Assumption of Risk in Products Liability Cases

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Resourceful advocacy has caused an expansion of the doctrine of assumption of risk, under both that name and the alias, *volenti non fit injuria*, well beyond the central idea of voluntary submission to a fully appreciated risk. The counterattack has not focused upon such dubious extensions alone; rather, it has been urged that all elements of the doctrine worth salvage are independently recognized under other rubrics of the law, and that either the doctrine should be banned from further use or else a statement that the plaintiff assumed the risk should be regarded as no more than a converse expression of the conclusion that the defendant is not liable. Four other areas of law are particularly relevant to this controversy—that area of contract law concerned with exculpatory agreements and those areas of tort law concerned with contributory negligence of the plaintiff, want of duty of the defendant, and want of the required causal relation between the defendant's sub-standard conduct and the plaintiff's harm.2

The existence of at least a wide area of overlapping of assumption of risk and other theories of defense3 is beyond chal-

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1. Some courts have insisted that the doctrine of assumption of risk is applicable only in employment cases, or perhaps also in other cases of contractual relations, and that the corresponding doctrine in cases outside these groups is *volenti non fit injuria*. It is generally conceded, however, that this is a difference in terminology only, the requisites and consequences of the two doctrines in their respective spheres being the same. See, e.g., Wood v. Kane Boiler Works, Inc., 150 Tex. 191, 238 S.W.2d 172 (1951); Jay v. Walla Walla College, 53 Wash.2d 590, 335 P.2d 458 (1959).

2. The doctrines in these four areas of law do not, however, exhaust the possibilities for basing a result of nonliability on some other theory though it might have been found that there was an assumption of risk in the sense of voluntary submission to a fully appreciated risk. Another possibility is breach of plaintiff's duty of mitigation, a theory closely analogous to contributory negligence. See note 61 infra.

3. For convenience, the term "defense" is here used in the broad sense of a basis for denial of relief, including not only those grounds as to which the defendant has a burden of pleading or proof but also those that are a negation of part of plaintiff's prima facie case. Thus, the term "defense" encompasses theories of no duty and no legal cause.
The principal question to which this article is addressed is whether there are, nevertheless, in accident cases generally and products liability cases particularly, some circumstances in which it is appropriate to recognize a defense of assumption of risk that is distinct in character from other defensive theories, including exculpation by contract, contributory negligence, want of duty, and want of legal cause.

I. MEANINGS OF "ASSUMPTION OF RISK"

"Assumption of risk," like "no duty," is a phrase of art. Perhaps it is adequate for the purpose when used candidly to signify only the conclusion of nonliability. More often, however, it is used as if it were an expression of reasons for this conclusion. It is true that, to one who is familiar with opinions in which the phrase has appeared, its use may call to his mind the cases he knows and perhaps even the reasons underlying the patterns of decisions. The phrase is nevertheless inadequate for signifying grounds of decision because of uncertainty about its meaning. "Assumption of risk" suggests that the conclusion of nonliability is based on consent to risk, whereas some of the senses in which the phrase is used are in sharp contrast with this connotation. Usage includes shadings in meaning from one to the other of two extremes with respect to dependence on consensual elements. These differences in consensual elements are concerned primarily with the degree of similarity between that aspect of the situation to which one has consented and that aspect as to which he is barred from recovery under the conclusion of assumption of risk. It will be useful to identify the extremes (the first and sixth meanings below), to identify other important meanings among the range of possibilities falling between these extremes, and to assign some terminology for use in this article as short-hand references to the several meanings identified.4

4. This assertion of the utility of identifying important meanings of "assumption of risk" as it has been used by judges and other legal writers is basically at odds with Dean Green's assertions, first, that the term "assumption of risk" and such associated terms as "consent," "voluntary," "knowledge" and "appreciation" are "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" and, second, that this state of affairs "insures the freedom of a court to reach a just or at least an acceptable result in a particular case" and is therefore a good thing. Green, Assumed Risk as a Defense, supra p. 78. It is true that "assumption of risk" has been used in many different senses, that it has been used often without precision, and that study of the context is often essential to understanding the sense of usage. But it is not true that all writers have been guilty of such im-
(1) **Express assumption of risk.** This is a defense based on an agreement between two persons, subsequently occupying the roles of plaintiff and defendant, that the plaintiff shall have no legal relief against the defendant for harm to person or property, within the scope of the agreement, caused by defendant’s risk-creating conduct or by a condition that the defendant creates or omits to change. From defendant’s point of view, this arrangement is one of exculpation and disclaimer of responsibility; from plaintiff’s point of view, it is a *consent to exculpation* and an assumption of responsibility.

(2) **Subjectively consensual assumption of risk.** This is a defense based on a plaintiff’s state of mind of uncoerced willingness to encounter a fully appreciated risk—that is, a willingness, with full understanding of the risk to himself or his property, caused by defendant’s act or omission, to remain or have his property remain within the area of risk. This is *consent to risk*, not consent to exculpation, and it is *subjective* in the sense that it is based on a plaintiff’s state of mind rather than his objective manifestations. Assumption of risk is used in this sense in the *Restatement of Torts.*

A basic enigma inherent in this, as well as the next usage discussed below, is its dependence upon the notion of full appreciation of risk. “Risk” implies a degree of want of appreciation of the forces that are at work in a given factual setting, since if one knew and understood all these forces he would know that injury was certain to occur or that it was certain not to occur. Thus the expression “fully appreciated risk” may seem to be a self-contradiction.

The answer to this enigma may be approached through the recognition that “risk” is not a physically descriptive term but rather an abstraction constructed by the mind of man. Risk must always be defined from some human point of view, and precision all of the time, and hopefully it is not futile to work for greater clarity in the formulation and expression of reasons for decision and thus to encourage evenhandedness in the administration of justice, though at the expense of some “freedom of a court to reach a just or at least an acceptable result” by yielding to pressures or unexplained hunches. Courts remain free to reach just results on reasoned bases, even though overruling outmoded precedents in the process.

5. The meaning of “uncoerced” in this context is discussed under “The Duress of Defendant’s Wrong,” p. 154 *infra.*

6. *Restatement, Torts* § 893 (1934). “The rule stated in this section differs from that stated in § 892 (Consent) in that the existence of the defense is dependent upon the plaintiff’s state of mind.” *Id.* Comment a.
any such view is one of incomplete understanding of the physical facts upon which the abstraction, risk, is constructed.

The nature of any risk is dependent upon the choice of the point of view from which it is defined since that choice determines the character and degree of knowledge and understanding of the facts that are assumed in the definition. For example, from the separate points of view of two persons watching an automobile approach an obstruction at high speed, the risks are different if only one knows that the automobile has defective brakes. Thus, saying that one "fully appreciated a risk" makes sense only in relative terms; it is a way of saying that his understanding of the probability of harm was at least as good as would be achieved from some point of view chosen as a standard for judgment.

The risk referred to in "assumption of risk" is a risk that causes defendant's conduct to be characterized as infringing a legal standard. Where the basis of liability is negligence, that risk is determined from the point of view of the ordinarily prudent person in the position of the defendant at some one or more times prior to the occurrence of the harm. Thus, saying that plaintiff had the full appreciation of risk required for subjectively consensual assumption of risk is in most circumstances the same as saying that he in fact understood that risk to himself and his property as well as the defendant should have understood it.\(^7\)

A subsidiary question is whether "risk" is unitary or separ-

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7. Perhaps the understanding that defendant should have had cannot always be used as the standard, however. First, in relation to exceptional circumstances in which defendant's appreciation was in fact greater than could have been expected of him and one aspect of his negligence was failure to act upon that special knowledge, probably "full appreciation of risk" implies that plaintiff's understanding of the risk was as good as defendant's. Secondly, though I disagree in part with comments in Mansfield, *Informed Choice in the Law of Torts*, supra p. 17 et seq., Professor Mansfield persuades me of the need for some modification of the standard in relation to cases in which defendant's negligence occurred at a point of time in advance of plaintiff's choice. If the risk as it would have appeared to the reasonable man in defendant's position has been modified by events intervening between defendant's negligent conduct and plaintiff's choice, it would seem that the defense of assumption of risk should not be defeated by the plaintiff's want of understanding of some aspect of that original risk that has disappeared before the occurrence of his choice; such an aspect of the original risk is not within the risk from which plaintiff suffered and on which plaintiff's claim is founded. But if plaintiff has suffered from a risk that was created by defendant and was not understood by plaintiff, the latter ought not to be barred by his informed choice to encounter some other risk unless making the choice is contributory negligence. I agree with Professor Mansfield that this line of thought is related to causation.
able for this purpose. That is, in seeking to determine whether there is subjectively consensual assumption of risk, should we ask whether plaintiff fully understood the risk that caused defendant to be subject to liability, or instead whether he fully understood a risk, the particular one that materialized in harm, among a group that, together, caused defendant to be subject to liability? If plaintiff, renting a car from defendant, fully understood the danger from defendant's carelessly maintained tires but did not know of defendant's carelessly maintained brakes, is the concept of subjective consent to risk applicable to harm caused by the defect of the tires without contribution by the brakes, but inapplicable to harm of which the defect of the brakes was a cause? Probably the correct answer is the affirmative. It is a commonly accepted proposition that, even though plaintiff is barred by assumption of risk from recovering for harms caused by risks to which he consented, he is not barred from recovering for harms from other causes.\(^8\) Separability of risk is implicit in this proposition.

Since proof of plaintiff's full appreciation of a risk is proof that plaintiff understood that risk as well as defendant should have understood it and since, by hypothesis, defendant was neg-

\(^8\) Though holdings squarely in point are scarce, the following opinions are illustrative of many that support this proposition: Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Olvera, 119 F.2d 584 (9th Cir. 1941) (failure to give defendant's requested instruction on assumption of risk by trapeze artist was not error since it failed to include a qualification to the effect that she was barred only "if her injuries were caused by such danger and peril" as she understood when she chose to engage in the work; plaintiff's judgment was set aside, however on the separate ground that, in view of a provision of the performance contract excusing the defendant from liability for ordinary negligence, the court erred in refusing to charge that plaintiff must prove gross negligence to recover); Hawayek v. Simmons, 91 So.2d 49, 61 A.L.R.2d 1254 (La. App. 1956) (fisherman's companion assumed all ordinary hazards incident to the venture, but not the risk of fisherman's negligent casting of fly so that it struck the companion's eye; as authority for the present point both this opinion and others it cites are weak because they may be read as defining the risks assumed in a sense that is not dependent on plaintiff's consent to risk); Goldstein v. United Amusement Corp., 86 N.H. 402, 169 Atl. 587 (1933) (plaintiff who knew that stairs were wet but not that risers were of unequal height did not assume risks from latter condition), subsequently explained in Papakalos v. Shaka, 91 N.H. 263, 18 A.2d 377 (1941), as a case that could have been decided on the basis that in New Hampshire, at least in cases not involving a master-servant relationship, voluntary exposure to a known danger is not a bar unless it amounts to contributory negligence; Triangle Motors of Dallas v. Richmond, 152 Tex. 354, 258 S.W.2d 60 (1953) (plaintiff undoubtedly knew there was danger in close approach to an open elevator shaft near which he was working, but, in view of his testimony that he thought he was on the top floor, it might be inferred that he did not consent to accept the risk of being hit by an elevator descending without warning signals; trial court erred in withdrawing the case from the jury and entering judgment for defendant). Also see the discussion of "ordinary" and "extraordinary" risks in Annot., Liability for injury to or death of participant in game or contest, 7 A.L.R.2d 704, 707-11 (1949).
ligent, one may ask whether such proof does not also establish that plaintiff was contributorily negligent. The answer depends in part on the fact that the defendant's conduct is judged on the basis of all the substantial, foreseeable risks his conduct creates, to plaintiff and to others, whereas plaintiff's understanding that is relevant to assumption of risk is concerned with only the risks to himself and his own property. Moreover, the utility of plaintiff's conduct that subjects himself to risks will usually be different from the utility of defendant's conduct that causes the same risks. Thus the comparison between the utility and risk on which the finding of negligence is dependent will not be the same as to plaintiff and defendant. It may happen that the plaintiff is reasonable in choosing to encounter a fully appreciated risk even though the defendant is unreasonable in caus- ing it.9

(3) Objectively consensual assumption of risk. This is a defense based on a plaintiff's objective manifestations of uncoerced willingness to encounter a fully appreciated risk, even though his uncommunicated state of mind may be one of lack of full appreciation of the risk or lack of willingness to encounter it. This is objectively manifested consent to risk. This defense differs from express assumption of risk in that the manifestations of the plaintiff do not go so far as to express willingness to accept legal responsibility for harm to himself and thus to grant exculpation to the defendant. This form of the doctrine, along with each of the other forms besides the first, is often called implied assumption of risk. The result of exculpation, however, is not an implication in fact of plaintiff's manifestations; rather, it is a conclusion imposed by law. The objectively consensual form of implied assumption of risk makes that legal conclusion dependent upon plaintiff's having manifested a voluntary and informed choice of consent to the risk.

