

Louisiana Law Review

Volume 22 | Number 1

Symposium: Assumption of Risk

Symposium: Insurance Law

December 1961

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Repository Citation

Page Keeton, *Assumption of Risk and the Landowner*, 22 La. L. Rev. (1961)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol22/iss1/9>

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Assumption of Risk and the Landowner

Page Keeton*

As Leon Green states in his introductory article to this symposium, a claimant may be regarded as assuming the risk of all accidents for which the law affords him no recovery. This would even include accidents caused in part by the claimant's contributory negligence, and accidents that are regarded as being too remotely related to defendant's conduct to justify holding the latter responsible therefor. But using Green's terminology again, the discussion here is primarily related to the "assumption of risk doctrine as a residuary doctrine," a doctrine that is used to deny an injured party a recovery solely because he voluntarily exposed himself to dangerous conduct or a dangerous condition with actual or constructive knowledge and appreciation of such danger. Moreover, the observations made herewith will be limited to the situation where plaintiff at the time he exposed himself to a condition or an activity on land *is found to have actually appreciated the danger and the extent thereof* of which the defendant-occupier was or should have been aware at the time of his negligent conduct. The practical difficulty encountered in the administration of a rule that would deny recovery in such a case without recognizing at the same time a like rule when plaintiff did not but should have discovered the condition and appreciated the danger has been commented on elsewhere.¹ Finally, the issue as to whether assumed risk of some kind should be a defense when liability is imposed on defendant without respect to legal fault, as where he is harboring vicious animals, has not been considered. The notion is that by voluntarily electing to proceed, the injured party manifested his willingness to accept it. But the expression that "he manifested his willingness to accept it" is ambiguous and clouds the issue. Actually, the injured party often only elects to take a chance, and that is all; and the issue is whether the law requires him to

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1. Page Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. PA. L. REV. 629, 642 (1952); PROSSER, TORTS 642 (1941). Typical of cases involving this problem are the following: *Anderson v. Sears Roebuck Co.*, 223 Minn. 1, 26 N.W.2d 355 (1947) (floor level at different heights and not noticed. Held for defendant on ground that plaintiff should have reasonably been expected to discover them); *Kingsul Theatres v. Quillen*, 29 Tenn. App. 248, 196 S.W.2d 316 (1946) (plaintiff allowed to recover when she fell at entrance of theatre while looking back for daughter and granddaughter).

"accept it" in the sense that losses from any harm suffered cannot be shifted to the defendant. The issue as to whether an actor's election to take a chance should bar recovery is far more fundamental and important than the procedural issue as to whether, if it is a basis for denial of recovery, the facts must be pleaded and proved as an affirmative defense or whether the negative must be proved by the claimant to establish a breach of duty, or a *prima facie* case. Most of the land cases seem to adopt the latter as the proper approach, and as Green states, assumption of risk is therefore but the negative of duty.

It is submitted that any general principle to the effect that one who elects to take a chance in exposing himself to dangerous conditions or activities on land should be required to "accept" the risk of injury is unsound and must have many qualifications. Salmond asserted that the maxim *volenti non fit injuria* covers three distinct types of cases: "(a) those in which the plaintiff has agreed expressly or impliedly to suffer harm or to run the risk of it; (b) those in which because the plaintiff knows of the danger, the defendant has done no wrong in causing it; and (c) those in which because the plaintiff knows of the danger, his act in voluntarily exposing himself to it is an act of contributory negligence, and so deprives him of an action."² No one would deny that plaintiff's election to expose himself to a danger on land was relevant to the issues of whether defendant has exercised ordinary care or whether plaintiff's conduct was unreasonably dangerous to himself, but many other factors are relevant on these fault issues, including the justification that each might have under the particular circumstances for taking a chance. Moreover, the justification or lack of justification that the defendant might have for maintaining a dangerous condition on his land is not at all conclusive or the same as it would be for the plaintiff in electing to expose himself to such danger. The statement often made that if it were negligence for the defendant to maintain a particular condition the danger of which was obvious, there would appear to be no escape from the conclusion that it was negligence for the plaintiff to encounter it is clearly erroneous and absurd.³ Thus, the reasons

