled to do what he does not choose to do nor prevented from doing what he does choose to do. If he chooses to suffer the invasion of a normally protected interest or expose himself to an unusual risk, he must not be held back. Nor, after he has acted, must he be deprived of the fruits of his choice if he is satisfied with them. These consequences appertain most directly to the plaintiff's freedom, and to withhold them would be to suspend the operation of that very process of free choice upon which, as has been said, the hopes of realizing the individual and common good are primarily founded.

Less obvious is the consequence that the law will not compensate the plaintiff for those results of his choice that he finds undesirable. The plaintiff cannot see why such assistance would interfere with the benefits of a regime of individual choice; indeed, why would it not contribute to the fuller realization of his freedom by giving effect to a second choice to undo the unwanted consequences of the first? The answer is clear enough, at least in the situation we are now considering, where the defendant was induced to act by a belief in the plaintiff's willingness. Correlative to the plaintiff's freedom is the defendant's freedom. If the plaintiff is not compelled to observe an authoritatively prescribed course of conduct, no more is the defendant. In particular, the defendant is not required to respond to the plaintiff's wish that he should act in a certain manner. Our hopes for the realization of the common good are based not exclusively on the fulfillment of the plaintiff's choice, but also on cooperation between plaintiff and defendant in mutually acceptable action. Therefore, so long as the defendant is not required to act, and so long as the only source of compensation for the plaintiff is the wealth of the defendant (a limitation that should not be taken for granted), the plaintiff's freedom must be less than perfect in order to assure that the choice of those in his position will be, for the major part, effective. If defendants were bound to compensate whenever the results of choice turned out disadvantageously, they might well cease to act at all in response to the desires of willing plaintiffs. At least a plaintiff's chance of inducing action would be significantly reduced. Thus, it is to the interest of willing plaintiffs as a class that a defendant who has been induced to act by a willing plaintiff be shielded from liability.

For the same reason the defendant must not be liable when he reasonably believed the plaintiff was willing though in fact he was not.⁸ The case is similar to that of mistake in the law of contracts. A promisor will generally be held to perform his promise in accordance with the meaning the promisee reasonably gave to his words, at least if the promisor had reason to know that this meaning would be given to his words and the promisee has irrevocably changed his position in reliance on it.⁹ "In interpreting the words of a bargain, our common ideas of justice require that the court should give much less weight to what

8. *O'Brien v. Cunard S.S. Co.*, 154 Mass. 272, 28 N.E. 266 (1891).

9. 3 CORBIN, *CONTRACTS* § 599, at 598-99 (1960).

it thinks the party actually meant than to what it is convinced that the other party actually understood them to mean, provided that the first knew or had reason to know that the second party did so understand them."¹⁰ Unless the defendant is protected when he acts on a reasonable belief, he will tend to hold back from acting in precisely those situations in which it is to the plaintiff's interest that he should act. It is not that the law is unconcerned with subjective willingness and looks only to objective manifestations. To the contrary, its principal concern is that defendants act only in accordance with actual willingness. But because of the defendant's freedom not to act, it is necessary that a particular plaintiff who was subjectively unwilling be refused recovery in order that defendants not be deterred from responding to the desires of actually willing plaintiffs. Of course if a defendant's belief was unreasonable, then there is no reason why he should not compensate the actually unwilling plaintiff. In this situation no interest of willing plaintiffs as a class requires that deterrent force be withheld.

The qualification in the contract situation that the promisor must have had reason to know that the promisee would attach a certain meaning to his words before he will be compelled to perform in accordance with that meaning, raises the analogous and troubling situation in connection with consent and assumption of risk. Suppose the defendant reasonably believed that the plaintiff had made an informed choice that he should invade a normally protected interest or create an unusual risk, but in fact the plaintiff had made no such choice and had no reason to suppose that the defendant would believe that he had. The manifestation of willingness may have reached the defendant through some unauthorized third person or as a result of the words or actions of the plaintiff himself.¹¹ It is hard to see why

10. *Id.* § 538, at 63.

Immediately before the sentence quoted the author makes some observations that are relevant to the situation we must eventually consider, where the plaintiff made an informed choice to suffer an injury or encounter a risk caused by the defendant's conduct, but the defendant did not act because of a belief that the plaintiff had made such a choice. "The rules for determining the operative meaning of a will are, and ought to be, different in important respects from those determining the operative meaning of a contract. The words of a will are not used in order to induce others to make promises in exchange or to act in reliance; and they usually have no such effect."

11. The solution of the *Restatement of Torts* to this problem seems to be to deny the plaintiff recovery when the manifestation of willingness was the result of the plaintiff's own words or actions, but to allow him recovery when it was the result of the actions of some unauthorized third person. See *RESTATEMENT, TORTS* § 50, comments *a*, *d*, and *e*, § 51 (1934), and § 892, comment *b* (1939). Why

we should not shield the defendant from liability in this case just as much as when the plaintiff had reason to know that the defendant would think him willing. The argument founded on fear of deterring defendants from responding to the desires of willing plaintiffs has as much force in one case as in the other. Perhaps the contract situation can be distinguished on the ground that if we deny a promisee performance of the promise according to its apparent meaning, we merely deny him a hoped for benefit, whereas if we hold the defendant liable in the case we are now considering, we actually compel him to pay damages to the apparently willing plaintiff, a much more drastic step to take against a concededly reasonable party. But the distinction is not altogether convincing, since if the promisee changed his position in reliance on the expected performance, the loss to him may be just as serious as that to the defendant who is compelled to pay damages.

Whatever the proper resolution of this difficult problem, it forcefully demonstrates that what was said about the law of contracts is equally true of consent and assumption of risk in cases where the defendant acted in the belief that the plaintiff was willing he should: "The task of the law of contract thus ceases to be the simple one of enforcing bargains and becomes the far more complex one of providing means for conducting a coöperative commonwealth on a voluntary basis, of reconciling group industry and economic justice with individual freedom and individual responsibility for results. To achieve this it is necessary to enforce promises to such an extent that promisees may reasonably entrust their fortunes to them, but not to an extent which will permit them to be made instruments of exploitation, multiply the chances of accidental gains and losses, or needlessly restrict the future economic initiative of promisors."¹² If a plaintiff is allowed to recover because he had no reason to think that the defendant would believe he was willing, although the defendant did in fact reasonably believe that he was willing, it is because our fear of deterring defendants from responding to the desires of willing plaintiffs is not an absolute

should the line be drawn here? But perhaps this is not a correct interpretation of the *Restatement's* position. Comment *a* of § 50 seems to require that the plaintiff have been "aware of the threatened invasion" and "capable of resistance or protest" before he will be barred from recovery. Is not this restriction consistent with the notion that, even if a manifestation of willingness resulted from the plaintiff's own words or actions, he ought not be barred from recovery unless he had reason to know of the belief they would induce in the defendant?

12. Gardner, *supra* note 3, at 21-22.

and unyielding consideration. We may be willing to take some chance of such deterrence, and run the risk of a decline in cooperation between plaintiffs and defendants, if leaving the loss on an unwilling plaintiff seems a particular hardship.

There has been considerable uncertainty about the relation between contract on the one hand and consent and assumption of risk on the other. The suggestion has been that if the plaintiff's manifestation of willingness takes contractual form, perhaps there are different or additional, but not clearly understood, reasons why he should not recover from the defendant. Mr. Justice Holmes referred in *Schlemmer v. Buffalo, R. & P. Ry.* to "the notion of contract, rather shadowy as applied to this broad form of the latter conception [assumption of risk] . . ." ¹³ It seems fairly clear, however, as Mr. Bohlen suggested in the context of the master-servant cases, ¹⁴ that the reasons for denying the plaintiff recovery when there is a contract are essentially the same as those that bar him in a case of simple willingness.

A characteristic of the contracts that we are here concerned with is that the defendant's conduct pursuant to the contract constitutes an invasion of a normally protected interest of the plaintiff or exposes him to risks from which he would ordinarily have a right to be free. Assume we have such a contract — that the plaintiff's manifestation of willingness took contractual form. What do we mean when we say this? What do we mean over and above what we mean when we say simply that the plaintiff was willing? If we mean something more, it must be that the plaintiff's willingness involved a promise. A promise looks to the future; it is an expression of intention, a commitment that the promisor will act or refrain from acting in a certain way in the future. ¹⁵ Thus, when we say that there was a contract, we mean that the manifestation of willingness, on the basis of which the defendant acted, indicated not only that the plaintiff was presently willing, but also aroused the defendant's expectations as to the future. In most cases of consent or assumption or risk, the defendant has no particular expectations that the plaintiff will act or refrain from acting in a certain way in the future. He proceeds simply on a supposition about the plaintiff's present disposition, and the plaintiff on his side does not consciously commit himself to do or not to

13. 205 U.S. 1, 12 (1907).

14. Bohlen, *supra* note 2, at 14, 16, 32.

15. 1 CORBIN, CONTRACTS § 13 (1950); RESTATEMENT, CONTRACTS § 2 (1932).

do anything in the future. Nevertheless, either expressly or impliedly, the plaintiff may indicate, and the defendant understand, that the plaintiff intends to act or not to act in a certain way in the future. Act in what way in the future? By not bringing suit against the defendant for injuries that may flow from the conduct that the plaintiff is willing should occur, or, more vaguely, by not taking any action whose effect would be to cast back upon the defendant any losses that may result from his conduct.

Expectations of this sort when aroused in the defendant do constitute a psychological circumstance not present in a case of simple willingness. Furthermore, the contractual setting does tend to emphasize the plaintiff's willingness that the defendant should act, the defendant's reliance on this willingness, and the likelihood that the plaintiff realized the character of the invasion that he would suffer or the dangers to which he would be exposed. The relations between the parties are conscious and highly articulated. Nevertheless, the defendant's expectations do not give rise to any additional reasons for denying the plaintiff recovery than exist in a case of simple willingness. The reasons for shielding the defendant from disappointment in his expectations by dismissing any action the plaintiff may bring against him, or in such an action applying only the standard of care that it was agreed by the parties the defendant should observe, and so giving the defendant a form of specific performance of the plaintiff's promise, are exactly the reasons that bar a plaintiff from recovery in a case where there is no promissory element whatsoever. This is not surprising when we consider that the enforcement of promises generally is referable to the same basic philosophy of individual choice that underlies the doctrines of consent and assumption of risk. In the last analysis, a person is bound to perform his promises precisely because he was willing, willing to be bound in the future.

Different analyses all lead to the same conclusion. If the transaction between the parties involved a bargain, an agreed to exchange of values that each party on his side would have been entitled to withhold, the defendant's acting for the plaintiff's promise not to shift losses back on the defendant, then the reasons for enforcing the plaintiff's promise, the consideration, are the same as those that bar him in a case of simple willingness. If no bargain was involved, because the plaintiff's purpose

was not to induce the defendant to act — an unlikely assumption in the situation we are considering — but the plaintiff should have realized that his promise would induce the defendant to act, once again the reasons for enforcing the plaintiff's promise are the same. In the words of Section 90 of the Restatement of Contracts, "injustice can be avoided only by enforcement of the promise" not to try to put the loss back on the defendant. The change of position by the defendant of a "definite and substantial character," called for by Section 90, is the irreversible action he has taken in invading an interest of the plaintiff or exposing him to a risk that he would not have taken but for the plaintiff's promise.¹⁶ The same reasons justify an estoppel even if no promise is involved. Indeed, the entire discussion of why the plaintiff cannot recover in a case of simple willingness can be cast in the terminology of estoppel without any change in the supporting considerations. The plaintiff has caused the defendant to change his position under circumstances in which it would be unjust to allow the plaintiff to assert his rights.

The considerations on which all these analyses ultimately turn, whether they stress the promissory element or the simple fact of willingness, have already been set forth. It is to the individual and common good that events respond to the informed choice of plaintiffs. At the same time, defendants are free to act or not to act as they choose. These two freedoms must be reconciled in a way conducive to maximum cooperation, and the power of willing plaintiffs to induce defendants to respond to their wishes must not be seriously impaired. If there are other reasons for enforcing the plaintiff's promise, if there are other considerations that lie beneath the sentiment that it would be unjust to allow the plaintiff to recover when by his promise he induced the defendant to act, it is not clear what they would be. It should be observed in passing, moreover, that if the reasons that bar a plaintiff from recovery are the same whether or not there is a promissory element, then if other and stronger reasons dictate that a plaintiff recover notwithstanding his willingness, they will also call for relieving him from the consequences of any promise that his willingness may have involved.^{16a}

16. The full text of § 90 is as follows: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." RESTATEMENT, CONTRACTS § 90 (1932). See 1 CORBIN, CONTRACTS §§ 194-196, 200 (1950).