Ordinarily there is little argument for the proposition that the legal consequences of the two forms of consensual assumption of risk — subjective and objective — should be different. The practical significance of such a distinction is further reduced by the likelihood that judges and juries would, on given evidence, find the facts requisite either to both of these forms of assumption of risk or to neither. It will be useful to have a sin-

gle phrase that is understood to include both the subjective and objective senses, and in this article the unqualified expression “consent to risk” will be used for this purpose. That is, it will be said that a person “consents to a risk” if either he has the state of mind of willingness to encounter the fully understood risk or his manifestations indicate that he has that state of mind.

(4) Assumption of risk by consent to conduct or condition. This is a defense based on objective manifestations of uncoerced willingness that defendant engage in a particular act or omission or course of conduct, or that he create or omit to change a physical condition, to which the risk is incident. This is consent to conduct or condition. There may be manifestation of such consent without manifestation of the full appreciation of risk that is a requisite of consent to risk.

The proposition, often asserted, that a plaintiff in a given type of case assumes risks that are obvious rests on either this or one of the less consensual senses of assumption of risk (the most common of which are discussed in the next two paragraphs below), since by its terms this proposition applies regardless of whether in the particular case there is evidence to support either a finding that plaintiff did in fact fully appreciate the risks or a finding that his objective manifestations so indicated. Perhaps the meaning of the phrase in this proposition is best described as “assumption of risk by consent to conduct or condition involving a risk that is obvious.” Thus, this usage is described in terms of the fourth of the meanings identified here, but with an added qualification (the italicized phrase) giving rise to a high probability that the consensual element is stronger than in other usages that fall in this fourth category.

(5) Associational assumption of risk. This is a defense based on objective manifestations of consent to an association to which the risk is incident. There may be manifestations of consent to an association without manifestations of full appreciation of the risk and without manifestations of consent to particular aspects of the association or to conduct in pursuance of it.

(6) Imposed assumption of risk. This is a defense recognized regardless of willingness or unwillingness of the plaintiff to encounter a risk, regardless of his appreciation or lack of appreciation of it, and regardless of his manifestations of consent or nonconsent to conduct or condition or to an association with the defendant.
When "assumption of risk" is used in the extreme form of the imposed sense, the phrase is strictly an expression of the legal conclusion of no cause of action; any connotation that consent or voluntary participation is a reason for that legal conclusion is false and misleading. The connotation of reasons for that conclusion must be derived from known patterns of decisions rather than from the phrase used to describe the defense. This legal conclusion of no cause of action might also be expressed by saying that the defendant had no duty to the plaintiff under the circumstances of the case, or that he committed no breach of duty.

A conclusion of no breach of duty may rest on either (1) the basis that the conduct was not unreasonable and that there is no liability without negligence, or (2) the basis that even though the conduct may have been unreasonable, the defendant had no duty of care toward the plaintiff. Assumption of risk is more often used in the latter type of case, but occasionally also in the former, as in the statement that the traveler on the public highway assumes the risk of unintended harms caused to him by the non-negligent driving of others.

When "assumption of risk" is used in the associational sense, the consensual connotation may be quite misleading, but it could be thought to have at least a diluted counterpart in reality since the defense is based on the voluntary character of the association. Indeed, the voluntary character of the association of the plaintiff with the defendant is said to be the gist of this form of the defense. Yet, the effect of its application is that the plaintiff, by voluntarily entering into an association, assumes those risks that, by rules of law, are imposed upon a voluntary participant in such an association. The obvious circularity of the statement of this meaning of assumption of risk reflects the inescapable fact that it is but another way of expressing the legal conclusion that responsibility for the risk in question shall be imposed upon one who voluntarily enters into the association in question. This legal conclusion may be and often has been reached without dependence upon a finding of manifestations of appreciation of the risk and uncoerced willingness to encounter it, and without dependence upon a finding of manifestations of uncoerced willingness that defendant engage in a course of conduct or maintain a condition. Consent to the association, not

10. See 2 HARPER AND JAMES, TORTS 1165, 1173 (1956).
consent to the risk or consent to the conduct or condition, is the gist of the defense. The similarity of this concept to the pure extreme of imposed assumption of risk is apparent since every physical injury arises from some kind of association and every association is in some degree voluntary. Doubtless the phrase appears in this extreme sense of imposed assumption of risk in the statement that each traveler on the public highway assumes the risk of unintended harms caused to him by the non-negligent driving of others. How different is it to say that when one voluntarily enters into an association with other travelers by going upon the highway he assumes these risks? Or to say, with somewhat greater candor, that in these circumstances he is held to assume these risks? Perhaps the distinction is that the concept of association implies a relationship among a limited number of persons — fewer, for example, than the whole group of travelers upon the highway. As the group is enlarged, the consensual element of the relationship is diminished; in such a very large group as the travelers upon the highway, it reaches insignificance. Thus, it is hardly an accurate factual description of plaintiff's state of mind or his objective manifestations concerning his state of mind to say that when he voluntarily becomes a traveler on the highway he is voluntarily entering into an association with each person whom he might encounter.

The recognition of these six categories of assumption of risk and the use of the terminology suggested here are not representative of the rationale or language of judicial opinions. Rather this analysis is an attempt to identify meanings that are implicit in various judicial applications of assumption of risk. The distinctions among these six meanings of assumption of risk are distinctions in degree of consensual elements, progressing from one extreme of express assumption of risk to the other extreme of imposed assumption of risk. Different systems of classification of meanings of assumption of risk have been suggested by others, and it will be well to note some of them.

Harper and James refer to three meanings as express assumption of risk, assumption of risk in its primary sense and assumption of risk in its secondary sense.11 "Express assumption of risk" is used by them in the same sense as it is used in this article. For them, "in its primary sense the plaintiff's assumption of a risk is only the counterpart of the defendant's lack

11. 2 id. at 1162, 1184-85.
of duty to protect the plaintiff from that risk.”¹² They observe that “the voluntary character of the association is the gist of the defense.”¹³ The primary sense in their terminology appears to be the sense referred to in this article as associational assumption of risk. In further explanation of their terminology, they add:

“A plaintiff may also be said to assume a risk created by defendant’s breach of duty towards him, when he deliberately chooses to encounter that risk. In such a case, except possibly in master and servant cases, plaintiff will be barred from recovery only if he was unreasonable in encountering the risk under the circumstances. This is a form of contributory negligence. Hereafter we shall call this “assumption of risk in a secondary sense.”¹⁴ (Emphasis added.)

The italicized passage is very misleading. Note that Harper and James are referring only to cases in which plaintiff is said to “assume a risk created by defendant’s breach of duty towards him.” Their theory is that the mass of decisions holding that plaintiff is barred because of his deliberate choice to encounter a risk created by defendant’s conduct are outside the group of cases referred to in this passage because they are in truth cases in which defendant had no duty towards plaintiff and was therefore not guilty of a breach of duty. Only if one disregards what many courts have said to be their grounds of decision in assumption of risk cases and accepts this no-duty reinterpretation can he agree with the italicized passage.¹⁵

In contrast with Harper and James, Prosser refers to a different meaning of assumption of risk as its primary sense, and identifies four different senses, as follows:

“In its simplest and primary sense, it means that the plaintiff has given his express consent to relieve the defendant of an obligation of conduct toward him, and to take his chance of injury from a known risk. The result is that the defend-

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¹² 2 id. at 1162.
¹³ 2 id. at 1165, 1173.
¹⁴ 2 id. at 1162.
¹⁵ Further comments on the choice between classifying assumption of risk as a phase of no duty and classifying it as a distinct, affirmative defense appear infra, text at notes 91-98. Note that the views expressed in this article are consistent, however, with Harper and James' position that, because of the nature of the underlying justifications for the defense of associational assumption of risk (assumption of risk in the primary sense, by their terminology) that defense is better expressed in terms of lack of duty to the plaintiff.
ant is simply under no legal duty to protect the plaintiff. A second, and closely related meaning, is that the plaintiff, with knowledge of the risk, has entered voluntarily into some relation with the defendant which necessarily involves it, and so is regarded as tacitly or impliedly agreeing to take his own chances.

“In a third type of situation the plaintiff, aware of a risk created by the negligence of the defendant, proceeds voluntarily to encounter it—as where, for example, a workman who finds that a machine has become dangerous and that his employer has failed to repair it, continues to work at the machine. He may not be negligent in doing so, since his decision may be an entirely reasonable one, and he may even act with unusual caution because he knows the danger; but the same policy of the common law which finds expression, as to intentional torts, in the doctrine that no wrong is done to one who consents will bar him from recovery where damage results from a risk which he has accepted and brought upon himself.

“To be distinguished from these three situations is the fourth, in which the plaintiff’s conduct in encountering a known risk is itself unreasonable, and amounts to contributory negligence.”

Prosser’s “primary sense” is closely comparable to the first of the six meanings identified above—express assumption of risk; his second, to associational assumption of risk. His third sense is somewhat like one or the other of the two forms of consensual assumption of risk. The above passage might be thought to refer to subjectively consensual assumption of risk, but there are other indications that the sense to which Prosser refers is more nearly like that identified in this article as objectively consensual assumption of risk, though his usage goes somewhat beyond objectively manifested consent to risk since it includes cases in which the plaintiff is charged with knowledge though he does not have it and has not manifested that he has it.

A usage of “assumption of risk” to refer to a kind of contributory negligence (Prosser’s fourth sense and Harper and

17. E.g., in discussing “Knowledge of Risk,” he states that “it is evident that in all such cases an objective standard must be applied, and that the plaintiff cannot be heard to say that he did not comprehend a risk which must have been obvious to him.” Id. at 310.
James' second) cannot be placed at any point within a pattern of meanings classified with respect to the degree of consensual elements. Rather, assumption of risk in any of the six senses identified in this article will sometimes overlap contributory negligence; the grounds for application of both defenses may be present in a single set of facts.

The choice among various methods of expression is a matter of significance if it influences the effectiveness of communication. The use of "assumption of risk" to refer to a kind of contributory negligence serves only the cause of confusion, since the relationship between the two doctrines and the policy justifications underlying them is one of overlapping; neither doctrine can be said to be only a phase of the other.

A cogent criticism of the use of "assumption of risk" in the imposed sense is its misleading character because of its consensual connotation. This criticism is applicable also, though in less serious degree, to use of the phrase in the associational and the consent-to-conduct-or-condition senses. At the least, these usages result in throwing together under one term defenses that are essentially different. If such usages of the phrase "assumption of risk" are prevalent, it is often necessary to use qualifying adjectives such as "associational" or "imposed" in order to communicate effectively. At worst, such usages lead to indiscriminate treatment of different types of cases as if they were alike, without inquiry as to whether reasons for recognition of a defense in one may be inapplicable in the other.

Some support can be found in case law for application of each of the six forms of the defense of assumption of risk that have been identified. Policy justifications based on consensual elements grow weaker as these elements diminish in the progression from the first to the sixth. It is therefore important to determine in which of the several senses "assumption of risk" is being used when it is being applied or its application is being urged in a case under study.

