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Torts - Assumption of Risk

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TORTS—ASSUMPTION OF RISK—A California Court of Appeals has held that a person's status as a trespasser is now largely immaterial and no longer determines that he assumed the risk of personal injuries caused by a possessor's negligence.

Beard v. Atchison, Topeka and Santa Fe Railway Company, 4 Cal. App. 3d 130, 84 Cal. Rptr. 449 (1970).

When returning home from school, plaintiff, a fourteen year old junior high school student of average or slightly-below average intelligence, crossed defendant railroad's right-of-way. A slow-moving (10-15 miles per hour) freight train came along. Plaintiff ran alongside the train, grasped the handle bar at the end of a box car, and attempted to pull himself aboard. According to plaintiff, as he placed his feet on the sill step of the box car, the step wobbled, gave way and he fell beneath the wheels of the train. The railroad's right-of-way was posted with "Keep Out" signs. Three of the five man crew were charged with the duty to watch for persons attempting to board the train. There was testimony that, at the point of the accident, hopping and riding of the train by school children was an almost daily occurrence. The sill steps had been visually inspected by the conductor before the run on which the accident happened. That evening, an experienced car inspector checked every step on one side of the train with a flashlight and found no defects.[1]

An action was brought in the trial court on two counts. The first count was based on negligence and the second count on the Federal Safety Appliance Act.[2] Because plaintiff was not a person to whom a cause of action had been given by the Safety Appliance Act, defendant's motion before trial for a summary judgment was granted on the second count. At trial, defendant's motion for a nonsuit on the first count was granted at the conclusion of the plaintiff's case.[3]

Between the trial court's decision and the appeal, the Supreme Court of California had decided *Rowland v. Christian*.[4] In this case, California abolished the old tests for standard of care owed to a trespasser, licensee, or invitee, and established a single new test based on ordinary principles of negligence.[5] The trial court applied the existing doctrine espoused

1. Beard v. The Atchison, Topeka and Santa Fe Railway Co., 4 Cal. App. 3d 134, 84 Cal. Rptr. 449, 452 (1970).
2. Safety Appliance Act of 1910, § 2, 45 U.S.C. § 11 (1965).
3. 4 Cal. App. 3d at 134, 84 Cal. Rptr. at 452.
4. Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).
5. *Id.*

by the Restatement,[6] and took the view that the plaintiff had the burden to establish that because of his youth he did not realize and appreciate the risk of boarding a moving freight train. However, under *Rowland,* the liability of a possessor of property to trespassing children is no longer limited by this section of the Restatement, or by the terms of other special doctrines and theories created as exceptions to a general rule barring trespassers from recovery for negligence. A landowner's liability is now governed by Civil Code, section 1714,[7] which imposes general liability on every person for injuries occasioned to others by negligence in the management of his property.

A possessor's duty is controlled by the foreseeability of the risk and not by the status of the person injured.[8] Consequently, the various exceptions to the former rule prohibiting trespassers from recovery for negligence no longer serve their intended purposes. A trespassing child does not have to rebut the presumption that as a trespasser he assumed the risk. The burden of proving assumption of risk remains on the defendant.

The court's analysis of the factual situation in *Beard* raised the issue of assumption of risk. Courts have traditionally disagreed as to the scope of this doctrine; whether it should be confined to contractual relations between parties; or whether it should be applied to any situation in which an action might be brought for negligence.[9] Some authority recognizes assumption of risk in its implied form as a separate defense,[10] while other authority holds that there is no assumption of risk doctrine separate from contributory negligence.[11]

One authority[12] sets forth the proposition that there are two types of assumption of risk. These two theories are designated "primary" assumption of risk, which is only the counterpart of the defendant's lack of duty to protect the plaintiff from that risk; and "secondary" assumption of risk which occurs when a plaintiff deliberately assumes a risk created by defendant's breach of duty toward him. Plaintiffs who unreasonably assume the risk in this "second sense" are barred from recovery, while in the "primary sense" a reasonable plaintiff would

6. RESTATEMENT (SECOND) OF TORTS § 339 (1965).
7. WEST'S ANN. CIV. CODE § 1714 (1954).
8. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).
9. Wade, *The Place of Assumption of Risk in the Law of Negligence,* 22 LA. L. REV. 5 (1961).
10. RESTATEMENT (SECOND) OF TORTS §§ 496 A-496G (1965).
11. McConville v. State Farm Mutual Automobile Insurance Co., 15 Wisc. 2d 374, ———, 113 N.W. 2d 14, 16 (1962).
12. James, *Assumption of Risk,* 61 YALE L.J. 141 (1952).