16a. Professor Robert Keeton puts the case of willingness embodied in

The inquiry so far has referred to consent and assumption of risk without any effort to identify them as separate concepts. Traditionally, however, they have been treated apart, and the notion has arisen that they are different in scope and application and may reflect somewhat different underlying considerations.¹⁷ Consent has usually been thought of in connection with intentional torts and assumption of risk in connection with negligence. But the truth seems to be that the terminological distinction corresponds to no important legal difference. If the traditional terminology cannot be avoided, and two forms must be employed, the following is suggested as at least a uniform way of speaking about these matters. Consent is the right term to use when the plaintiff was willing that a certain event occur, probably some conduct on the part of the defendant, because he desired an invasion of a normally protected interest. Ordinarily he will believe that the invasion is substantially certain to follow

contractual form under the heading of "express assumption of risk." There is an agreement that "the plaintiff shall have no legal relief against the defendant for harm to person or property, within the scope of the agreement, caused by defendant's risk-creating conduct or by a condition that the defendant creates or omits to change. From defendant's point of view, this arrangement is one of exculpation or disclaimer of responsibility; from plaintiff's point of view, it is a *consent to exculpation* and an assumption of responsibility. Robert E. Keeton, *Assumption of Risk in Products Liability Cases*, page 123 *supra*. Professor Keeton and I appear to be in agreement that a distinctive feature of these contract cases is the parties' advertence to their future legal relations. At least I mean to emphasize this point in saying that the defendant has been led to expect that the plaintiff will not seek to cast back on him losses that may result from the defendant's conduct. On the other hand, is there some disagreement between Professor Keeton and myself in regard to the significance to be attributed to the fact that the parties adverted to the question of their future legal relations? That they have so adverted, that there is an "exculpation or disclaimer of responsibility" is not, without more, an explanation of why the plaintiff cannot recover. Exculpation from what? Disclaimer of responsibility for what? For injuries arising out of risks within the scope of the agreement. But what risks are within the scope of the agreement? That question cannot be answered without reference to what the plaintiff appreciated or the defendant thought the plaintiff appreciated were the risks created by the defendant's conduct, or at least to the question of what risks the parties were consciously ignorant of. The parties advertence to their legal relations will relieve the defendant from liability only if joined with an appreciation of risk or conscious ignorance of risk. Thus in both contract cases and other cases the basic reasons for nonliability are found in the plaintiff's informed choice to encounter risks created by the defendant's conduct. On the other hand, it is probably true, as has already been said, that when there is a contract and the parties have adverted to their future legal relations, very likely they have given more careful attention to the risks involved or were more conscious of their ignorance of those risks than would be true in a case of simple willingness. For this reason a court may be justified in relieving a defendant from liability for an injury that fell within only a very general class of risks appreciated by the parties, whereas in a case of simple willingness there may be required a more pointed appreciation of the particular risk that led to the plaintiff's injury.

17. See RESTATEMENT, TORTS §§ 49-62, 892 (consent), §§ 466, 893 (assumption of risk).

the event, and the term consent focuses on his belief in the certainty of the invasion. Assumption of risk is the right term to use when the plaintiff was willing that a certain event occur, but he neither desired an invasion of a normally protected interest nor did he suppose that such an invasion was substantially certain to result. The focus is on the uncertainty of the result from the plaintiff's point of view. If we are dealing with a case in which the defendant acted on the basis of a belief in the plaintiff's willingness, then when we talk about consent and assumption of risk, and attempt to distinguish between them, we are referring to the defendant's belief about the plaintiff's state of mind in regard to the certainty or uncertainty of the invasion of his interest.

As so defined, the terms consent and assumption of risk do not parallel the distinction between intentional torts and negligence.¹⁸ The defendant may intend an invasion and the plaintiff even realize that he intends it, and yet it is a case of assumption of risk if the plaintiff does not desire the invasion or think it substantially certain to occur. Or the defendant may be merely negligent and not intend an invasion, but if the plaintiff thinks an invasion substantially certain to occur, it is a case of consent. Since we are dealing here with a theory that relieves the defendant from liability if the plaintiff had, or reasonably appeared to have, a certain state of mind, it seems appropriate to reserve the term "risk" and the phrase "assumption of risk" to express the plaintiff's estimate of the situation and the uncertainty of the result from his point of view. Whether in the defendant's opinion an invasion was certain or only likely will of course affect his legal position and determine whether his conduct constitutes an intentional tort or merely negligence, but that question hardly seems relevant to the present point. Likewise, under the suggested terminology, consent and assumption of risk do not parallel the distinction between those cases in which the defendant acted on the basis of manifested willingness and those in which he did not.¹⁹ The defendant may have acted

18. For language suggesting that consent corresponds with those cases in which the defendant intends, or the plaintiff believes that he intends, to bring about an invasion, see *RESTATEMENT, TORTS*, scope note preceding § 49 and § 50, comment *a*. But see § 53, comment *a*. For language suggesting that assumption of risk corresponds with those cases in which the defendant does not intend to bring about an invasion, see *RESTATEMENT, TORTS*, § 893, comment *d*.

19. For language suggesting that consent corresponds with those cases in which the defendant acted on the basis of manifested willingness and assumption of risk with those in which he did not, see *RESTATEMENT, TORTS* § 893, comment *a*.

on the basis of manifested willingness, and yet, because he believed that the plaintiff did not suppose an invasion certain, it is a case of assumption of risk. Or, contrariwise, the defendant may not have acted on the basis of manifested willingness, but because the plaintiff desired an invasion or believed it certain, it is a case of consent. It would be a happy convenience if these entrenched terms, consent and assumption of risk, corresponded with this distinction of major significance, but it would be doing too great violence to normal usage to have them do so.

This manner of speaking, or any that attempts to give consent and assumption of risk independent and reasonably precise meanings, is bound to result in certain cases in awkward and somewhat artificial application.²⁰ But the matter is probably of no great importance, since although it is of significance whether the defendant did or did not act on a belief in the plaintiff's willingness, nothing would generally seem to turn on whether the plaintiff believed an invasion certain or only likely.²¹ In either case, recovery is denied for the same reasons. Indeed, it is preferable to consider all these cases as raising a single unified problem of the consequences of informed willingness, so that insights scattered as a result of traditional compartmentalization can be brought together.

When the defendant acted on the basis of a belief in the plaintiff's willingness, then the question of actual willingness is in a sense, and for the reasons already discussed, subordinated to the manifestations of willingness that preceded or accom-

20. A boxing match, football game, or similar contest is a good situation in which to try out the suggested terminology. See RESTATEMENT, TORTS § 53, comment b (boxing); § 50, comment c (football); *McAdams v. Windham*, 208 Ala. 492, 94 So. 742 (1922) (boxing); *Thomas v. Barlow*, 5 N.J. Misc. 764, 138 Atl. 208 (Sup. Ct. 1927) (basketball). Some contacts the defendant intends, others he does not. In regard to both intended and unintended contacts, the defendant acts because he believes the plaintiff is willing. From the plaintiff's point of view, or the plaintiff's point of view as understood by the defendant, most of the contacts are not substantially certain to occur; the plaintiff hopes to escape them. As to these contacts the plaintiff assumes the risk. Some few contacts are known to be certain. There is consent to these. Rather close scrutiny would be necessary to determine whether the defendant believed that the plaintiff thought that a particular blow was certain or only likely. Obviously the inquiry is an absurd one in the case of a rough and tumble, fast-moving contest in which neither party gives the slightest thought to whether a particular blow is certain or not. Artificialities of thought, if they arise, are the result of attempting to give distinct meanings to consent and assumption of risk. In fact, the single notion of willingness adequately covers the whole case. The defendant believed the plaintiff was willing he should act as he did.

21. The beginnings of a retreat from this statement are found at the end of this article, where it is suggested that it may make a difference in certain situations whether the plaintiff got precisely what he wanted. Text at note 76 *infra*.

panied the defendant's action. We are concerned to give the defendant a practical guide to conduct. When the defendant did not act on the basis of a belief in the plaintiff's willingness, then our concern is less with manifestations than with the plaintiff's actual state of mind itself. If manifestations are important, it is not as a guide for the defendant's conduct, but as a basis for the court's or jury's own inference about the plaintiff's state of mind. For this purpose the plaintiff's words and actions after the event are as relevant as those that preceded it. The plaintiff's willingness is a circumstance to be inferred from his total conduct.

What do we mean when we say that the plaintiff was willing that an event should occur? We mean that he had a certain state of mind of acceptance or approval in regard to the happening of the event. If he had this state of mind, perhaps for our purposes it makes no difference whether he had power to affect the happening of the event. A doctrine that makes important consequences turn on the presence or absence of this state of mind rests on a belief in at least the partial independence of the human person from his environment, including perhaps the environment of his own physical and psychic make-up. The words choice and willingness themselves express this belief. Whatever may be the ultimate conclusions of recent psychological and biological investigation and speculation,²² the law still pervasively adheres to a belief in a certain autonomy, a capacity to accept or reject, a break in the causal chain between environment and act. There is a "black box that lies athwart the communication channel."²³ What it is we do not rightly know, but it is how we experience ourselves to be.

If this capacity is exercised, and the judgment of acceptance

22. "Perhaps the chief difficulty in speaking about the system that controls our actions is that the brain is such an active organ. Our ordinary language is framed for description of relatively simple sequences of events; we expect to be able to speak about the *cause* of each event in terms of what went immediately before. When we cannot see simple agents at work controlling a man's behavior we invent them. For example, when we fail to follow in detail the connections between his earlier history and some action we give up the attempt and say 'it was his will', inventing the will because we are not competent to analyse the situation more fully. If we are to be able to understand and control ourselves better we have to be prepared to examine the actions of an extremely complicated system. We shall only be able to forecast its future if we look not merely for an immediate cause, but far into its past history. Moreover, our forecast will always be of its *probable* behavior, not of exactly what it will do." J. Z. YOUNG, DOUBT AND CERTAINTY IN SCIENCE 74-75 (1956).

23. BRUNER, GOODNOW & AUSTIN, A STUDY OF THINKING viii (1956).

formulated, we say that the plaintiff was willing. Lord Bramwell was surely right about this, although of course wrong in going on to suggest that if a plaintiff was willing he necessarily cannot recover.²⁴ A plaintiff may be allowed to recover if the pressures on him from his environment make it unlikely that attributing legal significance to his choice will lead either to the individual or the common good. But he has nonetheless made a choice; his encountering of the risk has been voluntary. It is the unyielding character of the world in which he made his choice, and in particular his inability to compel the defendant to act in a more careful manner, that justifies recovery. To weigh this consideration under the notion that it in some way detracts from the plaintiff's voluntariness leads only to confusion and misdirects attention to the plaintiff's state of mind and away from the question of his power over the environment.²⁵

When we say that the plaintiff was willing that an event should occur, and the event referred to is some action on the part of the plaintiff himself, rather than conduct of the defendant or some other change in the plaintiff's environment, we are using the notion of willingness in a rather different and more complex sense. This is the case when the defendant did not act because he believed that the plaintiff was willing, but instead created a risk to which the plaintiff then, at a later time, exposed himself. When we say in this situation that the plaintiff was willing, we refer not merely to the fact that he had a certain state of mind of acceptance in respect to the happening of the event, but also that there was a causal relation between this state of mind and the event. The plaintiff was not moved as the simple instrument of outside causes; he willed the act.

Furthermore, when we speak of the plaintiff's having been willing that an event occur, we obviously do not signify some simple, sharply-defined state of mind. Rather, the expression

24. "Volenti non fit injuria, and the plaintiff was volens. I hold that where a man is not physically constrained, where he can at his option do a thing or not, and he does it, the maxim applies. What is volens? Willing; and a man is willing when he wills to do a thing and does it. No doubt a man, popularly speaking, is said to do a thing unwillingly, with no good will, but if he does it, no matter what his dislike is, he prefers doing it to leaving it alone. He wills to do it. He does not will not to do it."

Membery v. Great Western R. Co., 14 App. Cas. 179, 187 (1889). See Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 26 (1906).

25. See *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 159-163, 29 N.E. 464, 465-67 (1891), where the question of recovery by an employee who slipped on icy steps leading from the defendant's mill is discussed in terms of the employee's voluntariness.

covers a broad spectrum of related psychological states. The plaintiff may have been only vaguely aware of the happening of the event. If there is no realization that consequences important to his welfare are likely to result, he may see no occasion to formulate a conscious attitude of mind in respect to the event. Even if the event is a movement of his own body, conscious control may not be assumed unless there is a realization of the importance of the outcome.²⁶ In a general way the plaintiff may be aware that he moves along the sidewalk, but it is hard to say that he wills to take each step. Even if the plaintiff is aware that the event holds important consequences for his welfare, he may respond to the challenge in a variety of ways. He may delay decision in the hope that time will bring further information as to the probable consequences of alternative courses.²⁷ Conscious deliberation may lead to highly articulated willingness. On the other hand, choice may be so difficult that the plaintiff recoils before the necessity of making it. He may never reach a conscious resolution of the question, but simply allow events to take their course. The language is full of expressions like "not making up your mind" that in a comfortingly human and imprecise manner express this state of affairs. The soldier may after conscious and painful weighing of the alternatives move toward the enemy lines, or he may simply allow himself to be carried forward by the charge.²⁸

We skirt here the edge of a problem somewhat different from that of determining what is meant by willingness. Are there situations in which the plaintiff will be barred from recovery not because he was willing, at least not in any ordinary sense of that word, but because he could have made a choice and

26. "Another large part of our behavior is carried on quite unconsciously. We do not attend to it and may not be aware that we have 'behaved.' In even the most carefully executed intentional behavior there are many components which escape our notice. In so simple an act as reaching for a piece of candy and swallowing it, we are not conscious of the movements of the several muscles individually; it is the movement as a whole to which we attend. Secretion of saliva is involuntary. One may not realize that it has taken place, yet it is an essential part of swallowing. If one had to control intentionally the degree and timing of the contraction of each separate muscle used in every act, he could not walk or talk. Our minds are not geared for that sort of performance. Indeed, in the acquisition of a skill like typewriting or driving a motor car, the first step is to learn to reduce the routine movements to the level of automatism so as to release the mind from attention to them." HERRICK, *THE EVOLUTION OF HUMAN NATURE* 19-20 (1956).

27. "In sum, the pleasure or displeasure of suspense can be concretely stated in terms of the values and costs, the positive and negative outcomes expected with delay and action." BRUNER, GOODNOW & AUSTIN, *op. cit. supra* note 23, at 228.