II. PRECEDENTS IN PRODUCTS LIABILITY CASES

A. Disclaimers of Responsibility

In general, though with exceptions that will be discussed presently, an agreement exonerating one of the parties or lim-

18. Text at notes 30-41 infra.
iting his liability to the other is effective between themselves.\textsuperscript{19} But, in the absence of a relationship under which one of the two has the power to bind a third person, the parties to a contract cannot make an effective declaration that one or both of them shall not be liable to a third person.\textsuperscript{20}

The cry of want of privity, which in pre-\textit{MacPherson}\textsuperscript{21} days was a remarkably effective part of the defendant's arsenal of argument in products liability cases, is almost silenced. Today the ingenuity of counsel for suppliers of products is more often directed to the drafting of disclaimers of responsibility and to the development of extensions of privity that will enlarge the group of persons who are bound by the disclaimers.

The favored technique of manufacturers and middlemen for enlarging the group against whom disclaimers may be effective is to cause a disclaimer in favor of themselves to be made a part of the transaction between the retailer and retail purchaser. If the product is of an appropriate type for requiring the execution of a retail sales agreement, the disclaimer appears in that agree-


\textsuperscript{20} E.g., see Pokrajac v. Wade Motors, Inc., 266 Wis. 305, 63 N.W.2d 720 (1954), sustaining the defense that a used car with defective brakes was sold to the plaintiff "as is" and distinguishing Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N.W. 855, 60 A.L.R. 357 (1928), as a case involving liability of the seller to a third party with whom the buyer collided because of defective brakes. Also see Tyler v. Dowell, Inc., 274 F.2d 890, 896 (10th Cir. 1960), which, however, involved an oil drilling contract rather than products liability.

ment. Also, cautionary directions and a notice of disclaimer may be printed on the retail package where that is practical, in the hope that they will be effective not only against the purchaser and others in privity, as an alleged part of the contractual transaction, but also against consumers generally as a notice placing them on guard and setting the basis for arguments of implied assumption of risk and no breach of duty.

The forms of disclaimers are quite varied. Some are sweeping exculpations from all responsibility. Perhaps the same scope is commonly intended by that form of disclaimer involved in an agreement that the product is sold "as is." More common, however, are the disclaimers that are expressed as qualifications of a written warranty that is declared to be given in lieu of all other warranties, express or implied. Whenever this more subtle form of disclaimer is used, the likelihood of the purchaser's being misled is greatly increased, and courts have freely invoked rules of construction disfavoring the conclusion that a clause expressed an agreement of exculpation of the supplier from liability for its own otherwise tortious conduct.

22. Such disclaimers may protect the retailer and middlemen as well as the manufacturer. See Taylor v. Jacobson, 338 Mass. 709, 715, 147 N.E.2d 770, 774 (1958), wherein the court remarks that the retail vendor of a product sold by trade name "adopts as his own any cautionary statements, disclaimers and limitations of warranties made (on the package and in accompanying circulars) by the manufacturer who best knows the infirmities of his product." But this is not so if the retailer sells the product "by description" rather than by trade name. Sokoloski v. Spalln, 311 Mass. 203, 40 N.E.2d 874 (1942) (sale of seed by oral description as "good field corn").

23. E.g., Welk v. Ace Rents, Inc., 249 Iowa 510, 87 N.W.2d 314 (1958); Ortolano v. U-Dryvit Auto Rental Co., 296 Mass. 439, 6 N.E.2d 346 (1937). In Moss v. Fortune, 340 S.W.2d 902 (Tenn. 1960), the plaintiff, at the time of rental of a horse and saddle from defendant, signed a form stating, "I am hiring your horse to ride today and all future rides at my own risk." The court sustained this agreement as a bar to a claim based on negligence in supplying a defective stirrup. Might this cryptic agreement have been held inapplicable to a risk caused by negligence in supplying defective equipment in view of its failure to specify such risks and the possibility of its being understood by the rider to refer to risks arising from the nature of the horse rather than the equipment?

24. E.g., see Pokrajac v. Wade Motors, Inc., 266 Wis. 398, 63 N.W.2d 720 (1954). U.C.C. § 2-316(2)(a) declares that "all implied warranties are excluded by expressions like 'as is' . . . ."

25. E.g., Rasmus v. A. O. Smith Corp., 158 F. Supp. 70 (N.D. Iowa 1958) (held enforceable); Shafer v. Reo Motors, 205 F.2d 685 (3d Cir. 1953) (held enforceable); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (held unenforceable); Norway v. Root, 361 P.2d 162 (Wash. 1961) (standard warranty held enforceable in suit against automobile dealer alone on the express warranty only, the court expressly reserving questions concerning its validity and effect on implied warranties).

26. E.g., see Gray Line Co. v. Goodyear Tire & Rubber Co., 280 F.2d 294 (9th Cir. 1960) (tire rental contract containing clause by which the bus line agreed
Occasionally the terminology of assumption of risk has been used with reference to disclaimers. At other times, however, opinions have not adverted to the relation between the effectiveness of disclaimers and the doctrine of assumption of risk.

In practice, manufacturers often choose not to stand on their disclaimers but instead to use them as means of attaining discretion to honor or reject claims selectively, without accountability for their standards of selection; moreover, even in cases of litigated claims, manufacturers sometimes decline to urge their disclaimers.

The impact of disclaimers is also affected by doctrinal developments concerning their enforceability. In the first place, agreements purporting to relieve one of the parties from responsibility to the other for wilful or gross misconduct are generally
unenforceable. Secondly, agreements purporting to relieve one party from responsibility to the other for negligence or even less blameworthy conduct of the former are unenforceable in some situations. Restrictions on the power of common carriers and employers to disclaim or limit responsibility are well developed.

The principal basis for declaring clauses of this type to be against public policy has been the overwhelming bargaining advantage of the party who obtained the exculpatory agreement. The doctrine of unenforceability of unconscionable exculpatory agreements has been extended by a number of opinions to situations involving public service corporations and bailees for hire, and by a few opinions to transactions of banks and lessors.

There is some support for extending the doctrine to advertising misrepresentations. Recently it has been extended in a scattering of cases to a miscellaneous assortment of other kinds of situations. One such case involved the contract of a company providing specialized services in the oil industry. Another involved a contract between a caterer and a bride and groom. A third, of more direct significance for the area of products liability, is *Henningsen v. Bloomfield Motors, Inc.*, an action for injuries sustained by the buyer's wife upon failure of the steering mechanism of a new car when it was, according to the odometer reading, in the 469th mile of travel. Sustaining a cause of action based on implied warranty, the court held unenforceable the exculpatory provisions of the uniform warranty of the Auto.

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33. See Annot., 175 A.L.R. 8 (1948).
34. See Ebers v. General Chemical Co., 310 Mich. 261, 17 N.W.2d 176 (1945) (manufacturer of compound intended for use in controlling peach tree borer and negligently placed on market without proper field tests to ascertain whether it would damage trees "cannot escape responsibility for such negligence merely by adding a disclaimer of warranty to its representation of safety").
36. Rosenthal v. 285 Buffalo Ave. Corp., 189 F.Supp. 677 (E.D.N.Y. 1960). The caterer, sued by a wedding guest, filed a third party complaint against the bride and groom who had signed an agreement that the caterer would not be liable to any guest for injury and that the bride and groom assumed responsibility for notifying guests. The third party complaint was dismissed on the dual grounds that there was no agreement to indemnify and that the requirement for notification was so unreasonable as to be unenforceable.
mobile Manufacturers Association. Other courts, while enforcing the exculpatory provisions of this automobile form in particular cases, have deliberately cast doubt on their vitality. One of these opinions reserves the question whether such exculpatory clauses may be held unconscionable under provisions of the Uniform Commercial Code, a section of which declares that a "limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not." Increasing recognition of the doctrine of unenforceability of exculpatory agreements appears to be in prospect, particularly in relation to personal injuries caused by defects in products sold under contracts of adhesion such as are commonly used in mass marketing.

B. Other Forms of Assumption of Risk in Products Liability Cases

Relatively few opinions in products liability cases, aside from those involving disclaimers, have discussed assumption of risk in any of its various forms. In still fewer instances has a judgment for defendant rested on this theory or any concept that might be regarded as one of its variants. In one recent case in

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38. Id. at 73-74, 161 A.2d at 84-96. Cf. General Motors Corp v. Dodson, 338 S.W.2d 655 (Tenn. App. 1960, cert. denied by Tenn. Sup. Ct.), allowing an action for damages, on the theory of breach of warranty, without discussion of the limitations of the standard automobile warranty clause, though it was quoted in the opinion.

39. Hall v. Everett Motors, Inc., 165 N.E.2d 109 (Mass. 1960) (reserving the question whether such provisions may be unenforceable under the UCC); Norway v. Root, 361 P.2d 162 (Wash. 1961) (enforcing such provisions in a suit against the automobile dealer alone on the express warranty only, no claim having been made on the theory of implied warranty).


41. UCC § 2-719(3).

42. This conclusion is confirmed by others. See FRUMER AND FRIEDMAN, PRODUCTS LIABILITY 349 (1960); Annot., 78 A.L.R.2d 594, 615 (1961); Annot., 78 A.L.R.2d 460, 491 (1961); Annot., 76 A.L.R.2d 9, 76 (1961). There is, of course, a twilight zone in which it is difficult to classify a case as within or outside the area of products liability. Cases involving a claim of liability because of defendant's supplying, for use by workers, an instrumentality inappropriate for a particular use, as distinguished from his marketing a defective product, are not generally regarded as products liability cases, and no attempt has been made to collect such cases, though a few are cited herein. See note 55 infra, and see Cummins v. Halliburton Oil Well Cementing Co., 319 S.W.2d 379 (Tex. Civ. App. 1959) (inadequate "stabbing board" on oil derrick; plaintiff barred as a matter of law because of his knowledge of danger of its breaking); Kirby Lumber Corp. v. Murphy, 271 S.W.2d 672 (Tex. Civ. App. 1954) (negligent loading of logs by defendant on truck furnished by plaintiff; plaintiff barred as a matter of law from recovery for injuries from log falling on him at unloading point since, after protesting at the time of loading, he nevertheless accepted the load with complete knowledge of the danger).
which a jury verdict for the defendant was sustained against a contention that the trial court erred in submitting assumption of risk to the jury, it appears that approval of this theory of defense was essential to the result reached. In another recent case, a directed verdict for the defendant was sustained solely on the ground of assumption of risk. In other cases a holding that the plaintiff assumed the risk as a matter of law was one of two grounds of decision for the defendant, the other being either contributory negligence as a matter of law or no breach of duty to the plaintiff. Occasionally where the plaintiff has prevailed on a jury verdict, a court has indicated that assumption of risk was properly treated as a fact issue; this suggests