2. SALMOND, TORTS 43 (8th ed. 1934).

3. See *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 29 N.E. 464, 31 Am. St. Rep. 537 (1891) (master-servant relation); *Mantino v. Sutter Hospital Assoc.*, 211 Cal. 556, 296 Pac. 76 (1931) (nurse employed by patient slipped on the floor of a room in which the patient was confined). In the *Fitzgerald* case, the court said: "Certainly, it would be inconsistent to hold that a defendant's act is negligent in reference to the danger of injuring the plaintiff, and that

that actuate the proprietor of a shop for using a terrazzo floor, for constructing a raised platform in front of a soda fountain, for using wax to clean floors, or for constructing a stairway without a hand-rail are altogether different from the reasons that impel a business guest to make use of the defendant's premises under the particular circumstances.⁴

EXPRESS ASSUMPTION OF RISK

But this residuary doctrine of assumed risk purports to be a limitation on liability because of a vague sort of *consent*.⁵ It is said to be an independent reason for denying recovery to a claimant even though the trier of fact can justifiably conclude that (a) defendant created an unreasonable risk of harm and (b) plaintiff exposed himself to it unreasonably. It refers to Salmond's first category, the type of case in which, according to Salmond, plaintiff has agreed expressly or impliedly to suffer harm or run the risk of it. If this residuary doctrine under this category were limited to the type of case in which plaintiff had made a promise in fact, expressly or impliedly, to bear all losses resulting from any harm that he might suffer by exposing himself to a danger created by defendant's negligent conduct, there would not be much reason to quarrel with the notion. If a landowner permits a person to come on his premises in reliance on a promise by the latter that he will not hold the landowner responsible for any injury suffered from exposure to a known danger, then the promise or assurance by the licensee or invitee would normally be enforceable and binding, whether or not the understanding is to be regarded as a bargain. The landowner having consented to the intrusion in reliance on the assurance that he would not be held responsible for any harm suffered should be able to enforce the promise made to him.

plaintiff is not negligent in voluntarily exposing himself when he understands the danger." Such is a clearly unsound proposition.

4. Page Keeton, *Assumption of Risk and the Landowner*, 20 TEX. L. REV. 562 (1942); Page Keeton, *Personal Injury Resulting from Open and Obvious Conditions*, 100 U. PA. L. REV. 629, 631 (1952).

5. Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14 (1906); RESTATEMENT, TORTS § 893 (1939). *Lindquest v. S. S. Kresge Co.*, 345 Mo. 849, 136 S.W.2d 303 (1940) (plaintiff fell down stairs made of marble and worn to depth of three-eighths inch by constant use. She had used stairs before. Held, defendant not liable since true ground of liability must be proprietor's superior knowledge); *Ambrose v. Moffat Coal Co.*, 358 Pa. 465, 58 A.2d 20 (1948); *Paubel v. Hitz*, 339 Mo. 274, 96 S.W.2d 369 (1936) (postman injured while delivering mail by falling on runway covered by melting snow and ice); *Funari v. Gravem-Inglis Baking Co.*, 40 Cal.App.2d 25, 104 P.2d 44 (1940) (slippery condition on elevator floor. Plaintiff injured while delivering sugar).

The question in such a case is "To what extent will such a promise or contract be enforced?" or "To what extent is such a contract to be considered illegal in that the defendant is attempting to contract away his responsibilities for injuries arising out of his negligent conduct?" If the promise is one that the promisor should be regarded as free to make under the circumstances, then either the defendant's negligence is not a breach of duty to the promisor even though it may be to others or the contract should be regarded as a defense to liability just as a release given after an accident would be a defense. When the promise is made as a part of a bargain, then the denial of recovery follows from the general doctrine set forth in the Restatement of Contracts making contracts exempting one of the parties from liability for negligence legal.⁶ As a matter of fact this doctrine is much broader than necessary to include the cases considered herein since the doctrine which confers on a person the power to give up a right of recovery which he would otherwise have in return for the permission to use a landowner's property would apply not only to injuries resulting from dangers in existence when the promise was made, but also to injuries arising out of negligent acts after the permission was granted.

