Washington and Lee Law Review

Volume 23 | Issue 1 Article 7

Spring 3-1-1966

Distinctions Between Assumption of Risk and Contributory Negligence

CASE COMMENTS

DISTINCTIONS BETWEEN ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE

"Attempting to explain with logic the cases on assumption of risk is almost an impossible task"; the cases seem irreconcilable,[1] and many courts use the terms assumption of risk and contributory negligence interchangeably.[2] The doctrines of assumption of risk and contributory negligence overlap when plaintiff has made an unreasonable choice to assume the risk; consequently many scholars and some courts believe a merger would be appropriate.[3] The majority of courts have rejected this merger on the ground that assumption of risk and contributory negligence are distinguishable when a person reasonably and voluntarily chooses to encounter a known danger, thus assuming the risk, yet not being contributorily negligent.[4] This distinction that a plaintiff may voluntarily, yet reasonably, choose to encounter a known danger seems highly questionable when the basis for determining voluntary choice is examined.

The problems involved in distinguishing between assumption of risk and contributory negligence are illustrated in *Kelley v. Alexander*.[5] Plaintiff employed defendant to repair conditions on plaintiff's property, and, while performing these repairs, defendant left an unprotected hole in plaintiff's yard. Plaintiff, afraid that the children who frequently played in her yard might be hurt, was attempting to drag a limb over the hole when she slipped and fell into the hole.

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[1]Greenhill, *Assumption of Risk*, 16 Baylor L. Rev. 111 (1964).

[2]*Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90, 93 (1959); *Petrone v. Margolis*, 20 N.J. Super. 180, 89 A.2d 476, 477 (1952); *Mudrich v. Standard Oil Co.*, 153 Ohio St. 31, 90 N.E.2d 859, 862 (1950); *Ferguson v. Jongsma*, 10 Utah 2d 179, 350 P.2d 404 (1960).

[3]*Frelick v. Homeopathic Hosp. Ass'n*, 51 Del. 568, 150 A.2d 17 (1959); *Felgner v. Anderson*, 375 Mich. 23, 133 N.W.2d 136, 153 (1965); *McGrath v. American Cyanamid Co.*, 41 N.J. 272, 196 A.2d 238, 239-40 (1963).

[4]E.g., *Seaboard Air Line Ry. v. Horton*, 233 U.S. 492, 503 (1914); *Narramore v. Cleveland, C.C. & St. L. Ry.*, 96 Fed. 298, 304 (6th Cir. 1899); *Porter v. Louisville & Nashville R.R.*, 201 Ala. 469, 78 So. 375, 377 (1918); *Wescott v. Chicago Great W.R.R.*, 157 Minn. 325, 196 N.W. 272, 273 (1923); *Lively v. Chicago, R.I. & P. Ry.* 115 Kan. 784, 225 Pac. 103, 105 (1924). Rice, *The Automobile Guest and the Rationale of Assumption of the Risk*, 27 Minn. L. Rev. 323, 335 (1943), Comment, *"Volenti Non Fit Injuria" is Actions of Negligence*, 8 Harv. L. Rev. 457, 461 (1895).

[5]392 S.W.2d 790 (Tex. Civ. App. 1965).

Plaintiff brought suit for her injuries and defendant pleaded contributory negligence and assumption of the risk. The trial court granted defendant a summary judgment without elaborating on which defense the judgment was based. On appeal plaintiff contended that under the rescue doctrine she was justified in encountering the danger and thus did not assume the risk.[6] The appellate court upheld the summary judgment on the ground that plaintiff had assumed the risk. The rescue doctrine was held inapplicable here as justification for assuming the risk because there was no evidence of "imminent peril."[7]

The lone dissenter based his opinion on two grounds: first, under previous decisions of the court, the rescue doctrine may have been applicable in *Kelley*.[8] However, the dissenter did not elaborate on this point and may have realized that discussion of the rescue doctrine was irrelevant since the proper effect of the rescue doctrine is to provide a cause-in-fact connection and a duty relationship between a negligent defendant and a third party rescuer.[9] In *Kelley*, defendant's lia-

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[6]Plaintiff relied on recent dicta that under assumption of the risk the plaintiff cannot recover if he deliberately and voluntarily encounters a known risk, however, "there may be some exceptions, such as where the plaintiff is motivated by humanitarianism or rescue impulses." *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368, 379 (Tex. 1963).

