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ASSUMPTION OF PRODUCTS RISKS*

by

Robert E. Keeton**

I. INTRODUCTION

A LIVELY debate has been in progress in recent years as to whether any distinct doctrine of assumption of risk exists. This debate occupied a full morning at the annual meeting of the American Law Institute in May, 1963, and of course it has not been terminated by the Institute's resolutions granting some measure of recognition to the doctrine.¹ In these circumstances, one who proposes to write about assumption of risk, in products liability cases or any other area of tort law, faces the burden of proving that his subject is not illusory. Perhaps one can meet that burden with greater ease, however, after—rather than before—examining concrete illustrations of what some of us choose to call applications of assumption of risk, either under that name or under the alias, *volenti non fit injuria*.² This Article focuses on such illustrations in products liability cases; the principles considered, however, seem equally applicable to other areas of tort law.

II. EXPLICIT AGREEMENTS FOR ASSUMPTION OF RISK BY PRODUCTS USERS

A. A Current Illustration In Automobile Marketing

In the purchase of a new car, the purchaser signs a document that includes a so-called manufacturer's warranty. Aphorisms about the fine print in insurance policies originated before automobiles were

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¹ 40 ALI Proceedings 367-76, 396-467 (1963). See also Restatement (Second), Torts § 496A (Tent. Draft No. 9, 1963).

² It has often been said that there is no substantive difference between assumption of risk and *volenti non fit injuria*, although as a matter of customary terminology in some courts assumption of risk applies only in employer-employee cases or only in cases of contractual relationships, whereas the *volenti* doctrine applies to other situations. E.g., Terry v. Boss Hotels, Inc., 376 S.W.2d 239 (Mo. 1964) (plaintiff slipped and fell on dance floor, which he admitted he realized was too heavily waxed; proper to submit the defense to the jury); Wood v. Kane Boiler Works, Inc., 150 Tex. 191, 238 S.W.2d 172 (1951) (inspector killed when pipe burst during tests; defense failed for want of showing full appreciation of risk). Long preservation of a distinction in terminology, however, is bound to invite explanations that there really is a difference. No distinction is made between the two in this Article. It will be well if courts continue to resist the temptation to give different substantive or procedural effects to these two theories of what is in essence one and the same defense.

invented—and before astute lawyers put their minds to drafting automobile manufacturers' warranties. Typically these warranties, rather than merely taking away something the bold print seems to grant, take away something the buyer would have if there were no bold print at all. Automobile dealers have commonly been instructed by manufacturers that they must deliver the warranty, obtaining the buyer's signature on a contract including it, whether the buyer wants it or not. The warranty includes an agreement that, from the point of view of the manufacturer, is an explicit disclaimer of liability beyond that specified in the purchase contract. From the point of view of the purchaser, it is an explicit assumption of risks of accidental harm from the product, other than those specified. Until quite recently the specified liability was mostly for replacement of parts for a limited period of time. The warranties have since been liberalized, but in general they still do not purport to confer liability for harm caused by defects, as distinguished from liability for the cost of correcting a defect itself. The early precedents in automobile cases upheld and enforced these exculpatory provisions, applying the general rule that an agreement exonerating one of the parties or limiting his liability to another party to the agreement is effective between themselves.³

B. *Who Is Affected By Exculpatory Clauses?*

It is well settled that exculpatory agreements are binding on only the parties or their privies.⁴ It is for this reason that automobile manufacturers insist that their warranty be made a part of the purchase contract between the buyer and the dealer. Through this device, the manufacturer seeks to establish a relationship of privity with the

³ E.g., *Shafer v. Reo Motors, Inc.*, 205 F.2d 685 (3d Cir. 1953) (sale of new car with defective gasoline tank, the contract reading "this Warranty being expressly in lieu of all other Warranties expressed or implied"); *Nichols v. Hitchcock Motor Co.*, 22 Cal. App. 2d 151, 70 P.2d 654 (Dist. Ct. App. 1937) (clause in purchase contract saying purchaser assumes full responsibility for any damage while seller's employee is driving vehicle); *Getzoff v. Von Lengerke Buick Co.*, 14 N.J. Misc. 750, 187 Atl. 539 (Sup. Ct. 1936) (suit based on defect in new Pontiac barred by disclaimer in conditional sales contract); *Sonnenberg v. Nolan Motors, Inc.*, 2 Misc. 2d 185, 36 N.Y.S.2d 549 (Sup. Ct. 1942) (buyer of new Dodge by contract waived any implied warranty made part of contract by New York statute). *But see Ford Motor Co. v. Cullum*, 96 F.2d 1 (5th Cir. 1938), *cert. denied*, 305 U.S. 627 (1938) (warranty limited to replacement of parts; rescission of purchase contract under Uniform Sales Act allowed when new parts supplied did not remedy defects).

