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Master-Servant - Abolition of Assumption of Risk as a Defense

Richard M. Hull

ment over the application of the defense to particular circumstances.

In rejecting legal impossibility if the consummation of the crime is impossible because of some rule of law, the Model Penal Code furnishes predictability and ease of administration and circumscribes judicial discretion in interpreting fact situations. However, these advantages are outweighed by countervailing policies. The Code will cause an adopting jurisdiction to shirk its responsibility to evaluate thoroughly the criminality of a course of conduct because it makes all conduct punishable once evil intent is manifested. It is the duty of the courts to do justice; that duty should not be avoided merely because the concepts are complex and confusing. When the consummation of an intended crime is legally impossible, the defense of legal impossibility should not be discarded. It is far from strange to view the criminality of an attempt in relation to the completed offense. Therefore, if an attempt occurs under circumstances that would not make the intended result a crime, the attempt should not be criminal.

Hellmut A. Erwing

Master-Servant — Abolition of Assumption of Risk as a Defense

Plaintiff, while working at a wash basin during her regular employment as a nurse's aid, was injured when a patient in a wheelchair pushed a door inward and caused a metal hook on the inside of the door to strike her in the upper portion of her back. The hook enabled patients and hospital personnel to open the door from the inside with a forearm. The evidence showed that the architect who designed the room knew that the door came in contact with the wash basin when fully opened, and consequently, he placed a rubber knob on the hook to absorb the forceful contact. Plaintiff contended that her employer, the hospital, was negligent in failing to provide a reasonably safe place to work. The hospital defended affirmatively on the basis of contributory negligence and assumption of risk. The trial court upheld the assumption of risk plea and did not make a finding on the contributory negligence defense. *Held*,[1] *reversed and remanded*:[2] In a common-law action brought by an employee, the

[1] The hospital-nurse employment relationship is not covered by the Washington Workmen's Compensation Act. See Wash. Rev. Code Ann. § 51.12.010 (employments included), § 51.12.020 (employments excluded), and § 51.12.030 (test for unenumerated occupations) (1962).

[2] The factual questions of negligence and contributory negligence were remanded to the lower court.

defense of assumption of risk is not available to a negligent employer. A servant injured during employment because of a dangerous condition negligently created or maintained by his master is not precluded from recovery merely because he is aware or should know of the dangerous condition. However, if the employee's voluntary exposure to the risk is unreasonable under the circumstances, he is barred from recovery because of contributory negligence. *Siragusa v. Swedish Hospital*, — Wash. 2d —, 373 P.2d 767 (1962).

The doctrine of assumption of risk in master-servant relationships[3] finds its source in *Priestly v. Fowler*,[4] in which the English court refused to hold an employer liable to an employee injured while on the job. The court reasoned that if the *overhead* of inevitable industrial injuries were placed on the employer, the expansion of industry would be seriously impeded. Such a theory is practically antithetical to modern treatment of the doctrine.[5] The change in judicial attitude is primarily a consequence of two types of legislation: (1) state workmen's compensation acts,[6] which cover nearly all industrial accidents, and (2) the Federal Employer's Liability Act[7] and the Jones Act,[8] which encompass the two largest groups not covered by state workmen's compensation statutes—railroad employees engaged in interstate commerce and seamen. In the comparatively few em-

[3] This Note is concerned with the doctrine of assumption of risk only as it relates to master-servant relationships. The general doctrine, according to Professor James, covers the following two types of situations:

> (1) In its primary sense the plaintiff's assumption of a risk is only the counterpart of the defendant's lack of duty to protect the plaintiff from that risk. In such a case plaintiff may not recover for his injury even though he was quite reasonable in encountering the risk that caused it. *Volenti non fit injuria.*
>
> (2) A plaintiff may also be said to assume a risk created by defendant's breach of duty towards him, when he deliberately chooses to encounter that risk. In such a case, except possibly in master and servant cases, plaintiff will be barred from recovery only if he was unreasonable in encountering the risk under the circumstances. Harper & James, Torts § 21.1, at 1162 (1956).

[4] 3 M. & W. 1, 150 Eng. Rep. 1030 (Ex. 1837).

[5] See Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943), for a history of the development of the doctrine.