28. See, *e.g.*, *O'Brien v. Cunard S.S. Co.*, 154 Mass. 272, 28 N.E. 266 (1891).

failed to do so? It seems unlikely that the defendant will succeed in justifying invading an interest of the plaintiff or exposing him to a risk by the argument that although he knew the plaintiff had not made up his mind, he supposed that this uncertainty was just as good as actual choice. The basic philosophy founds its hopes for the common good on the defendant's cooperation in the fulfillment of the plaintiff's considered choice, not on the exposure to risk of one who has gone through no such process of decision. But may it be that in cases where the defendant did not act on any belief about the plaintiff's state of mind, when we look exclusively to the plaintiff's actual state of mind as a reason for nonliability, that actual choice and the opportunity for choice will have the same legal consequences? The question cannot be gone into here; it is related to the problem of the consequences of actual willingness on the part of the plaintiff when the defendant's conduct furnishes no reason why he should not be liable.

The state of mind with which we are concerned is not one of willingness only but of informed willingness. If we are talking about a case in which the plaintiff was exposed to a risk—and in a sense we almost always are, because even if the plaintiff thought an invasion substantially certain to result from a given event, he is unlikely to have believed that the particular harmful consequences of which he now complains were certain to follow—in such a case it is not enough that the plaintiff was willing that the risk-creating event should occur. He must have appreciated the risk that was created by the event, or, as the Restatement puts it, he must have known that “another has created a danger or is doing a dangerous act or that the land or chattels of another are dangerous”²⁹ The basic philosophy founds its hopes not on bare willingness that an event occur, but on this more complex psychological state. Choice by a plaintiff wholly ignorant of the factual context in which he chooses is no more likely to lead to the individual and common good than complete involuntariness.

What do we mean when we say that the plaintiff must have “appreciated the risk”? Risk imports a point of view, an estimate of the likelihood of a future result or class of results. One may have knowledge of a present fact and yet fail to attach any significance to it in terms of the likelihood of a future result.

29. RESTATEMENT, TORTS § 893.

Furthermore, to say that the plaintiff must have appreciated *the* risk suggests that there is some standard estimate of the likelihood of the future result to which the plaintiff's estimate must roughly correspond. But what is this standard estimate? Is it that of a reasonable man? Perhaps it is the estimate that ordinarily would be regarded as providing a sound basis, or as sound a basis as is usually available in such circumstances, for deciding whether it is to the plaintiff's interest that a particular event occur. Such a test makes sense in the light of the basic philosophy.^{29a}

29a. Here is Professor Robert Keeton's answer to the question what is the risk the plaintiff must have appreciated:

"The risk referred to in 'assumption of risk' is a risk that causes defendant's conduct to be characterized as infringing a legal standard. Where the basis of liability is negligence, that risk is determined from the point of view of the ordinarily prudent person in the position of the defendant at some one or more times prior to the occurrence of the harm. Thus, saying that plaintiff had the full appreciation of risk required for subjectively consensual assumption of risk is in most circumstances the same as saying that he in fact understood that risk to himself and his property as well as the defendant should have understood it."

Robert E. Keeton, *Assumption of Risk in Products Liability Cases*, text at note 7.

In cases where the defendant acts on the basis of manifested willingness, the situation I have thought necessary to examine first to provide a foundation for inquiry into the legal consequences of what Professor Keeton calls "subjectively consensual assumption of risk," the issue is what the defendant must believe in regard to the plaintiff's appreciation of risk in order to escape liability. Is it always a satisfactory answer that the defendant must believe that the plaintiff understands the risk as well as the defendant should understand it? May it not be enough in some cases that the defendant believes that the plaintiff has the same knowledge and makes the same estimate of likelihood of injury as the defendant does himself, although this estimate falls below the standard to which the defendant would ordinarily be held? Are there not other cases in which the standard applicable to the defendant requires him, perhaps because of special training, to form a very precise and comprehensive appreciation of the risk, and yet he need not possess the plaintiff of the same knowledge to avoid liability? The plaintiff may simply not have the education necessary to enable him to form such an estimate. Finally, what about the cases in which the defendant in fact knows more than he is required to know under the standard applicable to one in his position?

Even in the case of "subjectively consensual assumption of risk," I cannot see my way to accepting Professor Keeton's correlation between the state of mind looked for in the plaintiff and the risk by reason of which the defendant's conduct is negligent. What is the risk by reason of which the defendant's conduct is negligent? The reasonable man's estimate of the likelihood of injury is of course relevant. But it is not enough that the defendant failed to make the estimate that a reasonable man would have made, or acted in a way that a reasonable man would have said created a likelihood of injury. The question is whether the defendant's conduct created a certain risk according to the belief of a reasonable man, which risk he ought not to have created because of the various values involved. This is the risk we refer to when we speak of the risk by reason of which the defendant's conduct is negligent. It is a rather special notion of risk, and is designed for the achievement of particular purposes. It is the means by which we decide whether we wish to deter the defendant from engaging in this sort of conduct and are willing to cast on him the burden of compensating the plaintiff. When we turn to the state of mind referred to in the case of "subjectively consensual assumption of risk," we are in quite a different context and concerned to achieve rather different pur-

The plaintiff's failure to make any estimate, or his underestimate relative to this standard, may be due to lack of intelligence, to lack of knowledge of some causal principle, or to lack of knowledge of present facts that would generate in the mind of an ordinary person the standard estimate of likelihood. Most of the cases that raise a question of whether the plaintiff "appreciated the risk" fall under this last head.³⁰ Of course it cannot be that knowledge of all the facts that as it turned out bore a causal relation to the harmful result is required. Such complete knowledge would carry with it an exact prevision of the future that would displace any notion of risk. Risk implies partial ignorance of the future and therefore, necessarily, incomplete knowledge of the present. But there is a difference between simple ignorance and consciousness of ignorance. An estimate of likelihood may be founded on a belief in the existence of some facts and conscious ignorance of others. The state of mind of the plaintiff who "appreciates the risk" may be much like that of the promisor whose contractual undertaking is aleatory in character. In estimating the likelihood of a future event, he may have been ignorant of a present fact that as it turned out was causally related to the event, but this will not entitle him to avoid his obligation if he was conscious of his ignorance.³¹ The parties were "aware of the uncertainty, estimated their chances, and fixed the compensation accordingly."³² Indeed, as would be said in the contractual context as

poses. It may be that for the achievement of these purposes we will require the plaintiff to have more detailed information and make a more particularized estimate of likelihood of harm than is required by that notion of risk that is embedded in a finding of the defendant's negligence. The most acceptable answer would seem to be that the plaintiff must have that state of mind that, according to the underlying philosophy, provides an adequate basis for the decision of matters importantly affecting his welfare. This is not necessarily the same as the test that governs our determination of risk in the context of the defendant's negligence.

I cannot help feeling that Professor Keeton has somehow, although I cannot quite trace the connection, drawn his theory out of some implication of the doctrine of legal or proximate cause. Of course it is true that ordinarily we are only going to hold the defendant liable for results that fall within the risks by reason of which his conduct is negligent. But this does not answer the question, in the application of the doctrine of assumption of risk, as to what state of mind the plaintiff must have in regard to the likelihood of such results before he is barred. Why should it be a state of mind that corresponds with an estimate of likelihood conceived for quite different purposes in the context of the defendant's conduct?

30. *Brant v. Chicago & Alton R. Co.*, 294 Ill. 606, 128 N.E. 732 (1920) is a good example. The absence of ropes in a "telltale" failed to give a railroad worker who was riding on the top of a refrigerator car warning that the train was approaching a low bridge.

31. 3 CORBIN, CONTRACTS § 598 (1960).

32. *Id.* at 586.

well, the promisor "assumed the risk." On the other hand, if the promisor was not conscious of his ignorance of some fact that contributed importantly to the happening of the future event, he may not be held to his promise.³³

A doubt may be expressed here whether the courts will in fact trouble themselves to determine whether the plaintiff did actually make an estimate of the likelihood of the harmful result, much less the standard estimate, if they are satisfied that he knew or was consciously ignorant of such facts as would ordinarily give rise to that estimate. The emphasis is very much on knowledge or conscious ignorance of present facts rather than on the psychological process of estimating probabilities, on the basis in knowledge for making the estimate rather than whether the estimate was actually made.

There is scarcely a case in which assumption of risk is mentioned that does not raise the question of what is meant by appreciating the risk, and present the plaintiff's knowledge of facts and estimate of likelihood in a somewhat different configuration. A worker in a railroad cutting may realize in a general way that stones are being swung over his head, but not that the particular operation that results in his injury is being undertaken.³⁴ In deciding whether a particular tooth is causing his pain and ought to be extracted, a plaintiff may have to rely completely on the opinion of the dentist.³⁵ In what sense does a plaintiff who has attended sports car races before, and who stands at a curve in the track protected only by a picket fence, appreciate the risk that a wheel will fly off one of the cars and crash through the picket fence?³⁶ The result in the case may turn on how often he has attended races before and whether or not the wheel flew off because of want of care in the maintenance of the vehicle. Probably it is clear that when a defendant who is about to set off fireworks explains to an onlooker that he has no idea what the effect will be, and the onlooker expresses willingness that the defendant proceed, he cannot recover for any resulting injuries. He may have been wholly ignorant of the nature of the fireworks, but he was conscious of that ignorance.

33. *Id.* at 587-92.

34. *Smith v. Charles Baker & Sons*, [1891] A.C. 325.

35. *Carr v. Dickey*, 163 Cal. App.2d 416, 329 P.2d 539 (1st Dist. 1958).

36. *Morton v. California Sports Car Club*, 163 Cal. App.2d 685, 329 P.2d 967 (2d Dist. 1958).

It is important to remember that for the moment at least we are primarily concerned with those cases in which the defendant acted on the basis of a belief about the plaintiff's state of mind. A discussion of the plaintiff's state of mind, both his willingness and his appreciation of the risk, must take this context into account. Since the defendant needs a workable rule for action, he must not be required to undertake an overly refined analysis of the plaintiff's mental processes. The importance of acting quickly, the opportunity for observation, and the likelihood that most people would under the circumstances be aware of the risk and willing to encounter it are all factors to be considered. When the defendant did not act on the basis of a belief in the plaintiff's willingness, and we are not concerned with what reasonable appearances there were of the plaintiff's state of mind, then our inquiry into his actual state of mind, if any is called for by an applicable rule of law, may appropriately be more searching and precise. Even here it will be an inquiry that seems to professional psychologists unpardonably crude. That is because we must make do with the common sense and untutored insights of judge and jury. But it is also because the inquiry is not one scientific in purpose. Rather, the purpose is the control of conduct and the distribution of losses in the pursuit of broadly conceived social goals. If it is salutary for the law from time to time to pay heed to the shifting sands of scientific theory, particularly in regard to the workings of the human mind, it must finally come back to its own business of fashioning rough but serviceable rules for the settlement of controversies and the ordering of human affairs.

II

So far we have been considering situations in which the defendant acted on the basis of manifested willingness. A basic philosophy looks to the informed choice of the plaintiff, together with the cooperation of the defendant, for the realization of the individual and common good. Rules are devised to assure that defendants are not unduly discouraged from responding to the desires of willing plaintiffs, and to this end some unwilling plaintiffs are sacrificed. But it is equally important, and indeed contributes to an understanding of the basic philosophy, to consider the limits of its applicability and to examine those situations in which informed choice is no longer found adequate, no longer found likely to lead to a socially desirable result.

There may be a conclusive judgment against the defendant's conduct. In the light of the risks involved and the advantages to be gained, both on the defendant's side and the plaintiff's, the defendant ought not to have acted as he did to invade the plaintiff's interest or expose him to a risk. The judgment of the defendant's conduct is conclusive; unlike the judgment ordinarily involved in describing a defendant's conduct as tortious, this judgment does not give way before the fact that the plaintiff was willing or apparently willing that the defendant should act as he did. Even though the plaintiff may have been under no especially constraining circumstances in making his choice, the risks or injuries involved so far outweighed any gain that could possibly be realized that the defendant's conduct cannot be tolerated.

Society has an interest in the well-being of its members. It seeks to shield them from very grievous harm when there will be no appreciable gain. For the most part this concern manifests itself only when the loss to the individual has some more or less discernible impact on the welfare of others or the community at large. But the interest goes beyond this, perhaps as the mark of a civilized society, to a concern for the individual himself. At least as far as concerns physical harm, there does not exist a sphere of individual interest where choice is sovereign no matter how great the injury and trivial the gain. The contrary view leads to labored efforts to make out from the individual's loss an injurious effect on some specific interest of the state, such as its "interest in the fighting value and productivity" of its citizens.³⁷ Society takes an interest in the individual for his own sake, without the necessity of piecing out some altogether imagined effect on the community at large. His life, his safety, his welfare are themselves matters of common concern in a society largely organized to promote them. Of course when other persons are unaffected, and there are no obvious social consequences, then a very great imbalance between loss and gain will be looked for before individual choice is set aside. But even in this situation there is a limit to how far society will permit its members to dispose of themselves.³⁸

37. Bohlen, *Consent as Affecting Civil Liability for Breaches of the Peace*, 24 COLUM. L. REV. 819 (1924).

38. Bohlen's criticism of Sir Frederick Pollock for taking the position that "the intentional infliction of 'appreciable' bodily harm requires a justification other than 'the mere pleasure of the parties or others,'" may be right in suggesting that this too narrowly describes the area in which choice will prevail, but it is surely wrong in suggesting that there is no line to be drawn here at all. *Id.* at 830, n. 22.

No easy test can be stated for determining when the imbalance between loss and gain will become so great that a judgment conclusive notwithstanding the apparent willingness of the plaintiff will be passed on the defendant's conduct. Community concern with the risks and injuries involved and prevailing opinion as to the value of the ends sought to be gained by a given course of conduct vary from one generation to another. The judgment of the criminal law is pertinent here, for it demonstrates the strength of the community's views. There are many cases in which the willingness of the victim destroys the criminality of the defendant's conduct.³⁹ It would seem that in such cases its tortious quality, any wrongfulness that the civil law might adjudge, is likewise negated. In other cases, however, the victim's willingness does not affect the criminality of the conduct — murder and mayhem are classic examples⁴⁰ — nor, one would suppose, its civil wrongfulness. In such cases the reason underlying the civil law's continued condemnation of the defendant's conduct is indistinguishable from underlying its criminality: the absence of any reasonable likelihood that the individual and common good would result from the course the plaintiff elected. Furthermore, even though the legislature has had no occasion to define as criminal conduct that causes serious injury or involves a high degree of risk for no good purpose, it may well be that the courts will, unaided, and in the context of tort law, formulate a conclusive judgment against such conduct.

