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Assumption of Risk in the Use of Icy Sidewalks

from side to side to frighten passengers in the rumble seat; a conviction of second degree murder was affirmed by the Supreme Court of North Carolina.

Texas, also, has upheld convictions of murder where the defendant was intoxicated and showing off. *Cockrell v. State*[26] upheld a conviction of murder when the defendant was intoxicated and driving at a high rate of speed. The defendant swerved to frighten some pedestrians, one of whom he struck and killed. The later case of *Lopez v. State*[27] affirmed a conviction on the same grounds.[28]

The cases of murder by the intoxicated motorist fall into two principal categories. States like Tennessee give controlling consideration to the intoxication of the defendant. Other states, like North Carolina, require that the defendant, in addition to being intoxicated, engage in some form of showing off. The Tennessee position has been the subject of some criticism.[29] A motorist should suffer criminal liability when his intoxicated condition causes the death of another person, and it seems the "showing off" analysis is the preferable theory to apply in this instance.

JOHN H. TATE JR.

ASSUMPTION OF RISK IN THE USE OF ICY SIDEWALKS

Assumption of risk is a well recognized doctrine in tort actions involving personal injuries caused by slipping or falling on icy sidewalks.[1] Often, the doctrine is applied to a situation in which a person, who has been injured, knew and appreciated a dangerous condi-

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[26]135 Tex. Crim. 218, 117 S.W.2d 1105 (1938).

[27]162 Tex. Crim. 454, 286 S.W.2d 424 (1956).

[28]Texas convictions are based on Texas Pen. Code Ann. § 802(c) (1948), which defines the crime of murder without malice [Texas Pen. Code Ann. § 1257(c) (1948)]. E.g., see, Yarborough v. State, 160 Tex. Crim. 239, 268 S.W.2d 154 (1954); Abargo v. State, 157 Tex. Crim. 264, 248 S.W.2d 490 (1952); Baggett v. State, 154 Tex. Crim. 618, 229 S.W.2d 801 (1950).

[29]Note, 27 Tenn. L. Rev. 417 (1960); Note, 23 Tenn. L. Rev. 896 (1955); Warren, Criminal Law and Procedure, 6 Vand. L. Rev. 1179 (1953).

[1]For discussions of assumption of risk see: Bohlen, Voluntary Assumption of Risk (pts. 1-2), 20 Harv. L. Rev. 14, 19 (1906); James Assumption of Risk, 61 Yale L.J. 141 (1952); Keeton, Assumption of Risk and the Lanowner, 20 Texas L. Rev. 562 (1942); Keeton, Personal Injuries Resulting from Open and Obvious Conditions, 100 U. Pa. L. Rev. 629 (1952); Paton, Some Problems Relating to Volenti Non Fit Injuria, 9 Brooklyn L. Rev. 132 (1940); Symposium, Assumption of Risk, 22 La. L. Rev. 1 (1961).

tion, and, nevertheless, voluntarily elected to encounter it.[2] A plaintiff who has assumed the risk cannot recover from a defendant who has been negligent in permitting the dangerous condition to exist,[3] because of the doctrine known as *volenti non fit injuria*.[4] This doctrine bars recovery even though the injured person has not been negligent in encountering the danger, since his decision may have been an entirely reasonable one, and he may even have acted with utmost caution because he knew of the danger.[5] Distinguishable from this doctrine is the rule that a person will be denied recovery where he acts unreasonably in encountering a known risk, and so his conduct amounts to contributory negligence. Here, a plaintiff is barred from recovery for two reasons: (a) he has impliedly consented to take a chance; and (b) the policy of the law is to deny recovery for a loss for which the plaintiff was at least partially responsible. In such a case, both assumption of risk and contributory negligence can be used as defenses.[6] When these two defenses overlap, ordinarily the name given to the defense makes little difference.[7] Since the entire conception of assumption of risk is rather vague, application of the doctrine has been

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[2]"'In the primary and narrower sense the doctrine can apply only when a contractual relation exists, ordinarily that of master and servant. But in the broader sense it may apply when no relation by contract exists within the limits of the maxim vilenti non fit injuria. 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. The maxim is predicted upon the theory of knowledge and appreciation of the danger and voluntary assent thereto.'" Southern Pac. Co. v. McCready, 47 F.2d 673, 676 (9th Cir. 1931), citing Grover v. Central Vt. Ry., 96 Vt. 208, 118 Atl. 874, 876 (1922). See also , Fowler v. Liquid Carbonic Corp., 121 So. 2d 49 (Fla. Dist. Ct. App. 1960); 38 Am. Jur. Negligence § 171 (1941); 65 C.J.S. Negligence § 174 (1950).

