Voluntary Assumption of Risk in Texas Revisited - A Plea for Its Abolition

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UNTIL a few years ago, many Texas lawyers erroneously believed that a "slip and fall" case was relatively easy to prepare and try. If the defendant knew of the dangerous condition on the floor or if it had been there so long that the defendant should have known of it, the plaintiff was entitled to have the primary negligence and causation issues submitted to the jury, to be followed by issues of contributory negligence. The law has advanced and, unfortunately, become more complex. The "slip and fall" case in Texas is no longer simple. In addition to negating "no duty," plaintiff must be found not to have either expressly or impliedly voluntarily assumed the risk. Only then may the jury consider the questions of primary and contributory negligence. Putting aside the nightmare of special issue submission which, at least for the time being, has been standardized and, hopefully, simplified by Adam Dante Corp. v. Sharpe, the substantive tort questions remain. How did voluntary assumption of risk evolve in Texas? Why do we have the doctrine? Is it sound tort theory in all cases, some cases, or none? Are there reasonable alternatives?

Consent or assent is the cornerstone of *volenti non fit injurias* or voluntary assumption of risk. However, the early concept of consent appears to have undergone radical transformation when compared to its present application in Texas negligence law. Originally, when the plaintiff expressly consented to the risk of harm, the defendant prevailed because he had committed no wrong. The defendant's conduct was privileged and, therefore, he never became a tortfeasor. In the area of intentional torts, the patient's consent to the surgeon's operation rendered the surgeon's conduct privileged. The reason the surgeon did not commit a battery was that the consent obtained before surgery prevented him from becoming a tortfeasor. At common law one was free to do as he pleased with his person and property. If he consented to their...
priation or abuse by others, no tort was committed. This principle was recog-
nized in *McCue v. Klein*: "As a general principle, a man can recover no
damages for an injury received at the hands of another, with his own consent,
unless it arises from some act which is in itself a breach of the peace."

Thus, a female over the age of eighteen years cannot recover civil damages
for rape if she has consented. The defendant does not commit rape—he does
not become a tortfeasor.8 An occupant's consent to entry constitutes a privi-
lege in a suit for trespass to land or personalty.8 Likewise, one who consents
to the creation of a nuisance cannot successfully maintain a cause of action
against those to whom consent was given because of the privilege afforded to
what would otherwise be antisocial, tortious conduct.9

These intentional tort cases involve express consent. The defendant intends
the consequences of the act which results in the harm and the plaintiff consents
prior to the act. However, negligence law involves unintentional harms and
regards fault, or antisocial conduct, as the basis of liability.10 One reason why
there are very few negligence cases in which the plaintiff expressly consents
to the injury is that the defendant does not intend the consequences of his
act. The defendant often creates an unreasonable risk of harm (thus violating
a duty of ordinary care to the plaintiff) long before the victim becomes aware
of, let alone consents to, the risk of harm.

On the other hand, if the defendant is induced to act or creates a risk of
harm on the reasonable belief that the plaintiff is willing to accept it, whether
plaintiff is actually willing or not, then the defendant acted reasonably.11 In
other words, the defendant is not negligent, either as a matter of law or fact.
Some courts, however, would say that the plaintiff consented to the risk by
implication (implied voluntary assumption of risk) or that the defendant
owed the plaintiff no duty. This Article will attempt to expose the fallacy of
this reasoning and suggest a logical alternative to the use of the "no duty" and
assumption of risk analyses.

I. McKee v. Patterson

*McKee v. Patterson*18 is the pivotal case in this area. The plaintiff, an em-
ployee of a subcontractor in charge of installing gymnasium partitions and
bleachers, slipped and fell from a ladder on a slick floor. The defendant, the
general contractor, was responsible for the slick floor because of the time
sequence in which he scheduled the work. Both the defendant and plaintiff

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8 60 Tex. 168 (1883); cf. Galveston H. & S.A. Ry. v. Zantzinger, 92 Tex. 365, 48
S.W. 563 (1898); Perkins v. Nail, 37 S.W.2d 211 (Tex. Civ. App.—Eastland 1931),
erorr ref.
6 Cf. Robinson v. Moore, 408 S.W.2d 582 (Tex. Civ. App.—San Antonio 1966); Maler
1933).
10 W. Prosser, LAW OF TORTS 17-19 (4th ed. 1971); BLACK'S LAW DICTIONARY 738
(rev. 4th ed. 1968); Gay, "Blindfolding" the Jury: Another View, 34 Texas L. Rev. 368
(1956).
11 See Mansfield, supra note 4, at 25.
knew and appreciated the hazard created by the floor in advance of the plaintiff's labor.

The Texas Supreme Court had several options available in analyzing these facts. The choices it made provide a foundation for the doctrinal difficulties encountered today. For example, the court equated the duty of a general contractor with the duty of a landowner to maintain the premises in a reasonably safe condition or to warn of dangers that are not open and obvious. The court failed to recognize that the policies that protect a general contractor are materially different from those protecting the landowner. The nature of the work and the activity of construction create hazardous conditions in themselves. In the usual sense, such is not the case with the landowner. Further, while it might be argued that the landowner intends to withhold entry unless the plaintiff expressly agrees to encounter the risk of harm, the thought of withholding entry to a subcontractor’s employee absent express assumption of risk is far from the contractor’s mind. If the court had recognized the general contractor’s duty as simply “to provide a reasonably safe place to work,” the volenti problem created by the alternate duty “to warn” would not have arisen.

The court apparently felt that the general contractor’s duty to the plaintiff could have been fulfilled by warning plaintiff of the dangerous condition, and since plaintiff was aware of the dangerous condition, this duty had been fulfilled. As will be stated later, a duty to warn should not necessarily be coextensive with the possessor’s duty to maintain reasonably safe premises. The duty to warn should be one of the possessor’s duties, but even if fulfilled, should not automatically free him from his general and larger duty of ordinary care.

The court’s decision to analyze and handle premises cases on the basis of “no duty” to warn of open and obvious dangers and volenti, in addition to contributory negligence, instead of the conventional “primary/contributory negligence” formula, means that fault is not the sole basis for gauging the plaintiff’s conduct. If fault determines the defendant’s liability in a negligence case, the same standard, measured by plaintiff’s contributory fault, should be required to exonerate the defendant.

Finally, relying upon old English and American cases which refused to recognize that economic as well as other forms of coercion are socially justifiable and acceptable reasons for excusing the plaintiff’s conduct, the court concluded that plaintiff voluntarily encountered the risk as a matter of law. In making this decision, a substantial body of Texas law was rejected.

In spite of the above comments, no criticism is directed to the result the

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\[13\] This equation has already been sufficiently criticized. See Green, supra note 4, at 84.

\[14\] Voluntary assumption of risk, unfortunately, has now spilled over into the “non-premises” cases and constitutes a valid defense even though the plaintiff was not contributorily negligent. Rabb v. Coleman, 409 S.W.2d 384 (Tex. 1971) (deceased killed when butane ignited); J. & W. Corp. v. Ball, 414 S.W.2d 143 (Tex. 1967) (plaintiff injured while assisting defendant’s employee in placing wheel of truck-tractor on block); Ellis v. Moore, 401 S.W.2d 789 (Tex. 1966) (plaintiff injured on defendant’s defective tractor); Texas Bitulithic Co. v. Caterpillar Tractor Co., 357 S.W.2d 406 (Tex. Civ. App.—Dallas 1962), error ref. n.r.e. (defectively designed maintainer); Kirby Lumber Corp. v. Murphy, 271 S.W.2d 672 (Tex. Civ. App.—Beaumont 1954) (defendant negligently placed logs on plaintiff’s truck).

\[15\] See text accompanying notes 21-29 infra.
court reached. There are many types of hazards which are an inherent part of
the work on the premises. It would not do violence to the court's role in the
administration of justice to recognize, considering the construction activity
underway in McKee, that the defendant did not maintain an unreasonably
dangerous condition or that the defendant was reasonable in believing that the
plaintiff was willing to accept the risk. In other words, the defendant was not
negligent as a matter of law. Or, if the court concluded that there was evidence
of defendant's negligence, it could have absolved the defendant of liability by
holding (though probably not warranted by the facts) that the plaintiff's con-
duct constituted contributory negligence as a matter of law.

The path chosen in McKee is unfortunate. In essence, the court denied re-
cover to a non-negligent plaintiff even though the defendant was negli-
gent. Contrary to the concept that fault is the basis of negligence law, the
defendant prevailed on a theory that has its roots in the privilege of consent—
not express consent, but implied consent. The two concepts are totally differ-
et, however, and the method adopted by the court neither clarified nor
simplified this body of the law. To the contrary, it has been a source of con-
stant confusion.

Five fact patterns will illustrate the resulting problems: (1) Assume that
the defendant landowner creates or maintains a dangerous condition on the
land. A business invitee enters and is injured by it. Since the defendant created
a risk of harm toward one to whom he owed a duty of ordinary care, the
creation or maintenance of that risk constituted a breach of that duty. Without
any additional facts, defendant was negligent. He owed the plaintiff a duty to
keep the premises reasonably safe and breached that duty.