When there is such a conclusive judgment, it is appropriate to say that the defendant has violated a duty owing the plaintiff, even if for some reason the plaintiff cannot recover against him. Until now in the discussion it seemed helpful to think of the defendant as having violated no duty. He acted on the basis of manifested willingness; there was no disapproval of his acting; indeed, he was encouraged to respond to the desires of apparently willing plaintiffs. Now, however, there is a conclusive

39. See *People v. Cohoon*, 315 Ill. App. 259, 42 N.E.2d 969 (1942) (victim chained to bed); *The King v. Donovan*, [1934] 2 K.B. 498, 506-510 (C.C.A.) (victim beaten; criminal only if bodily harm a probable consequence); Beale, *Consent in the Criminal Law*, 8 HARV. L. REV. 317, 323-24 (1895).

40. See *Commonwealth v. Farrell*, 322 Mass. 606, 620-21, 78 N.E.2d 697, 705 (1948) (serious physical harm inflicted on victim); *People v. Roberts*, 211 Mich. 187, 195-98, 178 N.W. 690, 692-93 (1920) (defendant provided victim with poison to kill herself); *Turner v. State*, 119 Tenn. 663, 670-71, 108 S.W. 1139, 1141 (1907) (partially executed suicide pact); *Wright's Case*, Co. Litt. 127a (defendant had his own hand cut off in order to "have the more colour to begge or to be relieved without putting himselfe to labour"). See also *Commonwealth v. Pierce*, 138 Mass. 165, 180 (1884); *Commonwealth v. Collberg*, 119 Mass. 350 (1876); Beale, *Consent in the Criminal Law*, 8 HARV. L. REV. 317, 324-25 (1895).

disapproval of his conduct that does not give way before the fact of willingness. There is nothing to be said in the defendant's favor, and there is every interest in deterring him. If his conduct alone is considered, there is no reason why he should not bear the cost of compensating the plaintiff. If he is not to be liable, the reasons for this result in no way detract from the judgment that he has acted otherwise than he ought to have in regard to the plaintiff, but relate rather to the conduct of the plaintiff himself.

There is another closely related situation. As far as the plaintiff's interests are concerned, the defendant's conduct may have served them well enough, and so fall within that zone of merely contingently tortious conduct where any condemnation gives way before the plaintiff's willingness to encounter the risk or suffer the injury. But others not willing or not appreciating the risk may also have been exposed to it, or undesirable consequences to the community at large may have been threatened by the defendant's action. Mutual combat under circumstances that make it a breach of the peace is a frequently cited example. "A battery, though of itself threatening no injury so serious as to make it for that reason an offense against the interests of the Crown, may be committed under circumstances of publicity which makes it a serious disturbance of the public order . . ." ⁴¹ Perhaps any conduct that exposes others than the willing plaintiff to an unreasonable risk, even though it does not constitute "a serious disturbance of the public order," should have the same consequences in respect to civil liability as a breach of the peace. Should we say in these cases that the defendant has violated a duty owing the plaintiff? It is certainly just as clear here as when the defendant acts in a way that cannot be justified by the plaintiff's interests that his conduct is conclusively condemned. Once again there is every interest in deterring him and once again if the plaintiff cannot recover it is only because of some reason arising out of his own conduct.

Another situation in which there is a conclusive judgment against the defendant's conduct, even though he acted on the basis of the plaintiff's manifested willingness, is when he not only invaded an interest of the plaintiff or exposed him to a risk, but he also unreasonably burdened some alternative course of action that the plaintiff could have taken. Because of this bur-

41. Bohlen, *Consent as Affecting Civil Liability for Breaches of the Peace*, 24 COLUM. L. REV. 819, 820, n. 1 (1924).

den on the alternative, the plaintiff's power over his environment was so reduced that there was no substantial likelihood that either his or the community's welfare would result from his choice. A philosophy that founds its hopes on the informed choice of the plaintiff and cooperation between plaintiff and defendant assumes that the plaintiff has a certain minimum power over the world in which he finds himself. When this power does not exist, and its absence is due to the defendant's conduct, the philosophy does not apply. Doubtless there was choice or willingness in the sense in which those words are used in this article, and it may well be that the choice was a prudent and reasonable one under the circumstances, but since the power of the plaintiff was so seriously constricted, and the defendant was responsible for this situation, he should not have allowed himself to be governed by the plaintiff's choice. He should not have acted as he did even though the plaintiff was willing.

Since a plaintiff never has complete power over his environment, what we are talking about here is a matter of degree, some minimum of power judged by what experience shows is necessary for individual choice to be a more desirable mode of decision than official law-making. Of course the defendant can impose some burdens on the alternatives open to the plaintiff, perhaps even with the purpose of coercing willingness, without his conduct in exposing the plaintiff to a risk or invading his interest being conclusively condemned. Social pressures may be employed, economic weapons of considerable potency wielded. Weighed in the balance is the social value of the ends the defendant is pursuing, and the importance of allowing him to take what measures he thinks necessary to attain them. But if the effect of his conduct is seriously to impair the plaintiff's power to meet him on an equality, a judgment whose difficulty need not be emphasized, then the philosophy of choice is abandoned and the defendant's conduct in invading the plaintiff's interest or exposing him to a risk conclusively condemned.

The question of whether the defendant's conduct is to be condemned because he unreasonably burdened an alternative open to the plaintiff is likely to arise in a context of other rights and duties between the parties. The defendant's burdening of the alternative may itself have violated a right given the plaintiff by some rule of law, whether of property, contract, or tort. A battery or false imprisonment, the breach of a contract, the invasion of an interest in property, or a threat to do any of these

things, may be the means by which the plaintiff was brought to express willingness to the defendant's risky or harmful conduct. Remedies for the violation of these rights may be available whether or not the plaintiff can recover for the consequences of the conduct to which he expressed willingness. That such a right has, independently, been violated, does not necessarily mean that the defendant's conduct in exposing the plaintiff to a risk or invading his interest on the basis of his willingness will be condemned. Nor will it not be condemned simply because no such right has been violated. Whether the defendant's conduct is conclusively condemned turns on whether the plaintiff's power over his environment was so reduced that action by the defendant on the basis of the plaintiff's willingness cannot be justified, and this question is not necessarily resolved by determining whether there was a violation of an independent right. Nevertheless, that factor is appropriate to consider in judging the practical effect of the conditions under which the plaintiff made his choice. If the defendant's burdening of the alternative violated a right, then there is a judgment by courts or legislature that an interest of the plaintiff is involved which needs protection and is not likely to survive or its real worth be recognized in the kind of competitive struggle the defendant has sought to wage. It is but another step, albeit not a required one, to the conclusion that when an interest of the plaintiff has been invaded or he has been exposed to a risk on the basis of a willingness extracted through the violation of such a right, that this willingness was not formulated under those conditions of relative equality and power over the environment that are a postulate of the basic philosophy of choice.

These matters are conventionally discussed, at least when intentional torts are involved, in the language of duress, a term whose vagueness appropriately reflects the difficulty of indicating the precise point at which coercive action by the defendant so far limits the plaintiff's power over his environment that the basic philosophy of choice must be abandoned. The Restatement of Torts, under the heading of "Assent Given Under Duress," lists imprisonment or threats of immediate imprisonment, or the application of physical force or threats of the application of physical force, as conduct that will vitiate the plaintiff's consent to an invasion of his interest.⁴² The conduct may be directed either at the plaintiff or a member of his immediate family. The

42. RESTATEMENT, TORTS § 58.

Restatement goes on, however, to express a caveat "as to whether forms of duress other than those described . . . may not render an assent procured thereby inoperative as a consent." It is to be noted that the threats of physical force or imprisonment given express recognition might not themselves give rise to an independent cause of action if they lack that immediacy required for an assault or fail to produce the aggravated consequences looked for in an action for intentional infliction of mental suffering; and of course harm or threats of harm to others will not give rise to a cause of action in the plaintiff except in the narrow class of cases where he can recover for loss of services. And yet because of the coercive actions of the defendant, the plaintiff can recover for the consequences of the conduct to which he expressed willingness. Some courts, moreover, seem to have given to invasions of interest in property the same recognition that the Restatement gives to invasions of interest in bodily security,⁴³ and it may be that the invasion of more subtle interests of personality, such as reputation, should be accorded the same effect.

Plaintiffs have been a good deal more successful in obtaining rescission of contracts than in maintaining tort actions when the defendant has burdened some alternative.⁴⁴ Here also duress is spoken of. Of course the plaintiff will be relieved from the obligation to perform his promise when he made it under the pressure of a battery, imprisonment, or threats thereof, or in any of the circumstances set forth in the Restatement of Torts, but the grounds for avoidance go beyond these and include certain threats to invade interests in property,⁴⁵ to commit breaches of contract,⁴⁶ and even to expose the plaintiff to serious humiliation.⁴⁷ It may or may not be true that it is less drastic to relieve the plaintiff from the obligation to perform a contract than to compel the defendant to compensate him for an injury, but in any event there is reason to think that the coercions given recognition as duress in these two situations will gradually draw together. As has already been observed, the enforcement of promises and the refusal to allow tort recovery against a defendant who acted on the basis of manifested willingness are both rooted in the same underlying philosophy of choice. It would

43. See, e.g., *Griffin v. Clark*, 55 Idaho 364, 371-75, 42 P.2d 297, 300-02 (1935).

44. See 5 WILLISTON, CONTRACTS §§ 1603-21 (rev. ed. 1937); RESTATEMENT, CONTRACTS § 493 (1932); Note, *Duress as a Tort*, 39 HARV. L. REV. 108 (1925).

45. RESTATEMENT, CONTRACTS § 493 (d) (1932).

46. 5 WILLISTON, CONTRACTS § 1618, at 4523 (rev. ed. 1937).

47. See RESTATEMENT, CONTRACTS § 493, illustrations of clause *e* (1932).

seem, therefore, that the circumstances that lead to an abandonment of this philosophy in the one case, because the defendant unduly narrowed the plaintiff's power of maneuver, ought also lead to its abandonment in the other.

When it is not the defendant who has burdened the alternative, the case wears a somewhat different aspect. It has often been said, in a general way, that the defendant does not violate a duty to the plaintiff simply because the plaintiff was faced with extremely disagreeable alternatives and submitted to the defendant's risky or injurious conduct only because it was the least of the evils. As Mr. Bohlen put it, "the pressure of commercial or economic necessities in no wise caused by the wrongful act of him who seeks to profit by them, while it may make his action harsh and morally reprehensible, will not render his act in so utilizing his neighbor's distress for his own advantage legally wrongful."⁴⁸

Why is there no condemnation of the defendant's conduct here? The plaintiff's power over his environment may be just as slight as it is when the defendant burdens the alternative. Why does it make a difference that it is not the defendant who is responsible for the plaintiff's helplessness? The answer lies in the same cooperative policy that shields the defendant from liability when the plaintiff was under no particularly constraining circumstances. Fear of liability might discourage defendants from acting at all to assist plaintiffs, and thereby deprive them of their only chance of improving their condition. Thus a plaintiff who needs to go to a hospital might be refused a ride by an incompetent driver who fears liability, although the plaintiff would prefer a ride with an incompetent driver than none at all. Or a plaintiff who has fallen into a shaft in the ground might be refused the use of a frayed rope by a passerby, although he would rather take his chances with a frayed rope than stay

48. Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 25 (1906). "Nor is it duress or undue influence when a party is constrained to enter into a transaction . . . by force of circumstances for which the other party is not responsible." 5 WILLISTON, CONTRACTS § 1608, at 4505 (rev. ed. 1937): "[A]nd certainly there is no broad doctrine forbidding a person from taking advantage of the adversity of another to drive a hard bargain." *Id.* § 1618, at 4523.

In *O'Brien v. Cunard S.S. Co.*, 154 Mass. 272, 28 N.E. 266 (1891), the plaintiff failed to recover against a steamship company for the act of the ship's surgeon in vaccinating her. Quarantine regulations required passengers to be vaccinated before they could land. Possible disagreeable alternatives facing the plaintiff if she was not vaccinated were to remain in quarantine or to make the long voyage back to Ireland. The surgeon must have been aware of these consequences, and yet, obviously, it made no difference. The quarantine regulations were not the doing of the steamship company or the surgeon.

where he is. Protecting the defendant from liability is the best we can do under the circumstances, unless we are willing to impose on him a duty to act, and to act carefully, to aid the plaintiff. A condemnation of the defendant's conduct might well discourage him from acting; it cannot enlarge the plaintiff's power over his environment since the causes restricting that power will not be affected by sanctions imposed on the defendant. On the other hand, when the defendant is contributing to the plaintiff's powerlessness by burdening an alternative, then the possible effects of a condemnation of his conduct are more various and hopeful. We are not forced to choose between the disadvantage of having him act in a risky fashion and the danger that he will not act at all. Instead, since it is he who is burdening the alternative, a condemnation of his conduct may cause him to lift that burden and thus relieve the plaintiff from the necessity of acceding to his risky or injurious conduct at all, or at least allow the plaintiff to make his choice under conditions of relative equality.

