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Economic Coercion as Plaintiff's Defense to Volenti Non Fit Injuria in Strict Liability Actions.

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ECONOMIC COERCION AS PLAINTIFF'S DEFENSE TO VOLENTI NON FIT INJURIA IN STRICT LIABILITY ACTIONS

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The doctrine of "assumed risk" is one of the most rapidly changing and diversifying tenets of law today. The basic trend that may be deduced from an analysis of the conglomeration of case law is the attempt to restrict and narrow the application of the defenses of "assumed risk," *volenti non fit injuria*, and "no duty." Texas is not without its contributions to this evolutionary process.

The recent decision in *Messick v. General Motors Corp.*[1] may effectively serve to soften the well-established doctrine of *volenti non fit injuria* in Texas. While the Texas courts have recognized the harshness of the "assumed risk" principles which bar recovery to the plaintiff without inquiry as to any justification for his conduct,[2] they have been reluctant to alter the situation. The *Messick* case represents the first significant inroad in this area. The Court of Appeals for the Fifth Circuit held that the *volenti* doctrine did not serve to bar recovery in a strict liability case where the plaintiff was acting under an element of economic duress.[3] The decision is consistent with the overall national trend to mollify the stringency of "assumed risk," and in some jurisdictions, to abolish it entirely.[4] A review of the various approaches taken by other jurisdictions, as well as tracing the development of the *volenti* doctrine in Texas, will aid in evaluating the impact of the economic duress concept. Understanding the distinctions between the defenses of contributory negligence, assumed risk, and *volenti* will serve to clarify whether these defenses bar the plaintiff's recovery in negligence actions or strict liability cases or both.

VOLENTI AND CONTRIBUTORY NEGLIGENCE DISTINGUISHED

The maxim, *volenti non fit injuria*, basically means that a plaintiff who voluntarily assumes a risk of injury arising from a reckless or negligent act or omission on the part of the defendant will be barred from recovering from that defendant.[5] The policy consideration here

1 460 F.2d 485 (5th Cir. 1972).

2 Ellis v. Moore, 401 S.W.2d 789, 792 (Tex. Sup. 1966); Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368, 380 (Tex. Sup. 1963).

3 Messick v. General Motors Corp., 460 F.2d 485 (5th Cir. 1972).

4 *See* McGrath v. American Cyanamid Co., 196 A.2d 238 (N.J. 1963); Siragusa v. Swedish Hosp., 373 P.2d 767 (Wash. 1962); McConville v. State Farm Mut. Auto. Ins. Co., 113 N.W.2d 14 (Wis. 1962). *See also* 50 N.C.L. Rev. 425 (1972).

5 RESTATEMENT (SECOND) OF TORTS § 496A (1966); *cf.* Walsh v. West Coast Mines, 197 P.2d 233 (Wash. 1948).

is that the plaintiff realizes the risk involved and has consented to chance it, thus relieving the defendant of any liability. The basic types of assumed risk[6] may best be shown by way of example;[7] first, the plaintiff expressly, and in advance, gives his consent to assume the risk and to relieve the defendant of legal duty to the plaintiff; second, the plaintiff voluntarily enters into a relation with the defendant with the knowledge that the defendant will not protect him against the risk; and third, the plaintiff realizes and appreciates a risk created by the defendant's negligence, yet proceeds to encounter it voluntarily.[8]

In the above examples, *volenti* will preclude the plaintiff's recovery where he has voluntarily and *reasonably* assumed the risk. However, where the plaintiff's assumption of the risk is voluntary and *unreasonable,* contributory negligence may also serve to bar recovery. Thus, there may be situations where both defenses apply or overlap.[9] The primary distinction between *volenti* and contributory negligence is that a subjective standard is applied to *volenti* in determining whether the plaintiff knows, understands, and appreciates the risk[10] while an objective standard is applied in contributory negligence to determine if the plaintiff acted as the "reasonable man."[11] Another distinguishing feature of the two doctrines is that *volenti* may serve as a defense in both negligence and strict liability actions while contributory negligence will only serve as a defense against liability for negligent conduct. Contributory negligence will not bar recovery in strict liability