43. Gallegos v. Nash, San Francisco, 137 Cal. App.2d 14, 289 P.2d 835 (1st Dist. 1955). Cf. the following, which, though not strictly products liability cases, are closely analogous: Warren v. Sullivan, 10 Cal. Rptr. 340 (1st Dist. 1961, hearing denied by Cal. Sup. Ct.) no error in instructions on assumption of risk of defective brakes by guest passenger in car; verdict and judgment for defendant); Lyle v. Disneyland, 2 Cal. Rptr. 704 (4th Dist. 1960) (no error in instructions on assumption of risk of "Astro-Jet" ride by minor in amusement park; verdict and judgment for defendant). 44. Runnels v. Dixie Drive-It-Yourself System Jackson Co., 220 Miss. 678, 71 So.2d 453, 46 A.L.R.2d 397 (1954) (rented car that shimmied).) 45. Saeter v. Harley Davidson Motor Co., 8 Cal. Rptr. 747 (4th Dist. 1960, hearing denied by Cal. Sup. Ct. with two justices dissenting); Sanders v. Kalamazoo Tank and Silo Co., 205 Mich. 339, 171 N.W. 523 (1919). 46. Carmen v. Eli Lilly & Co., 109 Ind. App. 76, 32 N.E.2d 729 (1941) (rabies vaccine administered, with fatal consequences, to one who had seen a pamphlet that warned of risk); Jewell v. Dell, 284 S.W.2d 94 (Ky. 1956) (incomplete repair of brakes, with notice to plaintiff that they were still defective); Lombard Water-Wheel Governor Co. v. Great Northern Paper Co., 101 Me. 114, 63 Atl. 585 (1906) (attempt by defendant's representative to adjust governor for water wheel of plaintiff's mill, with mutual understanding that attempted use of governor was experimental). Compare Saddlemire v. Coca-Cola Co. of Canada, [1941] 4 D.L.R. 614. The plaintiff continued to drink after noticing a bad odor and taste; later he observed that there was a mouse in the bottle. One ground of decision seems to have been a rejection of the argument that the manufacturer owed a duty to the ultimate consumer of a packaged product, the rejection being based on the fact that the liquid and glass container did not conceal the mouse from observation. But should not the manufacturer's duty extend also to cases of a partially concealed defect, at least where the plaintiff has not discovered the defect? Of course the claim would be subject to a defense of contributory negligence, if proved. Another ground of decision was that plaintiff was barred by his voluntary choice to incur the risk incident to drinking of the contents after noticing the bad odor and taste. But was the risk fully appreciated by the plaintiff? It is rare that, on the facts, it can fairly be said that the plaintiff acquires full appreciation of risk through odor and taste. Cf. Dickerson, PRODUCTS LIABILITY AND THE FOOD CONSUMER 76-80 (1951) (discussing the defense of contributory negligence in food cases); Annot., 77 A.L.R.2d 215, 240 (1961) (beverage cases); Annot., 77 A.L.R.2d 7, 54-55 (1961) (food cases). 47. De Eugenio v. Allis-Chalmers Mfg. Co., 210 F.2d 409 (3d Cir. 1954); Kelly v. Pittsfield Coal Gas Co., 257 Mass. 441, 154 N.E. 74 (1926); Balbridge v. Wright Gas Co., 154 Ohio St. 452, 96 N.E.2d 300 (1961). Cf. Robbins v. Milner Enterprises, Inc., 278 F.2d 492 (5th Cir. 1960) (summary judgment for defendant overruled since record did not establish that there would be no jury issue on knowledge of risk that defective brakes would lock). See also McClanahan v. California Spray-Chemical Corp., 194 Va. 842, 75 S.E.2d 712 (1953), in which the-
the possibility that a few more cases are won by defendants on this theory at the trial level. Finally, in some cases wherein there is no reference to assumption of risk as such, the basis of decision is that the plaintiff had knowledge of a defective condition and is therefore in no position to recover for injuries it caused. These several indications of success of defendants in urging some theory that might possibly be regarded as one of the variants of assumption of risk add up to a rather unimpressive total in comparison with the volume of products liability cases.

Saeter v. Harley Davidson Motor Co., one of the few cases resting judgment at least alternatively on assumption of risk, will serve as a useful illustration. The plaintiff sustained injuries in a motorcycle accident allegedly due to a defectively designed “damper” that had no adequate device to lock the damper knob; as a result it would unwind and permit wobbling of the front wheel at high speeds. The plaintiff, an experienced motorcyclist, discovered the defect several days and several hundred miles before the accident, but continued his pleasure trip “without the slightest compulsion of business or otherwise.” Overturning a jury verdict for the plaintiff, the district court of appeals held that as a matter of law the plaintiff was barred on the two grounds of assumption of risk, with actual knowledge of the danger, and contributory negligence; the Supreme Court denied hearing, two justices dissenting.

In Saeter, and perhaps in most other products liability cases in which the defense of assumption of risk has been sustained, court’s discussion of assumption of risk adverted to the fact that this issue had been submitted to the jury, which found for the plaintiff, but the court directed its attention primarily to answering the defendant’s argument of no duty and then turned to the defense of assumption of risk, remarking: “Once the question of the duty to warn has been determined, this question [assumption of risk] is simplified, if not settled.”

48. In addition to cases cited infra note 66, which rely on a no-duty theory, see, e.g., Youtz v. Thompson Tire Co., 46 Cal.App.2d 672, 116 P.2d 636 (1941) (hearing denied by Cal. Sup. Ct. with Carter, J., dissenting) (injury while mounting defective tire); Gutelius v. General Electric Co., 37 Cal.App.2d 455, 99 P.2d 682 (1940) (hearing denied by Cal. Sup. Ct. with Carter, J., dissenting) (injury while operating washing machine wringer with defective shifter lever). These two California cases are discussed in Frumer and Friedman, Products Liability 349-50 (1960). The theory of these opinions appears to be a combination of the ideas that the manufacturer’s duty was limited to warning and that its negligence was not a proximate cause of the injury. See also Annot., 76 A.L.R.2d 9, 28-36, 71-72 (1961), and note 69 infra.

49. 8 Cal. Rptr. 747 (4th Dist. 1960, hearing denied by Cal. Sup. Ct. with two justices dissenting).

50. Id. at 753.

51. Ibid.
it appears that the form of the concept of which the court was thinking was consent to risk, either subjective, or objectively manifested. Ordinarily products liability opinions using the phrase “assumption of risk” in one of the less consensual senses have done so only in the process of declaring the defense unavailable. Thus, it has been said that on grounds of public policy it is better to impose an implied warranty on the sale of food than “to compel the purchaser to assume the risk” — a statement using the phrase in the sense of imposed assumption of risk, not at all concerned with the more consensual forms of the doctrine.

A number of decisions have held the defense of assumption of risk inapplicable in the absence of proof that the plaintiff fully appreciated the risks incident to use of a product.

52. In Saeter, 8 Cal. Rptr. at 752, the court remarked that knowledge of the danger “must be actual.” Most of the other opinions cited in notes 43-46 supra also speak of knowledge of danger in a way that is consistent with the concept of consent to risk, though they do not explicitly reject less consensual forms of assumption of risk. But see comments on Carmen and Gallegos in the next note infra.

53. See, e.g., cases cited in note 54 infra. But see Carmen v. Eli Lilly Co., 109 Ind. App. 76, 84, 32 N.E.2d 729, 731 (1941), wherein the court said that the decedent whose death was caused by rabies vaccine administered after he had seen a pamphlet describing the risk “is presumed to have acquainted himself with not only a part, but all of the pamphlet.” Also observe the slight deviation from the principle of consent to risk in cases recognizing a defense of assumption of obvious risks without any requirement of findings as to whether the plaintiff’s state of mind or his manifestations. See, e.g., Gallegos v. Nash, San Francisco, 137 Cal.App.2d 14, 280 P.2d 835 (1955) (dictum that “the plaintiff cannot be heard to say that he did not comprehend a risk that must have been obvious to him”). Also see text at note 55 infra.


sionally the opinions in such cases have added that it did not appear that the plaintiff should have appreciated the risk. It is probably inappropriate, however, to infer from such an opinion that the court would have held the defense to be established by proof that the plaintiff should have appreciated the risk, even though he did not. Such proof goes far toward establishing contributory negligence, though not all the way since there might be countervailing justifications that stand in the way of a finding that plaintiff's conduct was unreasonably risky. Also, proof that plaintiff should have appreciated the risk helps to support a fact finding that he did in fact appreciate it. But in general there is support, in the few products liability cases that are relevant, for the proposition that assumption of risk is not established without a fact-finding of consent to risk.

Campbell Athletic Goods Co., 235 Mo. App. 612, 626, 144 S.W.2d 866, 872 (1940) (vaulting pole). Cf. Arnold v. May Department Stores Co., 337 Mo. 727, 737, 85 S.W.2d 748, 754 (1935) (hair dye). See also the following cases, which might be regarded as not within the products liability classification: Fletcher v. Kemp, 327 S.W.2d 178, 186 (Mo. 1959) (defendant placed in the hands of plaintiff, for welding, a drum containing residue of explosive liquid; "assumption of risk applies only where there is knowledge and appreciation of the danger"); Reed v. Rosenthal, 129 Ore. 203, 276 Pac. 684 (1929) (an illustrative case among a number involving patrons of beauty parlors); Wood v. Kane Boiler Works, Inc., 150 Tex. 191, 201, 238 S.W.2d 172, 178 (1951) (the plaintiff was injured while inspecting the defendant's work in the welding of a pipeline).

56. McCormick v. Lowe & Campbell Athletic Goods Co., 235 Mo. App. 612, 626, 144 S.W.2d 866, 872 (1940) (plaintiff "did not, prior to the accident, know or have cause to believe the pole was not a safe one to use in vaulting"); Reed v. Rosenthal, 129 Ore. 203, 276 Pac. 684 (1929) ("testimony does not indicate that plaintiff had any reason to, or did, appreciate any risk or danger in obtaining the facial"); Wood v. Kane Boiler Works, Inc., 150 Tex. 101, 201, 238 S.W.2d 172, 178 (1951) ("it cannot be said that [the plaintiff] had either actual or implied knowledge of the specific defect"). Cf. Robbins v. Milner Enterprises, Inc., 278 F.2d 492, 495 (5th Cir. 1960) (statement that question whether proof of knowledge that brakes were grabbing established knowledge also of risk of their locking so as to wrest car from control calls for application of rule of ordinary prudence). See also Valmas Drug Co. v. Smoots, 269 Fed. 356, 360 (6th Cir. 1920) ("plaintiff did not assume the risk from [use of eyewash] unless she knew and appreciated the danger therefrom, or should have done so").

57. See Moran v. Pittsburgh-Des Moines Steel Co., 166 F.2d 908, 919 (1948); Saeter v. Harley Davidson Motor Co., 8 Cal. Rptr. 747, 752 (4th Dist. 1960, hearing denied by Cal. Sup. Ct. with two justices dissenting) (knowledge of the danger "must be actual"); Brooks v. Allis-Chalmers Mfg. Co., 163 Cal.App.2d 410, 415, 329 P.2d 575, 579 (1958, hearing denied by Cal. Sup. Ct.) (there must be "actual, not constructive knowledge of the risk"); Arnold v. May Department Stores Co., 337 Mo. 727, 737, 85 S.W.2d 748, 754 (1935); Baldridge v. Wright Gas Co., 154 Ohio St. 452, 96 N.E.2d 300 (1951) ("knowledge of danger and intelligent acquiescence therein"). But cf. Valmas Drug Co. v. Smoots, 269 Fed. 356, 360 (6th Cir. 1920) (no assumption of risk unless plaintiff appreciated danger "or should have done so"); Louisville & Nashville R.R. v. Travis, 192 Ala. 453, 455, 85 So. 342, 343 (1915) (dictum that dining car patron must be presumed to know the general risk from the commonly known capacity of oysters for rapid deterioration but a verdict for the patron was sustained on a theory of negligence of the defendant "in the last selection of the particular oysters"); Carmen v. Eli Lilly Co., 109 Ind. App. 76, 84, 32 N.E.2d 729, 731 (1941) (victim of rabies vaccine who had
It is true here, as elsewhere in the law of torts, that confusion has sometimes developed because of failure to distinguish between the fact that must be proved and the method by which it may be proved. This confusion is especially apparent in relation to objectively manifested consent to risk. The crucial fact, under this form of the doctrine, is that the plaintiff has manifested that his state of mind is one of full appreciation of the risk and willingness to encounter it. If he manifests such appreciation and willingness, the fact that he secretly knows that he does not understand or is not willing to submit to the risk does not save him from the defense. On the other hand, the fact that the risk is one he should appreciate does not establish either contributory negligence (since it may happen that his encountering the known risk is reasonable) or consent to risk (since it may happen that he neither manifests nor secretly holds the state of mind of full appreciation and willingness to encounter the risk). Similarly, the fact that the risk is “obvious” falls short of establishing plaintiff’s consent to risk, unless “obvious” means that the evidence is such that no reasonable jury could make findings that plaintiff neither manifested nor secretly held the state of mind of full appreciation of the risk and consent to it. Probably it is not a fair reading of opinions in point to interpret “obvious” this narrowly, and one is thus forced to the conclusion that in products liability cases, as in other areas, there is support for a departure from the strict principle of consent to risk by recognition of a defense of assumption of obvious risks without any requirement of findings as to either the plaintiff’s state of mind or his manifestations.

Occasionally an opinion in a products liability case has seemed to treat assumption of risk as merely a form of contributory negligence. More often, however, they have been recog-
ized as distinct defenses. Plainly assumption of risk overlaps both contributory negligence and the analogue of contributory negligence, breach of a duty of mitigation.