When, therefore, one is privileged to exclude visitors, his agreement to admit them on condition that there shall be no liability for injury would probably be upheld in most instances.⁷ When the property owner is not so privileged, however, this would not seem to be true. If the defendant is engaged in the kind of business which makes it obligatory for him to serve all who apply, the defendant cannot justify the exoneration

6. RESTATEMENT, CONTRACTS §§ 574, 575 (1932). Under these sections a bargain for exemption from liability for the consequences of ordinary negligence is not illegal except when (a) the parties are employer and employee and the bargain relates to negligent injury of the employee in the course of employment, or (b) one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation.

7. *Kirshenbaum v. General Outdoor Adv. Co.*, 258 N.Y. 489, 180 N.E. 245, 84 A.L.R. 645 (1932) (provision in a contract exempting a landlord from liability to a lessee for property damage resulting from his negligence held enforceable); *Globe Home Impr. Co. v. Perth Amboy C. of C. Credit Rating Bureau*, 116 N.J.L. 168, 182 Atl. 641, 102 A.L.R. 1068 (1936) (provision in a contract exempting credit company for false information); *Checkley v. Illinois Central R.R.*, 257 Ill. 491, 100 N.E. 942, 44 L.R.A. (N.S.) 1127 (1913); *Frederick v. Great Northern Ry.*, 207 Wis. 234, 240 N.W. 387, 241 N.W. 363, 80 A.L.R. 984 (1932).

8. *Kirshenbaum v. General Outdoor Adv. Co.*, 258 N.Y. 489, 180 N.E. 245, 84 A.L.R. 645 (1932); See McClain, *Contractual Limitation of Liability for Negligence*, 28 HARV. L. REV. 550 (1915).

contract on the ground that he could have refused his service altogether. The suggestion has been made that courts have refused to uphold such agreements when one party is at such obvious disadvantage in bargaining power that the effect of the contract is to put him at the mercy of the other's negligence.⁹ Even though the defendant is privileged to withhold consent, if he is offering a unique service, or operates an amusement center, or has a monopoly, such a contract might well be regarded as unenforceable.¹⁰ No attempt is here made to give this question a thorough treatment.

IMPLIED ASSUMPTION OF RISK

An implied in fact promise to assume a risk is of course just as effective to bar a recovery as an express promise. It is submitted that such an implied in fact promise can be regarded as having been made in the many situations where a plaintiff was employed to correct a dangerous condition negligently created by the defendant.¹¹ Thus, in *De La Pena v. Moore-McCormick Lines, Inc.*,¹² plaintiff was an employee of an independent contractor who was employed to clean up the defendant's ship. He slipped on a pile of metal strips lying on the deck and fell back into a trench that surrounded the hatch. The court held that he could not recover because he was employed to clean up the strips along with everything else loose on the deck, and the trench was open and obvious. Such an implied in fact promise to assume the risk could normally be found when one is employed to inspect for and repair concealed dangers as well as when the employment is to repair an obvious danger. In all such instances, it can normally be inferred that it was the intention of the parties for the repairman to accept without recourse the risk involved and the charge made by the plaintiff

9. PROSSER, TORTS § 55 (2d ed. 1955); HARPER AND JAMES, TORTS § 21.6 (1956).

10. Often, there is a stipulation against liability when a patron pays an admission fee into a place of public amusement. Frequently, stipulations of this character have not been enforced, because it was not brought to the attention of the patron. *Kushner v. McGinnis*, 289 Mass. 326, 194 N.E. 106, 97 A.L.R. 578 (1935); *Brennan v. Ocean View Amusement Co.*, 289 Mass. 587, 194 N.E. 911 (1935). It is doubtful if the Massachusetts court would have enforced it, even if the plaintiff's attention had been called to the exemption provision.

11. *Broecker v. Armstrong Cork Co.*, 128 N.J.L. 3, 24 A.2d 194 (1942) (injury was caused by the very condition which the plaintiff was employed to correct and was in the process of correcting when injured); *Byars v. Moore-McCormack Lines, Inc.*, 155 F.2d 587 (2d Cir. 1946); *Brucker v. Matsen*, 18 Wash. 2d 375, 139 P.2d 276 (1943).

12. 84 F. Supp. 698 (1948).

for the service to be performed reflects the risk that is being incurred. If, for example, an expert is employed for a large fee to put out an oil well fire negligently started by a producer, it would be universally recognized that the expert agrees, impliedly if not expressly, to accept such a risk, without recourse.

