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Assumed Risk as a Defense

*Leon Green**

The concept of assumed risk is more fundamental than the phrases used in its doctrinal formulation indicate. In fact it is so broad and fundamental that it must be broken down into a group of doctrines which more pointedly focus the factual defenses on which a defendant may rely in a particular case. It may be put this way. In any tort case for which a defendant is called to account there may be many risks which result at least in part from his conduct. The objective of the judicial process is seldom if ever to impose all such risks upon the defendant, but only those that fall within the ambit of the law's protection. To this end the inquiry is sharpened by asking what was the defendant's duty and what risks are included within its scope? The scope of the defendant's duty marks the extent of his liability. All the risks that fall outside his duty fall on the victim, unless some other defendant can be found. Where the defendant's duty ends, the assumption of risks by the victim begins. In this sense assumption of risks is but the negative of duty.

Duty and its scope are of course but conclusions reached after consideration of the various factors and policies which determine liability. This is sometimes called a weighing and balancing of interests. Whatever it may be called it is the law making or law determination function of the judicial process. It is apparent that to call all the risks that fall without the scope of a defendant's duty "assumed risks" is to include in that term a hodge-podge of many considerations. If all liability could be determined by an affirmative approach of marking out the boundaries of a defendant's duty, it would not be necessary to bother with those that fall without. In many cases however it is desirable and of great value to approach the liability of a defendant from a negative point of view, i.e., what risks should not fall upon him but should be excluded.

In an adversary system of adjudication where arguments are so vital to the respective parties, a defendant must have argumentative doctrinal support to meet those of the plaintiff.

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It is thus that the risks which a defendant seeks to avoid must be classified and given names. They are too bulky to deal with under the generic name of "assumed risks." They have come to be designated by specific doctrines which indicate limitations on a defendant's duty. The most usual of these doctrinal defenses are known as accident, act of God, no violation of duty, contributory negligence, proximate cause and its progeny, plus a possible *residuary* doctrine of "assumed risk," and numerous refinements that need not be catalogued here. They all represent risks assumed by the victim. It can be readily understood why it is difficult to maintain clear lines between these doctrinal categories when each may have a different content of meaning in different types of cases. Their easy convertibility into one another is a source of great frustration to those who insist upon doctrinal integrity.

Let it be emphasized that each of these defensive doctrines is a variable or inconstant and highly ambiguous and each is given meaning by the factual content of the particular case and its environment. The assumption of risk doctrine as a residuary doctrine of the group takes on many colorations and any authoritative formula for making use of it will be helpful only so long as it does not impinge on the freedom of a court to evaluate the factual and environmental data of the particular case to the end that the risk involved can be allocated to the one party or the other with a maximum of justice.

The residuary category of assumed risk is not clarified by being tied too closely with "consent," "voluntary," "knowledge," and "appreciation."¹ Each of these terms is also a variable, inconstant and unstable, meaningful only in the light of the factual and environmental context of the particular case, and can only frustrate judgment if given or attempted to be given a stable or static content of meaning. It is not here suggested that this easy convertibility of doctrine and the instability of its vocabulary are disadvantageous, or are to be condemned. On the contrary, the inability to achieve a uniformity of terminology and usage may well be the very factors in the judicial process that insures the freedom of a court to reach a just or at least an acceptable result in the particular case.

1. See PROSSER, *TORTS* 303-314 (2d ed. 1955): "Knowledge of the risk is the watchword of assumption of risk." (*id.* at 309); Keeton, *Assumption of Risk and the Landowner*, 20 *TEXAS L. REV.* 562 (1942).

An examination of some of the classes of cases in which the assumed risk defense has played an important role will reinforce some of the foregoing observations.