[7]The court may have overstepped its powers in deciding that, as a matter of law, there was no imminent peril. "The word 'imminent' carries the idea of closeness in point of time, but does not necessarily imply the absence of any interval whatever. There is some latitude in its application according to the situation presented." *Smith v. City Ice & Delivery Co.*, 117 Kan. 485, 232 Pac. 603, 605 (1925). "In determining whether the peril, or appearance of peril, is imminent ... the circumstances presented to the rescuer must be such that a reasonable prudent man, under the same or similar circumstances would determine that such peril existed. (The issue of whether the rescuer's determination conformed with the reasonably prudent man standard is a question for the jury, under proper instruction.)" *French v. Chase*, 48 Wash. 2d 825, 297 P.2d 235, 239 (1956). The fact that no one was in actual danger and that plaintiff's act might ultimately have proved unnecessary does not affect the situation. The facts must be viewed as they might reasonably have appeared to the plaintiff, and there is a "peculiar value" in submitting the issue to the jury. *Cote v. Palmer*, 127 Conn. 321, 16 A.2d 595, 599 (1940).

[8]The dissenter noted that *Swift & Co. v. Baldwin*, 299 S.W.2d 157 (Tex. Civ. App. 1957), cited by the *Kelley* majority, applied the rescue doctrine to a fact situation similar to the one facing plaintiff in *Kelley*. In *Swift & Co.* plaintiff was injured while attempting to repair a loose sign in an area where school children frequently passed. The jury found there was imminent peril, although there were no children in the area at the time of plaintiff's act.

[9]"The effect of the rescue doctrine when properly applied ... is to extend for the benefit of the rescuer the liability which the defendant in a given case may have toward the person whom it has placed in danger." *Brady v. Chicago & Nw.R.R.*, 265 Wis. 618, 62 N.W.2d 415, 419 (1954). Cardozo stated in the landmark case, *Wagner v. International Ry.*, 232 N.Y. 176, 133 N.E. 437 (1921), "danger invites rescue" and the defendant cannot claim the rescuer was unforeseeable.

bility to plaintiff is based on the employment contract relation between them, and the rescue doctrine is raised by plaintiff to refute assumption of risk, not to provide the necessary cause-in-fact connection and duty relationship between defendant and plaintiff.

The second ground of dissent was that, regardless of the applicability of the rescue doctrine in *Kelley*, plaintiff had not assumed the risk because "one who has a legal right, or is under a social or legal duty, to act as he has under conditions created by defendant's wrong does not act voluntarily."[10] The defendant's duty violation imposed a legal duty on the plaintiff;[11] thus the plaintiff's choice to encounter the danger was not the voluntary choice required for assumption of risk.[12]

What constitutes a voluntary choice has caused most of the confusion between assumption of risk and contributory negligence.[13] To understand that confusion it is necessary to understand in what sense assumption of risk is being used.[14] Assumption of risk has been analyzed into at least three distinct fact situations.[15] (1) The plaintiff

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[10]*Kelley v. Alexander*, supra note 5, at 794.

[11]"A possessor of land is subject to liability for bodily harm to children trespassing thereon caused by an artificial condition upon the land if (a) the place where the condition exists is one upon which the possessor knows or has reason to know that [such] children are likely to trespass, and (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or seriously bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it...." Restatement (Second), Torts § 339 (1965).