6 The terms *volenti* and assumed risk are often applied to this principle interchangeably by the courts. Originally, however, the *volenti* defense was limited to employer-employee relationships. Greenhill, *Assumed Risk,* 20 Sw. L.J. 1, 6 (1966). Gradually, the majority of jurisdictions applied the doctrine of assumed risk to cover virtually any relationship, contractual or not. For discussion of the history of *volenti* and assumed risk see Bohlen, *Voluntary Assumption of Risk,* 20 HARV. L. REV. 14 (1906); Gow, *The Defense of Volenti Non Fit Injuria,* 61 JURID. REV. 37 (Eng. 1949); Greenhill, *Assumed Risk,* 20 Sw. L.J. 1 (1966); Warren, *Volenti Non Fit Injuria in Actions of Negligence,* 8 HARV. L. REV. 457 (1895). *See also* Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610 (1943) (separate opinions of Black and Frankfurter, J.J.). Texas courts continued to make a technical distinction between assumption of risk and *volenti non fit injuria.* They have repeatedly held that assumption of risk applies solely to cases arising out of contractual relationships, such as employer-employee cases, and that *volenti non fit injuria* is applied independently of any contractual relation. Wood v. Kane Boiler Works, Inc., 150 Tex. 191, 195, 238 S.W.2d 172, 174 (Tex. Sup. 1951); Cummins v. Halliburton Oil Well Cementing Co., 319 S.W.2d 379 (Tex. Civ. App.—El Paso 1958, no writ). However, most jurisdictions regard it as a "distinction without a difference." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 68, at 440 (4th ed. 1971).

7 W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 68, at 440 (4th ed. 1971). Prosser categorizes the types of assumed risk into three classifications while Keeton divides them into six separate categories. Keeton, *Assumption of Risk in Products Liability Cases,* 22 LA. L. REV. 122 (1961).

8 W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 68, at 440 (4th ed. 1971). *See also* RESTATEMENT (SECOND) OF TORTS § 496A, comment *c* 2 (1966).

9 Keeton, *Assumption of Risk in Products Liability Cases,* 22 LA. L. REV. 122, 133 (1961).

10 RESTATEMENT (SECOND) OF TORTS § 496A (1966). *See also* Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty,* 52 MINN. L. REV. 627, 638 (1968).

11 Greenhill, *Assumed Risk,* 20 Sw. L.J. 1, 17 (1966).

actions where the plaintiff's negligence consists solely of failing to discover the defect in the product.[12] Thus, it may be said that contributory negligence does apply in strict liability cases, but only when the plaintiff discovers the defect and "voluntarily and unreasonably" proceeds to encounter the danger, this being the overlap between *volenti* and contributory negligence.

ELEMENTS OF TEXAS VOLENTI DOCTRINE

In the early Texas *volenti* cases, it was necessary to establish that the plaintiff knew of the dangerous circumstances or should have known by exercising reasonable care, and that he assumed the risks.[13] Whether plaintiff should have been aware of the risk ceased to be a question of fact for the jury, and instead, became a question of law.[14] In 1951, the Texas Supreme Court qualified the requisites of *volenti* in *Wood v. Kane Boiler Works, Inc.*[15] The court, in refusing to allow a *volenti* defense, stated that a choice to accept a risk must be deliberate and must be made with full appreciation and knowledge of the danger in order that the plaintiff's action may be the result of an "intelligent choice."[16]

The knowledge element of volenti became settled in *Halepeska v. Callihan Interests, Inc.*[17] This case involved a gas well owned by the defendant which blew out killing Halepeska. The defendant asked that the court charge the plaintiff with constructive knowledge and appreciation of the danger by virtue of his employment. The court, citing *Wood* and *Schiller v. Rice*,[18] said that "for *volenti* to be applicable, there must be actual knowledge and appreciation; or the danger must be so open and obvious that the plaintiff is charged in law with knowledge and appreciation thereof."[19] The court emphasized that *volenti* is

12 RESTATEMENT (SECOND) OF TORTS § 420A, comment *n* (1966).

13 Missouri, K. & T. Ry. v. Hannig, 91 Tex. 347, 43 S.W. 508 (1897).

14 Levlon v. Dallas Ry. & Terminal Co., 117 S.W.2d 876 (Tex. Civ. App.—Dallas 1938, writ ref'd). Plaintiff's stalled car was pushed off defendant's tracks while plaintiff's ignition was "on," car started, ran out of control and crashed. Court charged plaintiff with knowledge of the danger and barred his recovery under *volenti*.

15 150 Tex. 191, 238 S.W.2d 172 (1951). This case concerned the plaintiff's deceased husband who was employed by the defendant to inspect welds on pressurized pipes. During the course of an inspection a pipe burst under pressure and killed Wood. Defendant contended that by the very nature of the work, the plaintiff should have known of the dangers involved and that since he accepted these risks, *volenti non fit injuria* should have barred recovery.

16 *Id.* at 201, 238 S.W.2d at 178. This rule was reiterated in Schiller v. Rice, 151 Tex. 116, 246 S.W.2d 607 (1952), but the court quickly added that the plaintiff would not be allowed to close his eyes to open and obvious dangers. Despite *Schiller* and *Wood* the Texas Supreme Court in McKee v. Patterson, 153 Tex. 517, 271 S.W.2d 391 (Tex. Sup. 1954) again charged that the plaintiff knew or should have known the dangers although their reasoning was guised in the cloak of "open and obvious danger."