INTENDED HARMS

In the area of intended physical contacts with the person the consent of the injured person is frequently though not always held to be a defense. This is true in fights, games, sexual offenses, surgical operations, and medical treatments. It is hornbook law that consent has a wide variation of meaning in these cases and courts do not always agree as to its availability as a defense. In the fight cases, mutuality is an inference drawn from the victim's conduct and even where obvious some courts refuse to recognize it as a defense.² In the abortion cases there is an equally wide division.³ In the play cases⁴ many factors qualify consent, while in the surgical cases the patient's consent may be absent altogether,⁵ or may be strictly guarded.⁶ In the more serious treatments the doctor is under a heavy duty to bring home to the patient the risks involved, even though the patient knows the treatment is hazardous and perhaps experimental.⁷ In all these cases consent is a much narrower and more easily administered defense than in types of cases in which the physical contacts are unintended. Moreover, in these cases consent where recognized as a defense is merely the boundary line of the defendant's duty.

2. *Morris v. Miller*, 83 Neb. 218, 119 N.W. 458 (1909); *Strawn v. Ingram*, 118 W.Va. 603, 191 S.E. 401 (1937); *Teolis v. Moscatelli*, 44 R.I. 494, 119 Atl. 161 (1923); *Annotts.*, 6 A.L.R. 388 (1920), 30 A.L.R. 199 (1924), 47 A.L.R. 1092 (1927).

3. *Joy v. Brown*, 173 Kan. 833, 252 P.2d 889 (1953); *Kimberly v. Ledbetter*, 183 Kan. 644, 331 P.2d 307 (1958); *Miller v. Bennett*, 190 Va. 162, 56 S.E.2d 217, 21 A.L.R.2d 364 (1949); see *Gluckstein v. Lippsett*, 209 P.2d 98 (Cal. App. 1949) for an interesting but abortive beauty operation.

4. *Boynton v. Ryan*, 257 F.2d 70 (3d Cir. 1958); *McAdams v. Windham*, 208 Ala. 492, 94 So. 742, 30 A.L.R. 194 (1922); *Rauch v. Pennsylvania Sports & Enterprises*, 367 Pa. 632, 81 A.2d 548 (1951); *May v. Yurek*, 168 N.E. 59 (Ohio App. 1929); *Knebel v. Jones*, 266 S.W.2d 470 (Tex. Civ. App. 1954); *Shaver v. Manziel*, 347 S.W.2d 20 (Tex. Civ. App. 1961).

5. *Luka v. Lowrie*, 171 Mich. 122, 136 N.W. 1106 (1912); *Jackovic v. Yocum*, 212 Iowa 914, 237 N.W. 444 (1931); *Brennan v. Parsonnet*, 82 N.J.L. 20, 83 Atl. 948 (1912).

6. *Tabor v. Scobee*, 254 S.W.2d 474 (Ky. 1952); *Wall v. Brim*, 145 F.2d 492 (5th Cir. 1944).

7. *Natanson v. Kline*, 350 P.2d 1093 (Kan. 1960), on rehearing 354 P.2d 670 (1960); *Mitchell v. Robinson*, 334 S.W.2d 11 (Mo. 1960); *Baldos v. Rogers*, 81 So.2d 658 (1955); *McCoid*, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549 (1949).

TRAFFIC CASES

Though the assumption of risk, as is true of other defenses in negligence cases, first came to the surface in horse and buggy cases,⁸ it has played a minor role in subsequent traffic cases. One reason perhaps is that other stronger defensive doctrines are available and focus the issues more sharply. The highway presents so many risks to so many people, and there are so many affirmative and defensive doctrines available for both plaintiff and defendant that assumed risk has lost its value as a means of allocating traffic risks. Currently its principal usage is found most frequently in cases of host and guest. The guest who enters an automobile is said to accept the vehicle as it is unless the host knows of some defect not apparent and not appreciated by the guest.⁹ Likewise the guest accepts the host operator with his deficiencies, if known.¹⁰ But at common law the acceptance of the vehicle or the host is a lame defense if the host is in fact negligent in his operation of the vehicle.¹¹ The guest statutes relieve the operator of liability unless his conduct rises to the level of gross, wanton or wilful negligence or some such standard of conduct.¹² It can be said in these cases that the duty of the operator is relaxed or that the risks incident to mere negligence are assumed by the guest, or that in case the guest accepts the invitation of an incompetent, inexperienced, intoxicated or reckless operator, or fails to leave the vehicle when the operator's condition or conduct becomes known, the guest is contributorily negligent.¹³ The cases are legion and wide disparity exists in the disposition made of them.