(2) Now suppose that after entry, the plaintiff observes the dangerous
condition, appreciates its danger and voluntarily encounters it, or (3) observes
the condition but really does not think of the danger it presents one way or
the other until after injury. Are either of these voluntary assumption of risk
or "no duty" cases? With respect to the "no duty" argument, it has been
established that the defendant breached his duty to the plaintiff by not keeping
the premises reasonably safe or warning the plaintiff of the danger. The de-
fendant has done nothing to change his duty to "no duty." The law should
not excuse the defendant's conduct by saying that he owed the plaintiff "no
duty" when, in fact, he not only owed the plaintiff a duty, but violated it prior
to plaintiff's injury. Likewise, with voluntary assumption of risk, which has
its genesis in consent or assent to injury, one cannot seriously say that the
defendant was not negligent. Since the defendant was negligent and the
plaintiff has not, in fact, consented to being hurt, defendant's conduct has

18 See, e.g., Genell Inc. v. Flynn, 358 S.W.2d 543 (Tex. 1962). Such analysis would
more properly explain the results of McNiel v. Fort Worth Baseball Club, 268 S.W.2d 244
(Tex. Civ. App.—Fort Worth 1954), error ref., and Knebel v. Jones, 266 S.W.2d 470
(Tex. Civ. App.—Austin 1954), error ref. n.r.e., in which spectators were injured by a
baseball. Either the risk of harm was not unreasonable or the defendant reasonably believed
the plaintiff was willing to accept the risk—defendant was simply not negligent as a matter
of law, although McNiel was decided on assumed risk and Knebel on a combination of no
primary negligence and contributory negligence as a matter of law.

19 Sargent v. Williams, 152 Tex. 413, 258 S.W.2d 787 (1953), is the last case in which
the court denied liability to an invitee on the basis of contributory negligence apart from
"no duty," volenti non fit injuria, or voluntary assumption of risk.
not become privileged. To say that plaintiff is willing to encounter a danger is entirely different from saying that he consents to the injury resulting from it. It cannot be said, with intellectual honesty, that defendant owed plaintiff "no duty," or that plaintiff consented or assented to the injury. The most that can be said is that plaintiff acted unreasonably. He may be contributorily negligent, either in law or in fact.

(4) Plaintiff never has been told by defendant of, nor does he observe, the unreasonably dangerous condition until after injury, although he has repeatedly exposed himself to it. The defendant was negligent and the "no duty" concept should be unavailable. Since plaintiff never observed the dangerous condition, he could not have consented to the injury resulting from its existence. Thus, contributory negligence is the only sensible negligence doctrine available to bar his recovery.

(5) Defendant maintains or creates a dangerous condition on the land but warns the plaintiff prior to entry and plaintiff is willing to enter in spite of it. Should a proper decision rest upon "no duty," no primary negligence as a matter of law, or consent to the risk? To answer the "no duty" question, the extent of the defendant's duty must be understood. Is it the duty to maintain reasonably safe premises, which includes the duty to warn, or is it a duty to maintain reasonably safe premises or to warn of dangers neither open nor obvious? In other words, should defendant's duty to exercise ordinary care be fulfilled or extinguished once he has warned the plaintiff? It is submitted that it should not. The law should impose upon the defendant the broad duty of maintaining reasonably safe premises, including many smaller duties, one of which is the duty to warn. The law should impose upon the defendant a continuing duty to maintain reasonably safe premises because it comports with desirable conduct in modern society.

One could say that the defendant, by giving warning prior to plaintiff's entry, acted reasonably, and consequently was not guilty of antisocial conduct. However, since he maintained a dangerous condition which is not socially desirable, it seems more realistic to say that the plaintiff, after being warned of the danger by the defendant, expressly (not impliedly) consented to the risk of harm created by the defendant. This is the heart of the doctrine of consent, because the defendant commits himself to a certain course of conduct when the plaintiff indicates a willingness to accept the defendant's risk of harm. Once the defendant warns the plaintiff, who then assents to the risk

18 Compare Triangle Motors v. Richfield, 152 Tex. 354, 358, 258 S.W.2d 60, 62 (1953) ("[A] duty to use reasonable care to make or keep the premises reasonably safe for [plaintiff]'s use, including the duty to warn him of dangers which were not obvious, reasonably apparent or as well known to the plaintiff as they were to the defendant.")., with Western Auto Supply Co. v. Campbell, 373 S.W.2d 735, 736 (Tex. 1963) ("[A] duty to use ordinary care to keep his premises in a reasonably safe condition for his invitees or to warn."). Note that the duty to warn is given much greater dignity in the latter quotation than the former.

19 Triangle Motors v. Richfield, 152 Tex. 354, 358, 258 S.W.2d 60, 62 (1953). On the other hand, if plaintiff's only theory of liability is the defendant's failure to warn, then such warning, once given, may fulfill the defendant's duty under some circumstances. See Technical Chem. Co. v. Jacobs, 480 S.W.2d 602 (Tex. 1972).

20 The defendant's commitment may also arise as a result of a contract with plaintiff (contractual assumption of risk) or by legislative edict (workmen's compensation insurance statutes and FELA, for example).
of harm, the defendant has relieved himself of any antisocial conduct. He is not negligent solely due to plaintiff's consent. If, on the other hand, the plaintiff manifests an unwillingness to accept the risk, the defendant is still in control of the situation and has the right to refuse plaintiff admission to the premises if he desires.

Prior to the decision in McKee, a substantial body of precedent had decided such cases on the traditional, simple, and sound principles of primary and contributory negligence. *Gulf, C. & S.F. Ry. v. Gascamp* was the earliest of such decisions. Defendant maintained its bridge at a point where its track crossed a public road. Because of defendant's negligence in failing to keep the bridge in repair, plaintiff's horse threw and injured him. Plaintiff knew that the bridge was in disrepair and dangerous but, by way of justification, plaintiff testified that the public road was the only one between his home and destination. In writing the opinion, Judge Gaines did not refer to assumption of risk or no duty, and the trial court's judgment for the plaintiff was affirmed upon a traditional analysis of primary and contributory negligence. In modern parlance, the court could have said that the defendant had a duty to maintain the premises in a reasonably safe condition or to warn of dangers not open and obvious, but since plaintiff knew of and voluntarily encountered the danger, he was barred by failing to negative "no duty" and voluntary assumption of risk. The court, however, used simple doctrines to handle a simple case. Sophistication was not required to determine that the defendant breached its duty to keep the bridge in reasonable repair and that there was sufficient evidence to support the jury's finding that plaintiff was free of contributory negligence.

In *McAfee v. Travis Gas Corp.* the plaintiff, while working on his employer's premises, went to a location near the property line to point out to defendant's employee a location where defendant's pipe line had been leaking for many months. Defendant's employee struck a match to light a cigarette, which caused the natural gas to explode and injure plaintiff. Since plaintiff was aware of the dangerous condition (the escaping gas), would current Texas practice require a directed verdict for defendant upon the theory that plaintiff failed to negate "no duty" since the dangerous condition was open and obvious, in spite of the fact that the defendant had negligently maintained it for two years, thus breaching its duty during that entire period? Fortunately, the

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\[1\] 69 Tex. 545, 7 S.W. 227 (1888).

\[2\] Would the present court reject plaintiff's contention that the encounter was not voluntary on the basis that he had the alternate choices of staying at home or crossing private lands to reach his destination? Cf. Greenwood v. Lowe Chem. Co., 433 S.W.2d 695 (Tex. 1968) (per curiam); Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368, 379 (Tex. 1965); McKee v. Patterson, 153 Tex. 517, 526, 271 S.W.2d 391, 397 (1954) (dissenting opinion).

\[3\] 137 Tex. 314, 153 S.W.2d 442 (1941).

\[4\] See Adam Dante Corp. v. Sharpe, 483 S.W.2d 452, 457 (Tex. 1972), in which the court stated: "A plaintiff ..., may be charged in law with knowledge and appreciation of a dangerous condition if the condition is open and obvious to her. A defendant, therefore, owes no duty as to conditions which are open and obvious." See also Methodist Hosp. v. Hudson, 465 S.W.2d 439 (Tex. Civ. App.—Houston [14th Dist.] 1971), *error ref. n.r.e.*; Gulfway Gen. Hosp. v. Pursley, 397 S.W.2d 93 (Tex. Civ. App.—Waco 1965), *error ref. n.r.e.*
court at that time was able to base its decision on the primary/contributory negligence formula.

Walgreen-Texas Co. v. Shivers is another example of how nicely the simple negligence formula works. Plaintiff, an elderly lady, had twice earlier on the day of the accident taken a seat at defendant's soda fountain. At the time of the accident, she was removing herself from the seat but forgot that the seat was affixed to a platform nine inches above the level of the floor. The court did not confuse the issue by resorting to the perplexing, baffling, confusing doctrinal quagmire of negating "no duty," "open and obvious," and voluntary assumption of risk. After reviewing the evidence, it concluded that there was sufficient evidence for the jury to determine defendant's negligence and lack of plaintiff's contributory negligence. Admittedly, such a method of analysis requires the court to deal with each case on its own facts. Each duty question must be determined between the precise parties and the risk of harm under consideration. These are close, hard questions, but it is the function of the court to come to grips with and answer them. Given a different, though somewhat analogous set of facts, the court might have charged the plaintiff with contributory negligence as a matter of law. For example, had plaintiff been an agile young woman who had or should have paid attention to the steps on the prior occasions or, as the plaintiff in Wesson v. Gillespie, been a daily visitor over a long period, a finding of contributory negligence as a matter of law might have been justified.

