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Assumed Risk

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ASSUMED RISK*

by

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I. WHAT IS IT?

THE doctrine of assumed risk, as it has come to be understood in most jurisdictions, embodies two separate concepts.[1] First, assumed risk is thought of as negativing the duty owed by the defendant to the plaintiff, particularly the duty of an owner-occupier to persons coming upon his premises. In Texas this concept is referred to as *no duty*. At early common law, a landowner owed very little duty to persons coming on his land. He was required to warn of hidden dangers so that the invitee could stay off the premises or take precautions to protect himself. As will be hereinafter discussed, when the landowner had taken this step, he had discharged his duty, and the invitee proceeded at his own risk. Being under no further duty to the plaintiff, the landowner was not liable to the plaintiff for injuries which occurred. Used in this sense, assumption of risk is but the negative of duty. When the landowner owed the invitee no duty, or had discharged whatever duty he had, the plaintiff could not recover even though he was found to have acted reasonably in encountering the risk.[2] Sometimes the no duty concept is referred to as a defense. Actually, the plaintiff must show the existence of a duty and its breach.[3] As a consequence, the *no duty*

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[1] While legal scholars differ, it is generally accepted that assumed risk has at least two separate meanings. For example, see James, *Assumption of Risk*, 61 YALE L.J. 141 (1952), dividing the use of assumed risk into a primary and a secondary sense. See also Keeton, *Assumption of Risk and the Landowner*, 22 LA. L. REV. 108 (1961), recognizing the existence of two separate meanings. However, see Green, *Assumed Risk as a Defense*, 22 LA. L. REV. 77 (1961), stating that assumed risk is but the negative of duty. See also Keeton, *Assumption of Product Risks*, 19 SW. L.J. 61 (1965), indicating that the subject of assumed risk may be illusory. He also exhorts the courts to resist the temptation to give different substantive or procedural effects to the two theories which he considers to be in essence one and the same defense. Dean Prosser, however, would divide assumed risk into three categories, *i.e.*, express consent, implied consent and voluntarily encountering a known dangerous condition. See PROSSER, TORTS 450-51 (3d ed. 1964).

[2] Western Auto Supply Co. v. Campbell, 373 S.W.2d 735 (Tex. 1963) (owner-occupier gave invitee a warning as to the dangerous condition).

[3] See Greenhill, *Assumption of Risk*, 16 BAYLOR L. REV. 111, 116 (1964); and RESTATEMENT (SECOND), TORTS 580-81, comment b. (1965).

rule is a part of the plaintiff's case and is not strictly speaking a defense.[4]

Second, assumed risk acts to deny recovery to a plaintiff for injuries received either on or off the premises of an owner-occupier, when the plaintiff, with knowledge and appreciation of the danger, voluntarily encounters the risk. In Texas this concept is labeled *volenti non fit injuria*. In its application the plaintiff is said to assume the risk when he deliberately chooses to encounter a risk created by the defendant's breach of duty toward him. The doctrine embodies the element of an intelligent choice[5] and presupposes the existence of a duty.[6] Used in this sense, assumed risk is a pure defense, *i.e.*, based on actual or implied consent, and requires knowledge and appreciation of the particular danger and a voluntary exposure to it. Thus, the burden of pleading, proof and submission of issues is upon the defendant.[7]

II. ORIGIN, BACKGROUND AND EARLY DEVELOPMENT

The English view of contributory negligence was that such negligence intervened and prevented the defendant's primary negligence from being the proximate cause of the injury. The doctrine of assumed risk was a part of the defense of contributory negligence in

[4] Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368 (Tex. 1963). See also note 7 *infra*.

[5] Wood v. Kane Boilerworks, Inc., 150 Tex. 116, 246 S.W.2d 607 (1952). The inquiry is not why the invitee chose to incur the risk, but only whether he knew of the risk and made a voluntary choice. See Brown v. Lundell, 162 Tex. 84, 344 S.W.2d 863 (1961) (plaintiff did not know that salt water pits would pollute fresh water); Dee v. Parish, 160 Tex. 171, 327 S.W.2d 449 (1959) (twelve-year-old child with little riding experience did not realize danger in urging horse to go faster in an area outside of defendant's premises); Triangle Motors v. Richmond, 152 Tex. 354, 258 S.W.2d 60 (1953) (plaintiff did not know elevator was on the floor above him and would strike him when it descended); Schiller v. Rice, 151 Tex. 116, 246 S.W.2d 607 (1952) (plaintiff knew that the driver was drunk and thus was charged with appreciation of the danger); Wood v. Kane Boilerworks, Inc., *supra* (plaintiff did not know of the particular latent defect in a pipe which exploded); and Missouri, K. & T. Ry. Co. of Tex. v. Hannig, 91 Tex. 347, 43 S.W. 508 (1897) (employee thought another workman was to help him lift a heavy load). However, for an exception to this principle see Sinclair Ref. Co. v. Winder, 340 S.W.2d 503 (Tex. Civ. App. 1960) *error ref.* (invitee motivated to incur the risk by a humanitarian or rescue impulse).

[6] Texas & N. O. Ry. Co. v. Rooks, 293 S.W. 554, 557 (Tex. Comm. App. 1927) (passenger injured in getting off of train); Pappas v. Wright, 171 S.W.2d 536, 537 (Tex. Civ. App. 1943) (collision between automobile and named defendant's truck).

[7] Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368 (Tex. 1963). In this regard see James, note 1 *supra*, at 167; Keeton, *Personal Injuries Resulting from Open and Obvious Conditions—Special Issue Submission in Texas*, 33 TEXAS L. REV. 1 (1954); Kronzer, *Special Issue Submission in Causes Involving "Premises Defects" and Volenti Non Fit Injuria*, 2 HOUS. L. REV. 1, 5 (1964); McGregor, *Incurred Risk in Texas*, 1 BAYLOR L. REV. 410, 416 (1949); SUTTON, AFFIRMATIVE DEFENSES AND COMPULSORY COUNTERCLAIMS, PERSONAL INJURY LITIGATION IN TEXAS 519, 523 (1961); Comment, *Submission of Special Issues in Slip and Fall Cases*, 5 BAYLOR L. REV. 161, 164-65 (1953); and Comment, *Open and Obvious Dangers in Slip and Fall Cases*, 5 BAYLOR L. REV. 176, 183 (1953). The citation of these excellent articles does not mean, of course, that the author agrees with all that is said in them. They are cited primarily for their scholarly treatment of the problem.

the early cases.[8] Assumed risk came to have an independent status only as recently as 1820.[9] The doctrine arose from the common law philosophy which held paramount the freedom of the individual. Each individual was left free to do what he chose and was expected to protect himself. In the law of torts at least the idea of any obligation to protect others was abnormal. The same concept was used with respect to the rescue doctrine, *i.e.*, rescue was considered to be an extravagance, and the rescuer generally was held to have assumed the risk of his good samaritanism.