8. *Cruden v. Fentham*, 2 Esp. 685 (nisi prius 1798). Incidentally in *Clay v. Wood*, 5 Esp. 44, 170 Eng. Rep. 432 (K.B. 1803) (wilful and wanton conduct); *Butterfield v. Forrester*, 11 East. 60 (1809) (contributory negligence); and *Flower v. Adam*, 2 Taunton's Rep. 314 127 Eng. Rep. 1098 (C.P. 1810) (accident, proximate cause), any one of the several defenses of negligence law sprouted in these cases could have been substituted for any one of the others without doctrinal violence. It may also be remarked that today probably in no one of the cases would the decision be the same.

9. *Higgins v. Mason*, 255 N.Y. 104, 174 N.E. 77 (1930); *Bugh v. Webb*, 328 S.W.2d 379 (Ark. 1959).

10. *Krueger v. Krueger*, 197 Wis. 588, 222 N.W. 784 (1929); *Eisenhut v. Eisenhut*, 212 Wis. 467, 248 N.W. 440, 91 A.L.R. 549 (1933). Cf. *Bohnsack v. Driftmier*, 243 Iowa 283, 52 N.W.2d 79 (1952); *Hendren v. Hill*, 131 Neb. 163, 267 N.W. 340 (1936).

11. Note 10 *supra*.

12. See *Williamson v. McKenna*, 354 P.2d 56 (Ore. 1960) for valiant effort by Judge O'Connell to bring order out of chaos. How well did he succeed? See the aftermath in *Burghardt v. Olson*, 354 P.2d 871 (1960).

13. *Schiller v. Rice*, 151 Tex. 116, 246 S.W.2d 607 (1952); *Sargent v. Williams*, 152 Tex. 413, 258 S.W.2d 787 (1953); *Cheek v. Fuller*, 322 S.W.2d 233 (Tenn. 1958).

Contributory negligence is the defensive doctrine most employed in these cases¹⁴ though variations of the proximate cause doctrine are not infrequently employed. Assumed risk is given little play.¹⁵ The other doctrines are more flexible, are more easily dealt with as jury issues, yet still permit the court to exercise its power decisively if the facts so warrant. Assuming a duty on a defendant's part in a traffic case, the victim can always be held contributorily negligent for taking the risk but, of course, if there is no duty or violation of duty no other defense is needed.

MANUFACTURER AND SUPPLIER CASES

The assumed risk doctrine is occasionally employed as a defense by the manufacturer or supplier in cases involving defective products or failure to give adequate warning of dangers incident to a product's use.¹⁶ Assuming a duty and its violation, the liability of the manufacturer or supplier is usually strict whether based on negligence or on some theory of warranty.¹⁷ Nevertheless the victim's own conduct may be a defense, but usually it is resolved into an issue of contributory negligence with the burden on the defendant to support the issue, and with its determination for a jury.¹⁸ In very clear cases a court may take the issue from the jury and when such is done may rationalize its decision on the basis of assumed risk.¹⁹ Actually there seems to be little if any difference between the two doctrines in these cases. Of course if there is no duty owed the victim as to the risk incurred, or no violation of the duty, then the victim necessarily assumes the risk of making use of the product. Here again both the broad concept of assumed risk and

14. *Lessen v. Allison*, 25 Ill. App. 2d 395, 166 N.E.2d 806 (1960); *Mascarenas v. Johnson*, 280 F.2d 49 (5th Cir. 1960).

15. *Bugh v. Webb*, 328 S.W.2d 379 (Ark. 1959); *Hendren v. Hill*, 131 Neb. 163 (1936); *Bohnsack v. Driftmier*, 52 N.W.2d 79 (1952); *Nygren v. American Boat Cartage, Inc.*, 290 F.2d 547 (2d Cir. 1961).

16. *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950); *Messina v. Clark Equipment Co.* 263 F.2d 291 (2d Cir. 1959); Note, 38 TEXAS L. REV. 342 (1960); Davis, *A Re-examination of the Doctrine of McPherson v. Buick, Etc.*, 24 FORDHAM L. REV. 204 (1955).