The case for contributory negligence is well stated in Northcutt v. Magnolia Petroleum Co., in which the jury found that plaintiff "knew or should have known" of the defect. No subsidiary issues on negligence or proximate cause were submitted. After first recognizing that liability is based on fault, the court observed:

If it be conceded that under the first phase of the finding the plaintiff had such knowledge [actual knowledge] or under the second phase of the same he had, as a matter of law, constructive notice of said fact [imputed knowledge as a matter of law], the finding had no further effect or importance. The material consideration under the circumstances would not be what the plaintiff knew as a disconnected fact, but what an ordinarily prudent person, having such knowledge, would have done or omitted to do under the circumstances.

Prior to the implementation of the concepts which require negating "no duty" and whether plaintiff voluntarily assumed the risk, the court never

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8 See Lang v. Henderson, 147 Tex. 353, 215 S.W.2d 585 (1948), in which plaintiffs were tenants in defendant's building and smelled gas from a defective hot water heater for several months before a fire resulted from the defect. Plaintiff was employed half-time while attending school, his wife was six months pregnant, and there was an acute housing shortage. Plaintiff had called the condition to defendant's attention several times prior to the fire, but defendant had failed to repair it. The court held that plaintiff was not contributorily negligent as a matter of law. See also Hall v. Medical Bldg., 151 Tex. 425, 251 S.W.2d 497 (1952); Renfro Drug Co. v. Lewis, 149 Tex. 507, 235 S.W.2d 609 (1951); J. Weingarten Inc. v. Brockman, 134 Tex. 451, 135 S.W.2d 698 (1940).
9 382 S.W.2d 921 (Tex. 1964).
10 90 S.W.2d 632 (Tex. Civ. App.—Eastland 1935), error ref.
11 Id. at 635.
12 Not to be confused with negating "no duty" in this area are those cases in which the defendant's duty does not extend to a particular plaintiff for the risk of harm under

hesitated to hold that a plaintiff was contributorily negligent as a matter of law if it concluded that reasonable minds could not differ on the point. United Gas Corp. v. Crawford is an example of such a case. Plaintiff, a city employee, fell into an open ditch that the defendant had excavated to lower its lines so the city could lower the street's grade. The court first examined the defendant's duty to maintain the excavation in reasonably safe condition and determined that its failure to brace the walls was a breach of that duty which caused plaintiff's injury. The court next looked to plaintiff's conduct and found that he failed, as a matter of law, either to maintain a proper lookout for his own safety or otherwise take reasonable precautions. Plaintiff's knowledge and appreciation of the dangerous condition that contributed to his injuries were thoroughly discussed and analyzed as they pertained to whether he was contributorily negligent. The court would not condone plaintiff's conduct because he was at fault. To determine whether the condition was open and obvious, or whether plaintiff negated "no duty," or voluntarily assumed the risk, in law or in fact, was unnecessary. Plaintiff's conduct was judged by the same standard as defendant's, i.e., that of a reasonably prudent person, and found lacking.

McKee, however, relied primarily upon five decisions to support its conclusion that plaintiff's knowledge, appreciation, and voluntary encounter extinguished the defendant's alternate duty to warn. In Houston National Bank v. Adair, most often cited as an "open and obvious" or "no duty" case, plaintiff was injured by falling on defendant's marble stairs. The court, in affirming the trial court's action of granting defendant's motion for instructed verdict, concluded that there was no evidence of defendant's negligence. Had the court terminated its opinion at that point, it would have simply been one of many cases which are lost because plaintiff failed to satisfy the burden of proof. Unfortunately, however, the court unnecessarily went further and assumed that even if the bank were negligent, the condition was "open and obvious." The opinion then became famous for its dictum, not its holding.

In A. C. Burton Co. v. Stasney a sixteen-year-old boy, upon leaving the defendant's premises, walked through a plate glass window adjacent to the entry door. While the court spoke of the legal duties owed by the possessor to the boy, it concluded that it was "apparent from the evidence adduced that the danger of injuring himself by walking into said window was obvious to appellee or that it should have been observed by him in the exercise of reasonable care." A reasonable construction of this language is that the plaintiff failed

consideration. For example, while a landowner might owe a duty of ordinary care to an adult invitee, such a duty may not extend to the adult trespasser. Certain fact situations also arise in which the occupier does not have an initial duty to warn. See Phillips Pipe Line Co. v. Razo, 420 S.W.2d 691 (Tex. 1967). The initial duty may be upon the entrant to make reasonable inquiry of the occupier concerning the location of potentially dangerous conditions. Pioneer Natural Gas Co. v. K & M Paving Co., 374 S.W.2d 214, 219 (Tex. 1963).

1 141 Tex. 332, 172 S.W.2d 297 (1943).
2 Cf. Sargent v. Williams, 152 Tex. 413, 258 S.W.2d 787 (1953) (children-guests contributorily negligent as a matter of law for riding with incompetent and reckless driver).
3 271 S.W.2d at 393-94.
4 146 Tex. 387, 207 S.W.2d 374 (1948).
5 Id. at 388, 207 S.W.2d at 375.
6 223 S.W.2d 310 (Tex. Civ. App.—Galveston 1949), error ref.
7 Id. at 312-13.
to maintain a proper lookout for his own safety as a matter of law. However, it has been classified as a “no duty” and “open and obvious” case even though the court’s discussion of the defendant’s duty to the boy had little, if any, bearing on its ultimate conclusion that contributory negligence precluded his recovery.

The plaintiff in Marshall v. San Jacinto Building stumbled over a slight elevation in a granite slab upon which defendant’s revolving door was located. More than ten million people had used the building since its construction and only three injuries involving the use of the door (not necessarily the elevation in the slab) had been reported. The slight elevation was observable to anyone that looked at it, although plaintiff denied knowing of its presence prior to tripping and being injured. Defendant’s instructed verdict was affirmed on the grounds that defendant owed plaintiff “no duty,” “open and obvious” conditions, and that defendant was not negligent. The “no duty” concept is certainly subject to criticism under the facts because defendant owed plaintiff a duty to maintain the premises in a reasonably safe condition, and, if it was not open and obvious to plaintiff (a subjective test), at least a fact issue could be raised by the evidence. A sounder basis for the result was that the premises were not, as a matter of law, unreasonably dangerous. Such a determination would involve a consideration of notice or lack of notice of the condition to the defendant, the number of exposures to the risk in comparison to the number of prior injuries, and whether a reasonable man could foresee harm from the risk. These factors, however, are more closely allied to defendant’s negligence than defendant’s duty.

The San Antonio Court of Civil Appeals ruled that a judgment n.o.v. must be entered in Hausman Packing Co. v. Badwey. The plaintiff fell from defendant’s meat truck, and unsuccessfully argued that he should be treated like a passenger on a bus or street car, because of the higher duty that defendant would owe him. The court, however, likened the meat truck to a house and determined that plaintiff could not recover because he was charged in law with knowledge of the slippery floor, lack of handrails, and inadequacy of steps. If defendant created a risk of harm prior to plaintiff’s entry and plaintiff did not consent or assent thereto, defendant was negligent. Unless there was consent or willingness by plaintiff to encounter a risk and the defendant acted upon that willingness in permitting entry instead of denying it, there was no voluntary assumption of risk. The remaining question of contributory negligence, in law or in fact, could then have been resolved on the record.

The McKee court was also confronted with whether it should examine the

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40 57 S.W.2d 372 (Tex. Civ. App.—Beaumont 1933), error ref.
41 For example, in J. Weingarten, Inc. v. Brockman, 134 Tex. 451, 135 S.W.2d 698 (1940), an abrupt change in elevation from one and one-half to three inches raised an inference of defendant’s negligence. The court expressly refused to recognize that this slight offset was open and obvious as a matter of law. To reconcile this holding with Marshall is difficult.
42 Adam Dante Corp. v. Sharpe, 483 S.W.2d 452, 459 (Tex. 1972), recognizes that “open and obvious” is a law question, which raises some interesting collateral questions. See part IV infra.
43 147 S.W.2d 856 (Tex. Civ. App.—San Antonio 1941), error ref.
conduct of the plaintiff in determining the defendant's duty. It felt bound by the "substantive law of the state" and declined to examine only the defendant's conduct to determine defendant's duty, reasoning that the defendant owed plaintiff no duty if the risk was voluntarily assumed. As stated earlier, it is fundamentally sound to say that if plaintiff has expressly consented to the risk (true volenti non fit injuria), the defendant owes plaintiff no further duty with respect to that risk. However, once defendant creates an unreasonable risk of harm and is thus negligent, only contributory negligence should bar plaintiff's recovery.

Two fact situations will illustrate the problem. First, assume that the landowner creates a dangerous open and obvious condition, knows and appreciates the danger he has created, yet fails to warn the plaintiff, whom he reasonably knows will be injured by it. Second, assume that the landowner does not know of the dangerous condition, but that he should know of it and of the foreseeable harm to plaintiff. The defendant's conduct is far more reprehensible in the first instance than in the second. Yet, in both situations, the existence and violation of defendant's duty is judged by one standard—the standard of ordinary care. The only concern is whether he maintained the premises in a reasonably safe condition, no more and no less. Therefore, in order to be perfectly fair to both parties in a negligence case, the plaintiff's conduct should be gauged by the same standard. So long as the defendant has created an unreasonable risk of harm and is negligent, it should make no difference whether plaintiff actually knew and appreciated, or simply should have known of, the danger. The test in a negligence case should be whether defendant and plaintiff were negligent, taking into consideration what they knew or should have known. The test of the reasonably prudent person should be the sole criterion for both parties, rather than for the defendant alone.