⁴ *Dockens v. La Caze*, 78 F. Supp. 515 (W.D. La. 1948) (provision in employment contract that employee should be solely liable for any injuries he inflicted upon others; held not binding on injured third person). See also 1 *Frumer & Friedman, Products Liability* § 16.04 [2] [e] (1964); 2 *Harper & James, Torts* § 28.25 n.13 (1956): "Where the effect of a warranty is extended by reason of the maker's advertising addressed to the general public, a disclaimer of warranty clearly expressed in the same advertising should perhaps be given equally broad effect. But where the disclaimer is in the documents of sale between the maker and his vendee, it should not bind remote vendees."

buyer. This is the converse of situations in which the manufacturer denies privity and the claimant seeks to establish it in order to support a theory of liability on implied warranty or negligence. That war has been won by claimants;⁵ only mopping-up operations remain. It has now become more useful to manufacturers to embrace privity and supplement it with exculpatory agreements.

C. *Decisional Limitations On Validity*

From the first there have been some limitations on the effectiveness of exculpatory agreements—limitations in the form of rules of construction disfavoring exculpation from liability for negligence.⁶ Recently, more rigorous limitations have been emerging in the precedents. For example, consider *Hunter v. American Rentals, Inc.*⁷ This was an action for personal injuries and property damage sustained by the plaintiff when a trailer rented to him by defendant and attached to his automobile came loose at the hitch but remained attached with a safety chain in such a manner that, swinging from one side of the highway to the other, it caused plaintiff's automobile to overturn. The rental agreement purported to absolve defendant of all responsibility. By its terms plaintiff waived all claims, "including those resulting from defects, latent or apparent."⁸ A statute of the state required that the hitch connecting one vehicle and another as its tow "shall be of sufficient strength to pull, stop and hold all weight towed thereby" and that "an adequate safety hitch" shall also be provided.⁹ The court denied a defense based on the exculpatory contractual provisions, holding that those provisions were void as "being in contravention of the statute and the public policy of this state."¹⁰

The matter was discussed as one of enforceability of a contractual provision, rather than in terms of assumption of risk. But from another point of view this was a holding that a purported express assumption of risk was ineffectual because contrary to a statute and the public policy of the state.

⁵ E.g., *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (automobile); *Ford Motor Co. v. Mathis*, 322 F.2d 267 (5th Cir. 1963) (automobile), noted in 18 Sw. L.J. 128 (1964).

⁶ E.g., *Grey v. Hayes-Sammons Chem. Co.*, 310 F.2d 291 (5th Cir. 1962) (disclaimer must clearly describe warranties it is disclaiming); *Aerial Agricultural Serv. v. Richard*, 264 F.2d 341 (5th Cir. 1959) (terms of exculpatory agreement must have been brought home to plaintiff and must apply to the particular negligence); *Chicago & N.W. Ry. v. Chicago Packaged Fuel Co.*, 195 F.2d 467 (7th Cir.), *cert. denied*, 344 U.S. 832 (1952) (contracts exculpating from liability for future negligence will be strictly construed against the party relying thereon).

⁷ 189 Kan. 615, 371 P.2d 131 (1962).

⁸ *Id.* at 616, 371 P.2d at 132.

⁹ *Id.* at 617, 371 P.2d at 133.

¹⁰ *Id.* at 619, 371 P.2d at 134.

Nor is this holding unique. A similar result was reached in *Henningsen v. Bloomfield Motors, Inc.*¹¹ An automobile dealer sold a car to Henningsen under a written purchase contract containing the standard automobile manufacturer's warranty—an exculpatory clause. Henningsen's wife was injured when the car went out of control after being driven only a few hundred miles. It was found that the accident was caused by a defect in the steering mechanism. The court held that an implied warranty of merchantability from both manufacturer and dealer extended to the purchaser and his wife (with intimations it would extend to anyone else foreseeably injured). The exculpatory provisions of the written agreement were held unenforceable because against public policy.

To date, there is only a scattering of cases holding exculpatory clauses unenforceable, but it seems evident that this is the trend. We can expect it to be extended rapidly to other jurisdictions and to other transactions in which the form of the contract is dictated by the bargaining power and position of one of the parties.