[12]Assumption of risk is applied when the plaintiff has made a voluntary choice to encounter a known and appreciated danger. *White v. McVicker*, 216 Iowa 90, 246 N.W. 385 (1933); *Robert E. McKee, Gen. Contractor, Inc. v. Patterson*, 153 Tex. 517, 271 S.W.2d 391 (1954). *Halepeska v. Callihan Interest, Inc.*, supra note 6. After knowledge and appreciation have been established, "there yet remains the issue as to whether the invitee voluntarily exposed himself to the danger known and appreciated by him." *Sinclair Ref. Co. v. Winder*, 340 S.W.2d 503, 504 (Tex. Civ. App. 1960). "The voluntary quality of ...[plaintiff's] action... is encountered immediately upon consideration of the defense" of assumption of risk. *Sewell v. London*, 371 S.W.2d 426, 428-29 (Tex. Civ. App. 1963).

[13]Rice, supra note 4, at 335-37.

[14]Some courts have limited assumption of risk to employment situations. But these courts apply assumption of risk principles to non-employment situations under the guise of volenti non fit injuria. Such a distinction between assumption of risk and volenti non fit injuria is one without difference. *Surface v. Safeway Stores, Inc.*, 169 F.2d 937, 942 (8th Cir. 1948); *Southern Pac. Co. v. McCready*, 47 F.2d 673, 676 (9th Cir. 1931); *Dietz v. Magill*, 104 S.W.2d 707, 711 (St. Louis Ct. App. 1937); *Kirby Lumber Corp. v. Murphy*, 271 S.W.2d 672, 678 (Tex. Civ. App. 1954); *Bailey v. Safeway Stores, Inc.*, 55 Wash. 2d 728, 349 P.2d 1077, 1078 (1960).

[15]The three situations referred to in this comment are suggested in Prosser, *Torts* § 67 at 450-51 (3d ed. 1964). The Restatement recognizes these three situations and adds a fourth: when the plaintiff assumes the risk by making a reckless

assumes the risk when he expressly and validly consents to relieve the defendant of what would otherwise be a duty of care toward him. In this situation, since the defendant was relieved of a legal duty to plaintiff, no tort occurs.[16] (2) The plaintiff assumes the risk when he voluntarily enters into a relationship with the defendant, usually employment, which will necessarily involve some specific risk. The plaintiff's voluntary entrance into the relationship implies his consent to the defendant's conduct, and again the defendant is relieved of a legal duty to plaintiff.[17] In these two situations assumption of risk is used as an alternative expression for the proposition that the defendant was not negligent, i.e., owed no duty to the plaintiff.[18] Used in this sense, assumption of risk adds nothing to the traditional concepts of duty and negligence and is merely a term used for identifying a situation where the defendant has not broken any duty owed to the plaintiff.[19] (3) In the third situation, the defendant has violated his duty to the plaintiff and will be liable, unless he can establish that the plaintiff assumed the risk by voluntarily choosing to encounter a

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choice to encounter the danger, he is contributorily negligent. Restatement (Second), *Torts* § 496A (1964). Situations one and two are often merged and referred to as the primary sense of assumption of risk, while the third situation is termed the secondary sense of assumption of risks. James, Assumption of Risk, 61 Yale L.J. 141 (1952). At least eight states have recognized this dual nature of assumption of risk, either directly or by inference: California, Indiana, Kentucky, Nebraska, New Jersey, New York, Utah, Vermont, Annot., 82 A.L.R.2d 1218, 1237-41 (1962).

[16]Prosser, op. cit. supra note 15; Restatement (Second), *Torts* § 496A (1964); James, supra note 15.

[17]*Ibid.*

[18]"To call this defense [assumption of risk] into play requires a showing that the person charged has no duty to protect the other from the risk." Dougherty v. Chas. H. Tompkins Co., 240 F.2d 34, 36 (D.C. Cir. 1957). Volenti non fit injuria "means that the injured party consented to the act or omission which caused his injury and which without such consent, would be a legal wrong." *Wood v. Kane Boiler Works, Inc.*, 150 Tex. 191, 238 S.W.2d 172, 174 (Tex. 1951). See *Frelich v. Homeopathic Hosp. Ass'n*, 51 Del. 568, 150 A.2d 17 (1959); *White v. McVicker*, 216 Iowa 90, 246 N.W. 385, 386 (1933). *Wash v. West Coast Coal Miners, Inc.*, 31 Wash. 2d 396, 197 P.2d 233, 238 (1948).