17 371 S.W.2d 368 (Tex. Sup. 1963).

18 151 Tex. 116, 246 S.W.2d 607 (1952).

19 Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368, 379 (Tex. Sup. 1963). The

applied subjectively; that is, did the plaintiff in fact know and appreciate, as opposed to contributory negligence which is applied objectively —did the plaintiff act as an ordinary, prudent man might under the same circumstances.[20] The same view was subsequently adopted by the *Restatement (Second) of Torts*.[21] Following this line of reasoning, it becomes clear that the court in *Halepeska* accurately concluded that the "basic difference between contributory negligence on one hand, and . . . *volenti* on the other, is the question of *justification*."[22] The "presence or absence of justification . . . [which is] the crux of contributory negligence," is ordinarily not important in *volenti*.[23]

The aggregate of the *volenti* requisites which were set forth in *Wood* and *Halepeska* was concisely expressed by the Texas Supreme Court in *J. & W. Corp. v. Ball*.[24] The court listed the four elements:

> The requirements for such a defense [*volenti non fit injuria*] are (1) the plaintiff has knowledge of facts constituting a dangerous condition or activity; (2) he knows the condition or activity is dangerous; (3) he appreciates the nature or extent of the danger; and (4) he voluntarily exposes himself to this danger.[25]

Volenti Applied to Strict Liability

With the firm establishment of the doctrine of *volenti*, the courts began to refine the use of the defense, first in the areas of negligence, then in regard to strict liability. The application of *volenti* in negligence actions was quickly delineated and accepted by the courts.[26] How-

rationale consisted of an approval of the "actual knowledge" and "intelligent choice" concepts espoused by preceding cases. Brown v. Lundell, 162 Tex. 84, 344 S.W.2d 863 (1961); Dee v. Parish, 160 Tex. 171, 327 S.W.2d 449 (1959).

20 Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368, 379 (Tex. Sup. 1963).

21 Restatement (Second) of Torts § 496A, comment *d* & § 496D (1966).

22 Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368, 381 (Tex. Sup. 1963) (emphasis added). For distinction see Myers v. Day & Zimmerman, 427 F.2d 248 (5th Cir. 1970).

23 Greenhill, *Assumed Risk*, 20 Sw. L.J. 1, 16 (1966). An apparent inconsistency arose in *Halepeska* when the court reasoned that "for *volenti* to be applicable, there must be actual knowledge and appreciation; or the danger must be so open and obvious that the plaintiff is charged in law with knowledge and appreciation thereof." Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368, 381 (Tex. Sup. 1963). This ostensible conflict was quickly resolved the following year in Wesson v. Gillespie, 382 S.W.2d 921 (Tex. Sup. 1964) when the court affirmed the denial of recovery to a plaintiff where the threshold of the tavern was so patent as to constitute an "open and obvious" danger. The Texas Supreme Court, while establishing an objective standard of what is "open and obvious," hastened to point out that it required more than mere proof that the plaintiff appreciated the danger or something stronger than testimony that the reasonable man would have appreciated the risk. Keeton, *Assumption of Products Risks*, 19 Sw. L.J. 61, 70 (1965).

24 414 S.W.2d 143 (Tex. Sup. 1967).

25 *Id.* at 146.

26 In 1971 the Texas Supreme Court reaffirmed *volenti*, as set forth in *J. & W. Corp. v. Ball*, as a valid defense to all negligence cases.

> *Volenti* is an affirmative defense to any negligence action in which the defendant is responsible for a dangerous condition . . . or activity of which the plaintiff knows, appreciates the danger and voluntarily exposes himself thereto. Rabb v. Coleman, 469 S.W.2d 384, 387 (Tex. Sup. 1971).

ever, several aspects of the defense as applied to strict liability were left open to speculation until the *Messick* decision.

In most products liability actions, the plaintiff not only alleges a cause of action for negligence, but also one of strict liability.[27] In those jurisdictions which abide by the comparative negligence doctrine, the distinctions between *volenti* and contributory negligence disappear as the forms of the plaintiff's conduct are blended into one category for the jury or court to weigh.[28] However, for the remaining jurisdictions the issues are not as simple.