The duty to protect arose in time with relation to public pursuits, such as carriers, innkeepers and the like.[10] So when an owner of public facilities permitted another to come on his premises, or even invited him, he was held bound to warn of any known defects not obvious to his guest. Throughout this development, however, it was an exceptional situation which required the landowner to do more than to warn of dangers and thus enable the invitee to protect himself.[11]

A. *Basic English Cases*

The assumed risk doctrine arose from two distinct legal relationships—those involving the duty of the occupier of the land or premises, and those involving a master and servant relationship. The origin of the doctrine as applied to an occupier of land is considered to be the case of *Ilott v. Wilkes*.[12] There a trespasser, while hunting in the defendant's woods was injured by a concealed spring gun. Signs indicated the presence of the guns, and a companion of the plaintiff had told him about their existence, but the plaintiff did not know where they were located. A safe path had been provided through the woods, but the plaintiff did not use it. Plaintiff tripped a hidden wire attached to a gun and was injured. The court, in denying a recovery to the plaintiff, wrote, "The maxim of law, volenti non fit injuria, applies; for he voluntarily exposed himself to the mischief which has happened."[13] Thus, the concept of assumed risk as a bar to recovery, without regard to negligence, was born. A reading of the opinion also discloses an underlying policy to protect the landowner and his game.[14]

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[8] For an excellent analysis of this history see Warren, *Volenti Non Fit Injuria in Actions of Negligence*, 8 HARV. L. REV. 457 (1895). See also Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14 (1906); Gow, *The Defense of Volenti Non Fit Injuria*, 61 JURID. REV. 37 (Eng. 1949); POLLOCK, TORTS 112 (15th ed. 1951).

[9] *Supra*, note 8. See also Ilott v. Wilkes, 106 Eng. Rep. 674 (1820).

[10] See Bohlen, note 8 *supra*, and PROSSER, LAW OF TORTS 450-69 (3d ed. 1964).

[11] See notes 8-9 *supra*.

[12] 106 Eng. Rep. 674 (1820).

[13] 106 Eng. Rep. at 677.

[14] 106 Eng. Rep. at 680.

Later in *Priestley v. Fowler*[15] the *volenti* theory was extended to the master and servant relationship. The plaintiff in that case was a butcher in the defendant's employ. The defendant directed that a wagon be loaded with meat and told the plaintiff to accompany the delivery. The wagon was overloaded and broke down, causing injury to the plaintiff. In its holding for the master the court stated that the servant *must* (should) *have known*[16] of the danger and assumed it. The court said,

> The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself. . . . [T]he plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded.[17]

As a consequence, the doctrine was extended to the point of charging the plaintiff with knowledge and appreciation of the danger involved.

While the English courts had enunciated the *volenti non fit injuria* doctrine in *Ilott v. Wilkes*,[18] discussed above, the court of appeals had yet to set out the *no duty* doctrine. It did so in *Thomas v. Quartermaine*,[19] an action for damages under the Employers Liability Act of 1880 for injuries received by the plaintiff, a brewery worker. The brewery had a boiling vat and a cooling vat in the same room, with a walkway in between. Beneath the boiling vat was a board which plaintiff needed to use as part of the cover for the cooling vat. The board was difficult to dislodge. Plaintiff pulled hard on it, and it suddenly came loose. As it did so, the plaintiff fell backward into the cooling vat and was severely injured. Since the plaintiff had knowledge of the risks involved and nevertheless proceeded to encounter them, he was held to have assumed the risk.[20] The court enunciated the basis for the assumed risk doctrine when it wrote,

> The duty of an occupier of premises which have an element of danger upon them reaches its vanishing point in the case of those who are cognisant of the full extent of the danger, and voluntarily run the risk. Volenti non fit injuria.[21]

The case formed the foundation for the later assumed risk deci-

[15] 150 Eng. Rep. 1030 (1837).

[16] Compare this *should have known* test with Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368 (Tex. 1963).

[17] 150 Eng. Rep. 1030, 1032-33 (1837).

[18] 106 Eng. Rep. 674 (1820).

[19] 18 Q.B.D. 685 (Ct. of App. 1887).

[20] In interpreting the Employers Liability Act of 1880, the court said, "The true view in my opinion is that the Act, with certain exceptions, has placed the workman in a position as advantageous as but no better than the rest of the world who use the master's premises at his invitation on business." 18 Q.B.D. 685, 693 (Ct. of App. 1887).

[21] 18 Q.B.D. at 695.

sions.[22] It should be noted that, while earlier decisions were based upon knowledge and appreciation which the plaintiff should have had, *Thomas v. Quartermaine* emphasized the actual knowledge and appreciation of the plaintiff and his voluntary exposure to the danger.

Before examining the development of assumed risk in America, two other leading English cases should be noted to further illustrate the doctrine there—*Smith v. Chas. Baker & Sons*[23] and *London Graving Dock Co. v. Horton.*[24] In *Smith* the plaintiff was employed to drill holes in a rock near an overhead crane operated by the defendant's employee. The crane lifted stones and at times swung them over the plaintiff's head. The plaintiff was generally aware of the danger involved, having worked in the area for several months. He was injured when a stone was negligently dropped from the crane. The plaintiff admitted that he generally knew the risk, *i.e.*, he knew that, from time to time, stones were being lifted over him. On such occasions his usual practice was to move until the stones passed overhead. At this particular time, however, he did not see the crane or know that it had moved, and no warning was given. In holding for the plaintiff, the court indicated that knowledge of the danger was not enough; there must also be appreciation of the particular danger.[25] The court pointed out that the (English) doctrine is *volenti non fit injuria,* which requires both knowledge and full appreciation, rather than *scienti non fit injuria,* requiring only knowledge.

In *Horton,* a workman slipped and fell while working on a defective scaffold in the hold of a ship. The plaintiff, a welder, was employed by a subcontractor to weld steel strips on a trawler being repaired by defendant, the main contractor. In order to get from one board of the scaffold to another, the plaintiff had to step on a defective iron beam. He had complained of this defect to the defendant's foreman, who assured him that it would be remedied. However, before it was the plaintiff slipped and fell and was injured. Notwithstanding the lack of contributory negligence, assumed risk was held to be a defense since the workman, with full knowledge and appreciation of the risk, still undertook it. Again *scienti* or mere knowledge was not enough; *volenti* or full appreciation was required.[26]

B. *Development In The United States*

The early American assumed risk cases, generally speaking, were

[22] See cases cited notes 80 and 82 *infra.*
[23] A. C. 325 (1891).
[24] 2 All E.R. 1 (1951).
[25] A.C. 325, 337 (1891).
[26] "In other words, it must be shown that he was *volens* within the meaning applied to that word in the phrase *volenti non fit injuria.* . . ." 2 All E.R. 1, 4 (1951).