The development of tort law in England and this country has historically favored the owner or occupier of land by restricting the defendant's duty through classification devices such as trespasser, licensee, business invitee, social guest, natural condition of the land, and others. Criticism of these classifications is not intended here, but it must be recognized that they are devices used to limit the defendant's duty. A basic question is what policy of the law now requires that a defendant's duty to exercise reasonable care be discharged by plaintiff's encounter with the danger. Hopefully, it can be agreed that the bases of the duties that exist in tort law are founded upon social utility. That is to say, the defendant is required to keep his premises reasonably safe because it serves a useful, social purpose. By the same token, the plaintiff is required to exercise ordinary care for his own safety because it is a type of conduct that comports with the socially acceptable standards imposed by the law.

In modern society, is social utility served when the defendant's duty is discharged upon the fortuitous circumstance that the plaintiff discovers and encounters the danger prior to the infliction of harm? Note that the defendant has done nothing; his liability is determined by plaintiff's conduct and knowledge. Therefore, it might be argued that the defendant should hope for a

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44 271 S.W.2d at 394.
mentally alert plaintiff, one who will more readily know and appreciate the
danger than one whose mind is dull, who will neither know nor appreciate the
defendant's breach of duty until after the injury. Justice is not served by such
distinctions.

Returning to _McKee_, what social purpose is achieved when the law dis-
charges a negligent contractor's duty to an injured workman simply because
the latter saw that the gym floor was slick? If the slick floor was unreasonably
dangerous and the responsibility of the contractor, plaintiff's knowledge should
not relieve the defendant of his duty to maintain the premises in a reasonably
safe condition.

Before leaving the _McKee_ era, two earlier cases should be discussed. One is
_Wood v. Kane Boiler Works_, in which plaintiff's husband was killed while
hydrostatically testing steel pipe that had been defectively welded by the de-
fendant. The jury found that defendant's negligence proximately caused the
death and that the deceased was not contributorily negligent. Defendant urged
"no duty" and the assumption of risk defense. The court refused to pass directly
on assumption of risk, since assumed risk applied only to master-servant cases,
and plaintiff was not defendant's employee. In resolving the "no duty" question,
the court said that the deceased's failure to consent to the risk of harm that
cased the accident, necessarily resolved any assumed risk or _volenti_ question
adversely to defendant. If the court was speaking of express consent, there is
no inconsistency with fundamental tort principles. As long as the plaintiff (1)
knows, appreciates, and consents to the danger that creates the risk of harm,
(2) communicates that willingness to subject himself to the exposure to the
defendant, and (3) defendant relies upon that willingness before the plaintiff
proceeds with the encounter, the defendant's conduct is privileged. The de-
ceased was a tester and his work undoubtedly involved some risks of harm.
However, as the court made clear, the risk of harm that killed Wood resulted
from an initial defective weld rather than the subsequent welds that were being
tested at the time he met his death. For example, if the defendant had told the
deceased of the possibility of the existence of the defective weld that actually
cased death and the deceased was willing to inspect the pipe with that knowl-
edge, then it would properly be said that the deceased consented to that risk;
but when the defendant does not change his position in reliance upon the
plaintiff's consent or assent to the exposure, the defendant's original antisocial,
unreasonable conduct (negligence) continues to be antisocial even though the
plaintiff becomes aware of it prior to injury. In such a case, recovery should
not be denied unless the victim also acts unreasonably.

The other case is _Shiller v. Rice_, in which the plaintiff passengers sued the
defendant driver for gross negligence under the Texas guest statute. The jury
found that defendant's driving while intoxicated was gross negligence and a
proximate cause of plaintiff's injuries. Under the evidence, plaintiffs knew of
defendant's intoxication, had a reasonable opportunity to leave the car, but
did not do so. After reviewing the evidence, the court concluded:

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*150 Tex. 191, 238 S.W.2d 172 (1951).*

*151 Tex. 116, 246 S.W.2d 607 (1952).*
The plaintiffs were heedless and reckless of their own safety as a matter of law, and that, as a matter of law, this heedless and reckless disregard of their own safety was a proximate cause of their injuries. It is our further conclusion that the plaintiffs voluntarily exposed themselves to the risk of injury by failing to leave the automobile and 'put themselves in the way of danger' of their own free will.\footnote{Id. at 128, 246 S.W.2d at 615.}

In other words, the court barred plaintiffs' recoveries based on contributory negligence as a matter of law and \textit{volenti}. Why bar recovery on both grounds? Perhaps it is because, in an earlier part of the opinion, the court stated that the differences between contributory negligence and \textit{volenti} were more philosophical than real. With all due respect, had the court realized that something more fundamental than philosophy was involved, it would have decided the case on the basis of contributory negligence alone unless the evidence showed that the plaintiffs expressly consented to the risk of harm before riding with defendant while he was in such a condition.

\section*{II. Contributory Negligence and Volenti}

As previously stated, contributory negligence bars plaintiff's recovery because of fault, the cornerstone of negligence law. \textit{Volenti}, on the other hand, as most often used by the court has nothing to do with fault. Quite the contrary, \textit{volenti}, under certain situations, has been said to exist and defeat plaintiff even though he is not at fault. Several factual variations of this case will illustrate the point:

\begin{enumerate}
\item Defendant driver is intoxicated. Plaintiff enters defendant's car for purely social purposes and does not reasonably learn of defendant's intoxication until the defendant reaches a high rate of speed, at which point defendant swerves into the left lane and collides with an oncoming car.
\item Defendant driver is intoxicated. Plaintiff enters defendant's car for purely social purposes at a time when he has actual knowledge of defendant's intoxication. Defendant immediately reaches a high rate of speed, swerves into the left lane and collides with an oncoming car.
\item Defendant driver is intoxicated. Plaintiff enters defendant's car for purely social reasons at a time when he does not have actual knowledge, but in the exercise of ordinary care should know, of defendant's intoxication. Defendant's conduct is then the same as set forth in example 2.
\item Defendant driver is intoxicated. Plaintiff enters defendant's car for purely social reasons but does not reasonably learn of defendant's intoxication for several minutes. Between the time of learning of defendant's condition and the accident arising from defendant's conduct set forth in example 2, plaintiff has an opportunity to leave the car, but unreasonably fails to do so.
\item The same facts as example 4, except that plaintiff does not act un-}

\footnote{Id. at 128, 246 S.W.2d at 615.}
reasonably in failing to leave the car. For example, the only opportunity to leave the car is in a strange slum area in the middle of the night.

(6) Defendant driver is intoxicated. Plaintiff, an employee of defendant, is aware of defendant's condition and initially declines the defendant's offer of transportation. Defendant threatens to fire plaintiff if he refuses, so plaintiff reluctantly enters the car and an accident arising from defendant's conduct occurs as set forth in example 2.

(7) Defendant driver is intoxicated. Plaintiff is a pregnant woman desperately needing medical attention. She stops defendant and is immediately aware of his condition before she enters the car. Nevertheless, she does enter and an accident arising from defendant's conduct occurs as set forth in example 2.

If the differences between contributory negligence and voluntary assumption of risk are more philosophical than real, then except for perhaps 1 and 5, plaintiff was contributorily negligent or plaintiff consented to the risk of harm in each instance. However, can it be said in all fairness that plaintiff was contributorily negligent in 7 or that plaintiff consented to the harm in 3?

Comparing some of the other examples will point up real, not philosophical, differences between contributory negligence and voluntary assumption of risk. Look at 2 and 3. To say that plaintiff's conduct should bar recovery in both instances merely begs the question. In 3, plaintiff was contributorily negligent—he failed to exercise ordinary care for his own safety. But in 2, plaintiff may have a number of reasons for entering the auto knowing of defendant's condition and still not be at fault; at least reasonable minds could properly justify or excuse the plaintiff's conduct. For example, see 6 and 7.

Contrast 4 and 5. In both instances the defendant was negligent at the time the plaintiff entered the automobile; he violated his duty of care by exposing plaintiff to an unreasonable risk of harm. Plaintiff did not consent to injury. In both situations, the plaintiff learned of defendant's condition but the plaintiff's conduct should not be judged in terms of voluntary assumption of risk in either situation. Rather, the question is whether plaintiff acted reasonably after learning of defendant's condition.\(^4\) If there were no substantial difference between contributory negligence and voluntary assumption of risk, plaintiff would be barred in 5 by the latter because he knows, appreciates, and voluntarily encounters the danger. However, such cases are decided on the basis of contributory negligence.\(^4\) The loss is placed on the party at fault.\(^5\)

In 4 and 5, the "no duty" concept is also inapplicable. If defendant not only owed plaintiff a duty but in fact breached that duty at the moment plaintiff entered the car, it is difficult to understand what would suddenly change defendant's affirmative duty of ordinary care to the status of "no  


\(^{50}\) Id.

\(^{51}\) For example, in Sargent v. Williams, 152 Tex. 413, 258 S.W.2d 787 (1953), plaintiffs were contributorily negligent as a matter of law for riding with an incompetent, reckless defendant. Discussion of voluntary assumption of risk and "no duty" was unnecessary.
duty." In each instance the defendant has committed antisocial conduct and breached a duty to the public. How then, should 7 be analyzed? The plaintiff knew of defendant's condition before her entry and the dangers of riding with a drunk. At this point, defendant did not have to give her a ride. By doing so, he alters his conduct and commits himself to a course of action relying upon the plaintiff's consent and willingness to incur the risks of harm attendant to her urgent journey. Since defendant's driving while intoxicated is a breach of duty, to say that he owed "no duty" is difficult. Hence, a more plausible explanation for denying plaintiff recovery would be a determination that she consented to the risk of harm.