Texas, like the majority of jurisdictions, adheres to the general rule that contributory negligence is not a defense to strict liability.[29] However, as to the harsh doctrine of *volenti*, which is a defense to strict liability, the courts have felt bound to keep it within justifiable limits.[30] *Ellis v. Moore*,[31] for example, held that *volenti* did not bar recovery merely because the plaintiff knew of the defect. The court insisted that he must have had knowledge of the danger and appreciation of the danger.[32]

In the year following the *Ellis v. Moore* decision, Texas adopted the forward-looking approach to strict liability enunciated in the *Restatement (Second) of Torts* section 402A.[33] In *Shamrock Fuel & Oil Sales*

The court proceeded to state that "the volenti defense in Texas cases has turned on whether or not it was established that the plaintiff knew he was exposing himself to the danger which in fact caused him harm." *Id.* at 387. In other words, if the plaintiff knows and appreciates a danger, but the danger is other than the one which harms him, *volenti* will not bar his recovery. *Cf.* Triangle Motors v. Richmond, 152 Tex. 354, 258 S.W.2d 60 (1953); Cantrell v. Markham & Brown Co., 452 S.W.2d 940 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.); Chickasha Cotton Oil Co. v. Holloway, 378 S.W.2d 695 (Tex. Civ. App. —Amarillo 1964, writ ref'd n.r.e.); American Cooperage Co. v. Clemons, 364 S.W.2d 705 (Tex. Civ. App.—Fort Worth 1963, writ ref'd n.r.e.); San Antonio Portland Cement Co. v. Chandler, 360 S.W.2d 165 (Tex. Civ. App.—San Antonio 1962, writ ref'd n.r.e.); Fabens Ice Co. v. Kosinski, 339 S.W.2d 546 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.).

27 Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627 (1968). *See also* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

28 *See, e.g.*, Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961), *aff'd* 304 F.2d 149 (9th Cir. 1962).

29 Hill, *How Strict is Strict?*, 32 TEX. B.J. 759, 767 (1969).

30 Ellis v. Moore, 401 S.W.2d 789, 792 (Tex. Sup. 1966).

31 *Id.*

32 This view was reiterated in Justice Steakley's dissent in Rabb v. Coleman, 469 S.W.2d 384 (Tex. Sup. 1971). Citing Ellis v. Moore, the dissent noted that knowledge of the defect was by no means synonymous with knowledge and appreciation of the danger. *Id.* at 388.

33 § 402A (1965) *Strict Liability—Special liability of seller of product for physical harm to user or consumer.*

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

Co. v. Tunks[34] an action was brought in strict liability alleging that kerosene had been adulterated with gasoline, thus causing an explosion. The defendant charged the plaintiff with contributory negligence. The court in holding for the plaintiff relied on section 402A, comment n:[35]

> Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence.

While both *Shamrock* and subsequent decisions[36] clearly stated what did not constitute a defense for strict liability, they refused to commit themselves as to what did constitute a valid defense. One author, commenting on *Shamrock*, observed that "misuse" may be a valid defense.[37]

The courts had three ideal opportunities[38] to apply *volenti*, as defined in *Halepeska* and *Rabb v. Coleman*,[39] to strict liability, yet refused to do so. The conspicuous absence of any application of *volenti*, that is, without any element of reasonableness or justification, certainly indicated that the courts had no intention of binding themselves to the harshness of the doctrine as it already existed in negligence actions.

Exceptions to Volenti Doctrine

As early as 1888[40] the courts recognized situations which might exempt the plaintiff from the harsh application of *volenti* or assumed

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(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

34 416 S.W.2d 779 (Tex. Sup. 1967).

35 *Id.* at 783.

36 Shortly after deciding *Shamrock*, the same court reaffirmed its views in McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. Sup. 1967). Here the plaintiff recovered for injuries she sustained while using a permanent wave preparation which she purchased from a distributor. Relying on § 402A, the court rejected the contention that she should have reasonably known of the consequences—a defense of contributory negligence.

37 Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, 1968 Utah L. Rev. 267, 280.

> The court seemed to indicate, by way of dictum, that misuse, submitted under a proper formulation and not as a catchall theory of contributory negligence, might well have been argued in the case at the bar. *Id.* at 281.

The Court of Appeals for the Fifth Circuit likewise recognized the reluctance of the Texas courts to take a firm stand on strict liability defenses in McDevitt v. Standard Oil Co., 391 F.2d 364 (5th Cir. 1968).

> It is evident from these two decisions (*Shamrock* and *McKisson*) that the Supreme Court of Texas did not decide that contributory negligence is never a defense to a strict liability action, but limited its holding to the principle that one who is contributorily negligent in failing to discover a defect in a product is not barred from recovery. *The question of whether that species of contributory negligence variously referred to as "misuse," "improper use," "voluntarily proceeding to encounter a known risk" or any other of the myriad synonyms used by various courts and writers constitutes defensive matter to such an action was expressly left open.*

Id. at 369 (emphasis added).

38 McDevitt v. Standard Oil Co., 391 F.2d 364 (5th Cir. 1968); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. Sup. 1967); Shamrock Fuel & Oil Sales Co. v. Tunks, 416 S.W.2d 779 (Tex. Sup. 1967).

39 469 S.W.2d 384 (Tex. Sup. 1971).