[3]Westborough Country Club v. Palmer, 204 F.2d 143 (8th Cir. 1953); Schmidt v. Fontaine Ferry Enterprises, Inc., 319 S.W.2d 468 (Ky. 1958); Strand Enterprises, Inc. v. Turner, 223 Miss. 588, 78 So. 2d 769 (1955); Landrum v. Roddy, 143 Neb. 934, 12 N.W.2d 82 (1943).

[4]No legal wrong is done to one who consents. See 44 Words and Phrases Volenti Non Fit Injuria 599 (perm. ed. 1962).

[5]Krolikowski v. Allstate Ins. Co., 283 F.2d 889 (7th Cir. 1960); Peirce v. Clavin, 82 Fed. 550 (7th Cir. 1897); Hunn. v. Windsor Hotel Co., 119 W. Va. 215, 193 S.E. 57 (1937); Hotchkin v. Erdrich, 214 Pa. 460,, 63 Atl. 1035 (1906); Miner v. Connecticut River R.R., 153 Mass. 398, 26 N.E. 994 (1891).

[6]2 Harper and James, Torts § 21.1 (1956).

[7]Compare the following cases. Assumption of Risk: Pomeroy v. Westfield, 154 Mass. 462, 28 N.E. 899 (1891); Howey v. Fisher, 122 Mich. 43, 80 N.W. 1004 (1899). Contributory Negligence: Mosheuvel v. District of Columbia, 191 U.S. 247 (1903); Wright v. City of St. Cloud, 54 Minn. 94, 55 N.W. 819 (1893); Houston, E. & W.T. Ry. v. McHale, 47 Tex. Civ. App. 360, 105 S.W. 1149 (1907); cf. Poole v. Lutz & Schmidt, Inc., 273 Ky. 586, 117 S.W.2d 575 (1938).

variant and diverse and, at times, courts have appeared to arrive at contrary decisions.[8]

The recent case of *Hansen v. City of Minneapolis*,[9] in which the defense of assumption of risk was unsuccessfully asserted by the defendant, illustrates the difficulty of applying the doctrine. The plaintiff brought a tort action for injuries suffered when she fell on an icy sidewalk adjacent to the defendant's office building. She claimed that the defendant was negligent in permitting an accumulation of ice on the sidewalk. The defendant denied acting negligently, but, even if it had, claimed that the accident was due to the plaintiff's assumption of the risk of injury. A jury verdict for the plaintiff was affirmed on appeal.

A defective downspout on the defendant's building caused water to pour onto the alleyway below, which, in freezing weather, resulted in the formation of a patch of ice on the portion of the alleyway used as a sidewalk. The plaintiff, in approaching the alleyway, noticed the surface was different from the rest of the sidewalk, there being bumps and ridges of ice near the building. The alleyway near the street was smooth, but occupied by other people. People ahead of her passed over the rough area with no apparent difficulty. Being concerned with what was ahead, she did not look down. In crossing the alleyway, she slipped, fell and was injured. The plaintiff testified that she realized that anyone who walked on an icy area was in danger of falling, but that, at the time, she had not thought of the possibility of falling.

The Supreme Court of Minnesota affirmed the lower court's ruling that assumption of risk was rightly left to the jury. One dissenting judge said the plaintiff had assumed the risk as a matter of law.

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[8]Compare the various concepts of the application of assumption of risk which were used in the following cases: "[T]he application of the [assumption of risk doctrine]... is limited to cases arising out of contractual relationships or the relationship of master and servant." Ward v. Thompson, 57 Wash. 2d 655, 359 P.2d 143, 146 (1961). "Assumption of risk is based, not on contract, but upon the maxim 'volenti non fit injuria.'" Rase v. Minneapolis, St. P. & S.S.M. Ry., 107 Minn. 260, 120 N.W. 360, 361 (1909). "The assumption of risks rests on an agreement, express or implied, between a master and his servant. Absent the relation of master and servant, the doctrine has no application." West Tex. Util. Co. v. Renner, 32 S.W.2d 264, 267 (Tex. Civ. App. 1930). "The defense of assumption of risk 'extends to relations independent of the master-servant relationship.'" Zimmer v. California Co., 174 F. Supp. 757, 763 (D. Mont. 1959). "[A]ssumption of risk is a form of contributory negligence...." Tosty v. Morgan Co., 151 Wis. 601, 139 N.W. 402, 404 (1913). "'Contributory negligence' and 'assumption of risk' may coexist but they are not synonymous terms." Nodland v. Kreutzer & Wasem, 184 Iowa 476, 168 N.W. 889, 891 (1918).