It has been stated that to sustain the defense the defendant must show not only that the plaintiff knew of the danger but also that he voluntarily encountered it. This line of thought is suggestive of the qualification that the doctrine is inapplicable in cases of consent to risk under the duress of defendant's wrong. There has also been intimation of a qualification that the doctrine is inapplicable in some cases where the defendant's wrong consists of a statutory violation.

Cir. 1954). The court remarked that it was not surprising to find defenses of contributory negligence and assumption of risk appearing in the case since the rolls of a hay baler, "the physical cause of plaintiff's injury, were not a hidden danger but were obvious," and held that assumption of the risk and contributory negligence were for the jury because plaintiff's voluntary exposure to a known danger was not enough to bar him as a matter of law since "to have that effect the voluntary exposure must be unreasonable." On the point stated in the last quoted phrase, the court cited only RESTATEMENT, TORTS § 466, Comment c (1934). The caption of that section is "Types of Contributory Negligence," and Comment c concerns "Voluntary exposure to unreasonable risk." Comment d states that there are two meanings of "voluntary assumption of risk," one of which is that form of contributory negligence just described. The other meaning identified in Comment d is a no-duty concept. The court does not refer to this other meaning, but perhaps it was partly with the purpose of negating applicability of this latter concept of assumption of risk that the court observed that defendant's argument of no duty to warn of an obvious danger was defeated by the fact that plaintiff's risky conduct was just what he had seen defendant's demonstrators doing in an attempt to make the defective baler operate. "The negligence was not in failing to warn plaintiff to stay away but in demonstrating to him that it was proper and safe to come near . . . ." Id. at 413. Is this not a way of saying that there was evidence from which it could be found that the danger was not fully appreciated by the plaintiff? If so, the result, though not the opinion, is easily reconciled with recognition that consensual assumption of risk is an independent defense, distinct from contributory negligence. Cf. FRUHER AND FRIEDMAN, PRODUCTS LIABILITY 351 (1960), suggesting that the court is "saying in substance that, under the circumstances, the hazard was not necessarily so 'obvious' as to bar recovery, and that this presented [fact] issues both as to assumption of risk and contributory negligence."

Another opinion that appears to treat assumption of risk as a form of contributory negligence is Dalrymple v. Simkoe, 230 N.C. 453, 457, 53 S.E.2d 437, 440 (1949), quoting 46 AM. JUR. 931-32 (1943). Compare Wright v. Carter Products, Inc., 244 F.2d 53, 60 (2d Cir. 1957), wherein the opinion discusses the two defenses together without adverting to any distinction.


61. For a products liability case involving the duty of mitigation, see Hogan Dairy Co. v. Creamery Package Mfg. Co., 358 P.2d 906 (Utah 1961) (verdict for defendant upheld on evidence that plaintiff, lessee of milk processing equipment manufactured by defendant, "knew of flavor and mechanical problems from the time of installation" and unreasonably continued to use the equipment with mounting losses).


63. See infra text at notes 79-87.

A few opinions have indicated that the defense in question is in essence one of no duty. This view implies that the supplier's duty is one of warning only as distinguished from a broader duty of reasonable care to provide safety features for the protection of even those who have notice of the danger. It is therefore of interest that in some instances, with no mention of assumption of risk, nonliability of suppliers has been rested on the theory of no duty to take precautions beyond reasonable notice. The relationship between the duty of warning and assumption of risk is also reflected in one cosmetics case where liability was imposed, the opinion observing that there was a breach of the duty to warn and no assumption of risk. It is also of interest that the result of nonliability of suppliers, where adequate notice has been given, has been extended to claims on the theory of breach of implied warranty as well as claims based on negligence.

If the defendant's duty of care is only a duty to warn, nonliability is almost certainly the result that would follow, even without reliance upon assumption of risk, in a case of injury to one who voluntarily encountered the risk created by defendant after learning, by other means, all that a proper warning would have disclosed. Even without regard to other requirements of legal cause, this would be the result because it is most unlikely

(1955) (statute requiring testing of brakes; the court found no evidence of violation in this case, however).


66. E.g., Jamieson v. Woodward & Lothrop, 247 F.2d 23 (D.C. Cir. 1957), cert. denied, 355 U.S. 855 (1957); Taylor v. Jacobson, 336 Mass. 709, 147 N.E.2d 770 (1958); Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950). Cf. Annot., 76 A.L.R.2d 9, 28-36 (1961). In Campo, the theory was that the supplier of an onion-topping machine having no hand guard or emergency stopping device was under no duty of care to a user since the dangers of use were patent. In Jamieson, the majority opinion holds the manufacturer of an elastic exerciser not negligent in failing to warn of the risk of injury if it should slip off the instep while being used in a recommended exercise, because the danger was obvious; the dissenting opinion, expressing the view that reasonable minds might differ as to whether the risk from the recommended exercise was obvious, also adverted to the concept of assumption of risk. In Taylor, it appeared that the plaintiff, in using a hair dye, failed to follow directions that admittedly she had read, and the only part of the opinion that might be regarded as referring to a concept of assumption of risk is a passage observing that the retail vendor of a product sold by trade name "adopts as his own any cautionary statements, disclaimers and limitations of warranties made (on the package and in accompanying circulars) by the manufacturer who best knows the infirmities of his product." 336 Mass. at 715, 147 N.E.2d at 774.

67. Wright v. Carter Products, Inc., 244 F.2d 53, 60 (2d Cir. 1957).


69. With respect to that aspect of legal cause that is concerned with the conduct of third persons, see, e.g., Nishida v. E. I. DuPont de Nemours & Co., 245
that lack of warning by the manufacturer of a product would be a substantial factor in bringing about injury to one having full knowledge of the risk-creating characteristic of the product. In these circumstances, regardless of whether it has significance in any other way, the plaintiff's free and informed consent to risk negates any prima facie case against the defendant by negating causal connection between defendant's breach of duty to warn and plaintiff's harm.

III. POLICY BASES FOR ASSUMPTION OF RISK

Inquiry into reasons for recognition of assumption of risk leads quickly into two twilight zones — that between consent to a certainty of interference and assumption of a risk of interference and that between this pair of tort concepts and contract concepts concerned with exculpatory agreements. A suitable point of beginning for an inquiry into policy bases of assumption of risk is a comparison of the concepts of consent to intentional interference and exculpation by contract.

A. The Relationship Between Consent in Intentional Torts and Exculpation by Contract

If two persons, by their respective courses of conduct, manifest consent to mutual combat, each is denied a recovery from the other by a number of decisions, though slightly a minority.11

F.2d 708 (5th Cir. 1957); Tayer v. York Ice Machinery Corp., 342 Mo. 912, 119 S.W.2d 240 (1938). Nishida sustains a verdict for defendant under instructions permitting the jury to find that defendant's participation in development of a soybean meal that poisoned plaintiff's cattle was not a proximate cause of plaintiff's loss in view of a letter, sent by defendant to the mill from which plaintiff obtained the meal, warning against sale of the meal for cattle feed. In Tayer, proof that plaintiff voluntarily encountered a known danger, under orders of his employer, led to nonliability of a third person, who supplied allegedly defective machinery, on the theory that, as a matter of law, defendant's conduct was not a proximate cause of plaintiff's injury, the court stating, "One without any right of possession or control should not be required to search for and guard against occurrences occasioned by acts of others which reasonably prudent persons would not anticipate." 119 S.W.2d at 247. The opinion on motion for rehearing suggests the possibility of an action against the employer. Ibid. It is of interest that liability of the employer and nonliability of the supplier might also have resulted from application of a theory of consent to risk, this defense being available to the supplier but unavailable to the employer either because of duress (see text at notes 79-87) or because of abolition of the defense as between employer and employee.


71. E.g., Lykins v. Hamrick, 144 Ky. 80, 137 S.W. 852 (1911); Galbraith
Because of the apparent analogy to exculpatory contract, one may be tempted to think of such a relationship as if there were mutual promises of exculpation, but in most cases this would be a distortion of the combatants' manifestations.

In consent cases other than those of mutual combat the analogy to exculpatory agreements is ordinarily more remote, though still observable. Nearly all such cases involve dealings between the parties on the basis of which arguments of enforceability of an implied covenant not to sue can be built, if one is willing to engage in fiction by inferring such a covenant from the mere manifestation of consent to what would otherwise amount to an intentional tort against his person or property, and is willing to stretch concepts of consideration and reliance so as to hold the covenant enforceable. These observations are illustrated in cases of consent to an operation or other medical procedure, cases of consent to sexual relations, and cases of consent to entry upon realty for recreational purposes.

Should the legal result in a case of consent to interference be different if the parties have entered into an exchange of express covenants not to sue? An exculpatory agreement that is enforceable under contract law is a complete defense to any tort claim within its scope. Such an agreement has been referred to as an express assumption of risk where, as is ordinarily true, its scope extends to risk and not merely to an interference certain to occur. This usage seems to suggest that the basis for other forms of assumption of risk is an analogy to exculpatory agreements. But the analogy is inadequate as a policy justification since the scope of application of other forms of assumption of risk is the very area where enforceable agreement, the gist of express assumption of risk, is lacking. If other forms of assumption of risk are to be sustained, and if the defense of consent is to be sustained, other policy justifications than those underlying freedom of contract must be found. Conversely, if mutual covenants of exculpation are proved, a rule that nevertheless imposes liability cannot be sustained unless policy justifications overriding those concerned with freedom of contract can be found. Thus, the policies underlying the principle of freedom of contract are relevant, but not necessarily decisive.

v. Fleming, 60 Mich. 403, 27 N.W. 581 (1886); Prosser, Torts 87 (2d ed. 1955). This view was urged in Bohlen, Consent as Affecting Civil Liability for Breaches of the Peace, 24 Colum. L. Rev. 819 (1924), reprinted in Bohlen, Studies in the Law of Torts 577 (1926), and was adopted in Restatement, Torts § 60 (1934).
For example, in a hypothetical case of mutual combat after an exchange of express covenants not to sue, the legal responsibilities of the combatants to each other should not be determined solely on the basis of the factors ordinarily brought to bear on the problem of enforceability of a commercial bargain. The concern with public peace that has occupied the attention of some courts in the tort cases on mutual combat is still relevant. It seems likely, incidentally, that the result in many jurisdictions would be the same in this hypothetical case as in a more typical case of mutual combat without a prior exchange of express covenants not to sue. Just as some courts say that the consent is ineffectual because it is consent to a breach of the public peace (thus reaching the result that each combatant recovers against the other),72 so they might say that the agreement composed of express covenants not to sue is unenforceable because made pursuant to a plan for committing a breach of the public peace. Just as some courts say that the criminal illegality of the breach of the peace is no reason for denying the effectiveness of the consent in relation to a tort claim (thus reaching the result that each bears his own loss),73 so they might say that the illegality of an agreement to mutual combat is no reason for denying the effectiveness of a mutual agreement not to invoke the aid of courts in tort claims for injuries suffered. The decision to treat the problem as one of contract would not resolve the near balance of competing arguments that have been brought to bear in the mutual combat cases. But the interest in enforcement of agreements would add some further weight to the arguments for the minority rule of denying recovery in the mutual combat cases, and perhaps would swing the other way the near balance of decisions between allowance and disallowance of recovery.

In cases of consent to what would otherwise be an actionable interference, without manifestation of a promise not to sue, the policies underlying the general rule of enforceability of agreements are relevant by way of analogy, but inapplicability of those policies is not decisive against the defense, since other interests are also at stake. Even where the dealings between the parties go beyond consent and take the form of an exculpatory agreement, other interests sometimes override those concerned with enforceability of agreements and lead to a determination

73. See authorities cited in note 71 supra.
that an agreement is unenforceable because contrary to public policy. Conversely, where the transaction between the parties falls short of an exculpatory agreement, other considerations have nevertheless been found to favor a conclusion of nonliability because of consent. What is the nature of these considerations, and are they applicable to assumption of a risk of interference as well as consent to a certainty of interference?