While the doctrine set forth in the Restatement of Contracts as to the enforceability of promises relieving another of responsibility for negligence is by its terms applicable to bargaining transactions only, it would seem, as indicated earlier, that in any case where the plaintiff in advance of encountering a danger indicates to defendant, by the nature of the circumstances, that he does not intend to hold the defendant responsible, and defendant thereafter grants permission to him to encounter the danger, such declared intention would be given effect.¹³ Thus, in *Walsh v. West Coast Coal Mines*,¹⁴ the mine inspector who volunteered his assistance to defendant's inexperienced foreman to prevent an imminent cave-in was held to have assumed the risk of the cave-in that killed him.

If this residuary doctrine of assumed risk related only to the question of the enforceability of promises, expressly or impliedly made, to accept a risk without recourse there would be little room to argue about it. However, it is commonly used as a basis for denying a recovery to the invitee or business guest who encounters known dangers on the property of the invitor or landowner. Thus it is said in the Restatement of Torts that "The second type of situation in which assumption of risk constitutes a defense is where the plaintiff enters the land or uses the chattels of the defendant or otherwise associates himself with the defendant's actions, *having no right or privilege to do so*, save that derived from the defendant's consent. In a situation of this sort the defendant has no greater duty than to inform the plaintiff of the danger of which the defendant knows or should be aware; if the plaintiff discovers the exist-

13. PROSSER, TORTS 305, § 55 (2d ed. 1955). Thus one who rides on a train, or enters a place of amusement on a pass stipulating that the donor is not to be held liable for negligence would not be able to recover.

14. 31 Wash. 2d 396, 197 P.2d 233 (1948). The situation in this case is clearly distinguishable from those where a rescuer has been allowed recovery. In the latter, there is no basis for an implied-in-fact promise made by the rescuer to the defendant, since the latter was not in a position to deny to the rescuer the privilege of encountering the danger to save the life or property of a third person. The court in the *Walsh* case gave unsatisfactory reasons for distinguishing the rescue cases. The court reasoned that because plaintiff was not acting impulsively and because plaintiff was not acting to save or assist an injured person, the plaintiff should be denied recovery.

ence of such danger, a breach of duty by the defendant in failing to notify the plaintiff of it does not cause him to be liable."¹⁵ There is a growing and respectable body of authority that would deny to a landowner such a broad defense. Thus, a government meat inspector was allowed to recover for an injury incurred in stepping from a platform to the main floor which was wet and slippery from the daily operations of the defendant¹⁶ and a general contractor was held liable for injuries incurred by a subcontractor's employee who fell because of a defective porch railing while painting.¹⁷ The actual result reached in many cases is inconsistent with the notion either that the occupier's duty is any way limited other than by the requirement of negligence or that there is such a defense as assumption of risk or *volenti non fit injuria* which is distinct from contributory negligence.¹⁸ Often in those instances there is no discussion either of assumption of risk or of the necessity for a breach of duty, the court being content to say that there was evidence sufficient to justify the findings of the jury on the issues of negligence and contributory negligence.¹⁹ Those results can be taken as some indication of dissatisfaction with the idea that a non-negligent customer should be denied relief simply because he chose to encounter a known danger caused by the occupier's negligent conduct. It is safe to say that in many such instances the defense argued the absence of any duty but the judge who wrote the opinion chose to ignore a discussion of the problem. Occasionally a court will do as the New Hampshire Supreme Court has done and will in clear language reject any notion that the defendant's duty of protection is in any way limited other than by the re-

15. RESTATEMENT, TORTS § 893, comment b (1939).

16. *Swift & Co. v. Schuster*, 192 F.2d 615 (10th Cir. 1951).

17. *Butler v. King*, 106 A.2d 385 (N.H. 1954).