grounded in the above line of English precedents, *i.e.*, the *Ilott, Priestley,* and *Thomas* cases.[27] The various courts in our country developed our case law from this beginning. In fact, the requirements of knowledge and appreciation of the risk along with voluntary exposure form the basis of most American decisions. Many of the early American cases developed in the master and servant area. It is worthy of note that our courts inherited the concept of extreme individualism of the early industrial revolution. Justices Black and Frankfurter traced the doctrine of assumed risk, as the phrase is used in employer-employee relations, in separate opinions in *Tiller v. Atlantic Coast Line Ry. Co.*[28] The holding in that case was that Congress intended to abolish assumed risk in Federal Employer Liability Act cases. Mr. Justice Black said:

> Assumption of risk is a judicially created rule which was developed in response to the general impulse of common law courts . . . to insulate the employer as much as possible from bearing the "human overhead" which is an inevitable part of the cost—to someone—of the doing of industrialized business. The general purpose . . . seems to have been to give maximum freedom to expanding industry.[29]

The holdings of the courts on assumed risk resulted in statutes in almost all jurisdictions abolishing the defense of assumed risk in workmen's compensation cases.[30] As stated in the *Tiller* case, above, one of the purposes of such laws is to put the cost of injury, notwithstanding any assumption of risk, on the employer, which cost is then shifted to the public. The cost of human injury and death is thus made a part of the cost of the item or services produced.[31]

As indicated, most assumed risk cases fall into two categories, each having a separate historical background and each having different legal criteria. The remainder of this Article will be devoted to an analysis of the two separate situations. We will specifically consider (1) the duty, or lack of duty, of an owner-occupier to people coming on his land or premises and (2) other situations where the defendant has created, or is responsible for, an unreasonable risk of danger, the plaintiff voluntarily encountering or subjecting himself to the danger. The basic analysis will consist of appropriate Texas

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[27] See Gow, *The Defense of Volenti Non Fit Injuria,* 61 Jurid. Rev. 37 (Eng. 1949). See also 2 HARPER & JAMES, TORTS 1162-93 (1956); PROSSER, TORTS 450-69 (3d ed. 1964).

[28] 318 U.S. 54 (1943).

[29] *Id.* at 58-59.

[30] See, *e.g.*, TEX. REV. CIV. STAT. ANN. art. 8306, § 1(3) (1956). The federal government has likewise abolished assumed risk in railroad employee accident cases, 53 Stat. 1404 (1939); and in cases involving seamen, 41 Stat. 1007 (1920).

[31] 318 U.S. 54 (1943).

law concepts, but other jurisdictions will be considered where particularly descriptive.

III. Considerations in Assumed Risk on Premises

A. *Trespassers, Licensees And Invitees— In General*

At early common law, and particularly since the *Ilott* case discussed above, the owner-occupier of land held a favored position.[32] Outsiders were not free to come on his land. Primarily because of this situation, there developed degrees of duty owed by the owner-occupier to people coming on the land. The varying duties are thoroughly discussed by the authorities cited in the footnotes accompanying this section. The following discussion is based primarily on their conclusions.

As to trespassers, the owner-occupier has only the slightest obligation. There is no duty to warn or to keep the land in a reasonably safe condition for a trespasser.[33] This rule is subject to certain exceptions which arise after the trespasser has been discovered.[34] The duty to licensees is slightly amplified. The owner-occupier is obligated to warn the licensee of any dangerous condition or activity within his knowledge, but is under no obligation to see that the premises are made safe for the licensee's use.[35] Thus, generally speaking, the licensee takes the premises as he finds them; there is no duty to inspect or to use ordinary care to make the premises safe. While these rules have not been subject to exceptions, several mitigating tendencies have been developed. There is a present-day tendency in many courts throughout the United States to remove people coming on premises from the *bare licensee* category and to find their legal relationship to be that of an invitee. This has especially been so in areas where unidentified segments of the public are involved, *i.e.*, outside of the home and especially in business establishments people are more readily

[32] "The landowner has been a favorite of the law. According to Blackstone the right of private ownership of property was one of the three absolute rights of English law. The law's regard for this right was so great that it would 'not authorize the least violation of it. . . . even for the general good of the whole community.'" Note, 42 N. C. L. Rev. 960, 965 (1964), quoting 2 Blackstone, Commentaries 138 (1807). See also Keeton, *Assumption of Risk and the Landowner,* note 1 *supra,* and Keeton, *Assumption of Risk and the Landowner,* 20 Texas L. Rev. 562 (1942).

[33] See Prosser, Torts 364-85 (3d ed. 1964); 2 Harper & James, Torts 1435-70 (1956). See also Eldridge, *Tort Liability to Trespassers,* 12 Temp. L.Q. 32 (1937); and James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers,* 63 Yale L.J. 144 (1953).

[34] *Ibid.*

[35] See Prosser, Torts 385-94 (3d ed. 1964); 2 Harper & James, Torts 1470-78 (1956). See also James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees,* 63 Yale L.J. 605 (1954).

classed as invitees. There also has been a tendency to enlarge the concept of what is considered a concealed defect or condition.

A higher duty of care is owed to an invitee. Generally, the owner-occupier must exercise ordinary care to make the premises safe or to warn the invitee of any dangerous condition or activity within his knowledge or which he could discover with reasonable diligence.[36] But in states which adhere to the assumed risk doctrine, the invitee is still regarded as being on the land merely at the invitation of the owner-occupier. The owner-occupier is not an insurer of the invitee's safety. The invitee can decide whether to come on or stay off. Thus if the property is patently dangerous, the invitee has a choice of either staying away or taking the property as he finds it and protecting himself from the danger if he can. The owner-occupier continues to have his obligation to warn of any hidden defects.

Some courts of this country are applying different rules to different sorts of invitees. They make a distinction between business and social invitees. While the ordinary rules are applied to social guests,[37] there is a tendency to impose a more severe obligation on the owner-occupier with respect to a business invitee than is said to be owed to a social invitee. In the ordinary invitee situation a warning of a danger discharges the defendant's duty.[38] Some courts are now saying that at least as to business guests, a simple warning such as "walk carefully" is not enough. The *warning* area is developing rather rapidly and will be further discussed under a subsequent section.

B. *Duty Of Owner-Occupier In Texas*

Because of its importance in the development of assumed risk, our analysis is confined to the duty owed to an invitee. In Texas the owner-occupier has, as to invitees, a duty to exercise ordinary care to keep the premises in a reasonably safe condition or to warn.[39] The duty has been further extended to require that the owner-occupier exercise ordinary care to inspect his premises for defects.[40] The test applied to determine the owner-occupier's duty is an objective one, *i.e.*, he is responsible if he knew, or as an ordinary prudent person

[36] Halepeska v. Callihan Interest, Inc., 371 S.W.2d 368, 378 (Tex. 1963). See James, note 35 *supra* and Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942). See also PROSSER, TORTS 394-408 (3d ed. 1964); and 2 HARPER & JAMES, TORTS 1478-1505 (1956).