40 Gulf, C. & S.F. Ry. v. Gasscamp, 69 Tex. 545, 7 S.W. 227 (1888).

risk. These exceptions were implemented either by finding that the voluntariness element was absent or, in particular instances, by repudiating the doctrine altogether. An example of the latter are those situations which qualify as rescue actions.

Rescue Actions

The rescue exception to *volenti* is firmly embedded in Texas jurisprudence.[41] In these emergency situations the courts create a legal fiction in order to waive the defense entirely. They simply state that the plaintiff's actions were not voluntary. In *Sinclair Refining Corp. v. Winder*[42] the plaintiff, a railroad employee, while working on the defendant's premises, tripped over a pile of slag, fell onto the tracks, and lost his finger beneath one of the rolling cars. It was established that the pile of slag was "open and obvious" and that the plaintiff had actual knowledge of it. Furthermore, the plaintiff admitted that his actions were voluntary. While the defendant contended that *volenti* should bar recovery, the plaintiff maintained that he acted to protect fellow workers who were unaware of the unattended, rolling car. The court found for the plaintiff, stating that where a plaintiff acts under a "humanitarian impulse" to prevent injury to others, the doctrine of *volenti* should not apply.[43]

Inadvertence

The *volenti* doctrine was further emasculated by a recent Court of Appeals for the Third Circuit decision, *Elder v. Crawley Book Machinery Co.*[44] This is significant because Pennsylvania, like Texas, has adopted section 402A of the *Restatement (Second) of Torts* concerning strict liability. In *Elder*, the plaintiff's finger was severed when she accidentally placed it in an opening in a book fabrication machine while working. The defendant, charged with the defective design of the machine, sought to have *volenti* bar the plaintiff's recovery since her actions were voluntary. The plaintiff rebutted stating that her actions were neither voluntary nor intentional, but purely accidental. The court in affirming judgment for the plaintiff stated:

> We conclude, therefore, that if the plaintiff's fingers became placed in a dangerous position in the machine by *reason of inadvertence, momentary inattention or diversion of attention,* that this *would not amount to assumption of the risk.*[45]

41 *See* Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368, 379 (Tex. Sup. 1963); Greenhill, *Assumed Risk*, 20 Sw. L.J. 1, 17 (1966).

42 340 S.W.2d 503 (Tex. Civ. App.—Waco 1960, writ ref'd).

43 *Id.* at 504. *See also* Henshaw v. Belyea, 31 P.2d 348 (Cal. 1934); Cote v. Palmer, 16 A.2d 595, 598 (Conn. 1940); Illinois Cent. R.R. v. Seler, 82 N.E. 362, 364 (Ill. 1907); Swift & Co. v. Baldwin, 299 S.W.2d 157, 162 (Tex. Civ. App.—Texarkana 1957, no writ).

44 441 F.2d 771 (3d Cir. 1971).

45 *Id.* at 774 (emphasis added).

While this case could have been decided on contributory negligence, it nontheless served to broaden the limitations on the fourth element of *volenti*, voluntariness.

Hard Choice[46]

This catchall for various types and degrees of *duress* has had the most devastating effect on the *volenti* defense. Robert Keeton accurately stated the rationale for the "hard choice" limitation when he said,

> Why should a negligent defendant be allowed to escape liability because the plaintiff chose to expose himself to the risk negligently created by the defendant, if the plaintiff's choice was reasonable? Should we not instead say that the defendant's negligence unfairly confronted plaintiff with a hard choice in which exposure to defendant's negligently created risk seemed the lesser evil and that, therefore, the defendant should be liable?[47]

The crux of the "hard choice" doctrine turns on a weighing of the alternatives open to the plaintiff. Justice Greenhill offers the hypothetical case of a girl on a date with a man who begins drinking after she gets in the car. He then gives her the choice to either get out on a lonely road or in a bad neighborhood or to be driven home by the man in a drunken condition. "A good case can be made that she does not voluntarily assume the risk by not getting out . . . ."[48] To what degree must the duress exist in order to render the plaintiff's choice involuntary? This is not clear.

> 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.[49]

Since the 1800's, the case law defining that degree of duress essential to constitute a "hard choice" has been voluminous.[50] The two Texas

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46 In a survey of assumed risk, Justice Greenhill observed:

> Recently some exceptions and limitations to this general rule [doctrine of assumed risk] have been considered in cases where the plaintiff was acting to rescue others from a risk negligently created by the defendant. [Also], there has been the development of the *hard choice limitation*. (Emphasis added.)

Greenhill, *Assumed Risk*, 20 Sw. L.J. 1, 17 (1966).