Shortly after McKee, the court was confronted with McElhenny v. Thielepape, in which plaintiff was injured at the defendant doctor's office when she was hit by a swing in which children were playing. She had observed this activity for some time and thought she had room to pass between the swing and a chair. Holding that the trial court was correct in granting defendant's motion for an instructed verdict, the court expressly stated that the defendant owed plaintiff no duty, the swing was not a dangerous instrumentality, the plaintiff was aware of the danger, the defendant could not foresee the risk of harm, and plaintiff could have easily avoided it. In a later opinion, it was treated as "an open and obvious as a matter of law" case. These theories, as announced by the court, have only one thing in common: the plaintiff loses. The similarity ends at that point. To say that defendant owes no duty to plaintiff is far different from saying defendant owes a duty but does not violate it. To say that defendant owes plaintiff a duty and violates it, but that plaintiff is willing to proceed in spite of defendant's violation, is still something else. To state that defendant has violated his duty and that plaintiff has also been negligent is yet another basis for determining the denial of liability. Only by a clear analysis of the different bases can conflict and confusion be avoided.

III. POST-MCKEE DEVELOPMENTS

What has the post-McKee era done to resolve these problems? Halepeska v. Callihan Interests, Inc. assisted in explaining the apparent equation of "knew and appreciated" with "should have known and appreciated" in McKee by recognizing that the two phrases are not synonymous; the former concerned volenti and the latter contributory negligence. Otherwise, while the court did attempt to distinguish between the "no duty" and volenti concepts, it essentially followed in the footsteps of McKee. The court's effectiveness in clarifying this troublesome area can best be evaluated by analyzing some of its more recent decisions.

The jury found in Western Auto Supply Co. v. Campbell that plaintiff, a customer in defendant's store, was warned by the defendant's employee of the

81 155 Tex. 319, 285 S.W.2d 940 (1956).
82 Id. at 322, 285 S.W.2d at 941-42.
84 371 S.W.2d 368 (Tex. 1963).
85 271 S.W.2d at 394.
86 373 S.W.2d 735 (Tex. 1963).
dangerous condition of the floor before he encountered it and slipped and fell. The court assumed that the floor was dangerous, thus creating an unreasonable risk of harm. The court treated these facts as a "no duty" case. However, it seems more reasonable to say that the defendant had a duty to maintain the premises in reasonably safe condition regardless of whether warning was given or the condition was open and obvious. This should be a continuing duty that is not extinguished by plaintiff's conduct but can be fulfilled only by defendant when he does in fact maintain reasonably safe premises.

Under the analysis earlier suggested, a court would recognize that the defendant, by creating an unreasonable risk of harm, was negligent. However, when the plaintiff indicated his willingness to accept the risk, thus causing the defendant to commit himself to a certain course of conduct, the defendant purged himself of any antisocial conduct and the plaintiff consented to the risk. Specifically, when defendant's employee told plaintiff of the danger, plaintiff could indicate that he did not want to walk on the slippery floor or that he was willing to risk the harm. If the plaintiff indicates the former, the defendant could steer him clear to a place of safety or otherwise exercise reasonable care for him. However, plaintiff's express consent to accept the risk would relieve defendant of further protection respecting that risk. Once the defendant's option or alternative is removed by plaintiff's consent, defendant's conduct concerning that risk becomes privileged.

Hernandez v. Heldenfels\textsuperscript{57} required the court to make an exception to its concept of "open and obvious" dangers within the "no duty" doctrine, by limiting its application to conditions which are "static" (holes, pits, etc.).\textsuperscript{58}

The plaintiff in Wesson v. Gillespie's\textsuperscript{59} was injured after stumbling over the threshold of the entry door at defendant's tavern, which she had frequented for many years. The trial judge determined that there was neither evidence that the threshold was unreasonably dangerous nor evidence that plaintiff was free of contributory negligence. If supported by the record, such a determination has always been a proper function of the court. The supreme court, however, did not base its affirmance of the trial court's judgment n.o.v. upon

\textsuperscript{57} 374 S.W.2d 196 (Tex. 1963).
\textsuperscript{58} Id. at 200-01. Even the sub-classification of "static" conditions creates problems. See Scott v. Liebman, 404 S.W.2d 288 (Tex. 1966), where plaintiff walked through a sliding glass door of a motel at night. Four members of the majority distinguished A.C. Burton Co. v. Stasney, 223 S.W.2d 310 (Tex. Civ. App.—Galveston 1949), error ref. (plaintiff walked through plate glass window next to entry door upon leaving store) because a sliding glass door is not a static condition, the incident occurred at night rather than during the day, and plaintiff did not know the door was closed. The fact that Stasney walked into a plate glass window and Liebman through a closed glass door was not discussed. These judges concluded that defendant could not prevail under the defense of voluntary assumption of risk. The Chief Justice concurred because the condition was not open and obvious. The four dissenting judges, under the authority of Stasney, would have rendered judgment for defendant by charging plaintiff in law with voluntary assumption of risk. These cases illustrate graphically the doctrinal quagmire which can result from a simple set of facts. If the court can be so finely divided in initial classification of static conditions and, further, be unable to agree on the applicability of voluntary assumption of risk as compared to "no duty," how can the bar be expected to handle future cases? When does a condition become static? Is it a question of fact or law? At what point does it become open and obvious? How many exposures to danger does it take to charge the plaintiff with knowledge and appreciation? If the court disregarded its concept of static conditions, "no duty," and voluntary assumption of risk and utilized the simple primary/contributory negligence formulas, these problems could be eliminated.

\textsuperscript{59} 382 S.W.2d 921 (Tex. 1964).
either of those grounds. Rather, it held that the plaintiff, by continuing to expose herself to the condition after knowledge and appreciation of its dangers, was barred, as a matter of law, by voluntary assumption of risk. Perhaps plaintiff should not have recovered in this case, but to deny liability based upon plaintiff’s consent to harm (the basis of voluntary assumption of risk) is subject to criticism. No one can seriously believe that the plaintiff consented to being hurt. To say that she did is a fiction—she certainly did not contemplate injury from tripping over the threshold. According to the trial court, the defendant satisfied his duty to maintain the threshold in a reasonably safe condition and was not negligent. The court recognized the meagerness of evidence, if any, on this point, but nevertheless assumed defendant’s negligence and decided the case on voluntary assumption of risk. Thus, under the court’s reasoning, this case is a classic example of a negligent defendant prevailing against a non-negligent plaintiff in a negligence case. The most simple and fundamental method of handling such cases would be to follow the example of the trial court—either the defendant acted reasonably as a matter of law or plaintiff was contributorily negligent as a matter of law. In either event, imposition of, or escape from, liability would be based upon negligence, nothing more and nothing less.

With respect to the court’s recognition that warning the plaintiff discharges the defendant’s duty to exercise ordinary care, the next step would be to impose vicarious knowledge on the plaintiff by issuing the warning to plaintiff’s superiors. Strong policy arguments can be made on both sides of the question of whether knowledge of a warning given plaintiff’s foreman should be imputed to plaintiff. Such a discussion is beyond the scope of this Article. However, it does point up one of the ancillary problems that can arise when a court equates the duty to warn with the duty to exercise ordinary care. What happens when the defendant does not warn plaintiff’s superior in fact, but supplies him with information from which knowledge of the danger is apparent, thus charging plaintiff’s superior with knowledge in law? Is this in turn imputed to plaintiff (a double imputation or charging of knowledge), thus discharging defendant’s duty to warn?

Voluntariness. Aside from the above doctrinal problems that are created by the use of “no duty” and the voluntary assumption of risk defense in a negligence case, other difficulties remain. Since consent or voluntary assent lies at the heart of voluntary assumption of risk, so that the injured party makes an intelligent choice either to proceed in the face of danger or to seek an alternate course, the meaning of the word “voluntary” must be determined. Does it apply to plaintiffs who are confronted with both reasonable and unreasonable

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60 J. & W. Corp. v. Ball, 414 S.W.2d 143 (Tex. 1967), is another illustration and additionally exemplifies the confusion between classification of static versus non-static conditions, and “no duty” versus voluntary assumption of risk.

61 Delhi-Taylor Oil Corp. v. Henry, 416 S.W.2d 390 (Tex. 1967).

62 See, e.g., Guidry v. Neches Butane Prods. Co., 476 S.W.2d 666 (Tex. 1972), in which this question was raised but not necessary to decide because of insufficient summary judgment facts.


alternatives? In Blanks v. Southland Hotel, Inc. the pre-McKee court had before it a defendant that failed to maintain its hotel in a reasonably safe condition. The plaintiff, a paying guest, was injured while descending the steps (his only method of exit and entry) for the first time at night during his three-week occupancy. After viewing the facts, the court refused to find plaintiff contributorily negligent as a matter of law.

Defendant additionally urged "open and obvious" and voluntary assumption of risk defenses as a matter of law. While the court preferred to gauge the plaintiff's conduct by the contributory negligence standard, it recognized that plaintiff's conduct was not voluntary. If the room clerk had advised plaintiff of the risk before assigning him the room, but plaintiff assented to encountering it, there would be a strong policy reason for invoking the privilege of consent and barring plaintiff's recovery, for the reason that plaintiff's consent deprives the defendant of an alternate course of conduct (such as giving the plaintiff a room on another floor where such hazards are not present or refusing to give him a room at all).

In McKee the court indicated that economic compulsion to encounter the risk did not vitiate the voluntariness of the encounter. In other words, the plaintiff's decision to encounter the danger rather than losing his job for refusing to encounter it was purely "voluntary." A later attempt by a court of civil appeals to label such a choice as an "unreasonable requirement" was unsuccessful.