[6] Prosser, Torts § 69 (2d ed. 1955):

> The theory underlying the workmen's compensation acts never has been stated better than in the old campaign slogan, "the cost of the product should bear the blood of the workman." The accident losses of modern industry are to be treated as a cost of production, like the breakage of tools or machinery. The financial burden is lifted from the shoulders of the employee and placed upon the employer, who is expected to add it to his costs, and so transfer it to the consumer. In this he is aided and controlled by a system of compulsory liability insurance, which equalizes the burden over the entire industry. Through such insurance both the master and the servant are protected at the expense of the ultimate consumer. *Id.* at 383.

[7] 53 Stat. 1404 (1939), 45 U.S.C. § 54 (1958).

[8] 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958).

ployer-employee areas in which legislatures have not abolished assumption of risk, the doctrine has generally been applied in two instances: (1) assumption of "ordinary or incidental risks" of employment, against which the master is not bound to protect and (2) assumption of "extraordinary risks," *i.e.*, those created by the negligence of the master.[9]

Ordinary risks of employment have been defined as "those risks which remain after the master has used all reasonable care to remove them and do not include any risk or hazard due to the master's negligence."[10] It is presumed that in the employment contract, the servant's wages are fixed in contemplation of the fact that he has assumed the risks incidental to the work to be performed.[11] However, the proper analysis of liability for injuries resulting from ordinary dangers of the employment is that the employer is under no obligation to protect his employee from the dangers that he cannot alleviate by the use of reasonable care. Assumption of the *ordinary* risk is not truly an affirmative defense. The employee is not allowed to recover simply because the employer is not negligent. Nevertheless, the majority of the courts have repeatedly utilized the label "assumption of risk" when analyzing the ordinary risks of employment because of the phrase's "felicity."[12] The result is indiscriminate confusion with the concept of assumption of *extraordinary* risks.[13] The latter necessarily involves an employer's breach of a primary duty[14]

[9] James, *Assumption of Risk*, 61 Yale L.J. 141, 155-56 n.84 (1952). Prof. James indicates that when the risk is incidental to the employment, the servant must plead and prove that he did not assume it; whereas, assumption of an extraordinary risk is an affirmative defense and casts the burden of proof upon the master-defendant.

[10] James, *supra* note 9, at 156. Another definition of ordinary risks has been stated as follows: "The usual and ordinary dangers incident to the service are assumed by the contract of hiring. One entering into an employment which is necessarily more or less dangerous is held to take those dangers into consideration in making his contract to work, and for an injury received from such dangers the servant cannot recover." Ross v. Chicago, R.I. & P. Ry., 243 Ill. 440, 90 N.E. 701, 703 (1909).

But see Bassett v. New York, C. & St. L.R.R., 235 F.2d 900 (3d Cir. 1956); Holliday v. Fulton Band Mill, 142 F.2d 1006 (5th Cir. 1944); Moore v. Morse Malloy Shoe, 89 N.H. 332, 197 Atl. 707 (1938), in which the employer's liability was not based on the breach of a primary duty, but rather on his failure to warn the employee of a latent defect not discoverable by due diligence. See also Annot., 28 L.R.A. (n.s.) 1215, 1219 (1910).

[11] Wichita Falls & S.R.R. v. Lindley, 143 S.W.2d 428 (Tex. Civ. App. 1940) *error dism., judgm. cor.*; commented on by McGregor, *Incurred Risk in Texas*, 1 Baylor L. Rev. 410, 412 (1948).

[12] See Mr. Justice Frankfurter's concurring opinion in Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943).

[13] Two noted jurists have concluded that the doctrine of assumption of either kind of risk adds nothing to the law but confusion. They advocate that the doctrine could be covered by three existing principles: (1) lack of duty on employer's part, (2) consent by employee, and (3) contributory negligence by employee. James, *op. cit. supra* note 9, at 141; Salmond, Torts 40 (1936).

[14] Lawler states that the employer owes his employee the duty (1) to provide safe machinery, (2) to provide a safe place in which to work, (3) to employ careful and

to his employee. This constitutes prima facie evidence of a negligent act.[15] However, a majority of jurisdictions hold that such liability is dissolved by a showing that the employee, with either actual or constructive knowledge[16] of the danger and an appreciation[17] thereof, voluntarily[18] entered into or continued in the employment without complaint and without any promise on the part of the employer to remedy that danger.[19] In these jurisdictions, assumption of the extraordinary risks is a true affirmative defense.