47 Keeton, *Assumption of Products Risks*, 19 Sw. L.J. 61, 71 (1965).

48 Greenhill, *Assumed Risk*, 20 Sw. L.J. 1, 17 (1966).

49 Keeton, *Assumption of Risk in Products Liability Cases*, 22 La. L. Rev. 122, 157 (1961).

50 *E.g.*, Clayards v. Dethick, 116 Eng. Rep. 932 (Q.B. 1848) (plaintiff's horse died after

cases which are regarded as "landmarks" on this issue are *Gulf, C. & S.F. Ry. v. Gasscamp*[51] and *Missouri, K. & T. Ry. v. McLean.*[52]

In *Gasscamp*, the plaintiff was injured while crossing a bridge he knew to be defective. The bridge constituted the only route from his house to town. The court held that the defendant's negligence left the plaintiff no alternative; hence, plaintiff's acceptance of the risk was not voluntary.[53]

A similar holding resulted in *McLean* when the plaintiff farmer contracted to have the railway company ship his produce in specially cooled cars. When the plaintiff appeared at the loading dock with his cabbages, he realized that the cars were not of the proper type. After the produce spoiled in transit and suit was brought against the defendant, the question of voluntary assumption of risk arose. The court held that the plaintiff's action in proceeding to ship on the defective car was not voluntary since the plaintiff had "no means or opportunity of relieving himself of the situation. [He] had either to ship them at the risk of their decaying in transit, or to let them lay and rot at the place where they were carried for shipment."[54]

Both of these decisions typify the "hard choice" doctrine which successfully attacks the fourth element of *volenti*. That is, in situations where the plaintiff is "damned if he does or damned if he doesn't," his acceptance of the risk will not bar his recovery.[55]

Economic Coercion[56]

"Where the defendant puts him [the plaintiff] to a choice of evils, there is a species of *duress*, which destroys all idea of freedom of election."[57] In the preceding discussion of the "hard choice" principle the

falling into an excavation blocking the only access to the stables); Central R.R. v. Crosby, 74 Ga. 737 (1885) (train engineer was killed when he remained aboard cab in effort to reduce the effects of the collision).

51 69 Tex. 545, 7 S.W. 227 (1888).

52 118 S.W. 161, 163 (Tex. Civ. App. 1909, writ ref'd).

53 Gulf, C. & S.F.Ry. v. Gasscamp, 69 Tex. 545, 548, 7 S.W. 227, 228 (1888).

54 Missouri, K. & T. Ry. v. McLean, 118 S.W. 161, 163 (Tex. Civ. App. 1909, writ ref'd).

55 *Accord*, Littleton v. Western Union Tel. Co., 442 F.2d 1169, 1172 (10th Cir. 1971) (woman slipped and fell where there was no dry access to the doorway); F. W. Woolworth Co. v. Freeman, 11 So. 2d 447 (Miss. 1943) (store employee fell off shelf which was only way to reach merchandise); Blanks v. Southland Hotel, Inc., 149 Tex. 139, 229 S.W.2d 357 (Tex. Sup. 1950) (woman fell down stairs when elevator was inoperative); Dunlap v. Executive Inn Motor Hotel, 404 S.W.2d 842 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.) (woman fell on outside stairs when door to inside passageway was locked). *Contra*, Gulfway Gen. Hosp., Inc. v. Pursly, 397 S.W.2d 93 (Tex. Civ. App.—Waco 1965, writ ref'd n.r.e.) (woman fell on ice which covered only entrance to the hospital). *See also* Comment, *Tort Defenses to Strict Products Liability*, 20 SYR. L. REV. 924, 933 (1969); Comment, *Products Liability: For the Defense—Contributory Fault*, 33 TENN. L. REV. 464, 474 (1966).

56 Economic coercion is not a term coined by the courts but by the author. It was adopted to encompass those terms such as compulsion, circumstance, and constraint which the courts have used to define, in reality, the extension of the "hard choice" defense to "economic hard choice."

57 W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 68, at 451 (4th ed. 1971) (emphasis added).

"species of duress" was limited primarily to instances where the plaintiff's only means of access were obstructed. However, that species of duress which is economic in character, intimated by the court in *Saeter v. Harley Davidson Motor Co.*,[58] has also developed into a viable defense to *volenti*.

The *Saeter* case involved an experienced motorcyclist, who, upon discovery of a dangerous defect in the machine, continued to use it until the time of his accident. Although the court held that he could not recover because he continued his journey on the defective motorcycle without "the slightest compulsion of *business* or otherwise,"[59] this case strongly implies that had the plaintiff been under some business or economic compulsion his actions would have been justified.[60] The consequence of considering economic duress, or any "hard choice" for that matter, presupposes a recognition of the plaintiff's motive on an objective standard. A weighing of the economic factors, however, is consistent with the well-established "hard choice" exceptions and the "reasonableness" element as introduced in the *Restatement*. The *Restatement*, when referring to assumed risk as a defense to strict liability noted:

> [T]he form of contributory negligence which consists in *voluntarily* and *unreasonably* proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense. . . . If the user or consumer discovers the defect and is aware of the danger, and nevertheless *unreasonably* proceeds to make use of the product and is injured by it, he is barred from recovery.[61]

The *Restatement*, elaborating on the voluntary element of assumed risk, pointed out that not all species of duress exempt the plaintiff from *volenti*.