[19]"[A]ssumption of risk serves no useful purpose, since it introduces nothing that is not fully covered by either the idea of an absence of duty on the part of the defendant, or by that of contributory negligence of the plaintiff." *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90, 96 (1959). The Supreme Court of New Jersey later considered the possiblity of using the phrase assumption of risk to focus attention on the concept of no duty violation by the defendant. The court rejected the use of the phrase assumption of risk and stated: "Experience, however, indicates the term 'assumption of risk' is so apt to create mist that it is better banished from the scene. We hope we have heard the last of it. Henceforth let us stay with 'negligence and contributory negligence.'" *McGrath v. American Cyanamid Co.*, supra note 3, at 240-41.

known danger.[20] As thus used, assumption of risk is an affirmative defense and bars the plaintiff's recovery because of his own conduct, even though the defendant has been clearly negligent; i.e., has violated his duty to the plaintiff.[21] In discussing the confusion between assumption of risk and contributory negligence, the remainder of this comment will use the phrase assumption of risk to mean an affirmative defense, as in this third situation.

Assumption of risk and contributory negligence are similar in that both bar a negligent defendant's liability because of the plaintiff's own conduct. Assumption of risk bars the plaintiff's recovery when he has made a voluntary choice to encounter a known danger,[22] while contributory negligence bars the plaintiff's recovery because he has acted unreasonably under the circumstances.[23] The similarity between the two doctrines continues in that the plaintiff has both assumed the risk and been contributorily negligent when he has made an unreasonable, but voluntary choice to encounter a known danger.[24] These similarities have led some courts to conclude that assumption of risk is a form of contributory negligence.[25] The majority of courts have rejected the proposal that assumption of risk exists only as a part of contributory negligence, and seek to distinguish the two defenses.[26]

Assumption of risk and contributory negligence are sometimes distinguished on the ground that they are based on different standards. Assumption of risk is concerned with a *subjective* standard requiring that the plaintiff have actual knowledge of the danger, whereas contributory negligence is concerned with an *objective* standard requiring only the knowledge of danger that a reasonably prudent man would have.[27] This distinction is helpful only when the assumption

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[20]*Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 155 A.2d 90 (1950); *McEvoy v. City of New York*, 266 App. Div. 445, 42 N.Y.S.2d 746, 749 (1943); *Ewer v. Johnson*, 44 Wash. 2d 746, 270 P.2d 813 (1954).

[21]*Ibid.*

[22]Cases cited note 12 supra.

[23]*Kleppe v. Prawl*, 181 Kan. 590, 313 P.2d 227 (1957); *Chesapeake & O. Ry. v. De Atley*, 159 Ky. 687, 167 S.W. 933 (1914); *Kansas, Okla. & Gulf Ry. v. State*, 244 Wash. 717, 275 P.2d 274 (1954).

[24]*Petrone v. Margolis*, 20 N.J. Super. 180, 89 A.2d 476, 477 (1952); *McEvoy v. City of New York*, supra note 20.

[25]*Schlemmer v. Buffalo*, R. & P. Ry., 205 U.S. 1, 12 (1907); *Swift and Co. v. Schuster*, 192 F.2d 615 (10th Cir. 1951); *Freedman v. Hurwitz*, 116 Conn. 283, 164 Atl. 647, 649 (1933); *Camp v. J.H. Kirkpatrick Co.*, 250 S.W.2d 413 (Tex. Civ. App. 1952).

[26]Cases cited note 4 supra.

[27]*Surface v. Safeway Stores, Inc.*, supra note 14, at 942; *Halepeska v. Callihan Interests, Inc.*, supra note 6, at 379; *Murdich v. Standard Oil Co.*, 153 Ohio St. 31, 90 N.E.2d 859, 862 (1950).

of risk standard is not met. When the assumption of risk requirement of subjective knowledge is not met, the defense of assumption of risk is eliminated.[28] and cannot be confused with contributory negligence. However, when the assumption of risk requirement of subjective or actual knowledge is met, the contributory negligence requirement of objective or constructed knowledge is also met, and a further distinction is necessary to prevent confusion.