[37] 2 HARPER & JAMES, TORTS 1181 (1956). See also Galbraith v. Busch, 267 N.Y. 230, 196 N.E. 36 (1935) (guest in automobile assumed the risk of unknown defects); and Higgins v. Mason, 255 N.Y. 104, 174 N.E. 77 (1930) (same).

[38] 2 HARPER & JAMES, TORTS 1179-84 (1956).

[39] Genell, Inc. v. Flynn, 163 Tex. 632, 358 S.W.2d 543 (1962) (child injured when glass broke in attempt to open door); Smith v. Henger, 148 Tex. 456, 226 S.W.2d 425 (1950) (timbers removed and tarpaulin merely covered a hole in the ground).

[40] See cases cited note 39 *supra*.

should have known, of the dangerous condition. It has been said that this duty is based on the owner-occupier's superior knowledge of the premises, or the knowledge which a reasonably prudent man should have of his premises.[41] If the dangerous conditions are not open and obvious, the owner-occupier is under a duty to exercise ordinary care in warning the invitee of the danger.[42] In those cases in which the warning has been communicated, the duty was found to have been discharged.[43] The function of the warning is to give the invitee knowledge of, and an opportunity to appreciate, the danger.[44]

Several difficult problems remain as to the adequacy of the warning to discharge the owner-occupier's duty. The problems involve not only the giving of the warning but the receiving and comprehension of it. Is it sufficient to give a warning, or must it also be found that the invitee received and comprehended it? In *Western Auto Supply Co. v. Campbell*,[45] the jury found that Campbell had been warned of the floor's slippery condition and that he had failed to heed the warning. These findings implied that the warning had been communicated to him. In the English case of *Ilott v. Wilkes*[46] there was a general "to whom it may concern" sign which plaintiff did not see, although he had been given some warning of spring-gun hazards by his companion. It is reasonable to assume that cases will arise concerning the sufficiency of the warning and its comprehension by the person warned. Our court has recently granted a writ of error in a case involving a warning to a five-year-old child.[47] In these cases the court will probably be urged to balance the adequacy of the warning against the capacity of the person receiving it, *e.g.*, a sign is of no value to an invitee who cannot read.[48]

[41] Renfro Drug Co. v. Lewis, 149 Tex. 507, 235 S.W.2d 609 (1950) (a step-down on the other side of a door); Smith v. Henger, 148 Tex. 456, 226 S.W.2d 425 (1950) (a tarpaulin covering timbers stored in a hole in the floor); Walgreen-Texas Co. v. Shivers, 137 Tex. 493, 154 S.W.2d 625 (1941) (a step-down from a raised platform at a soda fountain); Camp v. J. H. Kirkpatrick Co., 250 S.W.2d 413 (Tex. Civ. App. 1952) *error ref. n.r.e.* (a terrazzo floor which became slick when wet); Marshall v. San Jacinto Bldg., Inc., 67 S.W.2d 372 (Tex. Civ. App. 1933) *error ref.* (slight rise from a sidewalk to building entrance). See also Keeton, *Assumption of Risk and The Landowner*, note 1 *supra*. The *Renfro Drug Co.* and *Walgreen-Texas Co.* cases were not treated as assumed risk cases but instead were disposed of on grounds of negligence and contributory negligence.

[42] Ellis v. Moore, ___ S.W.2d ___ (Tex. 1966) (duty to warn of danger in the operation of defective tractor); Western Auto Supply Co. v. Campbell, 373 S.W.2d 735 (Tex. 1964) (duty to warn of slick floors).

[43] Western Auto Supply Co. v. Campbell, note 42 *supra* (owner-occupier warned invitee of dangerously slick floors).

[44] Ellis v. Moore, ___ S.W.2d ___ (Tex. 1966).

[45] 373 S.W.2d 735 (Tex. 1964).

[46] 106 Eng. Rep. 674 (1820).

[47] McClary v. Jones, ___ S.W.2d ___ (Tex. Civ. App. 1966) *writ granted*, ___ S.W.2d ___ (Tex. 1966).

[48] Holmes v. J. C. Penney Co., Inc., 378 S.W.2d 105 (Tex. Civ. App. 1964) *rev'd on other grounds*, 382 S.W.2d 472 (Tex. 1964).

Although logically it also goes to the matter of sufficiency, the question to whom warning need be given presents a slightly different but equally difficult situation. This is regarded as an unsettled area. For example, in *Gulf Oil Co. v. Bivins*[49] an employee of an independent contractor hired by the lessee was injured in a gas explosion while working on the well. Gulf had warned both the contractor and the crew chief for whom the plaintiff worked of the possibility that the well might be affected by certain iron sulphide deposits which created a hazardous condition. The warning was never directly communicated to the plaintiff who was injured. The majority of the Fifth Circuit held that the lessee had a duty to warn the employee of the contractor but had discharged that duty by warning both the contractor and the foreman. Judge Brown, however, dissenting in part and concurring in part, said that the rule should be based upon reasonableness. He stated that the rule should be whether, in each particular case, a prudent occupier in the position of the defendant would reasonably have concluded that the particular warning would in all likelihood be brought home to an employee who might otherwise be ignorant of the danger.[50] This is, in effect, the way the *Restatement of Torts (Second)* expresses the proposition.[51] The plaintiff, however, received no warning. Thus it could be, and was, forcefully argued that the plaintiff could not have assumed a risk of which he had no knowledge.[52]

C. *Duty Of Invitee In Texas*

In Texas the invitee is under no duty to inspect the premises.[53] He may assume that the premises are in good condition. The common law rule denying recovery based on the invitee's constructive knowledge has been altered. The invitee must either have actual knowledge and appreciation of the danger[54] or the danger must be open and obvious before he will be held to have assumed the risk.[55]

[49] 276 F.2d 753 (5th Cir. 1960). See also Tyler v. McDaniel, 386 S.W.2d 552 (Tex. Civ. App. 1965) *error ref. n.r.e.* (warning to crew chief held to discharge duty to warn employee).

[50] 276 F.2d at 764.

[51] RESTATEMENT (SECOND), TORTS 215-16 (1965).

[52] 276 F.2d at 757.

[53] Peck v. Peck, 99 Tex. 10, 87 S.W. 248 (1905). See also BOHLEN, STUDIES IN THE LAW OF TORTS 184 (1926).

[54] At common law, the invitee was denied recovery and held responsible if he *should have known and appreciated* the danger. This concept was expressed in the early English case of Priestley v. Fowler, 150 Eng. Rep. 1030 (1837). It was deliberately repudiated in Texas in Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368 (Tex. 1963).

[55] Houston National Bank v. Adair, 146 Tex. 387, 207 S.W.2d 374 (1948) (worn stairs and no handrail); A. C. Burton Co., Inc. v. Stasny, 223 S.W.2d 310 (Tex. Civ. App. 1949) *error ref.* (glass window next to a door); Hausman Packing Co. v. Badwey, 147 S.W.2d 856 (Tex. Civ. App. 1941) *error ref.* (slippery floor in refrigerated meat truck); Marshall v. San Jacinto Bldg., Inc., 67 S.W.2d 372 (Tex. Civ. App. 1933) *error ref.* (slight rise from sidewalk to building entrance).