Consider an illustration of express assumption of risk in another kind of case, *Jefferson County Bank v. Armored Motors Serv.*¹² Plaintiff bank delivered bags of currency to defendant for transmission to another bank. After depositing the bags in their truck and locking it, defendant's guards went back into plaintiff bank to deliver bags of silver. On their return they discovered that four bags of currency had been taken by unknown persons, the loss amounting to about \$165,000. Rates charged for defendant's armored-car service were graduated in ratio to the maximum liability to the customer on each shipment. Plaintiff bank had paid thirty-five dollars per month for ten round-trip pickups; and, under the terms of the contract, \$30,000 was defendant's maximum liability per shipment at that rate. The contract was held enforceable. The court spoke of this arrangement not as an assumption of risk but as an enforceable contract to limit one's liability for negligence. This is what one says when looking at the transaction through the eyes of the negligent party. The transaction is also what one refers to, looking at it through the eyes of the victim, as express assumption of risk.

One's instinctive reaction about the rough-and-ready justice of that fact situation is, no doubt, consistent with the court's enforcement of the contract; probably that is so even if one customarily represents bankers rather than people who operate armored cars—on either side of the law. Note the contrast between this case, on the one

¹¹ 32 N.J. 358, 161 A.2d 69 (1960).

¹² 148 Colo. 343, 366 P.2d 134 (1961).

hand, and *Henningsen* and *Hunter* on the other. In this bank case, one might say there was no disparity of bargaining positions in the first place. Even if there may have been such a disparity, however, the party drawing the form contract gave the other party a clear option—pay one price and assume the risk of loss from negligence of the armored-car service above \$30,000 per delivery or pay a higher price and leave that risk upon the armored-car service, where tort law places it in the absence of a valid exculpatory agreement. That kind of arrangement seems very fair, and it will surely continue to be enforceable even where the trend toward striking down exculpatory agreements has taken effect. Thus, lawyers who are employed to draft exculpatory clauses would do well to consider proposing a two-price option—one price with exculpation, and a higher price without. That kind of solution has evolved with respect to common carriers' efforts to limit their liability,¹³ and a similar solution regarding exculpatory contracts in other contexts seems likely.

III. "As Is" SALES AND UNILATERAL DISCLAIMERS

In a sense, one seeks to invoke an analogy to a two-price option when he attempts to make an "as is" sale. In *Pokrajac v. Wade Motors, Inc.*,¹⁴ for example, a used car with defective brakes was offered "as is"—and no doubt at a price that compared favorably with the price demanded for an ordinary sale. The court upheld the implicit agreement of exculpation, declaring that the purchaser had assumed the risk. The court noted,¹⁵ however, that a different question is involved if, as in *Flies v. Fox Bros. Buick Co.*,¹⁶ the claimant is a third person (not a party to the contract) who is injured by use of the defective vehicle before the brakes have been repaired.

Another kind of three-party problem arises when the manufacturer of a product attempts a unilateral disclaimer. In a way, calling such a disclaimer unilateral is misleading. What the manufacturer hopes to accomplish is so to bring the disclaimer to the attention of the purchaser that it must be said that the purchaser bought with notice (and that any user other than the purchaser used with notice) and is not a third party in the sense of being a stranger to the disclaimer. Ordinarily, as indicated in *Taylor v. Jacobson*,¹⁷ such a dis-

¹³ *Union Pac. R.R. v. Burke*, 255 U.S. 317 (1921) (rail carrier failed to give choice of rates and limitation held invalid); *Holmes v. National Van Lines, Inc.*, 55 Wash. 2d 861, 350 P.2d 864 (1960) (motor carrier gave choice of rates and limitation held valid). See also Annot., 165 A.L.R. 1005 (1946).

¹⁴ 266 Wis. 398, 63 N.W.2d 720 (1954).

¹⁵ *Id.* at 401, 63 N.W.2d at 722.

¹⁶ 196 Wis. 196, 218 N.W. 855 (1928).

¹⁷ 336 Mass. 709, 147 N.E.2d 770 (1958).

claimer is a good defense for a retailer as well as a manufacturer if there is proof of its being brought to the attention of the purchaser and the user. If brought to the purchaser's attention before purchase, perhaps it may be regarded as part of an explicit assumption of risk. If brought to his attention only afterwards, however, no contract for assumption of risk can be made out. In that situation, the defense is more closely related to what is commonly called implied assumption of risk—a defense based on voluntary exposure to recognized risk.

IV. VOLUNTARY EXPOSURE TO RECOGNIZED RISK

A. Recognition As A Defense

What is the legal result if a person recognizes the existence of risks created by negligence of another, but nevertheless goes forward voluntarily with conduct exposing himself to those risks and suffers injury within their scope? A defense based on such facts has been upheld in a number of cases.¹⁸ The essence of this defense is voluntary exposure to recognized risk.