But even when the defendant is not in any way responsible for the plaintiff's powerlessness, the law may condemn his conduct. Mr. Williston, in discussing this question in connection with the rescission of contracts, after remarking that it is not duress when a party is constrained "by force of circumstances for which the other party is not responsible," goes on to add, however, that "it seems clear that if such circumstances were known and advantage taken of them by the other party a degree of pressure which would not ordinarily amount to duress, might have such coercive effect as to invalidate a transaction."⁴⁹ The reason for this is not that the plaintiff is exposed to risks so great for gain so trifling that, in the light of his interests, the defendant's conduct cannot under any circumstances be tolerated. It may well be that if the plaintiff had more power over his environment, the defendant's acting on the basis of his will-

49. 5 WILLISTON, *CONTRACTS* § 1608, at 4505 (rev. ed. 1937).

"The very individualism of the common law, which requires that each man shall bear the consequences of his own voluntary conduct, of necessity requires that it shall not impose an intolerable subjection to fortuitous advantages of superior physical, social, and economic position While the common law makes no pretence of being a social reformer, and does not profess to reduce all persons to an absolutely equal position by eliminating all natural advantages, but rather, recognizing society as it is, considers social inequalities as the natural inevitable tactical advantages of those lucky enough to possess them, it does prohibit their misuse, while permitting their use within fair limits." Bohlen, *Voluntary Assumption of Risk*, 20 *HARV. L. REV.* 14, 22 (1906).

ingness would not be disapproved. The reason is that the risks are high and the plaintiff so much at the mercy of the defendant, that the law deems it best to forbid the defendant to act in a dangerous manner, even though the plaintiff is willing that he should. There is the chance that the defendant will not act at all if he is not allowed to act as he pleases, so that the plaintiff is deprived altogether of a benefit flowing from an association with him. But this is a chance worth taking, and, as a matter of fact, it may not be a very great chance. Motives of self-interest or the ability to absorb or pass on increased costs may make it likely that the defendant will continue to act to benefit the plaintiff, although now in a less risky fashion. Perhaps the defendant's conduct will not be condemned unless there are reasonable assurances that this is the case.

There has been no greater change in social policy over the past half century than on this question of when the plaintiff's power over his environment is so reduced that it is best unqualifiedly to forbid the defendant to act in a risky manner. In regard to certain classes of plaintiffs there has been a radically altered and notably more realistic appraisal of the alternatives practically open to them and the slightness of their power over the environment. The change has come through both statute and judicial decision. Experience here has been the great teacher as to the insufficiency of individual choice, no matter how intelligently exercised, to overcome social and economic disabilities. The quiet but steady readjustment of the law of torts in this regard is but a local manifestation of a much more general withdrawal, throughout the law, from the Nineteenth Century's excessive reliance on the free play of economic forces. But the change has come not simply through the reappraisal of given social and economic conditions. Fundamental changes in the social and economic order itself have taken place, and their effect has been in many instances to reduce further the power of individual plaintiffs, to narrow further the alternatives effectively open to them. The centralization of economic power and the growth of a more organized and inflexible society have contributed to this result. Pregnant with the future was Mr. Bohlen's observation, in 1906, that perhaps the reason why employees in certain situations were held in the United States to have assumed the risk, whereas in England the contrary result was reached, was that in this country they could more easily move on to

another job.⁵⁰ Since then we have become more like England. Concurrently with this development, the capacity of important classes of defendants to absorb or pass on the costs of greater care has increased.

Employees more than any other class of plaintiffs have been successful in securing a reappraisal of their bargaining power and a reduction in the significance attached to their willingness to encounter a risk.⁵¹ There is no reason to think, however, that the change has stopped here and will not gradually extend to other classes of plaintiffs, such as invitees of large business establishments and consumers of mass-produced goods, whose bargaining power is no more impressive than that of employees. Furthermore, if these plaintiffs are allowed to recover in cases where the defendant acted on the basis of manifested willingness, it is hard to see why they should not also recover when the plaintiff was willing but the defendant was not governed in his conduct by any belief about that willingness. In the latter situation a condemnation of the defendant's conduct is less likely to impede cooperation or interfere with advantages flowing from the defendant's activity than when express agreements are invalidated.

50. Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 91, 115 (1906).

51. See 2 HARPER & JAMES, TORTS § 21.6, at 1186-88 (1956); RESTATEMENT, CONTRACTS § 575(1) (a) (1932).

Even as originally enacted, in 1908, the FELA included a provision, in § 5, that "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void . . ." 35 Stat. 66 (1908), 45 U.S.C. § 55 (1952). Section 4 provided that in any action under the act any employee "shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 35 Stat. 66 (1908). In 1939, § 4 was amended to provide comprehensively that an employee "shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . ." 53 Stat. 1404 (1939), 45 U.S.C. § 54 (1952).

An interesting recent case, where the plaintiff was on the threshold of employment, is *Bard v. Board of Educ.*, 140 N.Y.S.2d 850 (Sup. Ct. 1955). Plaintiff applied for a position as a playground instructress. She was told to report to a gymnasium in one of defendant's schools for the purpose of taking a physical examination. Before taking the examination she was required to sign a paper in which she "assume[d] all responsibility" and released defendant "from all claim for liability in case of accident." During the examination plaintiff was directed to bat a softball and run to "first base," a sack on the gymnasium floor. She did as instructed, and was injured when the base, which was not attached to the floor, slid out from under her. The court allowed recovery on the grounds that the language of the agreement was not sufficiently express to exempt defendant from liability for negligence, and that there was no assumption of risk because the plaintiff's action was not "voluntary." "[T]his plaintiff had no choice but to forego the examination or proceed as directed." 140 N.Y.S.2d at 852.

52. See RESTATEMENT, CONTRACTS § 575(1) (b) (1932).

One other situation ought to be mentioned to round out our consideration of those cases in which the defendant's conduct is conclusively condemned. That is the case where the plaintiff is entitled to a benefit from the defendant, but the defendant conditions the giving of the benefit on the plaintiff's willingness to be exposed to an unreasonable risk. A familiar example is when a common carrier, under an obligation to serve the public, attempts to limit its liability to a passenger by agreement.⁵² This case is not so very different from that in which the defendant burdens an alternative open to the plaintiff, and in doing so invades an independent right; unless the plaintiff is willing to be exposed to the unreasonable risk, he must do without the benefit to which he is entitled. Once again the argument can be made that it does not necessarily follow from the defendant's duty to provide the benefit that his conduct in exposing the plaintiff to the risk must be condemned. It may be that although the plaintiff could have recovered for the denial of the benefit, he cannot recover for the consequences of his willingness to take the benefit under risky conditions. But, as in the case of the wrongful burdening of an alternative, the fact that the defendant had a duty to furnish the benefit provides a strong argument that the plaintiff's bargaining position is so weak in respect to this benefit that no significance should be attached to his willingness to undergo a risk to secure it. As we have seen, the plaintiff may be able to make the same argument, invoking the powerlessness of his condition, although the defendant had no obligation to provide the benefit or enter into an association with him, but in fact decided to do so.

Here then are a number of situations in which the defendant's conduct in exposing the plaintiff to a risk or invading his interest is condemned notwithstanding he acted on the basis of the plaintiff's manifested willingness. If the defendant's conduct is alone considered, there is nothing to be said in its favor and every reason to deter it. But it is not the only element that requires consideration. If the defendant should not have acted as he did, so also perhaps the plaintiff should not have acted as he did and allowed his interest to be invaded or his person exposed to such serious risks. If there is a conclusive judgment against the defendant's conduct, so also there may be a conclusive judgment against the plaintiff's, and for this reason he cannot recover.

If the defendant is condemned for exposing the plaintiff to a risk or invading his interest, the plaintiff may be condemned for his willing subjection to the defendant's conduct. On the other hand, since the parties may make different estimates of the risk or the plaintiff justifiably place great importance on the avoidance of certain evils, the defendant's conduct may be condemned but not the plaintiff's acceptance of it. As with the defendant's conduct, so with the plaintiff's, the fact that it violated a criminal prohibition will be of assistance in determining whether in the context of tort law there is a conclusive judgment against it. In some cases in which the plaintiff was willing to be exposed to a risk or subjected to an injury the defendant's conduct alone will be criminal, but in others the plaintiff's willing participation may itself violate the criminal law. This may be because of the seriousness of the consequences to himself, or, as in the case of a breach of the peace, because of the risk to others or the disturbance of public order.

A condemnation of the plaintiff's conduct is ordinarily expressed by saying that he was contributorily negligent. Of course the policy that condemns the plaintiff's conduct and bars him from recovery extends beyond the cases in which he appreciated the risk and includes those in which he merely ought to have appreciated it. But our concern here is with the plaintiff who was actually aware of his danger. It is helpful to note in this connection that when we describe the plaintiff's conduct as contributorily negligent, we have already passed beyond the point at which we are willing to defer to his choice. It makes no difference that the plaintiff appreciated the risks and was willing to encounter them. We have already considered the importance of allowing him to live his own life and determine the dangers to which he will be exposed, and that one who chooses with his eyes open may be justified in an action that an ignorant person would be condemned for. We have already weighed these considerations and found them insufficient to justify the plaintiff's choice.

When the plaintiff is denied recovery because there is a conclusive judgment against his conduct, it must be that our desire to deter the defendant and our willingness to make him compensate for any injuries that have occurred are outweighed by a desire to deter the plaintiff and educate him to a responsible exercise of his power of choice. This desire is reinforced by the

difficult to define notion, particularly prominent when the plaintiff's conduct is criminal but also present when his faultiness does not merit so strong a disapproval, that one who has been heedless of the commands of society should not be allowed to set in motion its judicial machinery to undo the consequences of his improper conduct. As Mr. Bohlen put it:

"There is another fundamental principle which is expressed in the maxim *ex turpe causa non oritur actio*, that one who takes part in an illegal act cannot ask the court to assist him in enforcing his agreements with those who participate with him therein or to give to him redress for any harm which they do him by acts necessary to carry out their common illegal purpose. While this principle is most usually applied in actions to enforce the obligation of an illegal contract or to recover money paid or the value of goods furnished under an illegal contract, it is often broadly stated as applying to actions of tort to recover for harm done by one participant in an illegal transaction to another."⁵³

Possibly this principle does not in fact reflect an independent policy, but is reducible to the same considerations of deterring and educating the plaintiff that underlie the defense of contributory negligence. Of course doubts have frequently been expressed about the wisdom of giving such great weight to the deterrence and education of the plaintiff. The abolition of contributory negligence as a defense in some cases, various schemes of comparative negligence, and the intricacies of last clear chance all reflect these doubts, more or less strongly felt. The problem is to accommodate conflicting objectives.

What is of importance to recognize is that when the plaintiff is denied recovery here, it is for reasons quite different from those that bar him in a case where the defendant acted on the basis of manifested willingness and is not condemned for having done so. In such a case the defendant is protected from liability so that those similarly situated will not be deterred from responding to the desires of willing plaintiffs. Our basic philosophy counts on informed choice to bring about a result agreeable to the interests of both parties, and devises rules to preserve and extend the effectiveness of such choice. On the other hand, when both the defendant's and plaintiff's actions are

53. Bohlen, *Consent as Affecting Civil Liability for Breaches of the Peace*, 24 COLUM. L. REV. 819-20 (1924) (footnotes omitted).

conclusively condemned, then the defendant does not escape liability in order that those in his position will not be discouraged from acting. On the contrary, there is every reason to discourage them, since there is no reasonable hope that a desirable result will follow from the plaintiff's choice. The defendant does not escape liability because of the demands of the basic philosophy, but simply as a means of educating the plaintiff. The two situations have only this in common, that each manifests a belief in a capacity for intelligent and responsible choice, but whereas the purpose of nonliability in the one case is to assure and extend the effectiveness of choice when made, in the other it is to compel the making of only responsible choices by the imposition of sanctions when irresponsible ones are made. The result is the same in either case, that the plaintiff cannot recover, but the reasons are fundamentally different.⁵⁴

In view of the rather different reasons underlying the same result, it is not so very surprising that some American courts have allowed plaintiffs to recover in those cases, already mentioned, where the conduct of both parties is criminal because it constitutes a breach of the peace.⁵⁵ These courts have been criticized for failing to perceive that the criminal character of the enterprise provides no reason for suspending the usual rule that one who was willing to be exposed to a risk or subjected to the invasion of an interest cannot recover.⁵⁶ But it is not this usual rule, or at least not that application of it that we have seen operating in cases where the defendant acted on the basis of manifested willingness, that bars the plaintiff from recovery. Precisely because the enterprise was criminal, there is no need to protect the defendant in his response to the plaintiff's choice, no need but to deter both parties in the most effective way pos-

54. In *Schlemmer v. Buffalo, R. & P. Ry.*, 205 U.S. 1 (1907), cited text at note 13, *supra*, Mr. Justice Holmes failed to grasp the distinction between contributory negligence and assumption of risk and to see that the gist of contributory negligence is the unreasonableness of the plaintiff's conduct. He erroneously supposed that the difference lay in causal proximity to the harm. "The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligent." *Id.* at 12. Mr. Justice Peckham's return in this case, on the opinion circulated by Holmes, is worthy to be perpetuated if only for its mastery of metaphor: "When the wolf has made up his mind to devour the lamb, the fact that the water runs from the wolf to the lamb does not in the least interfere with the plea that the lamb has muddied the water — Why is it that you are maintaining so many erroneous views of the law this term? I dissent." Original at the Harvard Law School. But the wolf intended to devour the lamb?