The test applied to determine the invitee's knowledge is a subjective one, *i.e.*, whether the particular individual had knowledge of the danger and appreciated the risk involved. Two cases are important in the development of the actual knowledge requirement—*Robert E. McKee, General Contractor, Inc. v. Patterson*[56] and *Halepeska v. Callihan Interests, Inc.*[57] In *McKee*, the plaintiff (Patterson) was an employee of a subcontractor hired to install bleachers in a gymnasium. Another subcontractor had been hired to finish the floors. The floor people finished their work before Patterson's work was completed. The ladder on which the plaintiff was working slipped on the slick floor, and he was injured. The plaintiff sued McKee, the general contractor. The evidence showed that the plaintiff actually knew of and appreciated the danger. However, the court indicated that the plaintiff could not recover if he either *knew* of the condition *and appreciated* the danger *or should have known and appreciated* the danger. The court further stated that a plaintiff could be charged with knowledge as a matter of law if the danger were open and obvious but indicated that, in some situations, whether the plaintiff *should have known* was a fact question. In *Halepeska* the court reconsidered the "should have known and appreciated" test. The jury had found that while Halepeska should have known and appreciated the danger, he did not actually have such knowledge and appreciation. The court of civil appeals had reversed a verdict in favor of the plaintiff, holding that actual knowledge is not required so long as the plaintiff *should have known* of the danger. Our court held that assumed risk requires a finding that the invitee have *actual* knowledge and appreciation of the danger or be charged with such knowledge and appreciation as a matter of law. The court narrowed the factual inquiries to *actual* knowledge and appreciation as distinguished from constructive knowledge.

Whether the plaintiff, as a prudent person, *should have known* and *should have appreciated* the dangers were said to be proper issues only of contributory negligence, to be followed by issues of proximate cause. In *Halepeska*, even assuming that these "should have known" issues could have supported a finding of negligence, there were no findings establishing proximate cause so as to bar the plaintiff from recovery. Since the trial court entered judgment for the plaintiff, the presumed findings were that the acts were *not* the proximate cause of plaintiff's injury.

It is not sufficient that the plaintiff have knowledge that there is

[56] 153 Tex. 517, 271 S.W.2d 391 (1954).
[57] *Halepeska*, 371 S.W.2d 368 (Tex. 1963).

some danger in the particular undertaking. He must have knowledge of the particular risk which leads to his injury.[58] In *Triangle Motors v. Richmond*[59] the plaintiff, a plumber, had been employed to make repairs on several floors of a building. On the first day, he was taken to the second floor in an elevator. The next day he walked up to the second floor. Having forgotten some tools, he leaned over the open elevator shaft and shouted down to his helper. There was no guard rail on the elevator shaft, and the plaintiff was struck by the descending elevator. He had taken steps to avoid falling down the shaft, but did not expect the elevator to come from above. The court refused to charge the plaintiff with knowledge stating that *volenti* applies only when the plaintiff, with full knowledge and appreciation of the danger, incurs the risk as the result of an intelligent choice.[60] The plaintiff there did not know of the particular risk or appreciate the particular danger which created his injury. He did know and appreciate the risk of falling down the unguarded elevator shaft but not of the danger which caused his injury.

As previously mentioned, in some situations the plaintiff will be charged with knowledge,[61] or appreciation,[62] or both. Although the invitee may assume that the premises are in a safe condition, he may not close his eyes to obvious dangers. Charging the plaintiff with knowledge and appreciation occurs primarily in those situations in which the danger is either open and obvious or when the plaintiff has repeatedly been exposed to it.[63]

The question then arises as to when and to whom the danger is

[58] This inquiry is also very important in the cases involving injuries to spectators at sporting events. For example, see Lee v. National League Baseball Club of Milwaukee, Inc., 4 Wis. 2d 168, 89 N.W.2d 811 (1958) (assumed risk did not apply where elderly lady plaintiff, who had purchased a box seat, was injured in rush by people outside her box to recover a foul ball); *but see* Brown v. San Francisco Ball Club, Inc., 99 Cal. App. 2d 484, 222 P.2d 19 (1950) (assumed risk was held to apply where plaintiff sat in unscreened portion of stadium and was struck by a ball some hour or so after the game had begun); Shaw v. Boston American League Baseball Co., 325 Mass. 419, 90 N.E.2d 840 (1950) (assumed risk was held to apply where plaintiff, who was familiar with the sport, was struck by a batted ball while seated in an unscreened portion of the stadium); Emhardt v. Perry Stadium, Inc., 113 Ind. App. 197, 46 N.E.2d 704 (1943) (assumed risk was held to apply where another spectator attempted to throw a baseball back onto the field and struck the plaintiff). The same inquiry must be made in cases involving injuries to a participant, see Shahinian v. McCormick, 30 Cal. Rptr. 521, 381 P.2d 377 (1963) (water skier assumed risk of falling but not that the boat would double back and run over him).

[59] 152 Tex. 354, 258 S.W.2d 60 (1953).

[60] 258 S.W.2d at 64. See also San Antonio Portland Cement Co. v. Chandler, 360 S.W.2d 165 (Tex. Civ. App. 1962) *error ref. n.r.e.* (plaintiff knew about one moving crane but did not know about a second crane which struck him).

[61] Wesson v. Gillespie, 382 S.W.2d 921 (Tex. 1964). See also cases cited note 55 *supra*; and see Keeton, *Personal Injuries Resulting From Open and Obvious Conditions*, 100 U. PA. L. REV. 629 (1952).

[62] Schiller v. Rice, 151 Tex. 116, 246 S.W.2d 607 (1952); *contra*, McConville v. State Farm Mutual Automobile Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962).

[63] See note 61 *supra*.

open and obvious. It is the writer's opinion that the danger must be so obvious that anyone could recognize and appreciate it as a danger,[64] *i.e.*, so plain that any fool could plainly see. While there may be issues of fact as to the size or other physical facts with regard to the defect, whether the danger is open and obvious is a question of law, and not a question of fact for the jury.[65]

As previously mentioned, the number of times the plaintiff has been exposed to the risk is another important factor in the determination. Where there has been no previous exposure and the defect is not open and obvious, the plaintiff will not be charged with knowledge or appreciation of the danger.[66] However the same result generally does not follow if the plaintiff has repeatedly been exposed to the danger.[67] In *Wesson v. Gillespie*[68] a lady plaintiff tripped over a threshhold going out of a tavern. She was a regular customer and had been in and out of the tavern from three to five times a week for about five years. She tripped during her fourth exposure that same night. It was held that her repeated exposure to the danger was sufficient to charge her with knowledge and appreciation of the danger.