The further distinction generally made between assumption of risk and contributory negligence is that voluntarily choosing to encounter a known danger may be reasonable, and consequently, not contributorily negligent.[29] The plaintiff is not contributorily negligent when his choice to encounter the danger is reasonable, but the plaintiff assumes the risk if his reasonable choice was also a voluntary choice.[30] Thus assumption of risk is concerned with the voluntariness of the plaintiff's choice to encounter a known danger, while contributory negligence is concerned with the reasonableness of the plaintiff's choice to encounter the danger.[31] The distinction makes it seem that voluntary choice and reasonable choice are independent of each other, while in fact they are interdependent.[32]

The interdependence of reasonable choice and voluntary choice

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[28]"Notice or knowledge and appreciation of the danger are indispensable to the assumption of the risk...." *City of Winona v. Botzet*, 169 Fed. 321 329 (8th Cir. 1909); *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass 155, 29 N.E. 464 (1891); *Taylor v. Home Tel. Co.*, 163 Mich. 458, 128 N.W. 728 (1910). *Alexander v. Great No. Ry.*, 51 Mont. 565, 154 Pac. 914 (1916).

[29]Authorities cited note 4 supra.

[30]*Surface v. Safeway Stores, Inc.*, supra note 14; *Pittsburgh, C., C. & St. L. Ry. v. Hoffman*, 57 Ind. App. 431, 107 N.E. 315, 318 (1914). "The maxim 'volenti non fit injuria' means: If one, knowing and comprehending the danger, voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom." *Landrum v. Roddy*, 143 Neb. 934, 12 N.W.2d 82, 84 (1943). *Jay v. Walla Walla College*, 53 Wash. 2d 590, 335 P.2d 458, 460 (1959).

[31]E.g., *Weber v. Eaton*, 160 F.2d 577, 578 (D.C. Cir. 1947); *Shaver v. Manziel*, 347 S.W.2d 20, 21 (Tex. Civ. App. 1961). Annot., 82 A.L.R.2d 1218, 1231 (1962).

[32]*Foster v. Buckner*, 203 F.2d 527 (6th Cir. 1953); *Freedman v. Hurwitz*, 116 Conn. 283, 164 Atl. 647 (1933); *Williams v. Town of Morristown*, 32 Tenn. App. 274, 222 S.W.2d 607 (1949). Defendant is liable for a "reasonable" effort to rescue. *Ridley v. Mobile & O. R.R.*, 114 Tenn. 727, 86 S.W. 606, 608 (1905). *McAfee v. Travis Gas Corp.*, 137 Tex. 314, 153 S.W.2d 442, 446 (1941); *Bond v. Baltimore & Ohio R.R.*, 82 W. Va. 557, 96 S.E. 932, 933 (1918). "[T]he question is not so much one of the voluntary nature of plaintiff's conduct in encountering the danger as it is one of feasibility and practicability.... [T]he alternatives which the plaintiff faced at the time of his... [decision] become important consideration[s] on whether he 'voluntarily' encountered the danger or whether there was such coercion as to vitiate the consent that he manifested." Keeton, *Personal Injuries Resulting from Open and Obvious Conditions—Special Issue Submission in Texas*, 33 Texas L. Rev. 1, 14 (1954).

as an element of assumption of risk[33] is apparent upon examining the basis courts use in determining whether the plaintiff's choice was voluntary. The courts have long recognized that there may be such pressure on the plaintiff as to destroy the voluntariness of his choice, and consequently his assumption of risk; although the opinions as to what constitutes sufficient pressure have varied from mere inconvenience[34] to nothing short of physical constriction.[35] Neither of these extreme views is followed today, and many courts now hold that there is sufficient pressure to destroy voluntariness of the plaintiff's choice when the defendant's negligent act has left the plaintiff no reasonable alternative.[36] Thus voluntary choice, as an essential element of assumption of risk, is contingent upon the reasonableness of the alternatives facing the plaintiff at the time of his choice.[37]