Other plaintiffs have faced similar dilemmas and lost. An injured lady, in a hurry to receive emergency aid, who slipped on the defendant hospital's steps, had the choice of staying at home, finding another hospital, or leaving her wound unattended. One patient had the choice of staying in bed or using the bathroom, while another could either step over a television cord to go home or stay at the hospital. To say that each of these victims was confronted with a reasonable alternative and exercised free choice is unrealistic. Such subtle

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65 149 Tex. 139, 229 S.W.2d 357 (1950).
66 Id. at 144, 229 S.W.2d at 360:
    Plaintiff had no way of reaching the floor where his room was, or of descending from it, other than by using the stairway between the eighth and ninth floors. While his situation in this regard was voluntary in the sense he willingly became a tenant on the ninth floor, it was involuntary in the sense that it was the only way provided by the Hotel whereby he, as such tenant, could use his room. He was aware, as indicated by his movements, that this predicament had become hazardous but such awareness is not conclusive that he was negligent as a matter of law in making use of the passageway.

Two points should be emphasized from the above quotation: First, the possessor's duty to maintain the premises in a reasonably safe condition should not be satisfied or extinguished even though the danger is open and obvious, known and appreciated. Second, implicit is the concept that negligence cases should be won or lost on fault.

67 271 S.W.2d at 396. This conclusion formed the basis for the dissenting opinion.
69 Gulfway Gen. Hosp., Inc. v. Pursley, 397 S.W.2d 93 (Tex. Civ. App.—Waco 1965), error ref. n.r.e.
forms of coercion which leave the plaintiff no reasonable alternative are at odds with a system of liability based on fault. If plaintiff's choice is unreasonable, it is simply one of the factors to be considered in a determination of contributory negligence.

**Exceptions.** While presently committed to these doctrines in limiting liability for the benefit of the owner or occupier of premises and others initially responsible for the harmful instrumentality, the court has recognized certain areas where they simply will not work.

*Rescuer.* In *Sinclair Refining Co. v. Winder* plaintiff voluntarily exposed himself to a risk created by the defendant's negligence. Yet he was permitted to recover because he was attempting to halt a runaway rail car threatening fellow workers who were unaware of the danger. No one could seriously quarrel with allowing the rescuer recovery. The policy of the law has an appealing, moralistic flavor. There is great social utility in protecting the rescuer-victim; there is little, if any, in protecting the tortfeasor.

The rescue case is recognized as an exception to the negating of "no duty" and voluntary assumption of risk defense. Such a case should be compared with *Gulfway General Hospital v. Pursley,* in which plaintiff, slipping on the icy steps of defendant's emergency entrance in an effort to receive emergency care, was barred as a matter of law because of the "no duty—open and obvious" doctrine. The only real difference between the rescuer and Mrs. Pursley is that Mrs. Pursley was thinking of herself and the rescuer was thinking of another. Unless a greater premium is to be placed on the act of helping another, rather than an act of helping oneself, in a moment of peril or emergency, this is a distinction without a difference. To put such cases in their proper perspective, assume that, as Mrs. Pursley approached the icy emergency entrance, an invitee stood nearby in a place of safety. Each sees the icy condition on the steps and is fully aware of the danger to those who venture forth. Mrs. Pursley, with her hand bleeding badly, gets near the top step and commences to lose her balance. The invitee immediately comes to her aid. Both slip, fall on the ice, and are injured. Under the existing state of the law, does Mrs. Pursley lose because the hospital owes her no duty? Does the rescuer prevail even though he knew, appreciated, and voluntarily exposed himself to known danger? If the hospital created an unreasonable risk of harm and becomes a tortfeasor to one, it is a tortfeasor to both. Mrs. Pursley's desire to receive emergency aid for her injury and the motive prompting those who attempt her rescue should be encouraged and protected by the courts with equal dignity.

*Master-Servant.* Another exception is found in *Sears, Roebuck & Co. v. Robinson,* in which plaintiff was injured on the premises of the defendant-employer by falling in a pool of oil which was open and obvious. Since the employer did not carry workmen's compensation insurance, the defenses of contributory

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17 Coercion, the term employed in Keeton, *Assumption of Risk and the Landowner,* 22 LA. L. REV. 108, 118-20 (1961), is far more accurate than voluntariness.


74 397 S.W.2d 93 (Tex. Civ. App.—Waco 1965), error ref. n.r.e.

75 154 Tex. 336, 280 S.W.2d 238 (1955).
negligence and assumed risk were unavailable." The defendant logically con-
tended that, under the case law then existing, since the landowner's duty was
either to maintain the premises in a reasonably safe condition or warn, the
plaintiff must negate "no duty" because the latter concept was distinct from
assumption of risk as set forth in McKee. The court distinguished McKee for
the reason that McKee was a "landowner-invitee" case and not a "master-
servant" case, refused to apply the "no duty—open and obvious" concept, and
affirmed the judgment for plaintiff. If the employee of a non-subscribing em-
ployer does not have to negate "no duty" and is not barred by open and
obvious conditions, the law should afford a business invitee on the employer's
premises the same protection for the identical risk of harm that has been cre-
ated by the defendant-employer's negligence.

Landlord-Tenant. Finally, the court excepts the landlord-tenant relation. In
Harvey v. Seale the minor plaintiff, whose parents leased the premises from
the defendant, momentarily forgot the hole in the porch. The court classified
her as a lessee, or at least distinguished her from an invitee on the theory that
she was present by matter of right under the lease, and not by the lessor's
consent, so that the child's knowledge and appreciation of the danger did not
extinguish the defendant's duty to repair the defect. Implicit in the court's
opinion, however, is the conclusion that if the child had been an invitee,
recovery would have been barred based on either "no duty" or volenti. The
risk of harm created by the defendant is unchanged whether the child is the
daughter of a tenant, a prospective tenant, or a business invitee. To say that
the lessee is not on the premises by virtue of the lessor's consent, but that the
business invitee is present by consent is a difficult concept to grasp. The lessor
does not have to lease the premises. He simply permits or consents to lessee's
occupancy upon the payment of the rent in a way similar to the way that he
consents or permits the invitee to enter upon the expectation that the invitee
may purchase or rent. Are we not accustomed to exercising the same standard
of reasonable care for the tenant and invitee alike? Both the invitee and
lessee should reasonably expect the same protection from the possessor. The
law should not impose negating "no duty" and voluntary assumption of risk on
one any more than the other.

IV. FACTUAL DETERMINATIONS

The "open and obvious" doctrine is included within the ambit of negating
"no duty" because of defendant's alternate duty to warn plaintiff of those

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78 362 S.W.2d 310 (Tex. 1962).
79 Why should we treat those plaintiffs just beneath the dignity of a lessee any differently? In Adam Dante Corp. v. Sharpe, 483 S.W.2d 452 (Tex. 1972), plaintiff urged that she was entitled to the same protection afforded a lessee since she was present on the premises as a matter of right under a one-year contract as a member of defendant's health spa. The court likened her to an invitee, and, therefore, subject to "no duty" and voluntary assumption of risk. Restatement (Second) of Torts § 496E (1965), which would seem to protect such a plaintiff, but was not discussed in Sharpe, states: "(2) The plaintiff's acceptance of a risk is not voluntary if the defendant's tortious conduct has left him no rea-
sonable alternative course of conduct in order to . . . (b) exercise or protect a right or privilege of which the defendant has no right to deprive him." Cf. Denton v. Poole, 478 S.W.2d 834 (Tex. Civ. App.—Beaumont 1972), error ref. n.r.e.
conditions which were not open and obvious. In attempting to clarify the problem presented by "open and obvious," the court has now determined it to be a question of law, not to be submitted to the jury as a special issue. The trial judge must decide whether there is proof that plaintiff has negated "no duty" and is to be charged with actual knowledge and appreciation as a matter of law under the voluntary assumption of risk defense.

However, Adam Dante Corp. v. Sharpe leaves several questions unresolved in this area and will require further clarification. One problem arises because "open and obvious" has frequently referred to a condition while "voluntary assumption of risk" has been concerned with a specific danger. The purpose of this Article is not to become embroiled in the special issue submission of voluntary assumption of risk. Rather, it is to analyze the theories involved in its application. A simple fact situation will illustrate this precise aspect of the problem in light of the special issue submission of voluntary assumption of risk suggested by Adam Dante. Assume that a business invitee enters defendant's premises and sees a clear liquid on the floor. Reasonably believing that the liquid is water, which presents no danger, plaintiff proceeds to walk through it. However, the liquid is not water, but clear silicone, upon which he slips and falls. The condition was open and obvious, but the specific danger of the encounter resulting from silicone instead of water was neither known nor appreciated. Since the court adopts the Restatement position, the open and obvious doctrine should apply only if the dangerous characteristics of the condition were open and obvious. Therefore, under our hypothetical case, plaintiff would have negated "no duty" as a matter of law.