B. The Relationships Among Fault, Consent, and Assumption of Risk

Perhaps the most fundamental premise that remains almost uniformly unchallenged in critical inquiries into bases of tort doctrine is the proposition that, unless good reason can be found for shifting a loss — unless more good than harm will be accomplished by doing so — the legal system ought to leave the loss where it lies, denying every claim for relief that would have the effect of shifting it. In modern Anglo-American law, fault is the most generally acceptable justification for loss-shifting by imposing liability in tort. The defenses of consent (in relation to claims of intentional tort) and assumption of risk (in relation to claims of liability for risk-creating conduct) are corollaries of the principle that liability in tort is based generally on fault. They are concerned with a quality of plaintiff's participation in causing harm to himself — a quality that, if not weighing more heavily against liability than defendant's fault weighs in support of liability, may at least bring the competition of factors into equilibrium and invoke the fundamental

74. Professor Mansfield's illuminating analysis of the philosophical basis for recognizing informed choice as a defense (Mansfield, Informed Choice in the Law of Torts, supra p. 17 et seq.) is, it seems to me, focused primarily on those tort cases in which the plaintiff's manifestations of consent have been communicated to the defendant prior to the occurrence of the conduct on account of which the defendant is charged with negligence. That focus is conducive to the view that there is a common philosophical basis for effectiveness of consent in contract and in tort. Near the conclusion of his article, (at pp. 57-73) Professor Mansfield raises the possibility that there may be different considerations operating in those assumption of risk cases in which plaintiff's manifestations of consent do not come to defendant's attention until harm has occurred. It seems to me not only that this is true but also that some considerations different from those underlying the effect of consent in contract bear upon consent or assumption of risk in the tort cases on which Professor Mansfield focuses primary attention. The discussion that follows, in the present article, is an effort to consider what, if any, distinctive bases can be found for a tort rule that gives effect to informed choice where contract law does not. Perhaps my urge to seek such a basis is influenced by a belief that the philosophical justifications for giving effect to informed choice grow progressively weaker in a succession from the most to the least consensual form of assumption of risk.
premise that loss shall not be shifted unless the shifting will accomplish more good than harm.

The relationship between consent and plaintiff's blameworthiness with respect to his own injury is much like that between intentional interference and defendant's blameworthiness. We are accustomed to thinking of doctrines of intentional tort as based in general, though with some particular exceptions, upon blameworthiness, and indeed blameworthiness of a greater degree than that on which, in general and again with exceptions, the law of negligence is based. But many intentional interferences with the interests of others are neither tortious nor blameworthy. A determination of the blameworthy quality of an intentional interference must depend, therefore, not alone upon the fact that the interference is intentional, but also upon appraisal of reasons for the interference, which happen to be dealt with under doctrines of privilege. Is it not true, similarly, that an assessment of blame or lack of it in plaintiff's consenting to an intentional interference or in consenting to a risk, by making an informed choice to encounter it, is dependent not alone upon the fact of consent but also upon appraisal of plaintiff's reasons for consenting?

In relation to negligence claims, the traditional doctrinal apparatus provides for a single-step weighing of all the diverse qualities of the actor's conduct to determine whether it shall be characterized as negligence. This method is in contrast with that by which we recognize the prima facie showing of intentional interference and then look to factors of justification under the rubric of privilege. The latter method of two-step analysis is also the traditional method of considering the defense of consent in relation to intentional torts. Thus, there is a substantial body of doctrine concerning expressions of consent that are ineffectual as defenses because of duress or incapacity. But this two-step method of analysis has not been employed customarily in cases concerned with assumption of risk. The want of any established understanding that factors of justification will be considered, either in determining whether conduct shall be characterized as an assumption of risk or as a separate step of inquiry comparable to that concerning privilege in relation to intentional torts, has been a source of confusion. It has sometimes led to the assumption that factors of justification are irrelevant and that assumption of risk (as distinguished from
the contributory negligence that overlaps with it) is in no way concerned with blameworthiness. But there is implicit recognition of the significance of justifying factors in holdings that the doctrine of assumption of risk is inapplicable to a choice to encounter a risk under circumstances that might fairly be characterized as a form of duress.\textsuperscript{75} In the absence of such justifying factors, the plaintiff's uncoerced and informed choice to encounter a risk is, from the point of view of determining whether he along with others should be blamed for bringing about his own injury, very much like defendant's choice to interfere in plaintiff's affairs without justification. This conclusion is fortified by the element of co-authorship discussed in the next paragraph below. The independence of this notion of blame from that involved in contributory negligence is fortified by the distinction between causing risk to oneself and causing risk to others, discussed in the next section below.

Perhaps it would be unfair to characterize the harm suffered by a plaintiff in a consent case as "self-inflicted," but if, without duress, the person whose interests are affected invites an interference by manifesting consent to it, he is at least a co-author of his own harm. Similarly, the plaintiff who, without duress, chooses to encounter a risk is, along with the defendant who created it, co-author of harm to himself within that risk.

In this situation, in counterweight to the utility of the tort cause of action as a deterrent to conduct like the defendant's is the disutility of its encouragement of conduct like the plaintiff's. In counterweight to the utility of compensating for plaintiff's loss is the disutility of imposing a like loss on the defendant. Thus we are driven toward application of the basic premise of tort law that the legal system ought to leave a loss where it lies unless more good than harm will be accomplished by shifting it. Moreover, it may happen that there is not merely a dead balance of factors favoring and disfavoring liability, but rather a heavier weighting against liability. A teacher of first year law students has the opportunity to observe anew each year a widely manifested, deep-seated reaction that some applications of assumption of risk are entirely just—a reaction that, being inadequately explained on the basis of an equilibrium of factors for and against shifting the loss, suggests instead a notion that it is unfair for one to be allowed a recovery from another despite

\textsuperscript{75} Duress is discussed at pp. 154-159 infra.
free and informed co-authorship of his own harm, though the justification and limits of this notion may prove most elusive when articulation is demanded.

Perhaps the explanation for this common reaction lies primarily in the fact that it is associated with the view, still widely held despite vigorous attacks against it, that fault is the most acceptable basis for liability in tort.

The defense of contributory fault may not be a good answer to the argument for liability, however, if there are material differences in the character of plaintiff's and defendant's participation in the events leading up to the loss. One illustration of this point is that contributory negligence is ordinarily not a defense to a claim of intentional tort. Another illustration is that where the basis of liability is changed from negligence to the principle of workmen's compensation — where the basis of liability is no longer the creation of an unreasonable risk in relation to the particular case — contributory negligence and assumption of risk may cease to be good answers to claims based on new and different reasons for shifting loss. It may be, for like reason, that whenever the basis of products liability is strict rather than negligence, assumption of risk should be inapplicable. The conclusion reached on this point in relation to a particular line of cases is appropriately dependent on the basis for imposing strict liability in those cases.

If capacity to bear and distribute risk were substituted for fault as the basis of liability in tort law, assumption of risk would lose nearly all its power to command a following. If liability were to be imposed upon each enterprise for harms typical of the enterprise,\textsuperscript{76} without proof of fault, probably assumption of risk would lose its force as an independent theory of defense, though the plaintiff's free and informed choice to encounter a risk would be a relevant factor bearing on the question whether the risk was typical of the defendant's enterprise rather than being typical of the plaintiff's activity. To the extent that negligence continues to be the basis of liability, however, the doctrine of assumption of risk continues to commend itself if (a) it is limited to cases in which either objectively consensual assumption of risk or an even more consensual form can be proved and (b) it is duly qualified to exclude cases of

\textsuperscript{76} A proposal of this type is presented in \textit{Ehrenzweig, Negligence Without Fault} (1951).
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duress, as that concept is developed below. Both of these qualifi-
cations are supported by the analogy to the doctrine of consent in intentional torts.

Arguably extension of the doctrine to cases in which the risk was obvious is supportable on the theory that it is the most practical method of giving effect to the policy justifications for recognition of the defense of consent to risk. Since courts and juries are less likely to brand the plaintiff a liar than to find that the risk he says he did not appreciate was nevertheless obvious, it may happen that, from an overall point of view, case results will be more consistent with the policy justifications underlying recognition of the defense of consent to risk than if findings of such consent were required even where the risk was obvious. If this extension of the doctrine beyond consent to risk is allowed, however, the standard for “obvious” should be very much more restrictive than a standard concerned with what should have been appreciated by an ordinarily prudent person in plaintiff’s position. Use of the latter standard for defining “obvious” would extend the practical impact of assumption of risk well beyond the concept of consent to risk.

Assumption of risk by consent to conduct or condition, associational assumption of risk, and imposed assumption of risk are to increasing extents beyond the analogy to consent; comments in justification of the defenses of consent in intentional torts and its analogue in negligence law are inapplicable to these less consensual concepts of assumption of risk. For this reason, it would be well that courts and writers refrain from using assumption of risk in these senses, and that liability in such cases be denied only if there are independent grounds for imposing this consequence even despite the lack of plaintiff’s consent to the risk. In most other instances within the broader usage of assumption of risk no independent grounds of satisfactory quality could be found. But if they could be found in exceptional cases, it would contribute to clarity of analysis and expression if those cases, not concerned with consent to risk, were dealt with under another rationale, such as duty or cause, rather than assumption of risk.

C. Risk to Oneself versus Risk to Others

It might be suggested that policy considerations concerned with coauthorship of harm to oneself serve to support a de-
fense only if the quality of the plaintiff's conduct, including his free and informed choice, goes beyond the limits of reasonableness— that is, that they support the denial of relief only if the plaintiff's choice is a contributorily negligent one. But there is a difference between causing risk to oneself and causing risk to others. Consider, for example, the objective of amusement. It deserves attention in the weighing of utility against risk to determine whether conduct is unreasonably risky.77 Weighing the actor's interest in amusement against risk to others is quite a different matter from weighing the actor's interest in amusement against risk to himself. It may be reasonable to have fun at one's own expense or risk, when not so at the expense or risk of others. Thus the concept of contributory negligence, concerned with unreasonableness in relation to the conduct, rather than unreasonableness in relation to the expectation that another will foot the bill, is too narrow to serve fully the policy justifications for denying relief to one who is co-author of his own harm by consenting to the risk out of which it arises.

It is not clear that jurors, even if following instructions, are precluded from applying a definition of contributory negligence that is a judgment only that it is unreasonable for plaintiff to engage in this course of conduct and then recover full compensation from another for the harm suffered, as distinguished from a judgment that his conduct falls below the standard of ordinary prudence for self-protection, irrespective of potential compensation for harm. It is clear, however, that such a definition of contributory negligence would differ from the definition of primary negligence in much the same way that the concept of "conditional fault" differs from "fault,"78 and that no such definition of contributory negligence is expressed in current jury instructions or in the doctrines currently used in determining whether a case should be taken from the jury because contributory negligence is established as a matter of law.

D. The Duress of Defendant's Wrong

Policy justifications for recognition of the defense of consent to risk are dependent upon plaintiff's having a free choice. That

77. Cf. Kimbar v. Estis, 1 N.Y.2d 399, 405, 135 N.E.2d 708, 710 (1956): "To hold summer camps to a duty of floodlighting woods . . . would be unfair . . . to the youth who seek the adventure of living closer to nature . . . ."

is not the case if the defendant's breach of duty so restricts plaintiff's range of choice that he is under pressure to elect to encounter the risk that defendant has caused. In such circumstances, the defendant's breach of duty operates as a form of duress.

Though not customarily referred to as duress, this concept has been evolving in common law decisions from a date that is very early in relation to the emergence of negligence as a distinct theory of action. *Clayards v. Dethick* was an action on the case for causing the death of a horse owned by the plaintiff, a cab proprietor. The evidence was that defendants, in constructing a drain pursuant to authorization, made an unfenced excavation that obstructed the narrow passageway through which the mews on which plaintiff's stables were located communicated with a street. As plaintiff was leading a horse over the mound of dirt piled beside the excavation, the mound gave way. The horse fell in and was strangled while an attempt was being made to get it out. A verdict for plaintiff was upheld against an attack on that part of the jury charge stating that "it could not be the plaintiff's duty to refrain altogether from coming out of the mews merely because the defendants had made the passage in some degree dangerous."  