Choice, by definition, involves at least two possibilities from which to choose; consequently, the plaintiff has not made a choice unless there was an available alternative. Logically, the alternative must be

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[33]A voluntary choice to encounter danger is required because assumption of risk is based on the plaintiff's consent to the injury. Cases cited note 18 supra. The earliest appearance of assumption of risk was in situations where there was actual consent by the plaintiff. Rice, supra note 4, at 330. But even actual consent has occasionally been criticized as an inadequate reason for denying the defendant's liability. "There is nothing to be said in the defendant's favor.... If his conduct alone is considered, there is no reason why he should not bear the cost of compensating the plaintiff." Regardless of the plaintiff's conduct, society has an interest in deterring the defendant from exposing others to the risks of his created hazard. Mansfield, *Informed Choice in the Law of Torts*, 22 La. L. Rev. 17, 44 (1961). Later, assumption of risk was extended beyond actual consent situations to master-servant relations where consent was implied from the employment contract. With the extension of assumption of risk beyond the master-servant situation, the courts stated that the consent forming the basis of assumption of risk was to be found in the relationship between the plaintiff and the defendant. Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 La. L. Rev. 5, 8 (1961). Just what constitutes a sufficient relationship is uncertain; assumption of risk has been extended to strangers. *Williams v. Main Island Creek Coal Co.*, 83 W. Va. 464, 98 S.E. 511 (1919).

[34]*Pomeroy v. Westfield*, 154 Mass. 462, 28 N.E. 899 (1891). The British view is that "a man cannot be said to be truly 'willing' unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances... but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will." *Bowater v. Rowley Regis Corp.*, 1 K.B. 476, 479 (1944).

[35]Rice, supra note 4, at 22.

[36]E.g., *Dougherty v. Chas. H. Tompkins Co.*, 240 F.2d 34, 36 (D.C. Cir. 1957); *Thornbury v. Maley*, 242 Iowa 70, 45 N.W.2d 576, 581 (1951); *Edwards v. Kirk*, 227 Iowa 684, 288 N.W. 875, 879 (1939); *Pona v. Boulevard Arena*, 35 N.J. Super. 148, 113 A.2d 529, 532, 534 (1955); *Rush v. Commercial Realty Co.*, 7 N.J. Misc. 337, 145 Atl. 476 (1929). *Missouri, K. & T. Ry. v. McLean*, 55 Tex. Civ. App. 130, 118 S.W. 161 (1909).

[37]Authorities cited note 31 supra.

reasonable or unreasonable, and the plaintiff must either choose the alternative or reject it. Thus when the defendant's negligent conduct has exposed the plaintiff to a known danger, the plaintiff is faced with four possibilities: acceptance of a reasonable or unreasonable alternative to the known danger; rejection of a reasonable or unreasonable alternative to the known danger. In the first two possibilities, plaintiff by accepting an alternative to the known danger has chosen not to encounter the known danger; consequently plaintiff has not assumed the risk,[38] making the reasonableness of the alternative immaterial. In the third and fourth possibilities, plaintiff, by rejecting an alternative, has chosen to encounter the known danger. If assumption of risk is to be distinguished from the contributory negligence on the ground that the plaintiff may *voluntarily, yet reasonably,* choose to encounter a danger,[39] at least one of these latter two possibilities must constitute voluntary choice (assumption of risk), but not unreasonable choice (contributory negligence).