D. *Conditions v. Activities*

A final item to consider is the source of the danger. This consideration primarily involves distinguishing between static conditions on the premises and activities. While it has not been determinative as such, the question of whether the danger involved was a static condition or an activity has made a difference in the holdings of the Texas courts.[69] Generally speaking, full knowledge and appreciation of the risks involved in a static condition on the premises are more easily acquired. For example, the dangerous nature of a hole or pit or of a broken stairway is generally known and easily appreciated. One merely needs to observe or be informed of the condition to acquire knowledge and appreciation of the danger involved. On the other hand, it is more difficult to acquire full knowledge and appreciation of risks involving activities.

In any event, our court has been reluctant to apply the assumed

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[64] *Halepeska*, 371 S.W.2d at 378. See also Greenhill, *Assumption of Risk*, 16 BAYLOR L. REV. 111, 118 (1964).

[65] 371 S.W.2d at 382. See also Greenhill, note 64 *supra*, at 118.

[66] Hall v. Medical Bldg. of Houston, 151 Tex. 425, 251 S.W.2d 497 (1952) (no previous exposure to door opening from stair well into lobby).

[67] Houston National Bank v. Adair, 146 Tex. 387, 207 S.W.2d 374 (1948) (plaintiff had been on worn stairs a number of times).

[68] 382 S.W.2d 921 (Tex. 1964).

[69] Analyzing the cases discloses that the *no duty* concept is generally applied to static conditions on the premises while the *volenti* cases generally involve activities. See the cases listed in Greenhill, note 64 *supra*, at 123-24.

risk doctrine to cases involving activities.[70] Generally these cases are tried instead on negligence and contributory negligence issues. In *Halepeska* the court had the opportunity to limit assumed risk to static or inert conditions on the premises but declined to do so. However, in a subsequent opinion, the application of assumed risk principles to activities was limited to those activities which are rigidly circumscribed and easily predictable.[71]

IV. Considerations in Assumed Risk Off Premises

In Texas assumption of risk off the premises is termed *volenti non fit injuria* as distinguished from *no duty*. The basis for this defense is consent, actual or implied. Actual consent, of course, presents no problems, but implied consent does. Consent is implied in varying degrees in different jurisdictions. In the early cases it was implied

[70] See, *e.g.*, Chickasha Cotton Oil Co. v. Holloway, 378 S.W.2d 695 (Tex. Civ. App. 1964) *error ref. n.r.e.* (employee of cotton gin pushed a bale of cotton off a loading platform onto plaintiff); American Cooperage Co., Inc. v. Clemons, 364 S.W.2d 705 (Tex. Civ. App. 1963) *error ref. n.r.e.* (city employee fell from elevated traffic signal tower when truck ran into wire support); San Antonio Portland Cement Co. v. Chandler, 360 S.W.2d 165 (Tex. Civ. App. 1962) *error ref. n.r.e.* (plaintiff struck by moving crane); Brock v. Worth Const. Co., 344 S.W.2d 752 (Tex. Civ. App. 1961) *error ref. n.r.e.* (plaintiff injured in automobile collision at obviously dangerous intersection); and Fabens Ice Co. v. Kosinski, 339 S.W.2d 546 (Tex. Civ. App. 1960) *error ref. n.r.e.* (plaintiff struck in the face by block of ice or ice tongs).

[71] Hernandez v. Heldenfels, 374 S.W.2d 196 (Tex. 1963). That case involved an invitee who was backed over by a truck while on the defendant's premises. The court held that the particular activity was not open and obvious and that assumed risk did not apply. For other examples see McElhenny v. Thielepape, 155 Tex. 319, 285 S.W.2d 940 (1962) (rocking chair type swing in doctor's office was rigidly circumscribed activity); and Cerboskas v. Farris, 391 S.W.2d 800 (Tex. Civ. App. 1965) *error ref. n.r.e.* (fact that plaintiff's car, while pushing defendant's stalled car, would swerve to the left into oncoming traffic was not easily predictable). Perhaps, in order to sum up this area, mention should be made of two writ of error applications which recently came before the court. Eagle Lincoln-Mercury, Inc. v. Hazlewood, 391 S.W.2d 180 (Tex. Civ. App. 1965) *error ref. n.r.e.*, involved injury to a plaintiff who had gone to the defendant company to look at a new automobile. Close to the side of a car which the defendant's salesman was showing the plaintiff was an open grease pit. The plaintiff saw the pit and knew it was there. He nevertheless stepped into the pit and was injured. One of the plaintiff's arguments was that he momentarily forgot, that he became entranced with the "sales pitch," and that such forgetfulness obliterated his knowledge and appreciation. By refusal of the application for writ of error (with the notation *no reversible error*) the court approved the holding that the plaintiff was barred from recovery because of his actual knowledge and appreciation of the danger. Another situation arose in Liebman v. Tidelands Motor Inn, 391 S.W.2d 540 (Tex. Civ. App. 1965) *writ granted*. In that case the plaintiff, a guest at the Tidelands Motor Inn, was injured when he walked through a clear glass sliding door. He knew the door was there; he had been through it several times, but in the daytime. At this particular time, however, he went out at night, and his wife shut the door. He walked back into the glass and was injured. The jury found a defective design and construction of the glass door in that, if closed, it could not be seen in the dark. The plaintiff had actual knowledge of the design and knew how the door worked. What he did not know was that his wife had closed the transparent door. The court of civil appeals held that plaintiff's knowledge did not preclude recovery. Analogizing the case to Wesson v. Gillespie, 382 S.W.2d 921 (Tex. 1964), and to A. C. Burton v. Stasny, 223 S.W.2d 310 (Tex. Civ. App. 1949) *error ref.*, it was argued that the plaintiff had been exposed to the construction and knew that the door would slide shut and open. However, it was also argued that plaintiff did not know of the particular defect. At any rate, the case raises many interesting questions.

that as part of the contract of employment the employee was charged with knowledge of dangers found on the job. Either he was bound to know of the ordinary risks involved or he had agreed to assume them, including those arising from the negligence of fellow servants.[72] He did not however assume hidden or unexpected dangers. The test then was objective, *i.e.*, the employee bore the risks of dangers of which he should have known. As previously mentioned,[73] the English view developed to require that the plaintiff fully appreciate the particular risk. In this sense, knowledge that some risk is involved is not enough; there must be a voluntary encounter by one fully cognizant of the nature and extent of the danger. The Canadian view has developed such a strictness that it requires a finding of an actual or implied bargain between the parties (not limited to the employer-employee relationship) whereby the injured party agreed in advance to give up his cause of action against the offending party.[74] For example, *Lehnert v. Stein*[75] involved a suit by a passenger against a drunk driver. The court held that the burden was on the defendant to prove that the plaintiff expressly or by necessary implication agreed to exempt the defendant from liability for damages. The defendant's only defense then, absent a showing of an agreement, was contributory negligence.