17. *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960); *Peterson v. Lamb Rubber Co.*, 353 P.2d 575 (Cal. 1960); *Spence v. Three Rivers Building & Masonry Supply Co.*, 353 Mich. 120, 90 N.W.2d 873 (1958); *Huberly v. Reardon Co.*, 317 S.W.2d 859 (Mo. 1958). See Symposium, James, Green, Plant, Lucey and Noel, *Strict Liability of Manufacturers*, 24 TENN. L. REV. 923-1018 (1957); Prosser, *The Assault Upon the Citadel (Manufacturers' Liability)*, 69 YALE L. J. 1099 (1960).

18. *Luneau v. Elmwood Gardens, Inc.*, 198 N.Y.S.2d 932 (1960).

19. *Robbins v. Milner Enterprise, Inc.*, 278 F.2d 492 (5th Cir. 1960).

its residuary doctrine are usually more adequately expressed by other doctrinal terminology.

LANDOWNER CASES

Assumed risk has had its most extensive usage in two very closely related groups of cases, namely, the landowner and master-servant cases. Historically assumed risk was basic to the immunities of both landowner and master until well into the nineteenth century, but it did not crystallize into a doctrinal defense before that time. At orthodox common law any person who came on another's land took the premises as they were in absence of some trap set for him.²⁰ This was true as to visitors of any class and also as to servants. In fact visitors were analogized to servants and no distinction as to the condition of premises was made between domestic and other servants.²¹ During the middle 1800's this complete immunity was modified as to landowners and as to masters, but very slightly until late in the century.

The immunity of the landowner was modified through categories of trespasser, licensee and invitee. The landowner owed the trespasser no duty as to the condition of the premises. The trespasser assumed all risks incident to his entry. This is still stated as good law,²² though the trespasser category has been greatly modified in recent years as to infant trespassers and in extreme cases even as to adults.²³ This modification was first made by treating certain trespassers as implied licensees or invitees to whom a duty to warn of hidden dangers was imposed on the landowner, or in case of children to use reasonable care to protect them against the dangers of attractive premises to which the landowner either knew or should have known they would come.²⁴ It is enough to say here that thousands of cases have been decided on the basis of these categories and their

20. *Hott v. Wilkes*, 3 Barn. and Ald. 308 (1820); *Howland v. Vincent*, 51 Mass. 371 (1845); *Foley v. H. F. Farnham Co.*, 135 Me. 29, 188 Atl. 708 (1936); *Bottum's Adm'r v. Hawks*, 84 Vt. 370, 79 Atl. 858 (1911).

21. *Southcote v. Stanley*, 1 H. & N. 250 (1856); See *Hawkins v. Coulsdon and Purley Urban District Council*, (C.A. 1953) 1 All Eng. Rep. 97 (1954) for historical development.

22. *Foley v. H. F. Farnham Co.*, 135 Me. 29, 188 Atl. 708 (1936).

23. *Gimmestad v. Rose Brothers Co.*, 194 Minn. 531, 261 N.W. 194 (1935); *Kahn v. James Burton Co.*, 5 Ill.2d 614, 126 N.E.2d 836 (1955); *Ehret v. Village of Scarsdale*, 269 N.Y. 198, 199 N.E. 56 (1935); *Brock v. Peabody Co-op Equity Exchange*, 352 P.2d 37 (Kan. 1960).

24. Green, *Landowners' Responsibility to Children*, 27 TEXAS L. REV. 1 (1948).

doctrinal refinements with slight uniformity in the use of doctrine or in decision.²⁵

It is worthy of emphasis that in nearly all landowner cases the cases turn on a consideration of defendant's duty rather than upon the concept of assumed risks, though the latter are always in the background. The assumption of risks by the trespasser is seldom adverted to.²⁶ The licensee and invitee categories have become so blurred that frequently no line can be drawn between the two except as a court makes use of one or the other to support some decision it considers just on the peculiar facts of the case.²⁷ One facet of the licensee doctrine is still maintained by many courts. A house servant or social guest still takes the premises as they are unless the danger is hidden and no warning given.²⁸ The severest modification of this nineteenth century anachronism is found in the resort to some affirmative negligence on the part of the landowner after the presence of the victim is known.²⁹ Moreover as house servants tend to become regarded as industrial employees they are more and more treated as of the latter group and the landowner's immunity correspondingly broadened. But the social guest is still a sort of tolerated intruder in his friend's house. Time and the law have simply passed him by.