This problem is well illustrated by *Halepeska v. Callihan Interests, Inc.*¹⁹ This was a wrongful death action against a gas well owner. The well blew out while Halepeska was working on it, causing his death. Plaintiffs contended that the well was negligently equipped. In response to special issues, the jury made two groups of findings: (1) that in the exercise of ordinary care Halepeska *should* have had full knowledge of the manner in which the wells were equipped, that he should have appreciated the danger of opening the valves that were opened, and that he voluntarily exposed himself to such danger, which in the exercise of ordinary care he should have known and appreciated; and (2) that Halepeska *did not* have full knowledge of the manner in which the wells were equipped and did not appreciate the extent of the danger involved in opening the valves. On the basis of the first group of findings, and treating the second group as not controlling, the court of civil appeals rendered judgment for the defendant on the theory of *volenti non fit injuria*.²⁰ The Supreme

¹⁸ E.g., *Saeter v. Harley Davidson Motor Co.*, 186 Cal. App. 2d 248, 8 Cal. Rptr. 747 (Dist. Ct. App. 1960) (hearing denied by Cal. Sup. Ct. with two justices dissenting) (continued driving of defective motorcycle); *Gallegos v. Nash*, San Francisco, 137 Cal. App. 2d 14, 289 P.2d 835 (Dist. Ct. App. 1955) (continued driving of car with spongy brakes); *Sanders v. Kalamazoo Tank & Silo Co.*, 205 Mich. 339, 171 N.W. 523 (1919) (use of derrick with knowledge it had not been assembled according to manufacturer's instructions); *Runnels v. Dixie Drive-It-Yourself Sys.*, 220 Miss. 678, 71 So. 2d 453 (1954) (continued driving of rented car that shimmed). See also Restatement (Second), Torts § 496A (Tent. Draft No. 9, 1963), and cases cited in note 23 *infra*.

¹⁹ 371 S.W.2d 368 (Tex. 1963).

²⁰ *Callihan Interests, Inc. v. Halepeska*, 349 S.W.2d 758 (Tex. Civ. App. 1961).

Court of Texas held that, because of the finding that Halepeska did not have full knowledge and appreciation of the risk arising from the defendant's negligence in improperly equipping the well, no defense based on voluntarily encountering known danger could be sustained. This resulted in a remand to the intermediate court for consideration of other contentions that might require reversal and remand to the trial court for new trial.²¹

B. *The Restatement Controversy And Its Practical Implications*

The *Halepeska* case presented to Justice Greenhill of the Supreme Court of Texas an ideal opportunity to invoke the arguments presented before the American Law Institute in May, 1963, concerning assumption of risk. Justice Greenhill capitalized on the opportunity with an opinion that reports the opposing views expressed before the ALI and skillfully traces in Texas cases colossal support for both of the opposing views.

Perhaps the controversy before the ALI is best introduced by stating a point not in dispute. It was agreed on all hands, as it was assumed by the court in the *Halepeska* case, that in some situations, even though the defendant unreasonably created a risk, he is entitled to judgment upon a finding that the plaintiff voluntarily exposed himself to the risk with full appreciation of it. Observe that this statement is so framed as not to speak of either the concept of assumption of risk or the concept of no duty.

The first point of controversy is simply a controversy over terminology. In the preceding paragraph the substantive proposition is expressed in a way acceptable, surely, to most representatives of both factions. It may also be expressed, however, in two other ways. (1) In some situations, even though the defendant unreasonably created a risk, he is entitled to judgment upon a finding that the plaintiff voluntarily exposed himself to the risk with full appreciation of it *because plaintiff thus assumed the risk*. This is, in effect, the way the *Restatement of Torts (Second)*²² expresses the proposition, and it is also the form of expression more commonly used in judicial opinions over the country.²³ (2) In some situations, even though the defendant unreasonably created a risk, he is entitled to judgment upon

²¹ 371 S.W.2d at 386.

²² Restatement (Second), Torts § 496A (Tent. Draft No. 9, 1963).

²³ Cases sustaining a defense of assumed risk are cited in note 18 *supra*. See also the following cases dealing with the problem under this terminology, though denying the defense on the facts: *Valmas Drug Co. v. Smoots*, 269 Fed. 356 (6th Cir. 1920) (eyewash tablets); *McCormick v. Lowe & Campbell Athletic Goods Co.*, 235 Mo. App. 653, 144 S.W.2d 866 (1940) (vaulting pole); *Swaney v. Peden Steel Co.*, 259 N.C. 531, 131 S.E.2d 601 (1963) (steel truss broke when bolts sheared).

a finding that the plaintiff voluntarily exposed himself to the risk with full appreciation of it, *because the defendant owed such a plaintiff no duty of care*. This is, in effect, the no-duty formulation.