The courts have been unable to settle upon a common basis for applying the doctrine of assumption of risk when a servant knowingly and voluntarily encounters a danger created by the master's

competent co-employees, and (4) to provide rules and regulations and to warn inexperienced servants of non-apparent hazards. Lawler, Texas Workmen's Compensation Laws 2-4 (1938).

[15] *Ibid.*

[16] "Knowledge and appreciation of the danger is an essential of the defense of assumption of risk and, hence, the doctrine does not apply unless the one alleged to have assumed the risk can be found to have known or to have been charged with knowledge of the danger." S. H. Kress & Co. v. Maddox, 201 Okla. 190, 203 P.2d 706, 709 (1949); Missouri-Kansas-Texas R.R. v. Barnaby, 167 S.W.2d 235 (Tex. Civ. App. 1942) *error ref. w.o.m.*

"Actual" knowledge presents no difficulty, provided it can be proven. However, in determining whether the employee should be charged with "constructive" knowledge of the defects, it is necessary to consider several factors, among which are the following: (1) the reasonableness in determining the danger; (2) the patent, as opposed to the latent, nature of the defect; (3) the environment of the plant or place of employment; (4) the ability of the employer to foresee and to prevent the injury; (5) the *relative* ability of each to foresee the harm; (6) the availability of the employees to rely on the employer to take precautions in order to prevent employment injuries; and (7) the respective duty of each to observe, investigate, and/or inspect.

[17] "There is involved in the question of assumption of risk not only . . . knowledge, but a reasonable opportunity to ascertain the nature of the risk, and also an appreciation [thereof]." York v. Chicago, M. & St. P. Ry., 184 Wis. 110, 198 N.W. 377, 381 (1924); Millen v. Pacific Bridge Co., 51 Ore. 538, 95 Pac. 196 (1908).

[18] See Prosser, *op. cit. supra* note 6, § 55 at 311-13.

> The difficulty in the administration of this principle [voluntary assumption] arises from the fact that, not withstanding vigorous protests, if the plaintiff proceeds to enter voluntarily into a situation which exposes him to the risk it will normally indicate that he does not stand on his objection, and has consented, however reluctantly, to accept the risk and look out for himself. *Id.* at 312.

Most American courts have refused to recognize the economic pressure placed on the worker in employment situations. Often it is necessary that the workman choose between his job and employment under dangerous circumstances. *Ibid.*

[19] Huestis v. Lapham's Estate, 113 Vt. 191, 32 A.2d 115 (1943); Hansen v. City of Minneapolis, 261 Minn. 568, 113 N.W.2d 508 (1962). By definition, assumption of the *extraordinary* risks involves an act of negligence by the employer. However, many courts have stated that a servant never assumes the risk of dangers created by the master's negligence. See, *e.g.*, Herrin Motor Lines v. Jarvis, 156 F.2d 276 (5th Cir. 1946); Yates v. Atlantic Ice & Coal Co., 76 F.2d 86 (5th Cir. 1935). For a list of state citations see 56 C.J.S. *Master & Servant* § 362 n.62 (1948). Most of these cases can be distinguished by the surrounding circumstances, *e.g.*, the servant did not know of the danger; the master assured the servant that there was no danger; the servant acted under the master's orders. See Annot., 28 L.R.A. (n.s.) 1226-27, 1231 (1910). It is submitted, therefore, that the above quoted phrase should be modified accordingly: A servant may not assume the risk of dangers created by the master's negligence, unless knowing and appreciating the danger, he (the servant) enters into or continues in the employment.

negligence. Three theories have been advanced: (1) the implied contractual basis whereby the employee assumes any dangers of which he has knowledge,[20] (2) *volenti non fit injuria*—"he who consents to an act will not be heard to claim that he is wronged by it,"[21] and (3) a servant who remains in the service of his master after acquiring knowledge of the defect is said to *waive* all claims for injuries resulting therefrom.[22]

An increasing minority severly questions the defense of assumption of extraordinary risks. The so-called "Missouri rule"[23] has, in effect, abolished the doctrine of assumption of risk as an affirmative defense although preserving it as a label for the ordinary dangers of employment. Stated differently, a servant may "assume" the incidental risks which remain after the master has exercised ordinary care.[24] However, "the moment negligence comes in the door . . . the doctrine of assumption of the risk goes out at the window."[25] Many Missouri courts have justified this treatment on the rationale of public policy:

> A servant neither by express nor implied contract is permitted to waive the right he has to the protection afforded by the exercise of reasonable care on the part of the master. Society has an interest to serve in the preservation of the lives, limbs and health of its individuals and an enlightened public policy will not tolerate the idea that a man may contract away a right so sacred and thus voluntarily offer his body as a sacrifice to positive wrong. Assumption of risk, being essentially contractual, disappears from view when we find that negligence is the producing cause of the injury and such cases cannot involve as elemental

[20] Britton v. Central Union Telephone Co., 131 Fed. 844 (6th Cir. 1904); Parker v. City of Wichita, 150 Kan. 249, 92 P.2d 86 (1939).

[21] Osterholm v. Boston & Montana Consol. Copper & Silver Mining Co., 40 Mont. 508, 107 Pac. 499 (1910); Kansas City So. Ry. v. Diggs, 205 Ark. 150, 167 S.W.2d 879 (1943); Schiano v. McCarthy Freight Sys., 75 R.I. 253, 65 A.2d 462 (1949).

[22] Illinois Cent. R.R. v. Fitzpatrick, 227 Ill. 118, 81 N.E. 529 (1907); 2 Cooley, Torts 1046 (3d ed. 1906).

Ordinarily, it is immaterial whether assumption of risk is founded upon implied contract, *volenti non fit injuria,* or waiver, since all three are based upon the knowledge of the servant. However, it has been argued that if the master breaches a statutory duty and the doctrine is rooted in contract, public policy will prevent the employee from waiving performance of an obligation imposed on the employer for the former's benefit. On the other hand, if the doctrine is based upon the maxim of *volenti non fit injuria,* it will be applicable to breaches of both statutory and nonstatutory duties. Annot., 28 L.R.A. (n.s.) 1215, 1228-1231.

[23] Goodwin v.. Missouri Pac. Ry., 335 Mo. 398, 72 S.W.2d 988 (1934); Hines v. Continental Banking Co., 334 S.W.2d 140 (Mo. 1960). The same result has been reached in North Carolina, Florida, Wisconsin, and Mississippi. See notes 31-36 *infra.*

[24] In Goodwin v. Missouri Pac. Ry., 335 Mo. 398, 72 S.W.2d 988, 991 (1934), the Missouri court stated that the rule (as to assumption of the ordinary risks) presupposes that the employer has performed the duty of caution, care, and vigilance which the law casts upon him and, by definition, that he is free from negligence. See also Spencer v. Veadle S.S. Co., 4 Cal. 2d 313, 48 P.2d 678 (1935), *aff'd,* 298 U.S. 124 (1936).

[25] Markley v. Kansas City So. Ry., 338 Mo. 436, 90 S.W.2d 409 (1936).

other issues than those concerned with the negligence of the master and the contributory negligence of the servant.[26]

Under the Missouri approach, the only defense available to the employer is contributory negligence.[27] It becomes necessary, then, to distinguish contributory negligence from the defense of assumption of extraordinary risks. The two are closely associated; the distinction between them is a matter of degree rather than kind. Often the same facts will support both defenses.[28] However, of necessity, contributory negligence always involves some fault of the servant; whereas, assumption of the extraordinary risk precludes recovery by the servant even though he has exercised more than an ordinary degree of care in encountering the situation created by the master's negligence.[29]

North Carolina courts have applied a different theory that, nevertheless, arrives at the same result as that reached by the Missouri judiciary. In *Hicks v. Naomi Falls Mfg. Co.*,[30] the North Carolina court stated that if the employer's negligence is the proximate cause of an injury to his employee, the latter shall not be precluded from recovery merely because he might have been aware of the increased danger. The employee is barred only if the danger is so great that his conduct, in effect, amounts to contributory negligence. Thus, North Carolina has eliminated assumption of risk as a defense in those areas in which the employee is injured while reasonably proceeding with actual or constructive awareness of the employer's negligently created or maintained defect. Nevertheless, the doctrine is nominally preserved as a defense if the employee is unreasonable in

[26] Mack v. Chicago, R.I. & P.R.R., 123 Mo. App. 531, 101 S.W. 142 (1907). There appears to be two major problems with the rationale: (1) The doctrine of assumption of risk has other bases besides contract, *viz.*, *volenti non fit injuria* and waiver. (2) In contracts where the servant *expressly* assumes the risk of his employment, the defense will be upheld. See James, *op. cit. supra* note 9, at 162-66.