MASTER-SERVANT CASES

The development of master-servant law followed closely the development of the landowner immunities. In the celebrated case of *Priestly v. Fowler*,³⁰ Lord Abinger's whole argument is based on the householder's immunity. The industrial servant as a part of his contract of service was held to assume all the risks of the conduct of his fellow servants, the other risks of the enterprise as well as of his own contributory negligence. Some courts

25. See *King v. Lennen*, 348 P.2d 98 (Cal. 1959); *Mayer, Ad'm. v. Temple Properties*, 307 N.Y. 559, 122 N.E.2d 909 (1954).

26. See *Gomes v. Byrne*, 333 P.2d 754 (Cal. 1959). Cf. *Paris v. Howard Johnson Co.*, 166 N.E.2d 735 (Mass. 1960).

27. *Laube v. Stevenson*, 137 Conn. 469, 78 A.2d 693 (1951); *Wolfson v. Chelist*, 284 S.W.2d 447 (Mo. 1956); *Renfro Drug Co. v. Lewis*, 149 Tex. 507, 235 S.W.2d 609 (1951); *Harkins v. Coulsdon, Etc.*, (C.A. 1953) 1 All Eng. Rep. 97, 55 A.L.R.2d 525 (1954); *Murdock v. Peterson*, 74 Nev. 363, 332 P.2d 649 (1958).

28. *Greenfield v. Miller*, 173 Wis. 184, 180 N.W. 834, 12 A.L.R. 982 (1921); Annot., *Liability for Injury to Social Guests*, 25 A.L.R.2d 598 (1923).

29. *Tesone v. Reiman*, 255 P.2d 48 (Cal. App. 1953); *Brigman v. Fiske-Carter Const. Co.*, 192 N.C. 791, 136 S.E. 125, 49 A.L.R. 773 (1926).

30. 3 M. & W. 1, 150 Eng. Rep. 1030 (Exch. 1837).

still hold that assumed risk is restricted to the master-servant relation, but the same courts may resort to the *volenti non fit injuria* doctrine which is the same concept expressed in Latin terminology.³¹ Here again it is enough to say that the immunities of the employer were modified by duties imposed upon him by the courts during the remainder of the 1800's with deliberate delay. Workmen's compensation and other legislative acts have removed the immunities for nearly all industrial employees. For employees outside the coverage of legislation the earlier common law doctrines have been modified by most courts but other courts not infrequently revert to nineteenth century type with harsh results.³²

A good example of this tenacity of the doctrinal obsession of the defenses in master-servant cases is found in the cases arising under the Federal Employers' Liability Act. The Act at first provided that contributory negligence of the employee should only be considered in diminution of damages. For many years defendants with approval of the courts converted contributory negligence into assumed risk. Congress eventually responded by abolishing assumed risks as a defense. Defendants with court approval then converted contributory negligence and assumed risks into issues of proximate cause, sole cause, and other causation doctrines. The Supreme Court put an end to this practice.³³ The insufficiency of evidence and state practices were then resorted to in order to escape the Act and when the Court closed these escapes both defendants and lower courts fell back on acid criticism which apparently is weakening the Court in its favorable disposition towards the Act.³⁴

SLIP AND FALL AND CONTRACTOR CASES

Currently the most usual employment of the assumed risk defense is bound in two types of cases.³⁵ First, the slip and fall

31. See Robert E. McKee, *General Contractor, Inc. v. Patterson*, 153 Tex. 517, 271 S.W.2d 391 (1954); PROSSER, *TORTS* 304, n. 86 (2d ed. 1955).

32. See *Bogart v. Hester*, 347 P.2d 327 (N.M. 1959) for good example. Also, *Burton Const. & Shipbldg. Co. v. Broussard*, 154 Tex. 50, 273 S.W.2d 598 (1955) (discharged employee); *Blackmore v. Auer*, 357 P.2d 765 (Kan. 1950); *Ritter v. Beals*, 358 P.2d 1080 (Ore. 1961).