> The plaintiff's acceptance of the risk is to be regarded as voluntary even though he is acting under the compulsion of circumstances, *not created by the tortious conduct of the defendant*, which have left him no reasonable alternative.[62]

Conversely:

> The plaintiff's acceptance of the risk is not to be regarded as voluntary where the defendant's tortious conduct has forced upon

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58 8 Cal. Rptr. 747 (Dist. Ct. App. 1960).

59 *Id.* at 753 (emphasis added).

60 *See* Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 140 (1961); Comment, 33 TENN. L. REV. 464, 474 (1966).

61 RESTATEMENT (SECOND) OF TORTS § 402A, comment *n* at 35 (1965) (emphasis added). Note that this is the section adopted in Texas by *McKisson* and *Shamrock*.

62 RESTATEMENT (SECOND) OF TORTS § 496E, comment *b* at 566 (1965) (emphasis added).

> him a choice of courses of conduct, which leaves him no *reasonable* alternative to taking his chances. . . . The existence of an alternative course of conduct which would avert the harm, or protect the right or privilege, does not make the plaintiff's choice voluntary, if the alternative is one which he can not *reasonably* be required to accept.[63]

With respect to *economic coercion,* the Texas courts have had difficulty in determining whether the duress was attributable to the tortious acts of the defendant and whether such duress left the plaintiff with a reasonable alternative.

In *McKee v. Patterson*[64] the Texas Supreme Court was divided over the issue of economic duress. In this case, the plaintiff, a carpenter, was employed to do overhead work in a gymnasium. The defendant ordered the plaintiff to discontinue working to allow other subcontractors to finish the floor. After completion of the floor, the defendant ordered the plaintiff to resume working from the ladder, adding a warning that the floor was slippery. The ladder slipped, injuring the plaintiff. In a negligence action against the defendant, the trial court awarded judgment to the plaintiff.[65] The supreme court reversed.[66] The majority reasoned:

> In this case the plaintiff suggests that there was a breach of duty because he did not voluntarily expose himself to the risk in that he was placed in a situation where he had no alternative; he either had to work on the slick floor or not do the work which he was obligated to do at all.
>
> . . . .
>
> So far as we have been able to discover the courts of this state have never held that the necessity of performing his duties and of earning a livelihood was such *economic compulsion* or *constraint* as to render involuntary the workman's choice of accepting or retaining employment in the face of *known* and *appreciated* dangers.[67]

The dissent was aligned with the English common law which does recognize the economic pressures brought to bear on workmen under the threat of loss of employment.[68] Justice Griffin's dissenting opinion noted that "Patterson had no control over the finishing of the floor at a time prior to the completion of his work. Patterson had no other

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63 RESTATEMENT (SECOND) OF TORTS § 496E, comment *c* at 577 (1965) (emphasis added).
64 153 Tex. 517, 271 S.W.2d 391 (1954).
65 McKee v. Patterson, 263 S.W.2d 326 (Tex. Civ. App.—Waco 1953), *rev'd,* 153 Tex. 517, 271 S.W.2d 391 (1954).
66 McKee v. Patterson, 153 Tex. 517, 526, 271 S.W.2d 391, 396 (1954).
67 *Id.* at 524, 271 S.W.2d at 396 (emphasis added).
68 W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 68, at 452 (4th ed. 1971).

alternative than to complete his work on the slick floor so furnished by the petitioner."[69]

This dissent pointed to *Texas & N.O.R.R. v. Wood*[70] which held that *economic coercion* may suffice to render the plaintiff's actions involuntary. Holding that the plaintiff did not voluntarily assume the risk, the court said:

> Generally, an invitee using the carrier's equipment for a business purpose is under some *economic compulsion* to do so, that is, he must use the facilities furnished or discontinue his business enterprise.[71]

Despite the well-founded reasoning in *Texas & N.O.R.R. v. Wood* and the dissenting opinion in *McKee v. Patterson*, the rule remains as enunciated in the majority opinion of *McKee*. That is, the element of *economic coercion* is not available to a plaintiff as a defense to *volenti* in a pure negligence action. *Economic coercion*, however, was not ruled out as a plaintiff's defense to *volenti* in strict liability cases.

Economic Coercion in Strict Liability: Messick v. General Motors Corp.