When the defendant's negligence has forced the plaintiff to choose between a danger and an unreasonable alternative, the plaintiff's choice to encounter the danger is not voluntary; thus the plaintiff has not assumed the risk. An unreasonable alternative is akin to the theory of duress, i.e., a choice of "your money or your life" is no real choice at all and negates the voluntariness of the plantiff's choice.[40] Forcing the plaintiff to forego a legal right in order to avoid danger does not afford him a reasonable alternative. The plaintiff cannot be required to surrender a valuable legal right, such as the right to use his land as he sees fit, merely because the defendant's conduct threatens physical harm if the plaintiff exercises his right.[41] Plaintiff in *Kelley* had a legal right to go on her own property to attempt a rescue, thus she did not assume the risk, since it was reasonably necessary to

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[38]Assumption of risk is applicable only when the plaintiff has chosen to encounter the danger. Cases cited note 12 *supra.*

[39]Authorities cited note 4 *supra.*

[40]*Fitzgerald v. Connecticut River Paper Co.,* 155 Mass. 155, 29 N.E. 464 (1891); Mansfield, supra note 32, at 46; Cases cited note 35 *supra.* "To constitute duress it is sufficient if the will be constrained by the unlawful presentation of a choice between comparative evils...." *Smith v. United States,* 153 F.2d 655, 661 (5th Cir. 1946). *Reiter v. Illinois Nat'l Cas. Co.,* 328 Ill. App. 234, 65 N.E.2d 830, 843 (1946). *Bratberg v. Advance-Rumely Thresher Co.,* 61 N.D. 452, 238 N.W. 552, 570 (1931).

[41]The rights of one man in the use of his property cannot be limited by the wrongful use by another of his property. *Leroy Fibre Co. v. Chicago, M. & St. P. Ry.,* 232 U.S. 340, 349 (1914). "At least, up to the point where one has become morally certain that the negligence of another will injure him he may make any proper and customary use of his property in total disregard of any negligence of that other, whether such negligence be known to him or not." *North Bend Lumber Co. v. City of Seattle,* 116 Wash. 500, 199 Pac. 988, 990 (1921).

encounter the danger in order to exercise that right.[42] However, plaintiff may have been contributorily negligent if the court deems it unreasonable to encounter the known danger to protect the right.[43]

In the fourth possible situation, in which the plaintiff has rejected a reasonable alternative and has chosen to encounter the danger, the plaintiff has assumed the risk because the defendant has not created sufficient pressure, in the form of an unreasonable alternative, to destroy the voluntariness of the plaintiff's choice.[44] The plaintiff is also contributorily negligent in rejecting a reasonable alternative because it is unreasonable to encounter danger voluntarily when there is a safe alternative.[45]

Of all the possible situations, only the fourth, in which the plaintiff rejected a reasonable alternative and chose to encounter the danger, constitutes a voluntary choice to assume the risk. This situation cannot support any distinction between assumption of risk and contributory negligence because here the plaintiff was also contributorily negligent in rejecting a reasonable alternative. Thus a voluntary choice to encounter a known danger, and thereby assume the risk, is equivalent to an unreasonabe choice to encounter the danger; hence, assuming the risk of a known danger is contributory negligence.[46]

It appears that the dissenter in *Kelley* was correct in his contention that the plaintiff did not voluntarily choose to assume the risk, since the plaintiff's only alternative, foregoing her legal right, was unreasonable and she should, absent contributory negligence, recover. It is submitted that it would be less confusing to consider these problems under the rubric of contributory negligence, since the distinction between

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[42]*Dougherty v. Chas. H. Tompkins Co.*, supra note 18, at 36. *O'Nan v. Kroger Co.*, 279 S.W.2d 236, 238 (Ky. 1955). *City of Madisonville v. Poole*, 249 S.W.2d 133, (Ky. 1952). *City of Madisonville v. Poole*, 249 S.W.2d 133, 137 (Ky. 1952). *Fawbush v. Carter*, 354 S.W.2d 649 (Tex. Civ. App. 1962).

[43]Plaintiff has not assumed the risk when she crosses a slippery floor to buy a can of beer if "it was necessary to make use of the slippery floor in order to accomplish her mission." Plaintiff may be contributorily negligent if it is found to be unreasonable to encounter the danger of a slippery floor in order to exercise the right to buy a can of beer. *Denham v. Steamer Avalon, Inc.*, 261 S.W.2d 291, 292 (Ky. 1953). *Dougherty v. Tompkins*, supra note 18, at 36.

[44]Cases cited note 36 *supra*.