55. See Bohlen, *Consent as Affecting Civil Liability for Breaches of the Peace*, 24 COLUM. L. REV. 819, 821-25 (1924).

56. *Id.* at 825, 829-30, 834-35.

sible. If the courts in these cases are to be criticized, it is not because they failed to apply the policy underlying consent or assumption of risk, so far as that policy receives particular expression where the defendant acted on the basis of manifested willingness, but because they failed to apply the policy underlying the defense of contributory fault, or some aspect of the philosophy of willingness that we have not yet seen. As has been remarked, the policy underlying the defense of contributory fault is of sufficiently doubtful validity that a failure to make it controlling cannot be counted a very grievous error. If it is said that these courts failed to strike a proper balance between deterring the defendant on the one hand and deterring the plaintiff on the other, the question is how such a balance can be achieved in a system that offers only the gross alternatives of allowing the plaintiff to recover fully from the defendant or allowing the defendant to escape liability altogether.⁵⁷

We have been considering the situation in which both the defendant's and the plaintiff's conduct is condemned. But when the defendant's conduct alone is condemned, and condemned even though he acted on the basis of the plaintiff's willingness, is there any reason why the plaintiff should not recover? All that can be said about the plaintiff is that he did appreciate the risk and did choose to encounter it. Why is that a reason to deny recovery? There is no need to deter the plaintiff, since his conduct is not disapproved. Why should he not then recover? When the defendant's conduct was criminal, this will undoubtedly be the result. When the defendant's conduct is condemned because the plaintiff's power over his environment was too slight to give hope that choice on his part would lead to either his or the common good, should the result be any different? Is not the question largely concluded by the character of the judgment that has already been passed on the defendant's conduct? If the plaintiff's power was too slight to warrant the defendant's acting on the basis of his choice, should not a choice made under such conditions be completely ignored in deciding whether the plaintiff can

57. The desirability of deterring the defendant by adding the burden of civil liability to that of possible prosecution is inadequately answered by saying that "there is no need to pervert what is today a purely private remedy into a device to punish and so prevent crime . . ." *Id.* at 830. As a matter of fact, the criminality of the parties' conduct is not necessarily the crucial consideration. If the defendant's conduct is conclusively condemned, but only by tort law, and the plaintiff was contributorily at fault, then the same question is presented: how effectively deter both parties? And here there would be no criminal penalty to point to as satisfying the need for deterrence.

recover? If the plaintiff is allowed to recover in these cases when the defendant acted on the basis of manifested willingness, is there any reason why he should not also recover when the defendant acted on no such basis but the plaintiff was in fact willing?

III

We have been considering cases in which the defendant acted because he believed that the plaintiff was willing he should. Included are cases in which, although the defendant did not believe that at the moment he acted the plaintiff was willing, he did believe that the plaintiff had previously made an informed choice to be exposed to the consequences of the defendant's later action. That such cases are included within the analysis so far undertaken is clear from the numerous situations in which it was obvious to the defendant at the time he acted that the plaintiff could at that moment have no state of mind whatsoever in regard to his action. Cases involving surgical operations, where the plaintiff is unconscious at the time of the *prima facie* battery, are an example.

In regard to all these cases, we have examined in a general way what it is the defendant must believe about the plaintiff's state of mind, both as to willingness and appreciation of the risk. The requirement is a realistic one. A rather rough and ready estimate may be all that is called for if time and opportunity for observation are limited. Defendants must not be unduly discouraged from responding to the desires of willing plaintiffs. The question of whether the defendant did in fact have such a belief about the plaintiff's state of mind may pose a difficult problem of proof, but perhaps no more difficult than many others the law sets for itself when it makes state of mind an important consideration. The mental circumstance must be inferred from its external traces.

In the statement that the defendant acted because he believed the plaintiff had a certain state of mind, there is implied not only that the defendant had the belief, but also that he acted because of this belief. Was it his belief in the plaintiff's willingness and appreciation of the risk that induced him to act as he did? As Mr. Corbin rightly observes, "it is indeed perilous to attempt to determine the inducing cause of anything, especially

the inducing cause of a human being's act,"⁵⁸ and yet daily we do it, both in law and in life. We are looking here for something a good deal more subtle than the causation of the mechanic, more complex than the determination of whether one billiard ball "caused" the movement of another. Perhaps we cannot come much closer to what we mean by someone acting "because of" a belief than the statement that if he had not entertained this belief he would not have acted. Probably he would not have acted. Of course we cannot be sure; we are talking about a hypothetical state of affairs and conjecturing on the basis of what we know about the person, and human nature in general, how he would have acted in that situation. It is possible that he would have acted just as he did, either because his belief in the plaintiff's willingness carried no particular weight with him, or because some other reason or motive would have come in to do service for the one we suppose to be decisive. This is possible, but our best judgment is that it would not be so, and that the defendant would not have acted if he had not believed that the plaintiff appreciated the risk and was willing to encounter it.

In many fields of law important results are made to turn on men's motives, the reasons that propel them to action. This is so because the social consequences of action vary according to the reasons for which it is undertaken. In any given situation the effect of the defendant's conduct may be the same no matter why he acted, whether because he believed the plaintiff was willing or with complete indifference to that circumstance. In either case the plaintiff who was affected may have been actually willing. But if a broader view of the matter is taken, the social consequences can be quite different. A defendant who does not act because of a belief in the plaintiff's willingness is more likely to expose to risk persons who are in fact unwilling than is a defendant who is governed by a belief about the plaintiff's state of mind. Indeed, in the case of the first defendant, is it not largely fortuitous that in the particular instance it is a willing plaintiff who is subjected to his risky conduct? He is a man ready to expose to risk the willing and unwilling alike. If we distinguish between a defendant who acted because of a belief in the plaintiff's willingness from one who did not, and attempt to give meaning to the notion of inducing cause, it is not out of an abstract interest in philosophy but because of a desire to at-

58. 1 CORBIN, CONTRACTS § 200, at 655 (1950).

tain certain social ends. The value of these ends is, of course, ultimately referable to the basic belief that events should occur in accordance with individual choice.

Once we have left this primary situation in which the defendant acted because he believed that the plaintiff appreciated the risk and was willing to encounter it, a variety of other possibilities is presented. These must be carefully distinguished and in each case consideration given whether the result should be the same as in the primary situation, and whether the reasons that justify nonliability there survive. *First*, the defendant may not have acted because of a belief about a present or past state of mind of willingness in the plaintiff, but because he believed, and reasonably, that those who would be exposed to the risk from his conduct would appreciate that risk and choose to encounter it. He acted because he believed that an informed choice would be made in the future. The plaintiff may or may not in fact have appreciated the risk and chosen to encounter it. *Second*, the defendant may not have acted because of any belief about an informed choice, past, present or future, on the part of the plaintiff, but a reasonable man in his position would have said that it was unlikely that a person in the plaintiff's position would be exposed to the risk without making an informed choice to encounter it. Here again the injured plaintiff may or may not in fact have appreciated the risk and chosen to encounter it. *Third*, the defendant may not have acted because of any belief about informed choice, nor would a reasonable man have said that a person in the plaintiff's position if exposed to the risk would be likely to appreciate it, but, as a matter of fact, in the particular case the plaintiff did appreciate the risk and did choose to encounter it.

A further distinction appears, once we have left the primary situation, between those cases in which the plaintiff exposed himself to the risk to obtain an advantage arising out of the defendant's conduct, and those cases in which he sought some other advantage. In both situations the risk is created by the defendant's conduct, but in the second class of cases the advantage derives from some other source. In the first situation the advantage sought may arise out of the very conduct or property of the defendant that creates the risk, or it may arise out of different conduct or property of the defendant. The risk may be inseparable from the advantage in the sense that it is impossible

to create the one without the other, or they may be joined simply because of the manner in which the defendant acted. In either event, if the defendant had not acted at all, or his property had not been available, the plaintiff would have had no chance of obtaining the advantage. In the second situation, even if the defendant had not acted at all, the plaintiff would still have had a chance of obtaining the advantage, since it arose independently of any conduct or property of the defendant. Indeed, if the defendant had not acted, the plaintiff could have pursued this independent advantage free from the risk created by the defendant's negligent conduct.

An example of the first situation is furnished by the well-known case of *Scanlon v. Wedger*.⁵⁹ There the defendant fired a bomb in the course of a fireworks display in a public square. He had a license to do this, but apparently the license was invalid under a statute that permitted the firing of only rockets, crackers, squibs, or serpents. The bomb exploded and injured the plaintiffs who were present for the purpose of witnessing the display. They exposed themselves to the risk to enjoy the fireworks, and not in order to pass through the square on some independent business of their own.⁶⁰ A recent federal case provides another example. The defendant was under contract with the lessee of certain premises to unload equipment near the site of an oil well. Employees of the defendant unloaded a heavy steel platform and, instead of placing it flat on the ground, leaned it against a small tree. The plaintiff, an employee of the lessee, crawled under the platform to be in the shade while he ate his lunch. The platform fell and injured him.⁶¹ Examples of the second situation are found in cases involving access to

59. 156 Mass. 462, 31 N.E. 642 (1892).

60. The court specifically mentions that the result, which was judgment for the defendant, might have been different if the plaintiffs had been travellers on the highway. *Id.* at 463-64. This is a good case for pointing up the difficulty of distinguishing situations in which the defendant acted on the basis of manifested willingness and situations in which he did not. Did the defendant, or whoever set off the bomb, act because he supposed that the spectators, including the plaintiffs, appreciated the risks and were willing to be exposed to them? It is obviously unrealistic to suppose that he adverted to the state of mind of any particular person in the crowd.

See also *Bailey v. Safeway Stores, Inc.*, 55 Wash. 2d 728, 349 P.2d 1077 (1960) (plaintiff fell into trench that was part of construction work she was investigating).

61. *E. L. Farmer & Co. v. Hooks*, 239 F.2d 547 (10th Cir. 1956), *cert. denied*, 353 U.S. 911 (1957). In fact, the court's opinion does not make it clear whether the plaintiff was actually under the platform, nor does it say whether he sat in the shade of the platform or of the tree. It is hard to believe that such trifles could make a difference.

private premises or the use of public ways. In *Clayards v. Dethick*,⁶² the defendants made an unfenced excavation in a passageway that provided the only access to the plaintiff's stables. The plaintiff was a cab proprietor, and his business required that he take horses in and out of the passageway. While the plaintiff was attempting to lead out a horse, it slipped and fell into the excavation.

Why is it that this distinction, which turns on the purpose for which the plaintiff exposed himself to the risk, did not emerge earlier in the discussion? It is precisely because we have been dealing with cases in which the defendant acted on the basis of a manifestation of willingness on the part of the plaintiff. In such cases, almost invariably, the plaintiff was seeking an advantage arising out of the defendant's conduct. Why else did he express willingness to be exposed to the risk? Unless it was important to him that the defendant should act, in order that some advantage would be created, he could have withheld his willingness and been none the worse off for it. If a plaintiff expresses willingness to undergo a surgical operation, it is because he seeks the benefit of restored health, a benefit he can have only if the surgeon acts. Or if a plaintiff expresses willingness to be exposed to certain risks in connection with an athletic contest, it is because he wants the excitement of an association with the defendant that he cannot have unless the defendant acts. If a plaintiff expresses willingness to be exposed to the risks from incompetent driving, it is because he wants to get somewhere, and cannot do so unless the defendant drives him. In all of these cases, the plaintiff seeks an advantage that depends on the defendant's acting or making his property available, and that is why he expresses willingness to be exposed to the risk.

The question is whether this distinction makes any difference. There certainly are cases that seem to attach importance to whether the plaintiff was or was not pursuing an advantage arising out of the defendant's conduct or property, an advantage that the defendant would have been entitled to withhold. If the distinction is of importance, then we are involved in still another psychological inquiry, this time into the reasons for the plaintiff's choice to encounter the risk. If we say that the plaintiff exposed himself to the risk in order to obtain an advantage

62. 12 Q.B. 439, 116 Eng. Rep. 932 (1848).

arising out of the defendant's conduct, do we mean that that was the sole reason for his action? One of the reasons? The dominant reason? A man may expose himself to the risks from a fireworks display in a public street in order to continue along the street to his office, and yet enjoy the fireworks as he goes. Perhaps here, as in our analysis of the defendant's state of mind, we mean that on balance the probabilities are that the plaintiff would not have exposed himself to the risk if he had not hoped to gain an advantage from the defendant's conduct. It would be a happy discovery to find that this additional inquiry, in an already tangled situation, is not necessary because in fact nothing turns on why the plaintiff acted.

When the plaintiff exposes himself to a risk not to obtain an advantage arising out of the defendant's conduct but for some other reason, it seems clear that he should not be barred from recovery simply because he appreciated the risk and chose to encounter it. Why should it be otherwise? Consider the defendant's conduct. He has already been determined to have been negligent. That is to say, it has already been decided that the importance of allowing persons in the plaintiff's position to go about their business free from this sort of risk outweighs the defendant's interest in acting as he did. A defendant can expose to some risk persons pursuing advantages in no way caused by his conduct — a nonnegligent automobile driver increases the risk to other users of the highway — but a negligent defendant has gone too far. How is our judgment against the defendant's conduct, embodied in this determination of negligence, in any way mitigated by the fact that the plaintiff appreciated the risk and chose to encounter it? What consideration, relevant to our judgment of the defendant's conduct, arises from the circumstance of informed choice that has not already been weighed in the finding of negligence? The basic philosophy provides none. A judgment against the defendant's conduct will not impair the power of plaintiffs to make events respond to their wishes. Those in the plaintiff's position gain nothing by the sort of risky conduct the defendant has engaged in, but rather are hampered in the pursuit of their own ends. It would seem, therefore, that in this situation the characterization of the defendant's conduct as negligent expresses not merely a tentative judgment, which gives way before the circumstance of informed choice, but a conclusive judgment that he has violated a duty owing the plaintiff and acted otherwise than he ought to have.

As far as the defendant's conduct is concerned, there is every reason to deter it and to cast upon him the burden of compensating the plaintiff.