The nice distinctions drawn by the court between "conditions" and "danger" have not served to minimize the confusion. Rabb v. Coleman is an example in

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80 See, e.g., Western Auto Supply Co. v. Campbell, 373 S.W.2d 735, 736 (Tex. 1963).
81 Massman-Johnson v. Gundolf, 484 S.W.2d 555 (Tex. 1972); Adam Dante Corp. v. Sharpe, 483 S.W.2d 452 (Tex. 1972).
82 483 S.W.2d 452 (Tex. 1972).
83 Id. at 457 ("A plaintiff, such as Mrs. Sharpe, may be charged in law with knowledge and appreciation of a dangerous condition if the condition is open and obvious to her."); Ellis v. Moore, 401 S.W.2d 789, 792-93 (Tex. 1966).
84 Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368, 379 (Tex. 1963) ("[A] person may not recover for an injury received when he voluntarily exposed himself to a known and appreciated danger.").
85 483 S.W.2d at 458 n.2:
Did plaintiff voluntarily assume the risk of [stating it]? (Subjective Test)
You are instructed that in order for the plaintiff [naming], to assume the risk, she must have actually known of the conditions which caused her injury and she also must have actually and fully appreciated the nature and extent of the danger involved in encountering the condition, and she must have voluntarily and of her own free will encountered the danger of the condition causing her injuries, if any.
86 RESTATEMENT (SECOND) OF TORTS § 343 (1965) (emphasis added):
Dangerous Conditions Known to or Discoverable by Possessor. A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
(c) fails to exercise reasonable care to protect them against the danger.
87 469 S.W.2d 384 (Tex. 1971).
which the owner of the premises was killed from the ignition of butane that occurred while the defendant's employee was filling the deceased's butane tank. The jury found defendant negligent, failed to find the deceased contributorily negligent, but found that the deceased knew and exposed himself to a dangerous condition. In a five-to-four decision, judgment for the defendant was affirmed on the defensive theory of volenti. The dissent argued that knowledge and appreciation of, and exposure to, the condition were not sufficient, i.e., knowledge of, and exposure to, the specific danger (that the pop-off valve would not perform its function and thus create a danger rather than eliminating it) was required, and would have affirmed the intermediate appellate court. The majority opinion did not refer to facts which showed that, as a matter of subjective knowledge, the deceased knew that the activation of the pop-off valve would create a danger. One could theorize that the court was thinking in terms of "no duty" as regards a condition, yet it constantly refers to the volenti doctrine.

Returning to the assumed fact situation, assume further that the defendant testifies that he warned the plaintiff that the liquid was silicone, but the plaintiff denies the warning. If "open and obvious," as part of the "no duty" doctrine, performs a useful purpose, why should not the truth or falsity of the defendant's testimony to determine the existence of duty be submitted to the jury as any other disputed issue of fact? To say that it is a law question since it relates to the defendant's duty simply begs the question, because the court frequently submits fact questions to the jury prior to the determination of duty. Possibly the best reason for making it a law question is to reduce the number of vexing problems that exist in an already too confused area. Suppose, however, that defendant does not plead voluntary assumption of risk as a defense or that, under the facts, it is a "no duty" case. In such a situation, even though there may be disputed facts concerning the "open and obvious" character of the dangerous condition, will "open and obvious" nevertheless be a law question or will an exception to the announced rule be required?

Another question comes to mind. If "open and obvious" is a question of law, does it cut both ways? Under the present state of the law, a Texas court is permitted to determine that a dangerous condition was open and obvious as a matter of law, and thus direct a verdict for the defendant. Should the trial court determine that a condition was not open and obvious as a matter of law if warranted by the facts? Returning to the example of the silicone on the

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88 Id. at 388-89.
89 For example, if the evidence conflicts on the plaintiff's status as a licensee or invitee, the trial court might properly submit the question to the jury concerning whether plaintiff was on the land as a result of permission or a business venture. After the jury answers this question, the court then applies the duty standard applicable to such classification. Cf. Coleman v. Hudson Gas & Oil Corp., 455 S.W.2d 701 (Tex. 1970) (defendant under no duty to protect plaintiff from risk unless factually determined that defendant undertook to bleed high pressure gas line).
90 Compare the original opinion in Adam Dante Corp. v. Sharpe, 15 Tex. Sup. Ct. J. 371, 376 (June 21, 1972) (emphasis added) that: "Mrs. Sharpe will have the burden to prove that Adam Dante owed some duty of reasonable care toward her, including her burden to show either that she neither knew of nor appreciated the danger or that she was not charged in law with knowledge and appreciation. The court, however, will make the decision
floor, a court could properly say that the danger was not, as a matter of law, open and obvious. If the court made the determination that plaintiff has negated "no duty" as a matter of law, it could logically have the effect of determining that voluntary assumption of risk does not exist as a matter of law. Since "open and obvious" is an underlying element of voluntary assumption of risk," a strong argument could be made that voluntary assumption of risk is not raised by the evidence once plaintiff denies knowledge of the condition's dangerous propensity. This is particularly true since the voluntary assumption of risk defense is measured subjectively.

While the court might have been referring to only that portion of "open and obvious" that relates to "no duty" as distinguished from voluntary assumption of risk (which can theoretically result because of the overlap between the two), what will be the result when the trial judge, in deciding the "open and obvious" duty question, concludes that plaintiff has negated "no duty" by subjectively establishing lack of knowledge and appreciation as a matter of law? One could persuasively argue that the voluntary assumption of risk issue should not be submitted since one of its essential elements is lacking. But what if the court nevertheless submits the voluntary assumption of risk issue and the jury answers it in favor of defendant? One could further theorize that each time the trial court refuses to instruct a verdict for defendant, it is because plaintiff has negated "no duty" as a matter of law, thus eliminating the requisite subjective knowledge to raise the voluntary assumption of risk defense. If this were the result, the therapeutic effect of limiting the defense would be achieved. Needless to say, all these questions could be easily removed from consideration by reverting to the primary/contributory negligence formula.

V. RESULTS OF MCKEE DOCTRINE

Application of the McKee doctrine can lead to unjust results. Gulfway General Hospital v. Pursley," in which plaintiff slipped and fell on the icy emergency entrance to defendant's hospital where she was going to obtain treatment for the severed tip of a finger, is such an example. In reversing and rendering for defendant, the court said that defendant owed no duty to plaintiff because the danger was open and obvious. That either the "no duty," "open and obvious," or voluntary assumption of risk doctrine was ever intended to reach such a result is absurd. The defendant, whose sole function is to care for the sick and infirm, holds itself out to the public to provide medical care and provides an emergency entrance for those in urgent need. On the one

whether she proves her lack of actual knowledge and full appreciation as well as the fact that the condition was not open and obvious to her." with the language that was substituted therefor upon final publication in 483 S.W.2d at 458-59 (emphasis added): "Mrs. Sharpe must make prima facie proof that she did not know of and appreciate the danger and that she was not charged in law with knowledge and appreciation of the danger. Upon such showing she will be entitled to go to the jury on the issues of defendant's negligence." This revision would indicate that "open and obvious" is for defendant's benefit only in that the trial court will probably be permitted to find that the condition was open and obvious and denied the right to find that it was not open and obvious.

92 483 S.W.2d at 458 n.2, special issue No. 5; cf. Massman-Johnson v. Gundolf, 484 S.W.2d 555 (Tex. 1972).
93 397 S.W.2d 93 (Tex. Civ. App.—Waco 1965), error ref. n.r.e.
hand, defendant says, "Hurry in this entrance and care will be provided." On the other hand, the court says that the defendant is under no duty to exercise reasonable care for those at the entrance because the danger maintained by it is so patent that the plaintiff can either take her chances or go elsewhere. The law's callous disregard for those who need help is untenable. The case clearly illustrates the need for recognizing that the defendant's duty to maintain the premises in a reasonably safe condition should transcend the duty to warn of dangers neither open nor obvious."

Somewhat analagous is *Methodist Hospital v. Hudson,* in which the patient, having just been given bathroom privileges, slipped and fell on the ceramic tile bathroom floor. The jury found that defendant was negligent in failing to provide a non-slip surface and judgment was entered for plaintiff. Charging plaintiff with knowledge and appreciation of the danger because of seventeen prior visits to the bathroom, the court reversed and rendered judgment for defendant, because defendant owed plaintiff no duty. It is one thing to deny recovery on the basis that the floor was not unreasonably dangerous (i.e., that the defendant was not negligent as a matter of law because the floor did not create an unreasonable risk of harm) and there might be a basis for such a conclusion. However, to disallow recovery because of "no duty" disregards the defendant's duty to maintain reasonably safe premises and the basic unfairness of imposing a decision on the patient concerning use of the bathroom privileges afforded him, particularly when there was no evidence of prior, similar occurrences to put him on notice of the danger.

*Sims v. Buddies Super Markets, Inc.* should also be considered. The fifty-nine-year-old plaintiff paid for her groceries but no one was immediately available to assist in pushing her cart to the car. She waited about twenty minutes and commenced pushing the cart herself to the parking area where her husband was waiting. She observed Christmas trees on both sides of the walkway ahead and a three-foot-wide trail between them littered with pine cones and debris in which the trees had been packed. The traffic in the parking area was heavy. Since the walkway seemed to present less of a hazard than the traffic in the parking lot, she began pushing her cart on pine needles and debris, fell, and was hurt. By summarily rejecting plaintiff's argument on "entrapment" and distinguishing *Blanks v. Southland Hotel, Inc.* without comment, the court affirmed defendant's summary judgment because of "no duty," "open and obvious," and voluntary assumption of risk.