[9]113 N.W.2d 508 (Minn. 1962).

It is well settled that knowledge and appreciation of the danger by the plaintiff are essential prerequisites to the defense of assumption of risk.[10] The majority in *Hansen* decided the evidence did not establish assumption of risk as a matter of law because it was not proven that she knew and appreciated the danger. The court relied on an earlier Minnesota case, *Schrader v. Kriesel*,[11] in which a woman slipped and fell in an icy rut in a used car lot. She had observed the general snowy condition of the lot, but she did not see the rut into which she fell because it was covered with snow. There, the court held that she had not assumed the risk because the evidence was insufficient to show that she knew of the dangerous condition.[12]

On the other hand, the dissenting judge relied on *Wright v. City of St. Cloud*,[13] which he called the leading Minnesota case on assumption of risk concerning the use of icy sidewalks. The plaintiff, also a woman, received injuries from a fall on an icy and snowy public sidewalk. She testified that she saw the ridge, but had no idea had bad it was. The court held that she assumed the risk as a matter of law.[14]

From these two lines of reasoning it is apparent that there is considerable difficulty and lack of preciseness in interpreting and applying the phrase, "knowledge and appreciation of the risk."

The doctrine of assumption of risk as applied to the icy sidewalk cases contains the following elements: (1) knowledge and appreciation of the danger; (2) the existence of a reasonable alternative route; and (3) a voluntary election to encounter the danger.[15]

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[10]38 Am. Jur. Negligence § 173 (1941); 65 C.J.S. Negligence § 174, at 851 (1950); 4 Words and Phrases 622 (perm. ed. 1940).

[11]232 Minn. 238, 45 N.W.2d 395 (1950).

[12]The court said: "She cannot be held to have assumed any risk at all unless the evidence shows that she knew of the peril which she faced. Defendant urges that Mrs. Schrader assumed the risk of entering his premises, because she testified that she had noticed the conditions of the car lot both during her visit there on November 14 and upon her entrance the night of the accident. We think there is no showing of assumption of risk as a matter of law. Mrs. Schrader testified that she did not see the rut where she fell and that the ice on the lot was covered with snow. On this evidence the jury was entitled to find that Mrs. Schrader was she did not see the rut where she fell and that the ice on the lost was covered not fully aware of the peril which she faced." 45 N.W.2d at 401.

[13]54 Minn. 94, 55 N.W. 819 (1893).

[14]The court said: "[W]hile plaintiff might not have know of the existence or location of any particular hollow or hole in this path, it is very clear from her own testimony that she had full and present knowledge of the precise condition of this part of the sidewalk, and of the risk incident to traveling over it. The only risk was that of slipping and falling, and that was perfectly patent to anyone of ordinary intelligence." 55 N.W. at 820.

[15]See: 38 Am. Jur. Negligence § 173 (1941); 65 C.J.S. Negligence § 174 (1950).

A plaintiff must know of the danger, but he must also fully appreciate and comprehend its possible consequences.[16] There must be sufficient appreciation of the character and extent of the danger so that he will be given an adequate basis for voluntary decision whether or not to take the chance.[17] In some situations, the danger may be so obvious that any reasonable person immediately would comprehend it and would be put on his guard.[18] To illustrate: if a person knows of the existence of an icy spot on a walk and that the ice is slippery, it much be presumed that he knows that there is a risk of falling if he steps on it.[19] Where it is plain that anyone of normal intelligence would have realized the hazard involved, the question of adequate knowledge and appreciation of the risk must be decided by the court,[20] but in cases where the dangerous condition may not be so obvious, the issue is properly put to the jury.[21] If it is decided that the person knew and comprehended the risk involved, the fact that he momentarily forgets about it is immaterial. He is still chargeable with complete and continuing understanding of the condition.[22] As these variables indicate, each case must be examined not from the point of

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[16]"The words 'the risk' denote not only the existence of a risk but also its extent. Thus, 'knowledge' of the risk involved in a particular condition implies not only that the condition is recognized as dangerous but also the chance of harm and the gravity of the threatened harm are appreciated." Restatement, Torts § 340, commebnt *b* (1934). See also, Prosser, Torts § 55, at 309 (2d ed. 1955).