What is said here is true in any of the situations set forth above: when the defendant acted in the reasonable belief that only those who appreciated the risk and chose to encounter it would be exposed, when a reasonable man would have said that such persons would be exposed, and when, although neither of these things is true, the plaintiff did in fact appreciate the risk and choose to encounter it. Take the first situation, the one most favorable to the defendant. As has been observed before, it is possible that the plaintiff's awareness of the danger will enable him to take self-protective measures that will reduce the risk below the level of unreasonableness. But assume this is not the case. Then our judgment of the defendant's conduct, that he ought not to have acted as he did because of the risk to those in the plaintiff's position, is not at all softened by the fact that he reasonably supposed that such persons would appreciate the risk. A defendant who leaves unfenced a dangerous excavation in a public street will not necessarily escape condemnation because he put up warning signs that he reasonably supposed would apprise pedestrians of the danger. He may have violated a duty even to the pedestrian who sees the sign, is fully aware of the danger, and yet proceeds on his way. The interest of such a plaintiff in going about his business free from this risk outweighs the defendant's interest in leaving the excavation unfenced, and the balance is not altered by the defendant's belief that the plaintiff would be aware of the danger. Even less is it altered if all that can be said is that a reasonable man would have entertained this belief, although the defendant did not, or that as a matter of fact the plaintiff did appreciate the risk and choose to encounter it.

The plaintiff's conduct gives no reason to deny him recovery. No implication of the basic philosophy calls for such a result. Contributory negligence, an unreasonable exposure to the risk,⁶³ whether informed or ignorant, should alone prevent recovery. Of course, in determining whether the plaintiff was reasonable, the fact that he did appreciate the risk may be a relevant consideration. What is care for an ignorant plaintiff may be negligence for an informed one; the plaintiff must use the informa-

63. See *RESTATEMENT, TORTS* § 466.

tion he has. The importance of the particular objectives the plaintiff was pursuing and the alternatives reasonably open to him will be relevant considerations, and even if they are said to bear on the voluntariness of his action they will in fact go to its reasonableness. The defense of contributory negligence satisfies the policy of educating the plaintiff to a responsible choice. If a responsible choice has in fact been made, then there is no reason why the plaintiff should not recover against a defendant who concededly has violated a duty owing to him. At least this is so when the plaintiff was not pursuing some advantage arising out of the defendant's conduct.

With occasional inexplicable aberrations, the cases do in fact support this view. A traveller on a public way who consciously exposes himself to a risk created by the defendant's negligence will not be barred from recovery unless his decision to proceed is unreasonable.⁶⁴ The same is true, as we have seen from the *Clayards* case,⁶⁵ of the plaintiff who encounters a risk to enter or leave his own property. A plaintiff who continues an activity on his property in the face of a danger created by the defendant's negligence will not be barred from recovery unless he was contributorily negligent;⁶⁶ and the undesirability of compelling the plaintiff to forego the use of his property and rely exclusively on legal remedies inclines the courts to considerable leniency in judging the reasonableness of his conduct.⁶⁷

The rescue cases are of the same pattern. The plaintiff exposes himself to a risk created by the defendant's conduct not to obtain an advantage created by the defendant, but to remove some person or property from danger. In the United States it is clear that the rescuer, even though he acted with full appreciation of the risk, will not be barred from recovery unless he was unreasonable.⁶⁸ In England there has been a growing ac-

64. See *Dougherty v. Chas. H. Tompkins Co.*, 240 F.2d 34, 35-36 (D.C. Cir. 1957); *Harris v. Township of Clinton*, 64 Mich. 447, 453, 31 N.W. 425, 427 (1887); Rice, *The Automobile Guest and the Rationale of Assumption of Risk*, 27 MINN. L. REV. 329, 365-66 (1943).

65. *Supra* note 62. See also *Hickey v. City of Waltham*, 159 Mass. 460, 34 N.E. 681 (1893).

66. PROSSER, *TORTS* 312 (2d ed. 1955).

67. See *LeRoy Fibre Co. v. Chicago, M. & St.P.Ry.*, 232 U.S. 340 (1914).

68. PROSSER, *TORTS* 312-13 (2d ed. 1955). A few recent cases are: *Brock v. Peabody Cooperative Equity Exchange, Inc.*, 186 Kan. 657, 352 P.2d 37 (1960); *Bilyeu v. Standard Freight Lines, Inc.*, 182 Cal. App.2d 536, 544-45 (4th Dist. 1960); *Jay v. Walla Walla College*, 53 Wash.2d 590, 594-95, 335 P.2d 458, 460-61 (1959); *Maxfield v. Maxfield*, 102 N.H. 101, 104, 151 A.2d 226, 229-30 (1959).

ceptance of this position.⁶⁹ The absence of any reason to bar a plaintiff who was not seeking an advantage arising out of the defendant's conduct is here reinforced by a desire to encourage reasonable rescue attempts. Generally it seems to make no difference that it was the defendant or his property that the plaintiff sought to rescue from the consequences of the defendant's negligence.⁷⁰ But it may be that in certain cases this circumstance will suggest the possibility that in acting as a rescuer the plaintiff was in fact seeking an association from which the defendant would have been entitled to exclude him.⁷¹

Finally, we must consider those cases in which the plaintiff was seeking an advantage arising out of the defendant's conduct or property. It is assumed that the defendant did not act because he believed that the plaintiff was willing — that situation has already been considered in the first parts of this article. But any of the other possible situations already mentioned may have existed: the defendant reasonably supposed that those who would be affected by his conduct would appreciate the risk and choose to encounter it; although the defendant did not entertain such a belief, a reasonable man in his position would have; the plaintiff did in fact appreciate the risk and choose to encounter it.

*McLeod Store v. Vinson*⁷² presents the various possibilities rather nicely. The defendant, as an advertising stunt, announced that a guinea race would be held in the street in front of its store. A large crowd assembled at the appointed hour and the defendant's employees released the guinea hens from the roof of the store. The plaintiff joined in a chase after one of the guineas and was injured when he stumbled or was tripped and a number of other persons fell upon him. The court reversed a judgment for the plaintiff on the ground of assumption of risk.⁷³ Now it

69. See Goodhart, *Rescue and Voluntary Assumption of Risk*, 5 *CAMB. L.J.* 192 (1934).

70. *Talbert v. Talbert*, 199 N.Y.S.2d 212 (Sup. Ct. 1960) (son injured while trying to rescue father from consequences of suicide attempt); *Reddick v. Longacre*, 228 S.W.2d 264, 270 (Tex. Civ. App. 1950) (bystander injured while removing driver from truck set on fire as result of accident caused by driver's negligent operation of the vehicle).

71. See, e.g., *Walsh v. West Coast Coal Mines, Inc.*, 31 Wash.2d 396, 406-15, 197 P.2d 233, 238-43 (1948).

72. 213 Ky. 667, 281 S.W. 799 (1926).

73. The court assumed that the plaintiff was not contributorily negligent. Its opinion supports the distinction already drawn between cases where the plaintiff was seeking an advantage arising out of the defendant's conduct and cases where he was not assuming, without deciding, that the defendant would have been

could be said that this is a case of conduct induced by a belief in present willingness; that the employees released the guineas because they believed that those in the crowd, which included the plaintiff, appreciated the risk and were nevertheless willing that the event should occur. Such an analysis points up the variety of situations comprehended by the notion of action on the basis of a belief in present willingness. Obviously the employees did not focus on the state of mind of any particular person in the crowd. At the most, they made a rough judgment that those below, in a collective sense, were willing to be exposed to the risk. If the employees did not even make this judgment, still it perhaps can be said that a reasonable man in their position would have done so. If the plaintiff had arrived on the scene after the release of the guineas, then the defendant would have to fall back on the argument that its employees acted because they reasonably believed that persons exposed to the risk would make an informed choice to encounter it, or that even if the employees did not act because of such a belief a reasonable man in their position would have made this prediction. Finally, the defendant could simply rely on the fact that the plaintiff did appreciate the risk and choose to encounter it.

Very similar to each other are the situations in which the defendant acted because he believed that those exposed to the risk would make an informed choice to encounter it and those in which, although he did not act because of such a belief, a reasonable man in his position would have made this prediction. The question in these situations is whether any legal significance ought to be attached to the circumstance that it was reasonably likely that the plaintiff would appreciate the risk and choose to encounter it. The issue is not one of negligence; it is assumed that the defendant was negligent. Because of the magnitude of the danger, the gravity of the injury threatened, and the relative importance of the interests of the parties, it was want of ordinary care for the defendant to expose the plaintiff to the risk. The question of negligence is affected by the likelihood that the plaintiff will appreciate the risk if such appreciation will enable him to take self-protective steps that will reduce the danger below the level of unreasonableness. It is not affected by other implications that may arise from the circumstance of informed choice or its reasonable foreseeability. The defendant

liable to a traveller exercising due care in the proper use of the street — *i.e.*, a person not chasing guineas. *Id.* at 668-69, 281 S.W. at 799.

may argue that if it was not reasonably foreseeable that the plaintiff would fail to appreciate the risk, but the plaintiff did in fact fail to appreciate the risk, then at least in respect to such a plaintiff he has not been negligent. Injury to an ignorant plaintiff was not within the risk by reason of which he was negligent. In some cases, perhaps, the plaintiff's ignorance is so unusual, so entwined with a quite unexpected course of events, that this argument will carry conviction. But not always. When a court talks about the foreseeability of the plaintiff's having a certain state of mind, singling out this particular circumstance from the total situation, it is likely to use a rather different test of prevision than when it is concerned with the question of negligence and whether an injury was within the risk of that negligence. It may well consider that although it was not reasonably foreseeable that the plaintiff would overlook warning signs or fail to heed certain obvious indications of danger, the defendant was nevertheless negligent with respect to the plaintiff and the injury within the risk created by that negligence. Prevision may vary according to the purpose for which it is invoked.

In considering these situations, a factor to be weighed is the extent to which the imposition of liability will cause defendants to cease acting altogether, rather than to act more carefully, and thus deprive willing plaintiffs of advantages that they might otherwise obtain. As we have seen, the implications of the basic philosophy make this an important consideration when the defendant acted on the basis of manifested willingness, and there is no reason to suppose that it will lose all significance now. The extent to which the flow of advantages is interfered with will vary according to the situation in which liability is imposed. A more serious interference may result when the defendant actually believed that the plaintiff would appreciate the risk and choose to encounter it than when he did not entertain such a belief but a reasonable man would have done so. Sometimes it may be impossible for the defendant to ascertain the plaintiff's state of mind before he acts, and yet unless he acts the plaintiff will be deprived of important advantages.

Of course the possible loss of some advantages to willing plaintiffs cannot be a conclusive argument against liability. After all, we do not hesitate to hold a defendant liable when his negligent conduct was likely to affect those ignorant of the

risk and the plaintiff was in fact ignorant. And yet the imposition of liability in this situation may cause some defendants to cease acting altogether and so reduce the flow of advantages to plaintiffs both ignorant and informed. But this seems a small price to pay for freeing from an unreasonable risk plaintiffs ignorant of their danger. Even if the defendant's conduct was likely to affect only those aware of the risk, we may nevertheless be willing, for a variety of reasons, to impose liability: the elimination of even a small chance that ignorant plaintiffs will be affected seems important; the advantages that may possibly be lost to willing plaintiffs are of no great significance; the loss of some advantages is outweighed by the desirability of compensating those who have been injured. Moreover, as we observed in discussing those cases in which the defendant acted on the basis of manifested willingness, there may be no real likelihood that a given class of defendants will cease acting altogether. The effect of liability will be simply to raise the quality of their performance. In some cases the defendants will be able to absorb or pass on the cost of acting more carefully. Certainly this is true of many large manufacturers and occupiers of business premises. In other cases the defendants may operate on such a narrow margin, or have so little incentive to act in the first place, that they will cease to act altogether rather than bear the cost of acting more carefully.

We can take as a starting point that there should be liability if the defendant would be liable had he acted on the basis of manifested willingness. He should be liable, in other words, when the harm or risk of harm from his conduct so seriously outweighed any possible gain that it must be condemned notwithstanding the plaintiff's willingness, and also when the plaintiff's power over his environment was so slight that a choice made under such circumstances could not lead to a desirable result. Employees have already been mentioned as often coming within the second category; they have been notably successful in securing a reassessment of their bargaining position. The equally limited power of consumers of mass-produced goods and invitees of large business establishments is also receiving increasing recognition. If in these cases the defendant's conduct is condemned when he acted on the basis of manifested willingness, what reason can there be for not also condemning it when the defendant merely thought the plaintiff would make an informed choice to encounter the risk, a reasonable man in

his position would have made this prediction, or the plaintiff did in fact make such a choice? The most serious interference with the flow of advantages to willing plaintiffs, a direct interference with cooperation between the parties, occurs when liability is imposed upon a defendant who acted on the basis of manifested willingness. If it has been decided that this price is worth paying, because of preponderating evils, what reason can there be for not also condemning the defendant's conduct when the plaintiff's power over his environment is just as slight but the interference with the flow of advantages likely to be less? Indeed, in such cases will we not more readily and more closely scrutinize the plaintiff's power over his environment in order to assure ourselves that it was sufficient to justify attaching legal significance to his choice?

When we speak of the reasonable likelihood that those exposed to the risk will make an informed choice to encounter it, we describe what is usually thought to be the limit of a landowner's duty to his invitees. If the danger from a condition on the premises was "open and obvious," if the risk was reasonably likely to be brought home to those exposed to it, then the invitee cannot recover for his injuries. He cannot recover if he did appreciate the risk; he cannot recover if he did not. In the former case he is not barred because of the circumstance of his actual knowledge; he is barred for a more fundamental reason, one which negatives any breach of duty on the part of the defendant, that it could not reasonably have been foreseen that those exposed to the risk would fail to appreciate it.⁷⁴ The landowner does not deny that he has been negligent in the sense in which that term is used in this article. He does not say that appreciation of the risk would enable the invitee to take self-protective measures that would reduce the danger below the level of unreasonableness. Nor does he claim that the importance of his enjoyment of the land, unburdened by the expense of making it less dangerous, justified exposure of invitees generally to the risk. Such an argument would properly go to the question of whether he has been negligent at all. The landowner's position is that because those exposed to the risk were likely to appreciate it, that is the reason why his conduct was justified. By relying in this manner on the likelihood of informed choice,

74. See *Morris v. Cleveland Hockey Club, Inc.*, 157 Ohio St. 225, 237-38, 105 N.E.2d 419, 426 (1952); Malone, *Contributory Negligence and the Landowner Cases*, 29 MINN. L. REV. 61, 83 (1945); 2 HARPER & JAMES, TORTS 1181 (1956).

he squarely founds his claim for a limited duty on some implication of the basic philosophy of choice.