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

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

quirement of negligence or fault.²⁰ Occasionally, also, a court will say that, save in the master and servant cases, assumption of risk is but a phase of contributory negligence;²¹ and others arrive at substantially the same result in a more confusing manner. Thus, in one case where a female customer in a grocery store slipped on an oiled floor, the court said that she had a *right* as an invitee to walk on the floor while making her purchase, that the floor was the only means provided by the proprietor for the purpose, and that "the danger of falling was not such an obvious one that an ordinarily prudent person exercising ordinary care for his own safety would not have walked on it." This simply means that as long as the plaintiff is acting reasonably, i.e., non-negligently, recovery will not be denied.²²

An English judge, Scrutton, L.J., once suggested that when an invitee or business visitor paid for the privilege of entering land, the defendant should have the premises reasonably safe; but that when the business visitor does not pay for his entry, then a warning would be sufficient.²³ The trend seems to be in the direction of holding the occupier of an amusement or entertainment center liable for his negligence to a non-negligent patron, notwithstanding the latter's appreciation of the danger.²⁴

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

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

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

23. See *Hall v. Brooklands Auto Racing Club*, [1933] 1 K.B. 205, 213; *Purkis v. Walthamstow B.C.*, 151 L.T. 30, 32 (1934); and *Little v. Yorkshire County Council*, [1934] 2 K.B. 101, 109. An excellent and thoughtful discussion of the English cases may be found in WINFIELD, TORT 562-568 (1948). No case has yet been reported in England according to Winfield in which the decision turned upon whether or not occupier must make his premises reasonably safe or merely give adequate warning of their existence. In *Letang v. Ottawa Electric Ry.*, [1926] A.C. 725, the plaintiff was an invitee on the defendant's premises where there were some stairs coated with ice, of which she was given no warning and which they made no attempt to remove. She did her best to avoid slipping by holding on to a rail, but in spite of this she slipped and was injured. The defendants were held liable, for, it was said, even if the plaintiff saw the danger of slipping, she neither realized the extent of the risk nor did she freely and voluntarily encounter it. Mere knowledge of a risk is no more consent to it in this connection than in any other part of the law of tort.

24. *Correira v. Atlantic Amusement Co.*, 302 Mass. 81, 18 N.E.2d 435 (1939) (slipping on steps at theatre); *Olds v. St. Louis National Baseball Club*, 232 Mo. App. 897, 104 S.W.2d 746 (1937) (exit at baseball park not screened); *Potts v. Crafts*, 5 Cal. App. 2d 83, 42 P.2d 87 (1935) (amusement device; oval board track defective), 16 Tex. L. Rev. 118 (1937); *McGillivray v. Eramian*,

The proprietor of a baseball park who screens in a sufficient space to take care of the normal demand for seats, with that protection and at a price stipulated, is not liable to one who is injured in an unscreened part of the park.²⁵ Liability of the proprietor to those who selected the unscreened portion under such circumstances would be difficult to justify. His conduct is not commonly regarded as unethical. If, however, the patron is forced to a choice of seeing the game in an unscreened place or not at all, there is authority supporting liability when negligence has been found by the jury. For example, failure to screen the exit to the screened portion of the stands has resulted in liability.²⁶ A person operating an amusement center is in a line of business that is likely to attract people in large numbers. Sometimes he is making a profit by catering to a desire on the part of people to get a thrill; and often he either has a monopoly or his service is unique and there is no adequate substitute for it.

Notwithstanding these evidences of dissatisfaction with a doctrine that would deny recovery to a business guest on no other basis than that he appreciated the danger of a condition that he elected to encounter, it must be admitted that there is abundant authority for the proposition that the true ground upon which the occupier's liability for personal injuries arising from dangerous conditions on land rests is his superior knowledge of the dangers thereon.²⁷ However, the dissatisfaction reported herein with the view that would deny recovery to a business guest simply because he was fully aware of a danger encountered is sufficient to justify a critical inquiry as to the reason therefor. Often, it is said without further elaboration

309 Mass. 430, 35 N.E.2d 209 (1941) (bowling alley floor back of the foul line was uneven and rotten).

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

26. *Olds v. St. Louis National Baseball Club*, 232 Mo. App. 897, 104 S.W.2d 746 (1937).

