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LANDLORD AND TENANT - ASSUMPTION OF RISK OF DEFECTIVE STAIRWAY IN LANDLORD'S CONTROL BY EMPLOYEE OF TENANT

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LANDLORD AND TENANT — ASSUMPTION OF RISK OF DEFECTIVE STAIRWAY IN LANDLORD'S CONTROL BY EMPLOYEE OF TENANT — Plaintiff, employee of a tenant in defendant's building, fell and suffered injuries while using a stairway designed for the use of the tenants and their employees. The stairway was in the control of the landlord, and had long been in a defective condition. It was the only means of ingress and egress. In the plaintiff's action against the landlord the trial court granted a non-suit on the ground that

plaintiff had voluntarily assumed the risk of the defective stairway by her use thereof. Plaintiff appealed. *Held*, the question whether the plaintiff had voluntarily assumed the risk is a question for the jury. *Di Geso v. Franklin Washington Trust Co.*, (N. J. L. 1939) 4 A. (2d) 9.

It has been said that one of the situations in which there is no room for the doctrine of assumption of risk is that wherein a tenant or his employee stays in possession of leased premises, voluntarily encountering the danger of a defective condition that the landlord has a duty to correct.[1] Professor Bohlen cites numerous cases in support of this proposition.[2] Unfortunately, these cases seem hardly conclusive. One makes no mention of either assumption of risk or of contributory negligence on the part of the tenant or his employee.[3] The others, although not speaking of assumption of risk, do discuss contributory negligence.[4] And a later case in the jurisdiction of three of these cases does discuss assumption of risk.[5] The distinction between contributory negligence and assumption of risk is often regarded as very slight.[6] It is possible that the courts in the cases cited by Professor Bohlen have themselves confused the two doctrines. However, the majority of states that have passed on assumption of risk in this situation support Mr. Bohlen.[7] The New Jersey court, however, has almost uniformly held that assumption of risk does apply in this situation,[8] and the court in the instant case specifically follows this line of decisions. As can be seen, the courts are not in agreement, and the writer submits that the approach suggested by Professor Bohlen is the fairest one.[9] If the assumption of risk doctrine is applied to this type of case, employees will either have to leave their job, or risk an injury from a defect for which neither they nor their employers are responsible. The reason given that the doctrine is not widely applied in England to this type of case is the practical one that there the loss of

[1] Bohlen, "Voluntary Assumption of Risk," 20 HARV. L. REV. 14 at 19 (1906).

[2] Looney v. McLean, 129 Mass. 33 (1880); Watkins v. Goodall, 138 Mass. 533 (1885); Marwedel v. Cook, 154 Mass. 235, 28 N. E. 140 (1891); Dollard v. Roberts, 130 N. Y. 269, 29 N. E. 104 (1891).

[3] Looney v. McLean, 129 Mass. 33 (1880).

[4] Watkins v. Goodall, 138 Mass. 533 (1885); Marwedel v. Cook, 154 Mass. 235, 28 N. E. 140 (1891); Dollard v. Roberts, 130 N. Y. 269, 29 N. E. 104 (1891).

[5] Cushing v. Jolles, (Mass. 1935) 197 N. E. 466.

[6] McFarlane v. City of Niagara Falls, 247 N. Y. 340, 160 N. E. 391 (1928).

[7] Brandt v. Rakauskas, 112 Conn. 69, 151 A. 315 (1930); L'Heureux v. Hurley, 117 Conn. 347, 168 A. 8 (1933); Stumpf v. Baronne Building, 16 La. App. 702, 135 So. 100 (1931). Illinois and Minnesota support the doctrine, but on the basis that assumption of risk cannot apply in the absence of a contractual relationship. Shoninger v. Mann, 219 Ill. 242, 76 N. E. 354 (1906); Mueller v. Phelps, 252 Ill. 630, 97 N. E. 228 (1912); Williams v. Dickson, 122 Minn. 49, 141 N. W. 849 (1913). But see 3 L. R. A. (N. S.) 1097 (1906) for a criticism of this basis.

[8] Vorrath v. Burke, 63 N. J. L. 188, 42 A. 838 (1899); Saunders v. Smith Realty Co., 84 N. J. L. 276, 86 A. 404 (1913); Rooney v. Siletti, 96 N. J. L. 312, 115 A. 664 (1921). Bailey v. Fortugno, 8 N. J. Misc. 739, 151 A. 484 (1930), held contra without referring to prior New Jersey decisions.

[9] Bohlen, "Voluntary Assumption of Risk," 20 HARV. L. REV. 14 at 19 (1906).

a job is a major problem due to the difficulties in obtaining work. Thus the fear of losing a job and the pressure of necessities are regarded as destructive of free will so the assumption of the risk is involuntary rather than voluntary.[10] In America it has been said that the economic conditions are different, that there is no dearth of work, and that the fear of losing a job is not destructive to free will because the employee can always quit and find a new job, so the doctrine has been freely applied.[11] When this statement was made it was probably true, but because of changing times the situation seems to be the same in this country as it is in England. Looking at the situation in a realistic light, the assumption of the risk by the employee can hardly be said to be voluntary, and the view expressed by Professor Bohlen seems to be the more socially desirable one.

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[10] Bohlen, "Voluntary Assumption of Risk," 20 HARV. L. REV. 91 at 115 (1906).

[11] Ibid.