A different approach and result, however, is found in *Dunlap v. Executive Inn Motor Hotel Corp.* Plaintiff had been an occupant in one of defendant's rooms for ten days. When she attempted to check out, she found the door to the inner stairway locked, so she proceeded to the lobby by means of the exterior stairs. After paying her bill, she ascended the exterior steps, went to

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95 465 S.W.2d 439 (Tex. Civ. App.—Houston [14th Dist.] 1971), error ref. n.r.e.
96 See *Houston Nat'l Bank v. Adair*, 146 Tex. 387, 390-91, 207 S.W.2d 374, 375 (1948).
97 460 S.W.2d 457 (Tex. Civ. App.—Fort Worth 1970), error ref. n.r.e.
98 149 Tex. 139, 229 S.W.2d 357 (1950); see text accompanying notes 65, 66 supra.
99 404 S.W.2d 842 (Tex. Civ. App.—Dallas 1966), error ref. n.r.e.
her room for a few moments and then descended by the same route, apparently
to meet transportation to the airport. A driving rain was blinding her when she
fell and was injured on the stairway. The court reversed a summary judgment
for defendant and remanded for trial. Considering Blanks and Gulf C. & S.F.
Ry. v. Gascamp\(^\text{100}\) to be controlling, the court felt that plaintiff was not con-
fronted with reasonable alternatives, i.e., defendant's unreasonable conduct
compelled plaintiff to proceed in spite of a known risk or one that was open
and obvious.\(^\text{101}\) Accordingly, the court recognized that when a plaintiff reason-
ably encounters a danger with (or is chargeable with) knowledge thereof,
such an encounter becomes a question of fact within the contributory negli-
gence issue.

To reconcile Dunlap with Sims, Hudson, and Pursley is difficult. It could be
said that a motel owner owes his guest a higher duty than a hospital owes its
patient or a grocery store owes its customer. One could rationalize and say that
the law on one hand should not require Mrs. Dunlap to remain in her room
until the steps become safe or until she contacts the management to open the
inner door, but the law should require Mrs. Sims to remain inside the grocery
store, Mrs. Pursley to seek medical aid elsewhere, and Mr. Hudson to forego use
of the bathroom. Conversely, it could be said that Mrs. Sims, Mrs. Pursley, and
Mr. Hudson were injured as the result of exercising an intelligent choice to
encounter the danger, but that such an intelligent choice was denied Mrs.
Dunlap. Perhaps a more simple explanation is that the cases are in conflict.

At this point, one might legitimately wonder whether it really makes any
difference whether a given fact situation is treated as one involving "no duty,"
voluntary assumption of risk, or contributory negligence. The method employed
and analysis suggested can have several practical effects:

(1) "No duty" is a question of law for the court, while contributory negli-
gence is most often a question of fact for the jury. Voluntary assumption of
risk may be either a question of law or fact at this point because the full im-
port of Adam Dante, in which voluntary assumption of risk is clearly a sub-
jective test rather than an objective one, is not clear.

(2) The assumption of risk defense (in all except the express consent
cases) gives the defendant two theories under which to attack the plaintiff's
conduct, while plaintiff is entitled to only one concerning the defendant's
conduct. Defendant is liable only if he fails to exercise ordinary care, and
plaintiff's lack of ordinary care should be the only defensive doctrine permitted
to defeat him.

(3) Contributory negligence is not a defense to a tort inflicted intention-
ally, willfully, or wantonly.\(^\text{102}\) Voluntary assumption of risk may be a defense.\(^\text{103}\)

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\(^{100}\) 69 Tex. 545, 5 S.W. 227 (1888).

\(^{101}\) Cf. McWilliams v. Snap-Pac Corp., 476 S.W.2d 941 (Tex. Civ. App.—Houston [1st
Dist.] 1972), error ref. n.r.e. (Plaintiff was unloading hydrocarbon from a truck when the
engine started running. He attempted to disconnect pump in spite of the known danger of
fire. It was held that a plaintiff acting in emergency with no time for reflection cannot
be charged with voluntary assumption of risk as a matter of law.)

\(^{102}\) Galveston, H. & S.A. Ry. v. Zantzinger, 92 Tex. 365, 48 S.W. 563 (1898); City
of Garland v. White, 368 S.W.2d 12 (Tex. Civ. App.—Eastland 1963), error ref. n.r.e.;

\(^{103}\) Cf. Perkins v. Nail, 37 S.W.2d 211, 212-13 (Tex. Civ. App.—Eastland 1931), error
ref. (dictum).
(4) When strict liability in tort is involved, it is not clear whether a plaintiff is barred by voluntary assumption of risk or only that form of contributory negligence which arises after plaintiff's discovery of the defect. While the court has discussed the problem, the precise issue was not before it. However, in applying the Erie doctrine, the Fifth Circuit has recently held that the voluntary assumption of risk defense to strict liability in tort must include an element of unreasonable conduct by plaintiff. This seems tantamount to requiring a finding of contributory negligence.

(5) When the court submits issues on assumption of risk and contributory negligence, the former affords the defendant an excellent springboard from which to argue the latter, thus enhancing a jury finding of contributory negligence. The plaintiff is denied any such benefit.

(6) Procedurally, the burden of proof on negating "no duty," including the related concept of "open and obvious" danger, is on the plaintiff, while contributory negligence is a burden of defendant.

One of the most persuasive arguments for abolishing voluntary assumption of risk as a defense and requiring defendant to rely upon contributory negligence is the recognition of fault as the only basis for imposing or denying liability. The results of some of the cited cases might be the same, but some might be different. The reason for that difference is simply that because the defendant is negligent in creating or maintaining a dangerous condition it does not necessarily mean that the plaintiff is negligent in the encounter. If the owner of an office building negligently maintains a slick floor in the lobby and the plaintiff is willing to "take a chance" in order to take her very ill infant to the doctor's office on the fifth floor, would anyone be heard to say that the reasons or motives that prompted the owner's conduct are the same or even similar to those of the plaintiff? Instead of taking her child to the doctor, suppose the plaintiff was on her way to her lawyer's office to execute her last will and testament prior to imminent surgery? The defendant's conduct is equally reprehensible in each instance. While the social utility of each plaintiff's conduct might vary in degree, the law should not deny its protection to either plaintiff absent a finding of contributory negligence.

VI. CONCLUSION

In McKee the court was squarely confronted with whether to recognize contributory negligence as the exclusive defensive doctrine. Its declination to do so was unfortunate. The question was reconsidered in Halepeska, but the
court felt bound by McKee. Adam Dante again provided the court with an opportunity to abandon the clumsy, baffling, unjust dichotomy of doctrine including "no duty" and voluntary assumption of risk. While the procedural reforms in the latter case should be of great assistance to the trial bar, greater progress could have been made by removing "no duty," "open and obvious," and voluntary assumption of risk from the tort law of Texas.106

Short of outright abolition, several possible alternatives exist. Since the supreme court has relied so heavily upon the Restatement position in the area, two specific sections deserve comment.

Section 343A107 makes it clear that if the possessor should anticipate harm to plaintiff despite the plaintiff's knowledge of the dangerous activity or obviousness of the dangerous condition, such possessor has a continuing duty over and above plaintiff's assumption of risk or failure to negate "no duty." If defendant's anticipation of harm is supported by the pleading and proof, plaintiff should be entitled to a special issue and prevail in the absence of contributory negligence. One court of civil appeals attempted to utilize this theory, but was reversed by the supreme court in a per curiam opinion that did not indicate whether the point was properly before it for consideration.108 Until the court holds that this section is not applicable or seriously curtails its availability, it offers plaintiff some hope.

Section 496E(2)109 is of more limited application but should render voluntary assumption of risk inapplicable when plaintiff is, for example, seeking medical attention110 or on the premises as a member of defendant's club.111

Finally, assuming voluntary assumption of risk is a recognized defense, why should not plaintiff be permitted a rebuttal issue on whether the defendant was negligent in allowing plaintiff to assume the risk or encounter the dangerous condition of which plaintiff had knowledge? To recognize such a theory of

106 An examination of the briefs before the court in Adam Dante indicates that plaintiff did not urge the court to abandon all defenses except contributory negligence. However, by the same token, neither party suggested that the Court use the case as an instrument of approving the method of special issue submission set out in the opinion. Presumably, then, the court could have suggested the abolition of all the defenses except contributory negligence if it had chosen to do so.

107 RESTATEMENT (SECOND) OF TORTS § 343A (1965) (emphasis added):

Known or Obvious Dangers

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.


109 RESTATEMENT (SECOND) OF TORTS § 496E (1965):

Necessity of voluntary assumption

(2) The plaintiff's acceptance of a risk is not voluntary if the defendant's tortious conduct has left him no reasonable alternative course of conduct in order to

(a) Avert harm to himself or another, or

(b) Exercise or protect a right or privilege of which the defendant has no right to deprive him.

110 E.g., Gulfway Gen. Hosp. v. Pursley, 397 S.W.2d 93 (Tex. Civ. App.—Waco 1965), error ref. n.r.e.

111 Adam Dante Corp. v. Sharpe, 483 S.W.2d 452 (Tex. 1972).
defendant's negligence might enable a plaintiff to obtain relief in those instances in which defendant has left him with no reasonable alternative.

The supreme court will hopefully repudiate and abandon voluntary assumption of risk, including negation of "no duty," at its earliest opportunity. Recent decisions indicate that it has faced similar challenges and is not reluctant, when justice demands, to advance the state of tort law.112 Eight other jurisdictions have recently either eliminated the defense or seriously limited its application.118 Perhaps Texas will be next.

112 Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969) (strict liability in tort for defective product extended to third parties); Morton v. Humber, 426 S.W.2d 554 (Tex. 1968) (implied warranty of fitness imposed on builder-vendor of homes); O.M. Franklin Serum Co. v. C.A. Hoover & Son, 418 S.W.2d 482 (Tex. 1967) (strict liability of seller of defective product extended to consumer's property).