27. Page Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. PA. L. REV. 629, 634 (1952). *Lindquist v. S. S. Kresge Co.*, 345 Mo. 849, 136 S.W.2d 303 (1940) (Plaintiff fell down stairs made of marble and worn to depth of three-eighths inch by constant use. She had used stairs before. Held, defendant not liable since true ground of liability must be proprietor's superior knowledge); *Ambrose v. Moffat Coal Co.*, 358 Pa. 465, 58 A.2d 20 (1948); *Paubel v. Hitz*, 339 Mo. 274, 96 S.W.2d 369 (1936) (postman injured while delivering mail by falling on runway covered by melting snow and ice); *Funari v. Gravem-Inglis Baking Co.*, 40 Cal. App. 2d 25, 104 P.2d 44 (1940) (Slippery condition on elevator floor. Plaintiff injured while delivering sugar).

that in such a case a person, by voluntarily electing to proceed, manifests his willingness to accept it. It is said that by entering freely and voluntarily into any relation or situation which presents obvious danger, the plaintiff may be taken to accept it, and to agree that he will look out for himself, and relieve the defendant of responsibility.²⁸ This is commonly referred to as implied assumption of risk. But in most of the cases it cannot be said that there is any implied in fact promise made by plaintiff to the defendant that the latter is to be relieved of all responsibility. The so-called promise is fictional and the effect is simply to require by law acceptance of the risk because plaintiff elected to take a chance.²⁹ If a business guest is to be denied relief, it should be done not by means of a fictional promise but on the basis of policy clearly stated and explained. For example: *B*, a business guest, enters on premises of *O*, occupier and owner of a grocery store. The floor is slippery, and *B* slips, falls, and breaks his arm. It certainly would require a stretch of the imagination to infer from such a situation that defendant intended to grant permission only if plaintiff was willing to accept all risks and that plaintiff understood this, and by going on impliedly gave such assurance. If defendant or his employee had been present at the entrance and advised *B* that he would have to come on at his own risk, then of course an intent to assume the risk is actually present. Or if a notice to the same effect had been posted at the entrance, a like intent on the part of the plaintiff is evidenced. But this is not the typical situation.

As stated at the outset, about all that can be said is that the business guest in the typical situation, without thinking or knowing anything about the law relating to a right of recovery of injured, elects or chooses to take a chance. It is often said that the maxim *volenti non fit injuria* applies and that consent bars recovery just as it does when there has been consent to conduct committed with the intention of causing an invasion of a legally protected interest, as in assault, battery, and false imprisonment. But there is a vast difference in the nature of plaintiff's consent manifested when he elects to encounter danger from conduct of defendant committed without an intention of inflicting harm from that manifested when defendant acts for the purpose of inflicting an invasion on another, and the latter, without coercion, manifests a desire to receive it. Quite ob-

28. PROSSER, TORTS 307 (2d ed. 1955).

29. FLEMING, TORTS 236 (1957).

viously the latter kind of conduct is either not generally regarded as socially undesirable³⁰ — as when one consents to an operation — or, the plaintiff and defendant are both guilty of blameworthy conduct and are in *pari delicto* — as when a woman consents to an abortion.³¹ Again, one who knows that an invasion of a particular kind is certain or substantially certain to result from conduct in which another is engaged cannot normally recover if he could avoid subjecting himself to such conduct but instead manifests a willingness to submit to it because of a public policy against recovery for a self-inflicted invasion.³² But when liability is sought on the basis of negligence, neither the defendant nor the plaintiff wants or knows that harm will follow from the action that each party took preceding the injury. Defendant cannot be held responsible simply because his conduct created a risk of harm of which he was aware. The risk must be unreasonable. If the defendant is not to be held liable for creating a danger and taking a chance of injuring others unless the chance was unreasonable and he was negligent, then it seems that the plaintiff should not in theory be denied relief for taking a chance unless the chance was unreasonable and he was contributorily negligent.

COERCION

It is commonly said that assumption of risk must be free and voluntary and that the risk is not assumed if the conduct of the defendant has left the plaintiff with no reasonable alternative.³³ But according to the Restatement of Torts, and apparently the results in many cases, the plaintiff's individual necessities and the compulsion of circumstances will not have the effect of causing the assumption of risk to be involuntary so long as defendant is in a position to deny the plaintiff the right or privilege to encounter the danger.³⁴ If the defendant's tortious conduct makes it reasonably necessary for the plaintiff to encounter a danger in order to exercise a right or privilege not