In short, the controversy over terminology is that one group prefers to say no liability because of assumption of risk in these cases of voluntary exposure to fully appreciated risk, and the other group prefers to say no liability because of no duty. If we must choose between these methods of expression, the former seems preferable, not merely because it is consistent with the usage in more judicial opinions than is the other, but also because it is less misleading. The no-duty usage produces two bizarre effects. For illustration of these effects, assume a case just like *Halepeska* except in one respect—that there was also another worker beside Halepeska, and this second worker did know and appreciate the risk. Under the no-duty usage, one says that the single course of conduct of the defendant in failing properly to equip its wells was negligence as to Halepeska but was not negligence as to the other worker toward whom there was no duty of care. The only difference is not in the quality of the defendant's conduct but rather in the quality of the plaintiffs' participation in the event. Talking about this one difference as a duty or no-duty proposition is confusing. Duty and no duty connote something about the defendant's conduct or the relation between the plaintiff and the defendant rather than something about the plaintiff's participation. Assumption of risk, on the other hand, connotes something about the plaintiff's participation, and since this is the point of distinction, use of this term seems the preferable way of saying it.

The second bizarre effect of the no-duty terminology is related to the fact that the defendant's conduct, equipping the well, occurs long before we or the defendant could know whether Halepeska and the other worker would discover the risk. Ordinarily we are accustomed to judging conduct as of the time and place it occurs, but under this usage the question whether the defendant's unreasonable conduct was negligence can only be decided as of a time when it is known whether the worker discovered the risk. And this judgment must be made separately in relation to each worker. Not illogical. Just misleading to anyone whose alertness to the special usage lapses even momentarily.

This much, as already indicated, seems merely a matter of terminology. It may be important, because our terminology tends to rule or to confuse us sometimes. Nevertheless, we can rule if we master the terminology, so it need not necessarily result in any substantive

difference. Most judicial opinions speak either exclusively or primarily in the assumption-of-risk terminology. A few recent opinions have spoken exclusively in the no-duty terminology.²⁴ And in some jurisdictions cases using each manner of speaking alone and other cases using both manners of speaking can be found.²⁵ Hopes for a uniform manner of speaking seem dim, so it is well to be bilingual—to be able to understand, perhaps even to speak and write, both languages.

Also, probably there is a bit more to this controversy than just the matter of terminology. The noncontroversial proposition stated previously, without use of either no-duty or assumption-of-risk concepts, was subject to a qualification—in *some situations*, even though the defendant unreasonably created a risk, he is entitled to judgment upon a finding that the plaintiff voluntarily exposed himself to the risk with full appreciation of it. Probably it is fair to say that the proponents of the no-duty terminology are usually also proponents of the proposition that prudent voluntary exposure to a fully appreciated risk ought not to defeat liability. They argue that although under the precedents such a way of defeating liability is available in some situations, the better path of the future is to recognize duty and liability despite a voluntary exposure that is reasonable and, therefore, not contributory negligence. In general that point of view seems sound in relation to cases of the hard-choice type to which reference will be made below.²⁶ For example, it should not be enough to escape liability that the defendant warns of danger and the plaintiff understands the warning, if the defendant's conduct has nevertheless created a situation in which he can foresee, if viewing the circumstances reasonably, that the hard choice he has presented to the plaintiff will cause the latter to chance the danger when that is a reasonable thing to do. No doubt proponents of this view can gain ground if they can persuade us all to use their terminology, for the plaintiff's voluntary exposure seems little reason to say the defendant has no duty of care; this remains true even if one thinks that voluntary exposure ought to be a good defense on some other theory. In short, the objective of this group is a good one, but their way of working for its accomplishment leads to confusion.

²⁴ *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90 (1959), is an example, and a passage in that opinion illustrates the confusion that can result from the terminology. See Keeton, *Assumption of Risk in Products Liability Cases*, 22 La. L. Rev. 122, 160-64 (1961).

²⁵ Texas is an example. The cases are classified from this point of view in Justice Greenhill's opinion in *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368 (Tex. 1963).

²⁶ See text accompanying notes 29-33 *infra*.

