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Assumption of Risk

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ASSUMPTION OF RISK

The Elements of the Doctrine:

Most of the courts and writers on the subject are agreed that the essentials of the doctrine of assumption of risk embrace knowledge and appreciation of the danger on the part of the one assuming the risk.[1] The term "assumption of risk" implies that one must be aware of the danger involved, and appreciate the existence of this danger; and, further that he then acquiesce in its presence. It follows that the condition of peril must have existed long enough to give the alleged "assumer" adequate or reasonable time to be charged with knowledge of it.[2] Without knowledge of the danger on the part of the one assuming the risk, it is impossible to invoke the doctrine.[3]

Pennsylvania follows these requirements. In the case of *Verna* v. *Lopresti*[4] the Superior Court said:

> "the plaintiff must know and appreciate or should know and appreciate the danger . . ."

The Supreme Court, in *Valjago* v. *Carnegie*,[5] expresses a similar view:

> ". . . it must appear clearly from the evidence, or there must be a finding of fact, that the plaintiff with full knowledge of the nature of the risk, impliedly took the chances of it."

The Application of the Doctrine:

There has been a great deal of confusion in legal circles in Pennsylvania, and elsewhere, concerning the doctrine of assumption of risk.[6] One reason for the confusion has been the difficulty in determining in just which type of case the defense will be allowed. The late Chief Justice Holmes, in *Schlemmer* v. *Buffalo, Rochester and Pittsburgh Railway*,[7] held that the earliest application of the phrase pertained only to cases arising out of master-servant relations. A minority still hold this limited application of the rule;[8] but it has been extended to cases involving contractual relationships by others.[9]

A majority of jurisdictions, applying the doctrine broadly, extend it to include the maxim, *Volenti Non Fit Injuria* (that to which a person assents is not deemed an injury by the law).[10] In a law review article by Professor Charles Warren entitled, "Volenti Non Fit Injuria in Actions of Negligence",[11] the author states:

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1 PROSSER ON TORTS, page 377 (1941).
2 Supra note 1, pages 385-386; 38 AMERICAN JURIS. 845.
3 HARPER ON TORTS, p. 291, 1933; Green Co. v. Bresmer, 97 Pa. 103 (1881).
4 157 Pa. Super. 163 (1945).
5 226 Pa. 514 (1909).
6 Eliot v. Philadelphia Transit Co., 160 Pa. Super. 291 (1946).
7 205 U. S. 1 (1906).
8 Cudahy Packing Co. v. McBride, 92 F.2d 737 (1937).
9 38 AMERICAN JURIS. 845. Southern Paciwic v. McCready 47 F.2d 673 (1931).
10 Gover v. Central Vermont R. R., 118 A. 874 (Vt. 1922).
11 8 HARV. L. REV.. 457 (1895).

> ". . . the scope of the defense (assumption of risk) as applied in actions of negligence has been extended to conduct showing a willingness to take the chances of the defendants actions, and to run the risk, i.e. a general assent to a condition which may or may not give rise to a cause of action."

The Restatement of Torts allows this broad application of the rule in § 893.

> "A person who knows that another has created a danger or is doing a dangerous act, or that the land and chattels of another are dangerous, and who nevertheless chooses to enter upon or to remain within or permit his things to remain within the area of risk, is not entitled to recover for harm unintentionally caused to him or his things by the others conduct or by the condition of the premises . . ."

Pennsylvania follows this view and allows the defense to be brought under the scope of the maxim. In *Hall* v. *Ziegler,*[12] where the plaintiff attempted to unlock the bumpers of two automobiles by standing between them, being thereby injured, the court said:

> ". . . the act of a plaintiff who chooses a place of danger in preference to one of comparative safety and is thereby injured, amounts to an assumption of the risk."

Assumption of risk has been most frequently used in personal injury cases where the plaintiff and defendant are in a master-servant relation. So, it would be interesting to note several factors which influence the applicability of the doctrine in these master-servant cases.