33. This story is better told in my article, *Jury Trial and Mr. Justice Black*, 65 YALE L. J. 482, 488 *et seq.* (1956).

34. See *Harris v. Pennsylvania R.R.*, 361 U.S. 15 (1959), Appendix to Opinion of Douglas, J., for list of cases and dissents; *Davis v. Virginian Ry. Co.*, 80 Sup. Ct. 387 (1960).

35. See Keeton, *Assumption of Risk and the Landowner*, 20 TEXAS L. REV. 562 (1942); *Personal Injuries Resulting from Open and Obvious Conditions*, 100

cases; second, suits against owners, suppliers, or general contractors by an employee of a sub-contractor. The slip and fall cases usually involve shopkeepers and customers. The duty of the shopkeeper is high even though expressed only in terms of ordinary care.³⁶ Most of the cases for plaintiffs fail because no negligence can be shown on the part of the shopkeeper. Now and then it appears that though the shopkeeper was negligent, the customer knew the situation confronting him and proceeded to incur the danger. It would seem that contributory negligence would be the most apposite defense in these cases as the victim can be held negligent for taking the risk.³⁷ Courts are sometimes inclined to take the case into their own hands and direct a verdict or grant judgment n.o.v. They can, of course, do this on the basis of contributory negligence as a matter of law, but now and then a court prefers to base its judgment on assumption of risk.³⁸ This is done on the basis that if the danger is open and obvious the defendant owed the plaintiff no duty. This is incompatible with good theory if in fact there was a duty to make the premises reasonably safe for the customer and the shopkeeper negligently failed to do so. In such a case the victim's conduct was simply contributing. It seems a contradiction in terms to say the shopkeeper owed the plaintiff no duty.³⁹ Nevertheless some courts prefer to express their decision in terms of no duty and assumption of risk. It is believed they do so in order to escape criticism for taking the contributory negligence issue away from the jury and thus invading the jury's function. Doctrinal semanticism serves their psychological reaction.

The third party cases are more of a puzzle. In most situations the employee has workmen's compensation from his em-

U. PA. L. REV. 629 (1952); James, *Assumption of Risk*, 61 YALE L. J. 141 (1952).

36. Dissent of Terrell, J., in *Carl's Markets, Inc. v. De Feo*, 55 So.2d 182 (Fla. 1951); *Carl's Markets, Inc. v. Meyer*, 69 So.2d 789 (Fla. 1953); *Pogue v. A. & P.*, 242 F.2d 575 (5th Cir. 1957); *Chapman v. Parking, Inc.*, 329 S.W.2d 439 (Tex. Civ. App. 1959).

37. See cases attempting to distinguish assumption of risk and contributory negligence: *Kleppe v. Prawl*, 181 Kan. 590, 313 P.2d 227, 63 A.L.R.2d 175 (1957); *Taylor v. Hostetler*, 352 Kan. 1042 (1960); *Ferguson v. Smith*, 257 F.2d 694 (4th Cir. 1958); *Jasper v. City and County of Denver*, 354 P.2d 1028 (Colo. 1960) (city street); *Hartley v. Tacoma School District*, 354 P.2d 897 (Wash. 1960) (sidewalk).

38. *Grover v. Ownes*, 353 P.2d 254 (Ore. 1960) (highly questionable); *Hunn v. Windsor Hotel Co.*, 119 W.Va. 215, 193 S.E. 57 (1937); *Pieraccini v. Crenshaw*, 204 Tenn. 327, 321 S.W.2d 546 (1959).