The general American view is substantially more liberal than either the English or Canadian view. Basically, it depends upon a voluntary assumption of a known and appreciated risk. The defense consists of four elements, and the plaintiff will be held to have assumed the risk when they are shown. The elements are that the plaintiff (1) had knowledge of the existence of the conditions, (2) had actual knowledge or is charged with knowledge of the danger (some jurisdictions still use the *should have known* test), (3) appreciated (understood) the nature and extent of the risk, and (4) voluntarily exposed himself to the risk. The final element is not necessary in *no duty* cases because if there is no duty owed to the plaintiff, he cannot create a duty by voluntarily exposing himself to a known and appreciated risk.[76]

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[72] 150 Eng. Rep. 1030 (1837).

[73] 2 All E.R. 1 (1951).

[74] See WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE 296 (1951), where the author points out that "[T]he scope of the defence [volenti non fit injuria] has been progressively curtailed since the end of the last century, so that at the present day it is allowed only where there is a positive agreement waiving the right of action." See further at page 308 where it is said, "To put this in general terms the defence of volens does not apply where as the result of a mental process the plaintiff decides to take a chance but there is nothing in his conduct to show a waiver of the right of action communicated to the other party. To constitute a defence, there must have been an express or implied bargain between the parties whereby the plaintiff gave up his right of action for negligence."

[75] 36 D.L.R. 159 (Can. Sup. Ct. 1962) (riding with a drunken driver).

[76] 371 S.W.2d at 380.

As mentioned, under some conditions, the plaintiff has been charged with *appreciation* as well as *knowledge* of the danger. An example in Texas is *Schiller v. Rice*,[77] which involved an injury to a plaintiff who was riding with a driver known to be intoxicated. The court held that since the plaintiff knew that the driver was drunk, she would be charged with appreciation of the danger. There is authority to the contrary in Canada[78] and Wisconsin.[79] These jurisdictions would approach the problem from the context of contributory negligence and not assumed risk.

V. How Does Assumed Risk Differ From Contributory Negligence?

Basically, a plaintiff is contributorily negligent if his conduct creates an unreasonable risk of harm to himself, or if his activities fall below the reasonable standard required of him for his own protection.[80]

There are three fundamental distinctions which can be drawn between assumed risk and contributory negligence.[81] First, presence or absence of justification on the part of the plaintiff, the crux of contributory negligence, is ordinarily not important in assumed risk.[82] Thus, a person may justifiably and prudently assume a risk of which he has knowledge or warning and still be denied a recovery. Perhaps the most extreme example of the indecisiveness of justification in assumed risk cases is *Grover v. Owens*.[83] In that case the lady plaintiff who had paid to attend a professional wrestling match slipped in a restroom. There was water on the floor of the restroom, and she knew of the messy conditions. However, she felt compelled to

[77] 151 Tex. 116, 246 S.W.2d 607 (1952).

[78] 36 D.L.R. 159 (Can. Sup. Ct. 1962).

[79] McConville v. State Farm Mutual Automobile Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962) (riding with a drunken driver).

[80] McFall v. Fletcher, 138 Tex. 93, 157 S.W.2d 131 (1941) (horse-drawn wagon without reflectors was struck from behind by automobile at night); Martin v. Texas & P. Ry. Co., 87 Tex. 117, 26 S.W. 1052 (1894) (plaintiff placed load of combustible cotton on platform near railroad track); Cannady v. Dallas Ry. & Term. Co., 219 S.W.2d 816 (Tex. Civ. App. 1949) (plaintiff failed to keep proper lookout before entering intersection). See also Bohlen, *Contributory Negligence*, 21 Harv. L. Rev. 233 (1908); Prosser, Torts 426-37 (3d ed. 1964); and Restatement (Second), Torts 504 (1965).

[81] A fourth distinction has been suggested, *i.e.*, contributory negligence is based on carelessness and assumed risk on venturousness. In this regard, see Robbins v. Milner Enterprises, Inc., 278 F.2d 492 (5th Cir. 1960) (driving an automobile with defective brakes); Porter v. Toledo Term. Ry. Co., 152 Ohio St. 463, 90 N.E.2d 142 (1950) (riding a bicycle over a rough railroad crossing).

[82] Western Auto Supply Co. v. Campbell, 373 S.W.2d 735 (Tex. 1964) (jury finding that plaintiff was not negligent in failing to heed warning); Robert E. McKee, General Contractor, Inc. v. Patterson, 153 Tex. 517, 271 S.W.2d 391 (1954) (economic compulsion in that the plaintiff was hired to complete construction of the bleachers).

[83] 353 P.2d 254 (Ore. 1960).

incur the risk for her own comfort and well being. While the personal necessity or justification for her being in the restroom was unquestioned the Oregon Supreme Court held that she voluntarily incurred a known and appreciated risk and could not recover.

Recently some exceptions and limitations to this general rule have been considered. For example, the *volenti* doctrine, particularly as to business invitees in areas where the public is invited, is being challenged. Moreover, an exception has been considered in cases where the plaintiff was acting to rescue others from a risk negligently created by the defendant. Finally, there has been the development of the hard choice limitation. This limitation, simply stated, is that if the defendant's negligence imposes a hard choice between exposure and nonexposure to a danger created by him, and taking the risk created by him seems the lesser of the two evils, the defendant should not be relieved of liability. For example, suppose a young lady goes on a date with a man who starts drinking after she gets in the car. He gives her the opportunity to get out on a lonely road or in a bad neighborhood, or the opportunity to be driven to her home by him in a drunken condition. A good case can be made that she does not voluntarily assume the risk by not getting out and that her conduct should be judged on the basis of contributory negligence.

A second fundamental difference between contributory negligence and assumed risk is that proximate cause in its technical sense, embodying the element of foreseeability, is an element of the former but not of the latter.[84] Actual cause would be a more nearly accurate description of the causal connection necessary to establish assumed risk.

The third basic distinction lies in the test of the plaintiff's conduct.[85] In contributory negligence the test is an objective one, *i.e.*, whether the plaintiff acted as would an ordinary prudent person—whether in the exercise of ordinary care he should have known of the danger. With assumed risk, the test is now a subjective one, *i.e.*, whether the particular plaintiff knew and appreciated the risk.

VI. Pleadings and Burden of Proof

Any analysis of the procedural aspects of assumed risk requires

[84] Walgreen-Texas Co. v. Shivers, 137 Tex. 493, 154 S.W.2d 625 (1941) (plaintiff injured in fall from raised platform at soda fountain); Ft. Worth & Dallas Ry. Co. v. Barlow, 263 S.W.2d 278 (Tex. Civ. App. 1953) *error ref. n.r.e.* (collision between train and truck at railroad crossing). See also Annot., *Distinction Between Assumption of Risk and Contributory Negligence,* 82 A.L.R. 2d 1218 (1962).