[17]Worden v. Francis, 148 Conn. 459, 172 A.2d 196 (1961); Dean v. Hershowitz, 119 Conn. 398, 177 Atl. 262 (1935). See also, 25 Am. Jur. Highways § 462 (1940); 65 C.J.S. Negligence § 174, at 851 (1950); James, Assumption of Risk, 61 Yale L.J. 141, 147 (1952).

[18]"At the same time, 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. As in the case of negligence itself, there are certain risks which anyone of adult age must be taken to appreciate: the danger of slipping on ice, of falling through unguarded openings, of lifting heavy objects...." Prosser, Torts § 55, at 310 (2d ed. 1955). See also Syverson v. Nelson, 245 Minn. 63, 70 N.W.2d 880 (1955); 25 Am. Jur. Highways § 464 (1940).

[19]"The very idea of ice being slippery implies a risk of falling....It must follow that if a person knows that ice is slippery he must also know that if he steps on it there is a risk of falling." Geis v. Hodgman, 255 Minn. 1, 95 N.W.2d 311 (1959).

[20]Lander v. Shannon, 148 Wash. 93, 268 Pac. 145 (1928); Boatman v. Miles, 27 Wyo. 481, 199 Pac. 933 (1921); 38 Am. Jur. Negligence § 349 (1941).

[21]Gray v. Turner, 350 P.2d 1043 (Colo. 1960); Loney v. Laramie Auto Co., 36 Wyo. 339, 255 Pac. 350 (1927); 38 Am. Jur. Negligence § 349 (1941).

[22]Jacobs v. Southern Ry., 241 U.S.228 (1916); Grand Trunk W. Ry. v. Reid, 42 F.2d 403 (6th Cir. 1930); New York, C. & St. L.R.R. v. McDougall, 15 F.2d 283 (6th Cir. 1926); Ferrie v. D'Arc, 31 N.J. 92, 155 A.2d 257 (1959); Cummins v. Dufault, 18 Wash. 2d 274, 139 P.2d 308 (1943); 25 Am. Jur. Highways § 468 (1940).

view of a specific test, but with due consideration of all the surrounding circumstances.[23] In the *Hansen* case, the court's contention that the plaintiff did not have full knowledge of the dangerous condition because she didn't see the particular bump upon which she fell seems to be an unnecessary narrowing of the knowledge and appreciation prerequisite.[24]

The second element, that there must be a reasonable, alternative route for the plaintiff to take, must be present, otherwise it cannot be said that he assumed the risk by advancing into a known, perilous situation.[25] Obviously, the actor can only decide to assume the risk where has more than one route from which to choose. The alternative route must be safe and convenient, and its existence must be known to the pedestrian.[26] If these circumstances exist, and the traveler nevertheless proceeds along the more dangerous route, and is injured, he will be precluded from recovery for he has assumed the risk of injury.[27] This is especially true where a pedestrian could easily avoid a dangerous place on a sidewalk, either by crossing over to the other side, by going out into the street, or by hesitating momentarily to let the crowd pass by in order to proceed around it on the same sidewalk.[28] In short, choice of the more dangerous way in the face of a reasonably safe alternative will, nearly always, amount to an assumption of the risk.[29] If no safe alternative is present, assumption of risk cannot successfully be asserted as a defense. Generally, the burden of proof rests on the defendant to show that a safer and more convenient route was reasonably available to the plaintiff.[30]

As stated previously, the third element is that the actor's decision to assume the risk of injury must be a completely free and voluntary one.[31] This may be apparent, either from his words or conduct.[32]

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[23]25 Am. Jur. Highways § 463, at 755 (1940).

[24]See note 14 supra.

[25]65 C.J.S. Negligence § 174, at 849 (1950); Prosser, Torts § 55, at 312 (2d ed. 1955).

[26]Annot., 13 A.L.R. 73, 90 (1921); Annot., 21 L.R.A. (N.S.) 614, 659 (1909).