39. *Camp v. J. H. Kirkpatrick Co.*, 250 S.W.2d 413 (Tex. Civ. App. 1952). See Malone, *Contributory Negligence and the Landowner Cases*, 29 MINN. L. REV. 61 (1945).

ployer and his insurance carrier has a deep interest by way of subrogation in the victim's pursuing his common law action against the general contractor or supplier or in some cases the owner or occupier of the premises. The usual grounds in such an action is the failure to warn of the dangers or to provide a reasonably safe place to work or reasonably safe instrumentality or properly superintend the over-all work of sub-contractors and their employees.⁴⁰

A workman expert in doing highly dangerous work and employed for such purpose cannot complain that the owner or contractor did not warn him of the danger or provide a safe place to work. He is hired for the very purpose of doing a dangerous job.⁴¹ Where the work is known to be dangerous by the owner or general contractor, and a contractor is hired to do the job, what duty is owed by the owner or general contractor to the employees of the contractor hired to do the job? Is it enough that he knows or is informed of the danger? Is the owner or general contractor relieved of his duty to warn the employee who does the work if his employer knows of the danger? Courts have held both for and against the injured employee.⁴² Either the employee must take the risk that his employer will give him warning or it must fall on the owner or general contractor. The problem is usually doctrinally rationalized on the basis of duty or no duty. This of course determines who must bear the risk. But why? The cases that put the risk upon the employee seemingly are governed by the nineteenth century attitude towards workmen. Moreover, even when a landowner is involved it would seem that the invitee doctrine

40. *Robert E. McKee, General Contractor, Inc. v. Patterson*, 153 Tex. 517, 271 S.W.2d 391 (1954); *Rittenberry v. Robert E. McKee, General Contractor, Inc.*, 337 S.W.2d 197 (Tex. Civ. App. 1960); *Chartier v. Winslow Crane Service Co.*, 350 P.2d 1044 (Colo. 1960); *Florez v. Groom Development Co.*, 348 P.2d 200 (Cal. 1959); *Boerio v. Haiss Motor Trucking Co.*, 181 N.Y.S.2d 823 (App. Div. 1959); *Dougherty v. Chas. H. Tompkins Co.*, 240 F.2d 34 (D.C. Cir. 1957); *Sullivan v. Shell Oil Co.*, 234 F.2d 733 (9th Cir. 1956); *Gulf Oil Corp. v. Bivins*, 276 F.2d 753 (5th Cir. 1960); *Shell Oil Co. v. Blanks*, 330 S.W.2d 569 (Tenn. 1959); *Houston Lighting & Power Co. v. Brooks*, 319 S.W.2d 427 (Tex. Civ. App. 1959), reversed 336 S.W.2d 603 (1960) on basis of no negligence shown; *Koenig v. Patrick Const. Corp.*, 298 N.Y. 313, 83 N.E.2d 133, 10 A.L.R.2d 848 (1948) (statute; contributory negligence no defense); *Annot.*, 31 A.L.R.2d 1384 (1924).

41. *Wood v. Kane Boiler Works, Inc.*, 150 Tex. 191, 238 S.W.2d 172 (1951) (doubtful that facts support decision, but see cases cited in opinion).

42. *Sullivan v. Shell Oil Co.*, 234 F.2d 733 (9th Cir. 1956); *Gulf Oil Co. v. Bivins*, 276 F.2d 753 (5th Cir. 1960), especially illuminating dissent of Brown, J.; *Lechman v. Hooper*, 52 N.J.L. 253, 19 Atl. 215 (1890); *Stevens v. United Gas & Electric Co.*, 73 N.H. 159, 60 Atl. 848 (1905).

is out of place. The employer's obligations under modern law would seem more apposite, and the duty to provide a safe place to work and to warn of danger non-delegable. The independent contractor doctrine confers no immunity in such a case.⁴³

Another situation involves the creation of a danger by the owner, supplier, or general contractor for the employee of a sub-contractor or the failure to make proper provision for protection against dangers created by other sub-contractors and their employees.⁴⁴ The danger may be apparent to the injured employee. May he proceed or must he refuse to proceed and incur the danger? Who must take the risk in this situation? Some courts relying on the landowner cases hold that the general contractor is under no duty to warn the employee and impose the risk upon the workman. Clearly there would be no duty to warn in such a case, but it can hardly be said that there is no duty to provide a safe place to work. The landowner analogy is misleading. The contractor is not a landowner, but is an employer with an independent contractor interposed. Nevertheless some courts impose the dangers upon the workman if they are open and obvious. They give him no benefit of the urgency of the construction; no benefit of the possible loss of a job and its economic consequences for him and his family; no benefit of the complexity of modern construction jobs. The courts again hark back to the status of the employee during the 1800's and early 1900's as disclosed by the decisions of those by-gone eras. They usually resort to the doctrine of assumed risk but may also hold the employee contributorily negligent. It may be that the decisive motivation of the court is the struggle between one insurance carrier to shift its burden to another carrier and thereby obtain a free ride. This may also be reinforced by the idea that recovery of workmen's compensation from the employer is enough even though the law permits an independent common law suit against the general contractor. Whatever the motivation there is doctrine available for either conclusion though it be doctrine taken over from an entirely different social and economic as well as legal environment.