[85] Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368, 379 (Tex. 1963). See also Prosser, Torts 462 (3d ed. 1964); and Restatement (Second), Torts 574-75 (1965).

a rather timorous approach because our court has not decided many of the points which can be involved.[86] Possible differences of opinion among the members of the court might exist on almost any point, and so by design, no sweeping statements or conclusions will be attempted. Generally, however, in *volenti* situations the burden of pleading, proof and submission of issues is upon the defendant.[87] It is clearly a matter of defense. However, in the "no duty" situation about all that has been established is that "no duty" is a part of the plaintiff's case since the plaintiff must show a duty on defendant's part and a breach of that duty.[88] The issue is raised by a general denial.

A primary difficulty remaining in Texas concerns the burden of requesting special issues in the "no duty" situation. The *Halepseka* case discussed the special issues necessary to establish assumed risk.[89] Special issues concerning the adequacy of a warning are touched upon in *Western Auto Supply Co. v. Campbell.*[90] Questions regarding whose duty it is to request the submission of special issues and the legal effect of a request for a part of a cluster of issues on assumed risk were deliberately raised but not answered in *Wesson v. Gillespie.*[91]

VII. Some Observations Regarding the Future of Assumed Risk

A. *Trends—Perhaps*

Any attempt to determine a trend in the assumed risk area is difficult. The number of possible trends seems to be roughly equivalent to the number of jurisdictions contributing to the area. However, some movement can be discerned in the morass of case law.

A few states have abolished the doctrine of assumed risk in favor of contributory negligence. The New Jersey court, in *McGrath v. American Cyanamid Co.*,[92] recently stated: "experience . . . indicates the term 'assumption of risk' is so apt to create mist that it is better banished from the scene. We hope we have heard the last of it. Henceforth let us stay with 'negligence' and 'contributory negligence.' "[93]

[86] Such is not the case in all jurisdictions, however. For example, art 23, § 6 of the Oklahoma Constitution provides, "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury." See also Note, 17 Okla. L. Rev. 348 (1964).

[87] See *Halepeska*, 371 S.W.2d 368 (Tex. 1963), and authorities cited note 7 *supra*.

[88] *Ibid.*

[89] 371 S.W.2d at 381.

[90] 373 S.W.2d 735 (Tex. 1964).

[91] 382 S.W.2d 921, 925 (Tex. 1964).

[92] 196 A.2d 238 (1963).

[93] *Id.* at 240-41.

The doctrine has been abolished in automobile cases involving guests[94] and in cases where the master was negligent in creating or maintaining the dangerous conditions.[95] However, in a few states, the doctrine continues to apply to the master and servant relationship.[96]

In the other direction, the current view of the American Law Institute is to retain the doctrine of assumed risk. Before that action was taken, however, there was a serious attack on the doctrine by some of our most astute legal scholars. In this regard, the extremely interesting and enlightening commentaries, called the "Battle of the Wilderness," are recommended.[97] The draft contains writings by Prosser, Seavey, Malone, Eldridge, *et al.*, on whether assumed risk should or should not be retained as an independent concept. After a prolonged controversy, assumed risk survived.

B. *Where Is Assumed Risk Going?*

While it is dangerous to attempt to forecast where assumed risk is going or how it is developing, there are certain areas where the doctrine may be limited in various jurisdictions. There probably will be a more stringent requirement that the plaintiff "actually knew and appreciated" the particular danger. A corollary will be the decrease in the number of cases in which the plaintiff is charged with knowledge or appreciation, or both. As to invitees, there probably will be an enlargement of the class of people regarded as business invitees. This should lead to a corresponding extension of duty to persons, especially children, accompanying the invitee. The general tendency to remove people from the "bare licensee" category will also probably continue to receive support.

There will probably be a relaxation of the rule that a person injured in a store or other place where the public is invited cannot recover if he knows of or is warned of some defects, depending upon his justification for proceeding through the store. We may even see, in some jurisdictions, the complete abolition of the *no duty* doctrine as applied to business guests.[98] The tendency probably will be to require safe conditions, with the test of plaintiff's conduct being judged on the basis of contributory negligence.

In some jurisdictions, emphasis will probably be placed on requir-

[94] McConville v. State Farm Mutual Automobile Ins. Co., 113 N.W.2d 14 (Wis. 1962).
[95] Siragusa v. Swedish Hospital, 373 P.2d 767 (Wash. 1962).
[96] Felgner v. Anderson, 133 N.W.2d 136 (Mich. 1965) (returning the doctrine of assumed risk to the master and servant relationship); Swift & Co. v. Schuster, 192 F.2d 615 (10th Cir. 1951) (limiting the doctrine of assumed risk to the master and servant relationship).
[97] RESTATEMENT (SECOND), TORTS 560-81 (1965).
[98] See, *e.g.*, Swift & Co. v. Schuster, 192 F.2d 615 (10th Cir. 1951).

ing an approximation to actual consent to the injury or to the exposure to the risk. Canada presently requires a finding of a contract to give up the cause of action. A distinct possibility exists of the expansion of the requirement of voluntary exposure, *i.e.*, where defendant has put plaintiff to a hard choice, some courts may say that the plaintiff did not voluntarily accept the risk. A good example, previously mentioned, involves a drunk driver, dark night, bad weather, female passenger on a dark road or in a rough part of town. Another example is the mother who enters a store with a slick floor to get medicine or food.[99] Or another example, previously mentioned, involves the lady who needs to use the restroom at the professional wrestling match. The element of justification for taking the risk is getting more attention.

Another area where the doctrine may be limited involves the possible enlargement of the rescue exception in assumed risk cases.[100] At early common law, each man was expected to look out for himself, a stern individualism. To help someone else in an emergency was an extravagance which the helper indulged in at his own risk and expense. Today, however, where the defendant has created a dangrous situation to which another naturally and understandably responds, and is reasonably justified in acting, there is a more charitable attitude toward the rescuer. The tendency is more toward holding the person causing the danger liable, testing the rescuer's actions by contributory negligence.

A final area of limitation may be with respect to the warning theory.[101] While the concept of a warning as negativing the duty of the owner-occupier is being retained, there will probably be a growing tendency to require a complete disclosure of the dangerous conditions involved.

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[99] At the present time the court has an opportunity to consider this problem. We have an application for writ of error pending in the case of Gulfway General Hospital v. Pursley, 397 S.W.2d 93 (Tex. Civ. App. 1965). That case involves an injury to a plaintiff when she slipped and fell on snow and ice while trying to get medical attention.

[100] Sinclair Ref. Co. v. Winder, 340 S.W.2d 503 (Tex. Civ. App. 1960) *error ref.*

[101] At present in a majority of jurisdictions, communication of a warning as to the danger discharges the owner-occupier's duty or causes the invitee to accept the risk. However, this rule has received much criticism, particularly with regard to business invitees. See 2 HARPER & JAMES, TORTS 1494 (1956). As a consequence, there should be an increasing number of cases where the warning will not be sufficient because there was not a full disclosure and the invitee did not fully appreciate the danger. Also, depending on the justification, a simple warning will not discharge the duty. The duty will be to protect, and proceeding notwithstanding the warning will be considered under contributory negligence.