C. *New Limits On The Scope Of The Defense—
Some Arguments Of Policy*

Over the years, many of the opinions on assumption of risk have included language in the terms of the first group of jury findings in *Halepeska*—that is, statements that the plaintiff *should* have appreciated the risk, or that he voluntarily exposed himself to a danger that in the exercise of ordinary care he would have appreciated. Enough of this remains in the precedents to make plausible, and perhaps even tenable in some jurisdictions, an argument for assumption of risk on an objective standard (*i.e.*, should have known and appreciated) rather than a subjective standard (*i.e.*, did know and appreciate). This, incidentally, was the substantive point at issue in *Halepeska*. That decision, consistently with the prevailing view, which is also adopted in the *Restatement*, limits the defense to cases of subjective appreciation of risk with one possible exception. That is, there remains a tendency to say that if the danger is open and obvious, one will not be heard to say he did not appreciate it. If that is only a delicate way of saying to the claimant that his story is a pack of lies or that no jury could reasonably find that he did not appreciate the risk in fact, regardless of what he says, it is consistent with the limitation of assumption of risk to the cases of subjective assumption of risk.

The court's opinion in *Halepeska* is a distinct service to lawyers and the law in clarifying the no-duty, assumption-of-risk and *volenti* doctrines in Texas. Another more recent opinion of Justice Greenhill has contributed further clarification, and improvement as well. The case is *Wesson v. Gillespie*.²⁷ Perhaps there is an element of poetic propriety in the fact that this assumption-of-risk case arose out of an incident at the Eight-Ball Bar. In leaving the establishment, the plaintiff tripped on the threshold and fell outside onto a concrete apron. Despite jury findings favorable to the plaintiff, the trial court entered judgment for the defendant. The supreme court affirmed the trial court, reversing the contrary decision of the court of civil appeals.²⁸ In ruling that under the evidence the condition of the threshold was open and obvious and plaintiff assumed the risk as a matter of law, the court moves far toward establishing an objective standard for what is open and obvious. Unmistakably, however, the court is requiring more than merely proof that the plaintiff should have appreciated the danger. Though the standard may be objective in some degree, it is not a standard concerned merely with whether

²⁷ 382 S.W.2d 921 (Tex. 1964).

²⁸ *Gillespie v. Wesson*, 370 S.W.2d 918 (Tex. Civ. App. 1963).

a reasonable person would have appreciated the danger. A considerably stronger showing than that is required.

The fact findings in *Halepeska* relieved the court of the necessity of facing a difficult question of substance that would have been presented if there had been a finding that Halepeska knew and appreciated the risk fully but was reasonable in exposing himself to it. Why should a negligent defendant be allowed to escape liability because the plaintiff chose to expose himself to the risk negligently created by the defendant, if the plaintiff's choice was reasonable? Should we not instead say that the defendant's negligence unfairly confronted plaintiff with a hard choice in which exposure to defendant's negligently created risk seemed the lesser evil and that, therefore, the defendant should be liable?²⁹

There is a very close analogy between this argument and the argument in cases like *Hunter*³⁰ and *Henningsen*³¹ that the exculpatory agreement was contrary to public policy. Just as we are witnessing an increasing number of decisions striking down exculpatory express assumptions of risk as contrary to public policy, so also an increasing number of decisions strike down the subtler form of defense. Two recent decisions are particularly noteworthy.

In *Siragusa v. Swedish Hosp.*,³² a nurse's aid sued her employer for injuries sustained while at work. As she was standing at the wash basin in a six-patient ward, a patient in a wheelchair pushed the ward door inward. On the door was a metal hook placed there to permit persons to open the door from the inside with a forearm. This hook struck the upper part of plaintiff's back. Plaintiff contended that defendant was negligent in failing to provide her a safe place to work, and the trial court dismissed at the close of the evidence on the ground that plaintiff voluntarily assumed the risk. The Supreme Court of Washington, without benefit of any applicable statute and overruling its own earlier decisions, held that assumption of risk is no longer a defense in employer-employee cases. The direct impact of this decision may not be great, since there are relatively few employer-employee cases not governed by statute. But its potential significance is far greater, because most of what was said about the injustice of

²⁹ See *Clayards v. Dethick*, 12 Q.B. 439, 116 Eng. Rep. 932 (1848) (plaintiff's horse strangled after falling in excavation blocking access to stables); *Central R.R. v. Crosby*, 74 Ga. 737 (1885) (engineer killed when he stayed in cab to try to lessen effects of collision); *Missouri, K. & T. Ry. v. McLean*, 55 Tex. Civ. App. 130, 118 S.W. 161 (1909) *error ref.* (alternative of using defective railway cars or losing cabbages from nonshipment). See also 2 Harper & James, *Torts*, § 21.1 (1956); Keeton, *Assumption of Risk in Products Liability Cases*, 22 La. L. Rev. 122, 154-59 (1961).

³⁰ *Hunter v. American Rentals, Inc.*, 189 Kan. 615, 371 P.2d 131 (1962).