Servants are subject to the defense of assumption of risk in the usual case where they are aware of the danger.[14] Also, where the servant informs the master of the defect and continues work without any comment from the master, the servant is still held to be assuming the risk.[15] Even his employer's negligence, of which he is aware, will not exclude the defense.[16] Special or unforeseen negligence by the master will, of course, exclude the defense.[17] Where the plaintiff tells his master of the defect and is told that there is no danger, and is subsequently injured, it is held that he has not assumed the risk.[18] But, if the assurance of safety is given to a person of mature years, experienced in the kind of work he is doing, assumption of risk will still defeat recovery by the employee where the risk is known and comprehended by him.[19]

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12 361 Pa. 228 (1949).
13 Bohlen, *Voluntary Assumption of Risk,* 20 HARV. L. REV. 14 (1906).
14 Dutry v. Phil. and Reading R. R., 265 Pa. 215 (1919).
15 Nuss v. Rafsnyder, 178 Pa. 397 (1896).
16 Guerierro v. Reading R. R. Co., 346 Pa. 187 (1942).
17 Rulh v. Philadelphia et al., 346 Pa. 214 (1942).
18 Hughes v. Fayette Co., 214 Pa. 282 (1906).
19 Herron v. American Steel and Wire Co., 230 Pa. 90 (1911).

Another reason for the present state of the law on this subject has been the confusion of the defenses of "assumption of risk" and "contributory negligence." In *Eliot* v. *Philadelphia Transfer Company*[20] the court said:

> "According to text writers the term voluntary assumption of risk is confusing as it is used in a dual sense. First, as synonymous with the term contributory negligence, which implies negligence upon both plaintiff and defendant, and second, where there is no question of defendants negligence but where the risk is voluntarily assumed in the course of a master-servant relationship, or some other voluntary undertaking, such as landowner and licensee, guest and passenger, etc."[21]

It is easy to understand how the two defenses may be confused. Still, though they are similar in nature and effect, there are definite distinctions which should be noted.[22] These differences have been defined in the following manner by the Maryland court:

> "Contributory negligence defeats recovery because it is a proximate cause of the accident which happens, but assumption of risk defeats recovery because it is a previous abandonment of the right to complain if an accident occurs."[23]

The state of the law in Pennsylvania seems to be that while there is a distinction between assumption of risk and contributory negligence as defenses, the result is the same; namely, the plaintiff cannot recover. In *Tharp* v. *Penna. Railroad*[24] this defense (assumption of risk) was referred to as contributory negligence.

> "A person having a choice of two ways, one of which is safe, while the other is subject to risks and changes, and who *voluntarily chooses* the dangerous way and is injured, such person is guilty of *contributory negligence* and cannot recover."[25]

Recent Case:

A recent case of interest on this subject is *Rubin Bros.* v. *Standard Equipment Co.*,[26] decided this year. In this case the plaintiff, who operated a junk and rag storage depot, wanted some welding done. A welder was sent by the defendant company and the work performed. During the welding a fire broke out in rags stored nearby and a building was consumed. It was proved that employees of the plaintiff had provided metal shields to guard against sparks from the welding operation. The court instructed the jury they might find an assumption of risk under these circumstances. The verdict was for the defendant and a motion for a new trial was overruled. According to the briefs submitted, neither side found

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20 See note 6, supra.
21 For a further reference, see note 13, supra.
22 Supra, note 1, p. 378.
23 Gordon v. Maryland State Fair, 199 A. 519 (Md. 1938).
24 332 Pa. 233 (1938).
25 Also see Patterson v. Pittsburgh & Connellsville R. R. Co., 76 Pa. 389 (1874), where the court treats assumption of risk and contributory negligence as convertible terms.
26 60 Dau. Co. 401 (1950).

a case in Pennsylvania on point. As before stated, Pennsylvania follows the broad application of the doctrine, but the great majority of factual situations involve suits brought by a servant against his master, so this case may well point the way for actions with similar factual backgrounds in this jurisdiction.

This has been an attempt to point out the elements of the doctrine of assumption of risk, the various views as to its applicability, its confusion with the defense of contributory negligence, the Pennsylvania view on the subject. It is hoped this will aid in realizing the problems involved in an otherwise elementary rule of law.

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