[27] Contributory negligence is the only defense available where the servant is injured by a peril created by the master's negligence. Fish v. Chicago, R.I. & P.R.R., 263 Mo. 106, 172 S.W. 340 (1914).

[28] "The point where the two concepts approximate is where the danger is so obvious and imminent that no one of ordinary prudence would encounter it." Stogner v. Great Atl. & Pac. Tea Co., 184 S.C. 406, 192 S.E. 406, 408 (1937).

[29] Schneider v. Texas Co., 244 Minn. 131, 69 N.W.2d 329 (1955); Meistrich v. Casino, 31 N.J. 44, 155 A.2d 90 (1959). See also James, *op. cit. supra* note 9, at 141; Annot., 82 A.L.R.2d 1221, 1226-27 (1962); *cf.* Alexander, *Rethinking Negligence*, 11 Miss. L.J. 290 (1939). An important reason for the distinction is that some statutes have recognized one defense, but abolished the other; *e.g.*, Minneapolis, St. P. & St. Ste. M.R.R. v. Popular, 237 U.S. 369 (1914), construed the Federal Safety Appliance Act, 27 Stat. 531 (1893), 45 U.S.C. § 1 (1954), "not [to] preclude the defense of contributory negligence, as distinguished from that of assumption of risk." Secondly, those jurisdictions adhering to the "Missouri rule" acknowledge only contributory negligence and refuse to apply assumption of extraordinary risks. See notes 23, 24 *supra* and notes 30-35 *infra*.

[30] 138 N.C. 319, 50 S.E. 703 (1905).

encountering the dangerous condition (the same area covered by contributory negligence under the "Missouri rule").[31]

An interesting treatment of the defense is afforded in Wisconsin. Assumption of risk as a defense is abolished by statute in all master-servant situations except farm labor.[32] However, the recent case of *Colson v. Rule*[33] set forth several reasons for the abolition of the defense even with respect to farm labor. (1) It is unrealistic to hold that a farm laborer can assume the risk of defective tools furnished by an employer because the doctrine requires "freedom of choice," and a refusal to make use of the tools would likely result in discharge. (2) "It tends to immunize those employers from liability who are the greatest transgressors in providing safe conditions of work for their employees."[34] (3) There is no moral justification for barring an employee from recovery "in negligence against his employer because of any act on the employee's part which an ordinarily careful and prudent man similarly situated would have performed."[35]

The Washington Supreme Court, in the principal case, remanded to the trial court the factual questions of the employer's negligence and the nurse's contributory negligence. In summarily subtracting from consideration the issue of assumption of the ordinary or incidental dangers of employment, the court stated that the true analysis is that the employer is under no duty to protect the employee with regard to such risks, and any injuries, therefore, are not due to the master's negligence.[36] "Hence, the point of inquiry here is to re-examine the rule which bars a servant's recovery for injuries due

[31] See text accompanying note 27 *supra*. Also see Maulden v. High Point Bending & Chair Co., 196 N.C. 122, 144 S.E. 557 (1928); Pressly v. Dover Yarn Mills, 138 N.C. 410, 51 S.E. 69 (1905). Like Missouri and the majority, North Carolina has utilized the phrase in cases of injuries resulting from incidental risks involved in employment.

[32] Wis. Stat. Ann. § 331.37(3) (1957).

[33] 15 Wis. 2d 387, 113 N.W.2d 21 (1962).

[34] *Id.* at 22.

[35] *Id.* at 23. The Wisconsin Supreme Court also set out a fourth, and most persuasive, argument, peculiar to comparative negligence jursidictions: under assumption of risk, the employee is precluded from any recovery in situations in which his master is negligent and he (employee) *passively* accepts a defective tool or unsafe condition of work. But according to the comparative negligence statute, the employee can *actively* contribute to cause his injury and still recover some damages against his negligent employer, provided the jury does not attribute 50% or more of the combined negligence to the employee. See 17 Sw. L.J. 155 (1963).