³¹ *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

³² 60 Wash. 2d 310, 373 P.2d 767 (1962).

allowing the negligent employer a defense of assumption of risk when the voluntary exposure was reasonable is also applicable in other relationships generally.

*McConville v. State Farm Mut. Auto. Ins. Co.*³³ is another decision pointing the same way. In that case the Wisconsin court, overruling precedents, declared that assumption of risk is no longer a part of automobile law in that jurisdiction.

In both these instances it is the substantive doctrine, concerned with voluntary exposure to fully appreciated risk, that is being abandoned. If a defendant argues for no duty, rather than for assumption of risk, he will encounter the same response. The theory of nonliability because of voluntary exposure to fully appreciated risk has been rejected, and it matters not what terminology one uses in trying to urge it.

V. ASSUMPTION OF RISK AND STRICT PRODUCTS LIABILITY

In *Greenman v. Yuba Power Prods., Inc.*,³⁴ plaintiff sued the retailer and the manufacturer of a combination power tool known as a "Shopsmith." It could be used as a saw, drill and wood lathe. And it turned out to be even more versatile. The language of the New York court, when it was subsequently describing the *Greenman* case, conjures up visions of a revolt of machines against their masters. This machine, said the New York court, "threw a piece of wood at a user."³⁵ The California court, in the opinion deciding the case, personified the wood rather than the machine. As they put it, a piece of wood the user wished to make into a chalice "suddenly flew out of the machine and struck him on the forehead, inflicting serious injuries."³⁶ The California court, imposing liability on the manufacturer of the Shopsmith for the injuries suffered by the user, made clear that in its view the liability of the manufacturer to the consumer is governed not "by the law of contract warranties but by the law of strict liability in tort."³⁷ "The purpose of such liability," observed the court, "is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."³⁸

³³ 15 Wis. 2d 374, 113 N.W.2d 14 (1962).

³⁴ 59 Cal. 2d 57, 377 P.2d 897 (1963), noted in 17 Sw. L.J. 669 (1963).

³⁵ *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 437, 191 N.E.2d 81, 83 (1963) (suit against air carrier and manufacturers of altimeter and airplane involved in airplane crash).

³⁶ 59 Cal. 2d at 59, 377 P.2d at 898.

³⁷ *Id.* at 63, 377 P.2d at 901.

³⁸ *Ibid.*

In a way, it may appear that the other major hurdle in the case—whether strict liability is to be extended beyond food products to products generally—is passed over rather lightly. The opinion simply says: “Recognized first in the case of unwholesome food products, such liability has now been extended to a variety of other products that create as great or greater hazards if defective.”³⁹ The illustrations cited by the court include, among others, cases of a defective grinding wheel,⁴⁰ soft-drink bottles,⁴¹ insect spray,⁴² a surgical pin,⁴³ automobiles,⁴⁴ home permanent,⁴⁵ hair dye,⁴⁶ and an airplane.⁴⁷ The opinion concludes: “To establish the manufacturer’s liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.”⁴⁸

Note two points. First, the court’s conclusion is qualified by the inclusion of the condition that the plaintiff was not aware of the defect. Thus, the court is free to say that voluntary exposure to a known defect bars a claimant, either on a theory of no duty or on a theory of assumption of risk. Second, the conclusion is qualified by the condition that the injury resulted from a defect in the product—in design and manufacture. It may be argued that the principle of placing the burden of injuries on the maker of the product should apply to injuries from expectable use of even a product without defect. But that is a debatable step, and one this court has not taken.

Although in *Greenman* the theory of liability approved by the court involved a showing of defect in the product, the opinion did not discuss what constitutes a defect. Other cases have begun to develop this concept of defect. *Casagrande v. F.W. Woolworth Co.*⁴⁹ is an example. The plaintiff suffered from dermatitis after applications of a deodorant purchased from the defendant. The defense was successful on the ground that the plaintiff failed to meet her burden of showing that the product was unfit—“that is, that it

³⁹ *Id.* at 62, 377 P.2d at 900.

⁴⁰ *Peterson v. Lamb Rubber Co.*, 54 Cal. 2d 339, 353 P.2d 575 (1960).

⁴¹ *Vallis v. Canada Dry Ginger Ale, Inc.*, 190 Cal. App. 2d 35, 11 Cal. Rptr. 823 (Dist. Ct. App. 1961); *Jones v. Burgermeister Brewing Corp.*, 198 Cal. App. 2d 198, 18 Cal. Rptr. 311 (Dist. Ct. App. 1961).

⁴² *McQuaide v. Bridegport Brass Co.*, 190 F. Supp. 252 (D. Conn. 1960).

