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Foreword - The Kid Who Got Left Out

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The reader, unless he happens to be versed in the lore of the history of chemistry, may never have encountered the word "phlogiston." Three hundred years ago, however, this term was very familiar and very awe-inspiring. At that time ancient alchemy was yielding reluctantly to the modern science of chemistry. A much disputed matter was the nature of fire, which was assumed to be the by-product of a substance, phlogiston, that abided in all materials that could burn, and which upon being released produced combustion. Such venerable scientists as Becher and Stahl debated the "true nature" of phlogiston sharply and at great length. The dispute, in fact, lasted for nearly a hundred years, until finally Lavoisier convinced the perplexed brotherhood that no such substance as phlogiston existed at all. The arguments had been over nothing. Only after the phlogiston myth had been exploded did it become possible to undertake a really productive inquiry into the causes of combustion and thus set the infant science of chemistry upon its proper course. The same has been true in many other fields of intellectual endeavor. Words, which should be the slaves of thinking men, have occasionally escaped the control of their masters and have themselves assumed the role of despots. There is a lesson here for lawyers.

Judges and legal writers have struggled valiantly in recent years to erect a structure of reason and internal consistency which we call the law of torts. This has been the result of piecing together the scattered mosaics of decisions. Likes and differences have been carefully noted and inconsistencies have been reconciled wherever possible. The result has been a complex aggregate of broad overriding conceptions. It would be a gross exaggeration to suggest that everybody concerned is completely happy with the pattern that is evolving. But we do console ourselves with the thought that our organized approach makes considerable sense on the whole, even if it has done no more than to assist us in focusing more sharply upon the considerations (good or bad) that make torts law what it is.

Sometimes the efforts to integrate have been bold. Scholars occasionally have cast into the rubbish heap cherished adages

which had secured a tenacious hold in the decisions. But the effort to extirpate such stuff from the cases has usually led to the substitution of new conceptions which have proved to be more searching and more helpful in the resolution of torts controversies. An appreciable amount of phlogiston has already been scrubbed out of the house of torts.

But, in this parade of progress toward a more unified and rational pattern of torts law we seem to have neglected to take aboard one uncommonly obstreperous kid — Assumption of Risk. This doctrine — if it can be called such — has thus far failed to yield to our intellectual maneuvers. Bohlen seems to have regarded assumption of risk merely as a convenient obverse to the limited character of employers' and landowners' duties. So long as these persons could fulfill their duties by merely warning, it would follow that those victims who encountered the danger with full knowledge could not recover. Yet we find assumption of risk creeping into the *Restatement of Torts* as an independent defensive doctrine generally available against all chance takers. Again, assumption of risk has been identified as an awkward blood kin of contributory negligence, or as a second cousin to the doctrine of consent. Should it be all these, some of them, or none? Does assumption of risk have a doctrinal integrity all its own and is it hence amenable to refinement and redefinition? Or is it the new phlogiston, destined for the exterminating knife of a modern Lavoisier? Or, again, is it a forensic device that deserves a place in the repertoire because it lends itself to such uses as the judge may choose? The pages that follow plunge us into these inquiries, and sometimes the going is very tough.

Just a word about the organization of the essays that follow and the participants in this symposium. Dean Wade has undertaken to set the stage and pose the dilemma in broad terms. In a sense, he takes up where my musings leave off. Wade, in turn, yields to Professor Mansfield, who plunges into the sheer analytics of the controversy. Mansfield's approach is in the classical tradition of conceptualistic jurisprudence — meticulous and unrelenting, but highly productive. He concludes substantially that assumption of risk is too blunt an instrument for effective use. The plethora of inquiries that it poses should be redistributed and dealt with under more incisive and more meaningful terms.

The transition from Mansfield's carefully executed thesis to the bold brush strokes of Professor Leon Green is striking. For

Green the important question is not, what does the doctrine *mean,* but, how is it *used?* Those who know the thoughtways of the author of "Judge and Jury" will recognize the approach at once. Of necessity, says Green, assumption of risk takes its full coloring from the fact-type situation in which it is employed. The justification of the term, or its absence of justification, depends upon its capacity to articulate the judge's individual reaction to the special controversy facing him. For Green the relative comfortableness of expression afforded by competing doctrines determines the choice to be made.

The final three contributions, by Professors Willard Pedrick, Page Keeton, and Robert Keeton, afford an opportunity to explore Green's broad observations in greater detail; for these papers are concerned with the operation of assumption of risk in specific fact-type areas. This, as the reader will promptly discover, does not imply that the writers all share his sentiments concerning the mission of the doctrine or his relative indifference toward its formal or analytic content.

The reader may also be struck by the contrast in literary style revealed in the various essays. It is difficult to make a scintillating display of wit in a discourse on algebra or logic, and in some instances the writers are constrained to attack in dead earnest. Their demands upon the reader's attention are necessarily exacting at times. In the case of Pedrick, however, who is concerned chiefly with pointing out the *farrago* that results when the strictures of a Nineteenth Century rubric are transported into a Twentieth Century setting, there is room for satire and high spirits, and Pedrick is at all times both charming and provocative.

Dean Page Keeton, like Pedrick, is disturbed over the tenacity of a highly individualistic philosophy in a modern society. There is much that is best described as analytical thinking in Keeton's attack, but incongruity between old rule and new world seems to me to be the essential key note here. Perhaps the reader will share my feeling that Keeton and Green are not far apart in their approach. For Keeton, too, is interested in the use to which the doctrine of assumption of risk can be put in allocating the burden of deciding between judge and jury.

Professor Robert Keeton's contribution is actually dual in character, and the title, "Assumption of Risk in Products Liability Cases" may be a bit misleading. After pointing out six sep-

arate phenomena to which the term, assumption of risk, may be applied, he surveys the products cases as they involve these distinct aspects. He then, however, proceeds to develop at some length his own thesis on the role of assumption of risk without restriction to the type of activity involved. He turns to the sheer phenomenon of conscious self-exposure to danger, divorced from all other considerations. He suggests that a denial of recovery may comport, occasionally at least, with the basic premise of fault liability — that risks should lie where they fall unless society will gain by shifting them to the shoulders of others. He emphasizes that the person who knowingly exposes himself to danger is, in one sense, a co-author of his own injury. The fact that self-exposure cannot always be characterized as contributory negligence is not, for Keeton, necessarily a reason for refusing to explore the considerations that appear to have prompted the plaintiff to take the chance that he did. This thesis has its challenge, and Professor Keeton's development of his position deserves careful attention. His conclusions would lend considerable support to the contention that conscious exposure to risk is a proper defense which should be made available to the defendant in some instances.

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