[27]Patton v. City of Grafton, 116 W. Va. 311, 180 S.E. 267 (1935); Williams v. Main Island Creek Coal Co., 83 W. Va. 464, 98 S.E. 511 (1919); Boyland v. City of Parkersburg, 78 W. Va. 749, 90 S.E. 347 (1916); Shriver v. Marion County Ct., 66 W. Va. 685, 66 S.E. 1062 (1910).

[28]Evans v. Philadelphia, 205 Pa. 193, 54 Atl. 775 (1903); Canfield v. City of Philadelphia, 134 Pa. Super. 590, 4 A.2d 605 (1939).

[29]25 Am. Jur. Highways § 465 (1940); Prosser, Torts § 55, at 313 (2d ed. 1955).

[30]Donald v. Moses, 254 Minn. 186, 192, 94 N.W.2d 255, 260 (1959); Campion v. City of Rochester, 202 Minn. 136, 277 N.W. 422 (1938).

[31]38 Am. Jur. Negligence § 171 (1941); 65 C.J.S. Negligence § 174, at 851 (1950). See also, James, Assumption of Risk, 61 Yale L.J. 141, 151 (1952); Keeton, Personal

There is no problem, of course, where a person by express language voluntarily accepts a risk, but normally this will arise in master and servant relationships and others based on contract.[33] However, such agreements are not recognized by the courts, where a party, at an obvious disadvantage in bargaining power, is put at the mercy of the other's negligence.[34] But, if it appears that the plaintiff fully understood that he was exempting the defendant from liability for any negligence, the express agreement will be upheld.[35] Only in rare cases would this have application in the sidewalk cases, where the plaintiff is normally but a traveler on a public pavement. An assumption of the risk by the pedestrian will almost always be found in his conduct alone. "The consent is found in going ahead with full knowledge of the risk."[36]

In testing for assumption of risk where injuries have been received by a pedestrian from a fall on an icy sidewalk, the factors discussed above should always be considered. These prerequisites are necessarily included in every assumption of risk determination based on the idea that there can be no injury in the eyes of the law to one who consents, as they, together, make up the definition of the doctrine.[37] The second element, alternative route, has been referred to as a corollary and needs to be applied only under certain circumstances,[38] but it would seem that in all cases involving this doctrine there must be knowledge of an alternative route before a voluntary decision to en-

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Injuries Resulting from Open and Obvious Conditions, 100 U. Pa. L. Rev. 629, 636 (1952).

[33]Ridgway v. Yenny, 223 Ind. 16, 57 N.E.2d 581 (1944); Krause v. Hall, 195 Wis. 565, 217 N.W. 290 (1928).

[34]Freeman v. United Fruit Co., 223 Mass. 300, 111 N.E. 789 (1916); Quimby v. Boston & Me. R.R., 150 Mass. 365, 23 N.E. 205 (1890); Peterson v. Chicago & N.W. Ry., 119 Wis. 197, 96 N.W. 532 (1903). See also, Arensberg, Limitation by Bailees and by Landlords of Liability for Negligent Acts, 51 Dick. L. Rev. 36 (1947); Keeton, Assumption of Risk and the Landowner, 22 La. L. Rev. 108, 110 (1961); 4 Mo. L. Rev. 55 (1939).

[35]Johnston v. Fargo, 184 N.Y. 379, 77 N.E. 388 (1906); Tarbell v. Rutland R.R., 73 Vt. 347, 51 Atl. 6 (1901); Restatement, Contracts § 575(1) (1932).

[36]Van Noy Interstate Co. v. Tucker, 125 Miss. 260, 87 So. 643 (1921); Lebkeucher v. Pennsylvania R.R., 97 N.J.L. 112, 116 Atl. 323 (Sup. Ct. 1922), aff'd, 98 N.J.L. 271, 118 Atl. 926 (Ct. Err. & App. 1922); Dodge v. Nashville, C. & St. L. Ry., 142 Tenn. 20, 215 S.W. 274 (1919).

[37]Prosser, Torts § 55, at 308 (2d ed. 1955). Also, in Fowler v. Liquid Carbonic Corp., 121 So. 2d 49, 51 (Fla. Dist. Ct. App. 1960), it was said: "[T]he plaintiff voluntarily entered into a situation involving an obvious and known danger, thus impliedly assuming the risk of injury...."

[38]65 C.J.S. Negligence § 174, at 849 (1959).

[39]Taylor v. City of Huntington, 126 W. Va. 732, 30 S.E.2d 14 (1944).