[45]It is a "settled rule that where a person, having a choice of two ways, one of which is safe, while the other is subject to risks and dangers, voluntarily chooses the dangerous way and is injured, such person is guilty of contributory negligence and cannot recover." *Tharp v. Pennsylvania R.R.*, 332 Pa. 233, 2 A.2d 695, 696 (1938). See *Kaczynski v. Pittsburgh*, 309 Pa. 211, 163 Atl. 513 (1932); *Levitt v. B/G Sandwich Shops, Inc.*, 294 Pa. 291, 144 Atl. 71 (1928).

[46]*Schlemmer v. Buffalo*, R. & P. Ry., supra note 25, at 12; *McGeever v. O'Bryne*, 203 Ala. 266, 82 So. 508, 511 (1919); *Schleif v. Grigsby*, 88 Cal. App. 174, 263 Pac. 255, 258 (1927). Cases cited note 24 *supra*.

assumption of risk and contributory negligence—that the plaintiff may *voluntarily, yet reasonably,* choose to encounter a known danger—breaks down when one realizes that it is never reasonable knowingly to encounter a danger when there is a reasonable alternative; and when there is no reasonable alternative, there cannot by any voluntary choice, *a fortiori,* no assumption of risk.[47]

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[47]This comment has taken an analytical approach to the theories of assumption of risk and contributory negligence; it has not considered procedural distinctions of the two theories. These procedural distinctions can be viewed quickly by noting Prosser's assertions that: (1) treating assumption of risk as a duty problem would shift the burden of proof to the plaintiff and would make the issue one for the judge rather than the jury; (2) assumption of risk, but not contributory negligence, is a bar to strict liability. Prosser, Torts § 67, at 453 (3d ed. 1964). Prosser feels in his first assertion that viewing assumption of risk as a question of duty would be a hardship on the plaintiff. He uses the example where the plaintiff with full knowledge consented to ride in a defective airplane and was killed in its subsequent crash. Because of the plaintiff's death it will be difficult for his survivors to discover the facts. Prosser points out that under assumption of risk the defendant has the burden of proving the plaintiff's consent, while under the duty concept the plaintiff has the burden of proving the defendant's breach of duty. But Prosser's presentation seems to ignore the fact that under either concept, the plaintiff must begin his law suit by establishing the defendant's breach of duty to him. Once the plaintiff has offered evidence of the defendant's breach of duty, the burden of coming forward with evidence shifts to the defendant. The defendant can refute his liability by offering evidence of the plaintiff's consent. If the theory of assumption of risk is used, establishing the plaintiff's consent will mean the plaintiff assumed the risk; if the duty concept is used, establishing the plaintiff's consent will mean the defendant was relieved of his duty to the plaintiff. Thus Prosser's fear that using duty rather than assumption of risk concepts would shift the difficulty of discovering and pleading facts from the defendant to the plaintiff is not borne out. Under either concept the plaintiff has the burden of discovering and pleading evidence as to the defendant's breach of duty, while the defendant has the burden of discovering and pleading evidence as to the plaintiff's consent. Using duty rather than assumption of risk concepts does not transfer the issue from the jury to the judge. Under either concept the defendant's liability will depend on the question of plaintiff's consent, which is a fact issue for the jury. The only difference under the two concepts would be in the judge's instructions to the jury—under assumption of risk if you find the plaintiff did consent, he assumed the risk and the defendant is not liable; under duty concepts if you find the plaintiff did consent, the defendant has been relieved of his duty to the plaintiff and the defendant is not liable. Under Prosser's second assertion contributory negligence is a bar to strict liability if the contributory negligence is reckless or wanton. When the defendant is strictly liable for maintaining a wild animal, the plaintiff's conduct in aggravating and teasing the animal would constitute reckless contributory negligence and the defendant would not be liable. The plaintiff's conscious exposure to such a danger would be on the same plane as the conduct of the defendant in maintaining the danger. Wade, The Place of Assumption of Risk in the Law of Negligence, 22 La. L. Rev. 5, 15 (1961).