Perhaps the landowner's position ultimately rests, once again, on the argument that if he is held liable willing and informed plaintiffs, the class likely to be exposed to the risk, will be deprived of important advantages. Landowners similarly situated will exclude persons altogether rather than undertake the task of correcting a risky condition. As has already been suggested, this seems highly improbable in the case of certain occupiers. Operators of large department stores are not likely to close their doors rather than make the premises reasonably safe for the public. With private householders the case may be different.

Cases involving dangerous chattels can be looked at in the same way. A defendant who sells, distributes, gives, or lends a chattel argues that at the time it left his control he reasonably believed, or one in his position could reasonably have believed, that those exposed to the risk would appreciate their danger. Therefore, he has violated no duty owing to the plaintiff. If there was a direct transaction between the parties, the defendant may have believed at the time he acted that the plaintiff was presently willing; otherwise he must rely on the likelihood of informed choice in the future. Like the landowner, he argues that unless he is shielded from liability, those similarly situated will not provide chattels in a safer condition but cease to provide them at all, and, as in the case of the landowner, this argument will often be met by a doubt that any such total deterrent effect will in fact result. If there is some interruption of the flow of advantages, it may be worth suffering for the sake of raising the general level of performance or compensating those who have been injured. If the only moment at which it could have been said that the plaintiff was likely to appreciate the risk was after the chattel left the defendant's control, then this circumstance will have no bearing on the question of the defendant's breach of duty. As far as the defendant's conduct is concerned, it was just as likely to affect the ignorant as the informed, and there is every reason to deter it.

If the duty of landowners and suppliers of chattels is limited to assuring that those exposed to the risk are likely to appreciate it, it does not follow that there is a general principle similarly restricting the defendant's duty whenever the plaintiff stands

to gain from his conduct. In cases not involving property, where there is simply some negligent activity on the part of the defendant, the limited duty notion is likely to receive less sympathetic attention, although the same argument is open to the defendant, that unless he is shielded from liability the flow of advantages to willing plaintiffs will be impeded. As a matter of fact, even in the landowner and chattel cases, the movement may be away from any flat rule that there is no breach of duty if it was reasonably likely that the plaintiff would appreciate the danger.⁷⁵ Of course there remains the problem of whether the burden of reducing the risk outweighs its seriousness and the gravity of the threatened harm, but this is appropriately considered in the determination of negligence.

We come finally to what might be called assumption of risk in its pure form, where the defendant did not act because he supposed that those exposed to the risk would appreciate their danger, nor would a reasonable man in his position have made this prediction, but as a matter of fact the plaintiff did appreciate the risk and did choose to encounter it. He did so in order to gain an advantage arising out of the defendant's conduct. There was an actual state of mind of informed willingness, and the willingness was engendered out of a desire to gain from the defendant's conduct. Examples have already been suggested. A defendant sets off fireworks without exercising ordinary care in regard to those in the area. He does not suppose, or have reason to suppose, that those exposed to the risk will appreciate it, but the plaintiff does in fact appreciate the risk and chooses to remain in order to enjoy the display. A defendant leans a heavy platform against a tree without any thought that some one might seek shelter under it. A reasonable man would have foreseen this possibility, but not have thought that such a person would appreciate the danger that the platform might fall on him. The plaintiff does, however, realize this danger, and nevertheless crawls under the platform to get out of the sun. These examples put the case where, as stated at the beginning of this article, is determined the greatest weight that the circumstance of informed choice will be made to bear. The question is whether the bare fact standing alone that the plaintiff made an informed choice to encounter the risk in order

75. See Malone, *supra* note 74, at 83; 2 HARPER & JAMES, *op. cit. supra* note 74, at 1183.

to gain an advantage arising out of the defendant's conduct ought to bar him from recovery.

Is there anything about the defendant's conduct that gives reason why it should not be considered a breach of duty, why he should not be deterred from engaging in such conduct and made to bear the cost of compensating the injured plaintiff? Is there anything to mitigate the judgment, implicit in the determination of negligence, that the defendant has acted otherwise than he ought to have? The imposition of liability will not significantly impede the flow of advantages to informed and willing plaintiffs. The defendant's conduct was just as likely to expose to danger the ignorant as the informed, and if in the particular case it was an informed plaintiff who was affected, this was merely a matter of chance. If we were to relieve the defendant from liability simply to preserve this chance, we should also relieve him from liability when it is an ignorant plaintiff who is injured. But no one would suggest such a thing.

Then what of the plaintiff's conduct? Does it furnish any reason why he should not recover? The question has been put before, but here it appears in its most direct form. Contributory negligence adequately, perhaps more than adequately, implements the policy of encouraging reasonable choices. A plaintiff who makes an unreasonable choice is denied recovery, as also perhaps is a plaintiff who fails to make a choice when he ought to, or fails to perceive the danger when a reasonable man would. But if the plaintiff makes a reasonable choice, allowing him to recover will not encourage him to make unreasonable choices. Does any implication of the basic philosophy require that the plaintiff be barred simply because he made an informed choice even though it was a reasonable one? That philosophy considers it desirable that events respond to the informed choice of plaintiffs. To achieve this end, the law refrains from imposing obstacles to the carrying out of such choices, and it does not reverse the results of a choice when the plaintiff is satisfied with them. But why not allow the plaintiff to recover from the defendant for the undesired consequences of a reasonable choice?

The defendant argues that it is unjust to require him to compensate the plaintiff. After all, the defendant did not have to act in the first place, and if he had not acted the plaintiff

would have stood no chance of obtaining the advantage he desired. The plaintiff was satisfied enough with the defendant's conduct when he hoped to gain by it. Only when things have gone badly does he complain that the defendant has violated a duty owing him and demand compensation for the consequences. The plaintiff wanted something for nothing, but when a cost was exacted seeks to cast this upon the defendant. These arguments also apply to some extent to the plaintiff who made a choice but was ignorant of the risk. He too sought to advantage himself from the defendant's conduct; in his case also the defendant need not have acted. But of course the fact that the defendant need not have acted in the first place does not necessarily strengthen his position. He did act, and so opened the way for the plaintiff in attempting to gain an advantage from the defendant's conduct to be exposed to a serious risk.

We have been talking principally about cases in which the defendant's conduct preceded the plaintiff's choice. The same issue is presented, however, when the plaintiff's choice preceded or was contemporaneous with the defendant's conduct, at least if we continue to make the assumption that the defendant did not act because of a belief that the plaintiff had made an informed choice and a reasonable man in the defendant's position would not have supposed that the plaintiff had done so. It could be said that when the plaintiff's choice is prior or contemporaneous, he can prevent the defendant from acting at all by manifesting unwillingness or take steps to remove himself from the danger, but this same power over the outcome can be predicated of the plaintiff who makes his choice after the defendant has acted. He can avoid the injury by not exposing himself to the risk.

Mr. Seavey seems to have the case of prior or contemporaneous willingness in mind when he refers to "non-communicated willingness." In this connection he states that, "I disagree with the Restatement § 52 which I believe will be corrected in Restatement of Torts Second. [Section 52 deals with consent, and requires that the plaintiff's "assent" be manifested to the defendant in order to relieve him from liability.] In vol. 4, § 892 [dealing generally with consent], in order not to throw mud on § 52, I omitted reference to the noncommunicated willingness, but the logic of § 893 [which sets forth the defense of "voluntary exposure to risk"] leads to the conclusion that it should be a bar

to action."⁷⁶ But if there is no basis for the defense set forth in Section 893, then that section at least gives no reason to condemn the result indicated by the present Section 52.

An argument for the defendant is suggested, however, by the specific examples Mr. Seavey gives immediately before the passage just quoted. He says: "I raise the question whether if one has not manifested consent but has really consented, there is a defense, e.g., the young woman who wants to be kissed but indicates an aversion to it. In *Les Miserables*, assuming the priest owned the silver and watched Jean take it with criminal intent, would there have been either larceny or conversion?" Is not a distinctive feature of both these examples that the plaintiff was willing that there should come about exactly the result that did come about? In the usual case the plaintiff seeks to recover for consequences that never were desired. This is true even when we classify the case as one involving "consent." The plaintiff desired an invasion of his interest or realized that it was substantially certain to occur, but he did not desire the particular injurious consequences of which he later complains; there was an element of risk present. But in Mr. Seavey's examples the plaintiff desired exactly what happened. All that can be said is that he has changed his mind about the value of this result, or that he wants both the advantage from the defendant's conduct and money from him as well.

Take the case of the girl willing to be kissed. Unless we want to impose liability solely for the purpose of deterring the defendant, we can scarcely avoid asking the question what loss has the plaintiff suffered? What is there to compensate for? She got the very thing she wanted. As for the priest, where is the loss to him? Assuming that he did not refrain from protesting out of fear, he evidently considered it to his advantage that Jean should have the silver. Suppose he had made a gift to Jean just before he took the silver? Then what would he have lost by the taking that he had not already seen fit to give away? A gift can be completed without any knowledge of the gift on the part of the donee.⁷⁷ Even if the priest did not formulate a state of mind of willingness until the moment when Jean took the silver, or afterwards, why should he be treated any dif-

76. SEAVEY, KEETON, & KEETON, NOTES FOR INSTRUCTORS FOR USE WITH CASES ON TORTS 6 (1957).

77. See BROWN, PERSONAL PROPERTY § 50 (2d ed. 1955).

Even a promise may be enforced by one to whom it was not communicated, as

ferently from one who has made a gift? The case is somewhat complicated by the fact that the defendant has not simply acted at some time in the past to invade the plaintiff's interest — as would be true in the case of a battery — but continues to enjoy and exercise control over the property. Perhaps the priest should be able to get the silver back, although not recover damages for the original taking.⁷⁸

A rule of nonliability in these cases would rest on two notions. First, that the plaintiff's informed choice is an appropriate means for deciding what invasions he shall suffer. Second, that when as a result of his choice the plaintiff has realized the very experience he desired and gained the very thing he considered an advantage, then there is no reason why the machinery of the law should be set in motion, against a usual rule of inertia, to take money from the defendant and give it to the plaintiff. Where is the need to compensate when the plaintiff considered there was no loss?⁷⁹ Granted, the argument tends

for example in the case of a contract for the benefit of a third party or a promise under seal. Perhaps a promise to pay a reward can be enforced by one who performed the desired act without knowledge of the offer. Corbin says this should be the result "if it seems good to the courts to enforce a promise when the promisor has received the desired equivalent . . ." 1 CORBIN, CONTRACTS § 59, at 181 (1950). Why will it seem good to the courts? Because the world is the way the promisor wanted it?

78. RESTATEMENT, TORTS § 252 (consent as a defense to trespass to chattels), and § 258 (consent as a defense to conversion), avoid the problem by assuming that defendant acted pursuant to the "assent."

On the question of Jean's criminal liability, see Beale, *Consent in the Criminal Law*, 8 HARV. L. REV. 317, 323-24 (1895); Beale, *Justification for Injury*, 41 HARV. L. REV. 553, 553-54 (1928); KENNY, *OUTLINES OF CRIMINAL LAW*, para. 246 (16th ed. 1952). The general question of when the plaintiff's willingness will destroy the criminality of the defendant's conduct if he acted on the basis of that willingness has already been discussed. Text at note 39, *supra*.

79. The importance of the plaintiff's expectation of less than what the law would ordinarily entitle him to is suggested by an interesting passage in HART & SACKS, *THE LEGAL PROCESS* (tentative ed. 1958). In the course of a discussion of the duty to maintain a seaworthy ship, the authors remark: "Given a majority practice of supplying and maintaining radios, what weight should be given to a defense by a non-complying owner in an action (a) by a seaman, (b) by a barge owner, and (c) by an owner of barge cargo, that the complainant had known of the non-compliance and nevertheless dealt with him? Is the function of the obligation under consideration simply to fulfill the normal and hence presumed expectations of those who deal with tug boat owners, so that the law ceases to be concerned when the existence of any expectation in fact on the part of the particular complainant is negated? Compare the history and rationale of the defense of assumption of risk in personal injury actions by employees and others." *Id.* at 434. Of course the function of the obligation to exercise ordinary care, or maintain a seaworthy ship, is not simply to fulfill actual or presumed expectations. An injured plaintiff can recover from a negligent defendant even if he had no expectations whatsoever as to how the defendant was going to act; the plaintiff's mind was simply not directed to the matter. The obligation to exercise ordinary care exists to protect plaintiffs from unreasonable risks. On the other hand, if the plaintiff does in fact expect the defendant to act in a manner that falls below

to ramify out beyond these cases where the plaintiff got exactly what he wanted, and to cast doubt on what has already been suggested ought to be the result when the plaintiff suffers an injury that was not desired or known to be substantially certain. But may it not be that a reasonable accommodation of our desire to deter the defendant, our belief in the adequacy of individual choice, and the need to compensate those who have been injured will be found to lie precisely along a line that distinguishes these two situations?

the standard of ordinary care, then it can be argued that these low expectations provide an independent reason for denying recovery. There is no loss to be compensated for because the plaintiff was competent to dispose of his interests. Of course, the suggestion in the passage quoted goes beyond the cases in which the plaintiff got exactly what he wanted and includes those in which he merely appreciated a risk. Furthermore, in most of the situations envisaged, the defendant will have acted on the basis of manifested willingness.