be precluded from recovery. The determination of what a court should do when a plaintiff reasonably encouters a risk in the "second sense" could play an important part in the resolution of such problems as are raised in *Beard.*

In the instant case the California courts, contrary to movements in some other states,[13] maintained the view that the defenses of assumption of risk and contributory negligence are separate and distinct.[14] The assumption of risk question in *Beard* would fall into either the "second sense" pattern as explained above, or the area where a plaintiff reasonably but voluntarily encountered a risk. The court in applying *Rowland,* which held that landowners owed a duty to trespassers,[15] removed the presumption that the plaintiff assumed the risk. The burden of proving that the plaintiff assumed the risk is on the defendant. To establish his prima facie case, the plaintiff must only prove the standard elements of a cause of action for negligence,[16] rather than go through the process of tediously fitting conduct into the pigeonholes supplied by the theory of the Restatement.[17] This is an honest approach to the problems of negligence and one for which the court should be commended. However, it is submitted that the court's solution to the problem of assumption of risk was not complete.

The defendant, in order to absolve himself from liability, under the assumption of risk doctrine as laid out by the court in *Beard,* must "establish by a preponderance of the evidence (1) plaintiff's conscious assumption of the risk, which in the case of a juvenile encompasses his capacity to realize and appreciate the risk, and (2) the risk which plaintiff assumed was the one which proximately caused his injury."[18]

It appears that this test now subjects the defendant to the weaknesses of the test formally forced on the plaintiff. If this is true, it is submitted, that this test now encumbent on the defendant will prove just as wooden as tests formerly required of plaintiffs under the Restate-

13. Smith, *The Last Days of Assumption of The Risk,* 5 GONZAGA L. REV. 190 (1969-1970); Farnam, *Assumption of Risk Bites the Dust in Idaho—Almost,* 6 IDAHO L. REV. 119 (1969).

14. Prescott v. Ralph's Grocery Co., 42 Cal. 2d 158, ———, 265 P.2d 904, 906 (1954).

15. For the view that applying *Rowland* to trespassers is dictum see Toomepuu, *Torts-Trespassers and Licensees-Elimination of Common Law Classifications,* 49 B.U.L. REV. 198 (1969).

16. W. PROSSER, TORTS § 30, at 146 (3d ed. 1964).

17. For a trespassing child to rebut the presumption that he did not assume the risk at the time of the *Beard* trial, it was necessary under the attractive nuisance doctrine to fill the conditions imposed by RESTATEMENT (SECOND) OF TORTS § 339 (1965).

18. Beard, citing Vierra v. Fifth Avenue Rental Service, 60 Cal. 2d 266, 271, 383 P.2d 777, 32 Cal. Rptr. 193 (1963).

ment.[19] In addition, the problem remains of what to do with a plaintiff who voluntarily, but reasonably, assumes a risk.

In order to illustrate this problem, assume that on remand the trial court found the following situation to be present:

The fourteen year old plaintiff is found by the jury not to be contributorily negligent,[20] because the probability of an accident resulting from a negligently maintained sill step is not so great as to be that type of hazard about which one must worry. The jury further found the railroad to be negligent in their maintenance of the sill step, but that the plaintiff assumed the risk. This latter determination is based on plaintiff's prior knowledge of a person having been injured on a train's broken sill step. The court now would have the problem of a plaintiff who, while acting reasonably, was injured by a defendant who acted unreasonably. Should the fact that plaintiff knew he might be hurt absolve the defendant from all liability?[21]

One solution is to do away with the doctrine of assumption of risk.[22] However, the California Court has not done so and has not eliminated the problem as a matter of law. The *Beard* court held that a fourteen year old by testifying that "he did not know, and had not been told, that hopping on a moving freight train was dangerous,"[23] presented a question of fact on the issue of assumption of risk for the jury. This holding could go a long way towards solving the problem in an indirect way. The jury when faced with this situation, that the law has not effectively handled, will not be caught up in the classification of assumption of risk. When presented with a reasonable but voluntary plaintiff, and an unreasonable defendant, the jury will balance the scales and reach an equitable solution.

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19. The plaintiff in *Beard* was required to fill all the conditions in RESTATEMENT (SECOND) OF TORTS § 339 (1965).
20. The *Beard* court indicates such a result is entirely possible. See 4 Cal. App. 3d at 139, 84 Cal. Rptr. at 456 (1970).
21. For interesting views on this issue see Mansfield, *Informed Choice In The Law of Torts*, 22 LA. L. REV. 17 (1961).
22. Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90 (1959).
23. 4 Cal. App. 3d at 138, 84 Cal. Rptr. at 455 (1970).