See also: (1) Miss. Code Ann. § 1456 (1942), which, with a few exceptions, abolishes assumption of risk in employer-employee relationships. Alexander, *op. cit. supra* note 29, suggests that the statute operates to abolish no defense, for assumption of risk never existed as a separate defense. (2) Ritter v. Beals, 225 Ore. 504, 358 P.2d 1080 (1961), noted in 47 Va. L. Rev. 1444 (1961).

[36] It is submitted that, as espoused by the Washington court, the nomenclature of assumption of risk should be eliminated in all cases in which an employee incurs injury from an incidental danger of employment; and rather, these cases should be decided on their true basis, the master's lack of duty.

to the master's negligence, although he was not acting unreasonably [contributorily negligent] in exposing himself to a known dangerous condition."[37] Under the rule in the majority of the states and under previous Washington law, the plaintiff-nurse could only recover if it were shown that she neither knew nor appreciated the danger of the bare protruding hook.[38] The court overruled the prior law and indicated that the employee's knowledge and appreciation of the risk of injury could be important factors in determining the questions of the employer's negligence in maintaining the dangerous condition and the employee's contributory negligence in exposing herself to it. The nurse may now recover if the jury finds that (1) the hospital negligently created or maintained the defective device and (2) she is free of contributory negligence, *i.e.*, she acted with reasonable and prudent caution while cognizant and appreciative of the danger.[39] It is submitted that the policy of the principal case is salutary in refusing to immunize a defendant in situations in which an innocent and reasonably cautious plaintiff is injured as a result of the former's negligence.[40]

A fair criticism of the holding in the present case would of necessity include a consideration of two problems. First, it has been aptly stated that:

> [I]n light of the obvious disenchantment of the judiciary with respect to the troublesome doctrine of assumption of risk it would not seem inappropriate to caution that any contemplated abolition of the defense in its entirety in the master-servant sphere of litigation should be resolved by legislative action, inasmuch as piece-meal judicial destruction of the doctrine . . . may only breed additional conceptual insecurity.[41]

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[37] 373 P.2d at 772.

[38] Such a showing would have been difficult in light of the purpose of the instrument and the nurse's experience in the hospital.

[39] The *Siragusa* fact pattern conceivably could fall into one of five categories:

(1) The injury was a result of an incidental risk connected with employment; the employer is free from negligence.

(2) The employer was negligent; employee neither knew nor appreciated the danger. Injury resulted.

(3) The employer was negligent; employee knew of the defect, but was (reasonably) unappreciative. Injury resulted.

(4) The employer was negligent; employee knew and appreciated the danger; employee was reasonable in proceeding in the face of said defect. Injury resulted.

(5) The employer was negligent; employee knew and appreciated the danger, but was unreasonable in encountering same. Injury resulted.

Under the majority rule, the plaintiff would be entitled to recovery only in (2) and (3) above. However, the law as stated in the present case allows the plaintiff to recover in (4) as well.

[40] See Keeton, *Assumption of Risk and the Landowner*, 22 La. L. Rev. 108, 120-21 (1961). See also text accompanying note 53 *infra*.

[41] Note, 47 Va. L. Rev. at 1450.

However, the Wisconsin Supreme Court recently overcame this objection: "The doctrine of assumption of risk as an absolute defense in master-servant cases was judge made. Therefore, if the legislature has refrained from acting on the subject, the courts could properly abolish or modify the doctrine."[42] The Washington court in the instant case evidently did not consider the issue to be a stumbling block since no mention of it was made. Secondly, the Washington court admitted that the traditional defense of assumption of extraordinary risks reduces the employer's duty of furnishing a reasonably safe place of employment to that of warning his employee of unknown defects and dangers.[43] Is such a substitution justified? "The duty of warning and instruction is entirely distinct from and independent of the duty of furnishing reasonably safe premises and appliances."[44] The employer must shoulder the responsibility of performing both. To preclude liability on the basis of an employee's knowledge and appreciation of the danger would, in effect, relieve the employer of the most important of the two duties. In a rather complete description of the master's duty to provide a reasonably safe place of employment, Judge Julian P. Alexander states:

> The master, of course, owes his servant the duty to use reasonable care to provide tools, appliances and places of work which are reasonably safe. This duty is more completely stated, however, when it involves the reciprocal duty of the servant to use reasonable prudence with respect to the place, appliances, tools, and other conditions of his employment.[45]

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[42] Colson v. Rule, 15 Wis. 2d 387, 113 N.W.2d 21 (1962).