In *McKee v. Patterson*,⁴⁵ defendant general contractor for

43. *Besner v. Central Trust Co.*, 230 N.Y. 357, 130 N.E. 577, 23 A.L.R. 1081 (1921).

44. *Roosth & Genecov Production Co. v. White*, 152 Tex. 619, 262 S.W.2d 99 (1953); *Smith v. Henger*, 148 Tex. 456, 226 S.W.2d 425, 20 A.L.R.2d 853 (1950).

45. *Supra* n. 40.

a gymnasium called off the fixture sub-contractor to permit the floor finishing sub-contractor to do the floors. After the floors were finished the fixture crew returned to work and plaintiff, an employee, fell from a ladder which slipped while he was on it about his work. He sued the general contractor, and the trial court with a jury found the general contractor was negligent in not providing a safe place to work and that plaintiff was not contributorily negligent in mounting the ladder on the polished floors. Its judgment was affirmed by the court of civil appeals. The Supreme Court reversed and rendered judgment for the defendant holding that defendant owed plaintiff no duty to warn him of the obvious dangers and that defendant breached no duty to the plaintiff. It also rejected the theory of contributory negligence as controlling the case.

The Supreme Court could draw no distinction between assumed risk and its Latin translation *volenti non fit injuria*. It stated the general contractor's duty to be the same as that of a *landowner* and hence no duty to warn of open and obvious dangers even to a person invited on the premises. The court glided over an *employer's* duty to provide a reasonably safe place to work. Had it considered the case as an employer-employee situation rather than that of a landowner and visitor it could never have said that the general contractor owed the plaintiff no duty or that it breached no duty owed him. The court could have reached the same result by holding plaintiff contributorily negligent for taking such a risk, but this would have meant repudiating the verdict of the jury and the judgments of both courts below and that may have seemed too drastic.⁴⁶

Two or three observations may be made. First, the court was led astray by the landowner analogy. The assumed risk immunity limiting a landowner's duty to an invitee has come to be much broader than that of the employer to an employee. Since the assumption of risk defense is always relative to the particular duty of the defendant, it is highly important to examine the duty in every case. This is especially true when a defendant may owe more than one duty. Second, in substituting assumed risk for contributory negligence the court did violence

46. See *Rittenberry v. Robert E. McKee General Contractors, Inc.*, 337 S.W.2d 197 (Tex. 1960) in which the contributory negligence of the plaintiff as a matter of law was also held to defeat him.

to legal theory. It had to hold that there was no duty owed plaintiff and also no breach of duty; otherwise it would have faced the issue of contributory negligence. Third, in refusing to recognize the economic pressure on plaintiff to take the risk as an incident of his job — a rush job it was — the court was forced to go back to decisions made by the Texas and English courts prior to 1900 — cases long ago passed by as reflecting the doctrines which govern current industrial employer-employee cases.

CONCLUSION

It would seem that no definitive meaning can be given any one of the basic defensive doctrinal terms available in a negligence case which will exclude all the others and that can be used by lawyers and judges with semantic accuracy. The ease of convertibility of one defense into some other makes the choice of defensive theory largely a matter of professional taste. The best usage is the one that most sharply focuses the defensive facts. Assumed risk is usually too blunt and too comprehensive to serve such a function in a highly developed adversary process. But when nothing better is within reach of the advocate or judge there is no good reason why he should not make use of the term if he thinks it serves the purpose of reaching a just judgment.⁴⁷

47. *Botter v. Brittan*, 286 F.2d 521 (3d Cir. 1961); *Pouliot v. Black*, 170 N.E.2d 709 (Mass. 1960).