⁴³ *Bowles v. Zimmer Mfg. Co.*, 277 F.2d 868 (7th Cir. 1960).

⁴⁴ *E.g., Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

⁴⁵ *Markovich v. McKesson & Robbins, Inc.*, 106 Ohio App. 265, 149 N.E.2d 181 (1958).

⁴⁶ *Graham v. Bottenfield’s, Inc.*, 176 Kan. 68, 269 P.2d 413 (1954).

⁴⁷ *Hinton v. Republic Aviation Corp.*, 180 F. Supp. 31 (S.D.N.Y. 1959).

⁴⁸ *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 64, 377 P.2d 897, 901 (1963), noted in 17 Sw. L.J. 669 (1963).

⁴⁹ 340 Mass. 552, 165 N.E.2d 109 (1960). See generally P. Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 Texas L. Rev. 855 (1963).

would have sensitized [and injured] a significant number of persons . . . either immediately or after a period of use."⁵⁰ In short, the defect—the aberration—may have been in the plaintiff's skin rather than the defendant's product. There is also a sprinkling of cases determining whether a chicken sandwich is defective if it has chicken bones in it,⁵¹ and whether oyster stew is defective if containing a piece of oyster shell.⁵²

This question of defect is also one of the many problems in the cigarette-cancer cases. In *Lartigue* the Fifth Circuit adopted the position, applying their best estimate of Louisiana law, that for liability to be imposed the product "must be unreasonably dangerous to the ordinary consumer, with knowledge common to the community as to its characterization."⁵³ Sugar is not defective, even though unwholesome for diabetics; whiskey is not defective, even though dangerous to alcoholics.⁵⁴ And proof that cigarettes contribute to cancer does not necessarily establish that they are defective or unwholesome in the sense required for strict liability. The court affirmed a general verdict for the defendants, stating in the process that a manufacturer of "cigarettes is strictly liable for foreseeable harm resulting from a defective condition in the product when the consumer uses the product for the purposes for which it was manufactured and marketed."⁵⁵

There is a most interesting relationship between the question whether a product is defective and the question whether plaintiff's recovery for harm caused by use of the product will be barred if he voluntarily exposed himself to a recognized risk from its use, from which injury resulted. A hypothetical case will illustrate the point. Defendant markets a drug with wondrous properties for curing one illness and causing another. Suppose, for example, it is a drug that causes no substantial ill effects except in pregnant women. If marketed in a package that contains maximum warning of its ill effects in a limited class of cases, is the drug defective? Is the manufacturer liable if through a mistake by a doctor or druggist or patient, it is

⁵⁰ *Id.* at 556, 165 N.E.2d at 112.

⁵¹ *E.g.*, *Bethia v. Cape Cod Corp.*, 10 Wis. 2d 323, 103 N.W.2d 64 (1960) (complaint stated cause of action; test of "reasonable expectation" approved and test of "natural" versus "foreign" substance disapproved).

⁵² *Bonenberger v. Pittsburg Mercantile Co.*, 345 Pa. 559, 28 A.2d 913 (1942) (jury question). *But cf.* *Allen v. Grafton*, 170 Ohio St. 249, 164 N.E.2d 167 (1960) (a plate of fried oysters was not unfit because containing a piece of oyster shell; 4-3 decision).

⁵³ *Lartigue v. R. J. Reynolds Tobacco Co.*, 317 F.2d 19, 37 (5th Cir. 1963), *cert. denied*, 375 U.S. 865 (1963).

⁵⁴ *Ibid.*, citing *Goodrich, C. J.*, in *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 302 (3d Cir. 1962).

⁵⁵ 317 F.2d at 39.

used by a pregnant woman? If so, is there liability even in case it is used by a pregnant woman who has read the warning on the package? Probably not. Indeed, this is not even a case of the type in which the defendant's conduct imposes upon the plaintiff a hard choice—the type of case in which, it has been suggested above,⁸⁶ a plaintiff's choice to encounter the risk ought not to bar his claim if the choice was reasonable, even though he fully understood the risk. One possible explanation of the result of nonliability in this hypothetical case is that the product was not defective. Another explanation is that the plaintiff, who read and understood the warning on the package and nevertheless chose to use the drug, assumed the risk. It is an explanation courts are likely to voice, despite sharp criticism of the doctrine of assumption of risk. And even if in this context it is a second reason for a result that could be reached on another ground alone, it strikes a responsive chord and fortifies the argument that the requirement of a defect is an appropriate limitation on the scope of the emerging rule of strict products liability.

⁸⁶ See text accompanying notes 29-33 *supra*.