Harper and James identify seven categories of cases in which applicability of the doctrine of assumption of risk has commonly been denied; they concern travelers on the highway, tenants (and others in their right) using common areas under the landlord's control, patrons of public utilities using areas or equipment appropriate for use to secure services of the utility, landowners whose access has been obstructed (as in *Clayards v. Dethick*), persons injured while at a place where they have a right to be without regard to defendant's consent, persons moving to a nuisance or using their own land in a way that increases the hazard caused by defendant's wrong, and persons engaged in attempted rescues.  

The temptation is great, because of the simplicity and clarity of the rule that might be achieved, to accept as an explanation of all these types of cases the generalization that assumption

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80. Id. at 442, 116 Eng. Rep. at 933. It is of interest, perhaps, that the phrase "assumption of risk" does not appear in the report of the arguments and opinions in this case.
81. 2 Harper and James, Torts 1165-67 (1956).
of risk is inapplicable wherever it appears that defendant's breach of duty was a cause of plaintiff's harm.\textsuperscript{82} That would mean, of course, that consent to risk is not an independent basis for defense in any situation, though it might be one among other factors bearing on defendant's duty and plaintiff's contributory negligence. If this much is accepted, it would seem to follow that the whole development of the doctrine of assumption of risk has been worse than useless, adding exactly nothing that properly affects results and much that causes confusion because of common belief that the doctrine is meant to affect results.

Put aside, for the moment, the choice of terminology — the question whether, if consent to risk is to be recognized as an independent basis for denial of liability, it is to be classified as an affirmative defense of assumption of risk or instead as a distinct phase of the duty concept, in which phase duty would be recognized but for consent to risk. The generalization suggested above is not merely a statement of preference for the latter over the former system of terminology, but rather an assertion that consent to risk shall not be an independent basis for denial of liability under any terminology. This sweeping assertion is contrary to precedent. It is also contrary to the principle that co-authorship of harm by free and informed consent to risk is relevant to liability; in some circumstances, the defendant's substandard conduct does not cause the plaintiff's choice to be made under duress rather than freely.

One way in which the defendant's substandard conduct may cause a risk of harm to the plaintiff without placing the plaintiff under duress to encounter it is that it may add to plaintiff's range of choice rather than restricting it. If this were the only way, then it would seem an appropriate generalization that the doctrine of assumption of risk should be inapplicable whenever defendant's breach of duty restricts the range of choice that the plaintiff would have enjoyed if defendant had not acted; no other qualification concerning duress would be needed. It happens that in most instances conduct of a defendant that is

\textsuperscript{82} Harper and James offer this generalization with respect to assumption of risk in their primary sense, which is comparable to the concept identified in this article as associational assumption of risk. \textit{Id.} at 1165. They also say that assumption of risk in their secondary sense (when plaintiff deliberately chooses to encounter the risk) bars plaintiff only if he was contributorily negligent. \textit{Id.} at 1162. Thus it appears that they would accept the generalization in the text above if "assumption of risk" is taken to mean anything distinct from a form of contributory negligence.
unduly risky also restricts plaintiff’s range of choice. Thus, under this generalization, the area in which the doctrine of assumption of risk would apply would be quite limited. In any event, the area in which this doctrine produces a different legal result rather than an added reason for the same result is limited by the fact that often in circumstances where a judge or jury would make fact findings of consent to risk they would also make fact findings that the defendant’s conduct was not unreasonable or the judge would also reach the legal conclusion, irrespective of plaintiff’s appreciation of the risk and choice to encounter it, that the defendant had no legal duty to the plaintiff. With all these limitations of the practical effect of the doctrine, its range of effectiveness might seem too narrow to justify the price of maintaining an independent doctrine. But it seems likely that a choice to encounter risk should be regarded as free of duress in a somewhat larger area of cases than merely those in which plaintiff’s range of choice is in no way restricted by defendant’s substandard conduct. The generalization offered in the Restatement of Torts supports this suggestion, since by its terms the plaintiff, in order to avoid application of the doctrine, must show that defendant’s substandard conduct “has created a situation in which it is reasonably necessary to undergo a risk in order to protect a right or avert a harm.”

The scope of duress in other areas of law does not extend to all pressures, however minor in character or degree. While the scope of the concept in relation to assumption of risk probably should be broader than it is in relation to some other areas of law, it seems reasonable to require something more substantial than a mere showing that in some way the defendant’s conduct has restricted plaintiff’s range of choice.

Consider a hypothetical case in which the plaintiffs Black and Blue are persons to whom the purchaser of a defectively designed motorcycle lends it, after discovering the defect and with full warning to Black but not to Blue, the plaintiffs having need of a vehicle and reasonably choosing to take this, the only vehicle available. If, as would surely be possible in some courts, both plaintiffs could overcome any arguments that the defendant manufacturer’s duty was one of warning only and, in any event, that its unreasonably risky design was not a legal cause of the harm suffered by plaintiffs, Blue, who did not know

83. Restatement, Torts § 893 (1934).
of the defect, would recover. As in the case of Blue, Black was not contributorily negligent, but, having known of the defect and having fully appreciated the danger, he consented to the risk. It might be argued that his range of choice was restricted by defendant's substandard conduct, because the purchaser of the motorcycle probably would have had another and safer vehicle to lend to plaintiffs if the defendant had not marketed motorcycles of defective design, including the one that figured in the accident. But it is probably more realistic to ascribe the compulsion under which the plaintiff Black made his choice to other factors (e.g., an emergency need for medical attention to Blue) than to duress from defendant's substandard conduct. The rationale of Saeter, recognizing assumption of risk as one of two independent grounds of judgment, suggests the result of nonliability to Black in the hypothetical case. Arguably no different result would be reached under the Restatement rule concerning duress, under which assumption of risk is inapplicable if the defendant "has created a situation in which it is reasonably necessary to undergo a risk in order to protect a right or avert a harm." Does the defendant "create" the situation by contributing one factor to it? Does not the answer depend on the relative significance of that factor among others?

Perhaps the combination of the suggested legal results in the hypothetical cases of Black and Blue seems to reward ignorance and penalize appreciation of risk. But this is a paradox similar to one that is a familiar part of the law of contributory negligence. The person who knows more about the dangers of some object than that minimum for which all members of the community are held legally responsible is judged

627 (1959) (issue concerning causal relation between manufacturer's negligence and injury to dealer's mechanic was for the jury where notice concerning defective brakes of a particular model had been given to dealer, and dealer's assistant service manager knew of the defect in individual car before forgetfully driving it and striking mechanic) with Ford Motor Co. v. Wagoner, 183 Tenn. 382, 192 S.W.2d 840, 842 (1946) (judgment for defendant manufacturer, the issue of causal relation between manufacturer's negligence and injury to subvendee's guest-driver being taken from the jury, where safety latch to supplement defective hood latch had been given to dealer and by dealer tendered to but rejected by original retail vendee, who was dealer's salesman). Also see GILLAM, PRODUCTS LIABILITY IN THE AUTOMOBILE INDUSTRY 168-70 (1960), and cases cited in notes 69 and 70 supra.

85. See text at note 49 supra.

86. By deliberate choice, the hypothetical facts do not involve a sale of the motorcycle to Black "as is." Of course the argument for nonliability would be somewhat stronger if such a sale were assumed.

87. RESTATEMENT, TORTS § 893 (1934).
by the standard of an ordinarily prudent person with his exceptional knowledge, thus seemingly being held to a more demanding standard than that applied to his less learned contemporaries. The answer to this paradox, in both instances, is that the quality of the conduct of one who acts with the benefit of the greater knowledge is different from that of one who acts without it. Here, the difference is that between consent to risk and nonconsent. If one finds this answer unpersuasive, he will be driven hard toward the conclusion that there is too little of merit in the doctrine of assumption of risk to justify its retention as an independent basis for denial of liability.

E. Proration of Loss or Denial of Relief

Should proration of loss rather than complete denial of recovery be the rule applicable in the event of co-authorship of harm to oneself? If it is a sound view that the doctrine of consensual assumption of risk is based on blameworthy participation by plaintiff, this problem is analogous to that concerning the effect of contributory negligence. So long as contributory negligence is given the effect of a complete bar, probably the same effect should be given to consensual assumption of risk. But a rule of comparative negligence seems fairer than the rule that contributory negligence is a complete bar, and there are indications that comparative negligence will be adopted in more jurisdictions in the future. The principal argument for sharing of the loss in that situation is based on the notion that it is unfair that the whole loss be placed on either of two parties, both of whom have contributed to causing it by conduct infringing a legal standard — the standard of reasonable care. While the nature of the standard is different in assumption of risk cases, the element of co-authorship remains. Moreover, the differences in nature of plaintiff’s contribution and defendant’s contribution may not be so great as the different characterizations of negligence and assumption of risk seem to suggest. Whatever those differences may be, they leave unaffected the basic notion of comparative negligence that neither of the co-authors of harm should have to bear it all. Undoubtedly it would be more difficult to apply to assumption of risk a rule of proration according to relative degrees of fault, as is done in some forms of comparative negligence. But if the problems of administration make such a rule of proration seem inappropriate, as may be the case, should not a rule of equal sharing among
co-authors of the harm, like that applicable to contribution among tortfeasors, be preferred over a rule that assumption of risk is a complete bar?

A finding of assumption of risk has been regarded as a complete bar to a claim based on negligence, even under a comparative negligence statute. But in one of the comparative negligence states, Wisconsin, there have been recent indications of the probability of a full-scale re-examination of the doctrine of assumption of risk, and such a re-examination might well include the question whether, if any form of assumption of risk is to be preserved, it should be treated as a partial rather than complete defense to achieve consistency in principle with comparative negligence. It would be well, also, that this problem be dealt with explicitly in comparative negligence statutes that are adopted or amended in the future.

IV. COMMENTS ON TERMINOLOGY

In cases of consent to risk, it is possible to express the conclusion of nonliability, as most commentators prefer to do, by saying that the defendant has no duty to one who fully appreciates the risk and chooses to encounter it, or to one who objectively manifests such appreciation and choice. But we might as readily say that the defendant has no duty to one who is contributorily negligent. In both instances, the result of

88. E.g., Krolikowski v. Allstate Ins. Co., 283 F.2d 889 (7th Cir. 1960), applying Wisconsin law.
90. While comparative negligence statutes generally have contained no explicit reference to assumption of risk, the F.E.L.A. abolishes the defense in cases to which it is applicable. 35 Stat. 66 (1908), as amended by 53 Stat. 1404 (1939), 45 U.S.C. § 54 (1952).
91. E.g., Bohlen, Voluntary Assumption of Risk, 20 Harv. L. Rev. 14, 16-18 (1906), reprinted in Bohlen, Studies in the Law of Torts 441, 443-46 (1926); 2 Harper and James, Torts 1162 (1956). The reader will also find that other contributors to this symposium use versions of the no-duty interpretation of assumption of risk.
92. During the early development of the defense of contributory negligence, it was occasionally explained on the somewhat analogous basis that defendant's conduct was not a legal cause of plaintiff's harm, his own fault being the entire cause. E.g., Buyley, J., in Butterfield v. Forrester, 11 East. 60, 61 (K.B. 1809) ("If he had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault"); Bowen, L.J., in Thomas v. Quartermaine, 18 Q.B.D. 685, 697 (1887) (contributory negligence rests on the view that "the plaintiff has by his own carelessness severed the causal connection between the defendant's negligence and the accident"). Perhaps it is significant that the latter opinion is also a leading exposition of the no-duty interpretation of assumption of risk. See Bohlen, Voluntary Assumption of Risk, 20 Harv. L. Rev. 14, 16-18 (1906), reprinted in Bohlen, Studies in the Law of Torts 441, 443-44 (1926), criticizing the "confusion" of contributory negligence and legal cause in this opinion, but applauding the assimilation of assumption of risk and no duty.
denial of relief would thus be expressed in terms connoting the lack of some requisite concerned with either the quality of defendant’s conduct or the nature of the relation between plaintiff and defendant, for this surely is the connotation of “no duty.” But in both instances the basis for refusal of relief is a quality of plaintiff’s participation in bringing about the harm.