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

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

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

33. PROSSER, TORTS § 55, at 311 (2d ed. 1955).

34. Section 893, comment b.

dependent on consent obtained from defendant, then the risk has not been voluntarily accepted. Thus, one who encounters a danger in the course of using a city sidewalk, a city street, or a waiting room of a railroad station would not assume the risk because his right to the use of the property is not dependent upon the consent of the owner or proprietor.³⁵ This reason is seldom given in cases of this character, and in most jurisdictions it is doubtful if the courts have consciously dealt in a different way with city streets and public utility premises from the ordinary business establishment.³⁶ Often it seems to be assumed that even in the cases of streets and highways the plaintiff can be entirely deprived of his privilege so long as he has a feasible alternative route.³⁷ It would seem that in such a case plaintiff has no alternative at all except to give up a privilege to use the particular route and that even under the narrow Restatement view of coercion the risk should be regarded as involuntarily assumed. It does appear, however, that in most cases where the plaintiff was not considered as acting in a voluntary manner he was acting in the exercise of a privilege or right. Examples are where he was making use of the facilities of a public utility, where he as a tenant was using a common passageway or leased premises that the landlord was under the obligation of keeping in repair,³⁸ and where he was injured in rescuing life or property.³⁹ The fact that some recognition is given to the notion that plaintiff's acceptance of a risk may be involuntary when he is in the exercise of a right or privilege

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

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

37. PROSSER, TORTS § 55, at 312 (2d ed. 1955).

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

39. *Carney v. Buyea*, 271 App. Div. 333, 65 N.Y.S.2d 902 (4th Dep't 1946), 32 CORNELL L.Q. 605 (1947), 45 MICH. L. REV. 918 (1947), 25 TEX. L. REV. 688 (1947), *Rushton v. Howle*, 79 Ga. App. 360, 53 S.E.2d 768 (1949).

does not touch the numerous cases where he encounters a danger under compulsion of circumstances. It was economic coercion, for example, that resulted in the enactment of Workmen's Compensation Acts and the abolition of assumption of risk as a defense as to the employer-employee relationship. Obviously, there are some relationships between landowner and intruder where the landowner's duty may well be satisfied by giving notice of dangers as an alternative to eliminating a danger, such as where the intruder is a trespasser or a licensee. But as has been observed, the key to the law here lies in the relationship between the parties, and where the plaintiff is a wrongdoer or a donee, then the fact that plaintiff has elected to take a chance may justifiably be a basis for denying relief.⁴⁰ It has been suggested in another article that it might be considered unwise policy to subject the defendant landowner to law suits by the ordinary business guest where injuries allegedly resulted from open and obvious conditions because of the impracticability of passing upon the very close questions of negligence and contributory negligence that are necessarily involved, but this is either an alternative reason or one in addition to the argument that plaintiff elected to take a chance and should be denied relief.⁴¹ In *McKee v. Patterson*,⁴² discussed by Green in his introductory article, an employee of a sub-contractor was injured when a ladder he had ascended to do certain overhead work slipped and plaintiff fell to the floor. It was found by the jury that the general contractor had been negligent in not providing a safe place to work for the employee of the sub-contractor. While the majority in that case denied recovery because of the assumed risk doctrine, a dissenting judge did note the economic compulsion under which the plaintiff was acting. Such a case seems to demonstrate that any general doctrine denying recovery to one who *voluntarily* elects to take a chance is an unwarranted limitation on the landowner's duty.

CONCLUSION

In his introductory article, Leon Green states in conclusion that the best usage for a defensive theory is the one "that most

40. HARPER & JAMES, TORTS § 21.2 (1956): "The key to the problem lies in the relationship between the parties, and the duty owed by defendant to plaintiff under all the circumstances."

41. Page Keeton, *Injuries Resulting from Open and Obvious Conditions*, 68 U. PA. L. REV. 629, 641 (1952).

42. 153 Tex. 517, 271 S.W.2d 391 (1954).

sharply focuses the defensive facts. Assumed risk is usually too blunt and too comprehensive to serve such a function in a highly developed adversary process." With that general conclusion the writer agrees, especially as regards the landowner cases. No doubt the defendant's duty has been and may justifiably be limited to that of protecting trespassers, and those coming on with permission but as an accommodation from the occupier, from hidden dangers, but it would seem that such a limitation applied generally to invitees and business guests is unwarranted. The notion that plaintiff must be regarded as accepting the risk simply because of an election to take a chance is, it is submitted, an unsound generalization.