[43] 373 P.2d at 772, 773.

[44] Gains v. Johnson, 133 Ky. 507, 105 S.W. 381 (1907).

[45] Alexander, *op. cit. supra* note 29, at 290. For coverage and exclusion of employees under the Texas Workmen's Compensation Act, see Commentary, 22 Tex. Rev. Civ. Stat. Ann. xxvi (1956).

Where assumption of risk with respect to the master-servant area is not covered by statute, the Texas courts have, in effect, followed the majority. However, at least in its technical sense, the doctrine has been limited solely to contractual relationships "too long, too often, and too lately . . . to permit of re-examination at this time." Schiller v. Rice, 151 Tex. 116, 246 S.W.2d 607, 610 (1952).

In noncontractual relationships where the plaintiff encountered a known and appreciated danger, the doctrine *volenti non fit injuria* has been the basic theory on which the courts have barred the plaintiff's recovery. "The only difference suggested by the courts in the defense of *volenti non fit injuria* and that of assumption of risk is that the latter doctrine applies to cases arising from the relationship of master and servant, or at least to cases involving a contractual relationship, whereas the doctrine of *volenti non fit injuria* applies in proper cases independently of any contractual relationship." Cummins v. Halliburton Oil Well Cementing Co., 319 S.W.2d 379, 382 (Tex. Civ. App. 1958).

The scope of assumption of risk in Texas has been succinctly stated in Carter v. Kansas City So. Ry., 155 S.W. 638 (Tex. Civ. App. 1913).

> The doctrine of assumed risk, as known at common law, is predicated upon an agreement, express or implied, by which the employe voluntarily exposes himself to the hazards which he encounters in the performance of his duties. The perils which he assumes are those ordinarily incident to his employment,

This may be interpreted to imply that whenever the employee acts reasonably, the employer cannot substitute a bare warning of danger for his duty to provide the employee with a reasonably safe place to work.

Those jurisdictions adhering to the holding in the *Siragusa* case[46] have, in effect, eliminated from all common law master-servant relationships assumption of risk as a defense to the master's negligence.[47] If a defect or danger exists because of the master's negligence, a servant may cautiously encounter the danger, though known and appreciated by him, without barring recovery should he suffer injury as a result.[48] The servant, however, does not have a license to act in a flagrantly irresponsible manner in such situations since contributory negligence on the employee's part is a complete defense. Further, the employee's knowledge and appreciation of the danger are, in those jurisdictions,[49] factors to be considered in determining negligence by the employer or contributory negligence by the employee.[50]

The policy behind the elimination of the defense of assumption of extraordinary risk appears sound from two standpoints. (1) "The best usage for a defensive theory is the one 'that most sharply focuses the defensive facts. Assumed risk is usually too blunt and too comprehensive to serve such a function in a highly developed adversary process.' "[51] A majority of the courts have seized upon assumption of risk because its rhetorical "felicity" provides an opportunity for treating certain cases on a single issue without the necessity of considering other, more difficult issues. Furthermore, certain policy problems are inadequately presented because the defense often overlaps and duplicates certain other doctrines.[52] (2) The master will not be liable if he is reasonably unaware that his conduct has resulted in a risk of harm. The creation of the risk *must* be unreasonable for the employer to be liable. In theory, then, if the master is held responsible

> and such as are normally to be expected from the particular character of the service in which the employe is engaged. The rule also includes those dangers arising from the failure of the employer to perform his duty in providing safe tools and appliances and safe places for work, of which the employe knows, or by the exercise of ordinary circumspection in the performance of his labors would know. Assumed risk is founded upon the knowledge of employe, either actual or constructive, of the hazards to be encountered, and his consent to take the chance of injury therefrom. *Id.* at 643.

[46] See notes 23, 30, 32, 35 *supra.*

[47] These jurisdictions still preclude recovery where the employee incurs injury from an incidental danger connected with the employment.

[48] Se note 39 *supra.*

[49] See note 46 *supra.*

[50] 373 P.2d at 773.

[51] Keeton, *op. cit. supra* note 40, at 120-21.

[52] Wade, *The Place of Assumption of Risk in the Law of Negligence,* 22 La. L. Rev. 5 (1961).