Consider the hypothetical case of the use of a defectively designed motorcycle by two persons, only one of whom is aware of the defect.93 The manufacturer’s conduct plainly violates a duty of care toward the one who is not aware of the defect. The distinction between this claimant and the other, who probably cannot recover, turns solely on the fact that only the latter fully appreciated the risk. If nonliability to the latter is explained by saying that the manufacturer had no duty to him, then the concept of duty, connoting something concerning defendant’s participation in bringing about plaintiff’s harm or concerning the relationship between the plaintiff and the defendant, is so defined as to turn instead on a characteristic of plaintiff’s participation. The statement that defendant had “no duty” in these circumstances is at least misleading in connotation. On the other hand, the statement that the plaintiff is barred by “assumption of risk” connotes, and correctly so in this instance, that the decision against liability is based upon the plaintiff’s consent to risk.

Meistrich v. Casino Arena Attractions, Inc.94 presents a good example of the quality of the terminology under which it is insisted that a defense based on the plaintiff’s voluntary but reasonable choice to encounter risk be classified as a no-duty defense; it well illustrates the likelihood that this terminology will produce ambiguity at least and perhaps outright confusion as well. This opinion is not an extraordinarily vulnerable statement of the point of view under criticism; rather it states that view very well indeed. One of the points of the opinion—a point also expounded by Harper and James95—is that assumption of risk in one sense (called “primary”) is merely the converse of the proposition that there was no breach of duty by defendant, and in another sense (called “secondary”) is merely a form of contributory negligence because, in the latter sense, it is not an effective defense unless plaintiff’s voluntary sub-

93. See text at note 84 supra.
95. 2 Harper and James, Torts 1162 (1956).
mission to the known risk was unreasonable. Near the end of the Meistrich opinion, the following passage appears:

“The fact that there [in cases in which the defendant has a duty to warn of the existence of a risk that is not itself the product of the defendant’s negligence] plaintiff’s knowledge of the risk is crucially involved in the issue of defendant’s breach of duty should not obscure the obligation of the plaintiff to prove that breach, i.e., a failure to warn. Different, of course is a case in which the risk itself was negligently created and defendant as part of his affirmative defense of contributory negligence seeks to prove that plaintiff was warned or knew of it.”96 (Emphasis added.)

In context, this passage implies that if the defendant negligently created the risk, his only available defense of assumption of risk is one in the “second” sense, a type of contributory negligence. This implied proposition is accurate only if the word “negligently,” at the points italicized above, is taken to mean not merely “carelessly” or “unreasonably” but also “and in breach of a legally recognized duty.” Proponents of this terminology concede that the defendant who has created a danger under circumstances such that he would be held negligent toward a person ignorant of the danger is sometimes held not subject to liability to one who is fully aware of the danger. If one chooses, as a matter of terminology, to say that such a defendant’s single course of conduct in creating a dangerous condition today is negligent toward those victims of future days who are ignorant of the danger but is not negligent toward those victims of future days who become fully aware of the danger before they suffer injury from it, then the proposition implied in the foregoing passage is accurate. But the form of statement is misleading in that it might cause the reader to believe that the plaintiff’s full appreciation of the risk was being declared wholly irrelevant to liability unless his conduct amounted to contributory negligence. On the other hand, if in the foregoing quotation and in the implied proposition the word “negligently” is taken as a description of the unreasonable quality of defendant’s conduct described as of a time when he could foresee that some potential victims would discover the dangerous condition and others would not, then the implied proposition is inaccurate since liability may be defeated on a no-duty theory (assumption of

96. 31 N.J. at 56, 155 A.2d at 97.
risk in the "primary" sense) by proof that the plaintiff fully appreciated the danger and voluntarily encountered it.

Another statement often made by proponents of the terminology under criticism is that assumption of risk negates the existence of any duty on defendant's part. Of course consent to risk bears on the quality of defendant's conduct if the consent is communicated to defendant prior to the occurrence of his conduct. If the proposition that assumption of risk negates duty is limited to this situation, it is unobjectionable. If the proposition is extended to cases in which consent to risk occurs at a time well after defendant's conduct, however, it applies to cases in which defendant, at the time of his conduct, did not know that consent to the risk would occur and in that state of uncertainty was unreasonable in creating the risk. The quality of defendant's conduct is not changed by the plaintiff's subsequent consent to risk. Rather, the explanation of nonliability is in the quality of plaintiff's participation in bringing about his own injury.

It is relevant to the choice of terminology that wherever plaintiff's awareness of the danger is in factual dispute, this issue must be submitted to the jury with guiding instructions. Adoption of the point of view under criticism, if consistently adhered to, would lead to instructing the jury that whether defendant violated his duty of reasonable care for the protection of the plaintiff depends not alone on the question whether defendant acted reasonably but also on the question whether plaintiff became aware of the danger created by defendant. This is true since the jury must find the defendant not negligent if they find either (a) that the defendant acted reasonably or, (b) that even though the defendant may have acted unreasonably, the plaintiff was fully aware of the danger and voluntarily encountered it.

If assumption of risk is incorporated into the concept of no duty, the effect is to treat it as "an exceptional curtailment of

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97. Classifying the problem as one of duty rather than assumption of risk should not preclude the jury's participation in resolving factual disputes. It is sometimes loosely stated that a question of duty is always one for the court, but this assertion is not well founded if it is meant to apply to a determination of the disputed facts of a particular case. Compare Palsgraf v. Long Island R. Co., 248 N.Y. 339, 345, 162 N.E. 99, 101 (1928), wherein Cardozo, C.J., speaking of a factual dispute relevant to duty under his analysis, stated: "The range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the jury."
defendant's duty" that not only is a diversion from the main theme of the concept of duty but also is in all instances dependent on plaintiff's conduct and in some instances on plaintiff's subsequent conduct. Confusion is less likely, both on the bench and in the jury room, if consent to risk is treated instead as a distinct, affirmative defense, concerned with plaintiff's own participation in bringing about the harm of which he is complaining.

V. CONCLUSIONS

If an independent doctrine of assumption of risk is to be maintained, it should be limited to cases that fall strictly within the concept of consent to risk or within that slight deviation from this concept concerning risks that are obvious. Within this limited scope, the doctrine is supported by policy factors concerned with plaintiff's co-authorship of his own harm — policy factors that are inapplicable to less consensual forms of assumption of risk, including assumption of risk by consent to conduct or condition, associational assumption of risk, and imposed assumption of risk. If application of the doctrine in any of these last three forms has policy support, it is on grounds other than co-authorship by consent to risk. Both incisiveness of inquiry into the adequacy of asserted grounds for denial of liability and clarity of expression of decisions and reasons would be facilitated if use of the phrase "assumption of risk" in these essentially nonconsensual senses were discontinued. Those decisions of nonliability of a manufacturer that are reached on the theory that his duty is rigidly limited to warning conform with this recommendation about choice of terminology and in so doing expose to clearer view their own susceptibility to criticism on substantive grounds.99

It may be suggested that the dispute concerning applicability of a separate doctrine, assumption of risk, to cases of free and informed consent to risk is principally one of terminology. It seems likely, however, that the dispute runs deeper and that critics of this usage of assumption of risk, not accepting the policy justifications outlined above, would prefer that the defense not be recognized under any name in circumstances where none of the other theories of defense is appropriate. If that

98. The quoted phrase is from 2 HARPER AND JAMES, TORTS 1191 (1956).
99. See, e.g., Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950), taking note of susceptibility of the result to criticism but responding that a change "so fundamental" is a function of the legislature rather than the courts.
be so, perhaps their objective is more likely to be achieved if the problem of consent to risk is dealt with as one of duty, since the blameworthy character of defendant’s conduct is more likely to seem an adequate answer to an argument of no duty than to one of affirmative defense.\footnote{100}

The question whether consent to risk is to be recognized as a basis of denial of liability is a matter of greater concern than the question whether the doctrine is to be regarded as an aspect of the duty of the defendant or instead as a distinct defense. Undoubtedly the plaintiff’s consent to risk, if communicated to the defendant, is relevant to appraisal of the quality of defendant’s participation and the nature of the relationship between plaintiff and defendant, and thus to the question of duty. Is consent to risk also independently relevant as a kind of contributory fault other than contributory negligence—at co-authorship of harm to oneself?

In the vast majority of cases in which the element of co-authorship of harm by consent to risk furnishes a justification for denial of liability, it happens that there is also justification for that result either on grounds of “no duty” in the stricter sense, consistent with the connotations of that phrase, or on other grounds such as want of a showing that defendant’s sub-standard conduct was a legal cause of plaintiff’s harm. Thus it is a debatable question whether recognition of an independent doctrine of consensual assumption of risk (or a comparable limitation as a distinct phase of the duty concept) will affect the results in enough cases to warrant the costs of maintaining such a doctrine in tort law. It might be argued that a degree of continuing confusion about the outer limits of the doctrine is inevitable if we attempt to maintain it, and that this confusion may lead to more results that are unsatisfactory from the point of view of ideal adherence to policy justifications underlying tort law than would occur if the independent doctrine were abolished.

\footnote{100. Cf. 2 Harber and James, Torts 1191 (1956): “[W]herever assumption of risk, in the primary sense, applies, this means that there is an exceptional curtailment of defendant’s duty below the generally prevailing one to take care to conduct oneself so as not to cause unreasonable danger to others. . . . [T]hese exceptions represent a doubtful policy indeed and are back eddies in the rising tide of liability at least for the injurious consequences of unreasonably dangerous acts and omissions, i.e., of negligence. And if such a result is thought desirable perhaps it is more likely to be reached here through the back door of assumption of risk—which makes a lack of duty look like a defense—than through a more straightforward analysis.”}
But a more optimistic view of the capacity of our legal system to approach the ideal seems appealing. A wisely pruned doctrine of assumption of risk, analogous to the doctrine of consent in actions based on intentional interferences, seems worth preserving as a defense to actions based on negligence. Such a doctrine, adhering closely to the concept of consent to risk, will properly affect results occasionally. Moreover, there is some value, perhaps, in the expression of a principle as closely tied to our way of thought about the basis of liability in negligence as this one appears to be, even when it is a second reason for the same result that would otherwise be reached.

Policy justifications for recognizing defenses of contributory negligence and assumption of risk are plainly less cogent, however, in relation to claims based on strict liability. Though the issue is debatable, it appears that the better solution is to deny recognition of an independent defense of consent to risk in cases of strict liability for injuries resulting from defective products. If this view prevails, the significance of assumption of risk in products liability cases will diminish with the trend toward strict liability.

101. This is not to deny, however, the relevance of plaintiff's free choice to encounter a known danger as a factor bearing on the question whether the harm he suffers is within the scope of whatever basis is chosen for the imposition of strict liability. For example, in a case involving allergic reaction to a cosmetic, marketed with inadequate warnings, it may be concluded that harm incurred by a plaintiff who has freely chosen to use the cosmetic, after learning about the risk from other sources than defendant, is beyond the scope of liability because the defendant's duty, though a strict duty rather than a duty of care, is only a duty of adequate warning and the failure to discharge that duty is not a legal cause of harm suffered by one who acquired full notice by other means. The relevance of plaintiff's free choice to the negation of the prima facie case in such a way as this is distinct from the question whether an independent defense of consent to risk should be recognized.

Note that the comment in the text above is concerned with consent to risk. If "assumption of risk" is used in one of the less consensual senses, no doubt it may be invoked in relation to strict liability of suppliers of products. For example, one who uses "assumption of risk" to explain nonliability of a cosmetics manufacturer for allergic reaction to a cosmetic marketed with adequate warning, instead of saying that the manufacturer's duty was merely one of warning and was fully discharged, might as appropriately invoke this defense in cases of a strict duty of warning as in those of a duty of care to warn. The same is true of use of the phrase in relation to cases wherein the risk-creating characteristic of the product is not regarded as a defect. See an example of such usage in Gillam, Products Liability in the Automobile Industry 207 (1960). Unless the comments of Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099, 1148 (1960), are construed as referring to "assumption of risk" in a sense other than consent to risk, they are in opposition to the view expressed in the text above since Prosser states, with no indication of disapproval in principle, that probably the defense of assumption of risk will be carried over to cases of strict liability of suppliers of products.