The most significant assault on the subjectivity of the *Halepeska volenti* doctrine in Texas is the recent Court of Appeals for the Fifth Circuit decision of *Messick v. General Motors Corp.*[72] The facts of the case are essentially undisputed. The plaintiff, Messick, purchased a new 1969 Oldsmobile from the defendant's dealer. He drove the automobile for business purposes for 4 months traveling over 15,000 miles. During the 4 months following the purchase of the car, the plaintiff took the automobile to the dealer on eight separate occasions for the purpose of correcting two defects. The first defect was an acute vibration of the front end. The second was a tendency for the automobile to veer excessively upon striking bumps or rough areas in the road. As a result of these repeated visits, the dealer was able to correct the vibration problem but admitted that he was unable to locate the source of the steering difficulty and unable to correct it. After taking the car to an independent mechanic for inspection he was warned that if he continued to drive the car in that condition, it would kill him. Messick then demanded that the defendant replace the automobile, but received no reply. Subsequently, Messick was injured in a one-car accident attributable to the steering defect, and brought a products liability suit

69 McKee v. Patterson, 153 Tex. 517, 526, 217 S.W.2d 391, 397 (1954) (Smith, J., joined in the dissent).
70 166 S.W.2d 141 (Tex. Civ. App.—San Antonio 1942, no writ).
71 *Id.* at 144 (emphasis added).
72 460 F.2d 485 (5th Cir. 1972).

against General Motors for negligent design of the automobile and for strict liability. The defendant alleged that the plaintiff was precluded from recovery by the doctrine of *volenti non fit injuria*. The plaintiff stipulated that the first three elements of *volenti*, as established in *J. & W. Corp. v. Ball*,[73] were fulfilled; he had subjective knowledge of the facts constituting the defect, he knew it to be dangerous, and he appreciated the extent of the danger. However, the plaintiff asserted that his *acceptance of the risk did not constitute voluntary exposure but was compulsory due to the economic situation* in which the defendant had placed him. Evidence was introduced to show "his dependence upon the automobile to procure his livelihood . . . [and] his economic inability to purchase a second car while continuing to pay off the Oldsmobile."[74] The jury, charged by the court to evaluate the plaintiff's voluntariness on an objective standard in light of these facts, found that Messick had not voluntarily assented to the risk. The defendant appealed on the basis that such a jury charge was improper and inconsistent with the doctrine of *volenti* in Texas. The Court of Appeals for the Fifth Circuit agreed with the defendant that *volenti*, as established in *Halepeska* and *J. & W. Corp. v. Ball*, must be applied subjectively in negligence actions.[75] "Nor is there an element of duress of economic circumstances available to plaintiff in a negligence action. . . . Moreover, the reasonableness of the undertaking is not available to relieve a plaintiff from the application of the doctrine."[76] After finding that the plaintiff's recovery for negligence alone was precluded by *volenti*, the court turned to the strict liability aspect. Noting that *volenti* in negligence was well settled, the court observed:

> The question, however, of whether *volenti* as defined in *Halepeska*, or something like *volenti* but with an element of reasonableness or justification for the continuation of the use was left open in the products case.[77]

The court concluded, after citing several "hardchoice" cases[78] and the *Restatement (Second) of Torts* section 402A,[79] that:

> Section 402A of the Restatement of Torts 2nd, comment (n), represents the successful ingraftation of elements of contributory negligence to the doctrine of *volenti*. . . . The voluntariness ele-

[73] 414 S.W.2d 143, 146 (Tex. Sup. 1967).
[74] Messick v. General Motors Corp., 460 F.2d 485, 488 (5th Cir. 1972). The defendant contended that the plaintiff's proper recourse would have been to stop using the car and bring an action under the law of sales.
[75] *Id.* at 488.
[76] *Id.* at 489.
[77] *Id.* at 489.
[78] *Id.* at 493.
[79] *Id.* at 491.

> ment . . . requires a finding of both subjective voluntary action . . . and an objective finding of unreasonableness.[80]
>
> . . . .
>
> The limits of the manufacturer's liability for releasing a defective and unreasonably dangerous product in the *volenti* area are that the plaintiff's consent to incur the risk has been voluntarily given and is objectively unreasonable. The plaintiff at bar was entitled to go to the jury with the question of whether his consent was voluntary or was the product of *duress of circumstances* and reasonable.[81]

The court affirmed the district court's judgment for the plaintiff stating that under the circumstances of the case, where it was shown to have cost the plaintiff one-sixth of his income to finance the Oldsmobile, it was proper for the jury to determine whether "a reasonably prudent man would have continued to use the vehicle or would have purchased another while seeking recourse against General Motors under the law of sales."[82]

This decision injected an element of objectiveness or justification into *volenti* which, until *Messick*, was foreign to the defense, save those rare "exception" instances. More specifically, the decision acknowledged *economic coercion* as a species of duress that will counter the defense of *volenti non fit injuria* in strict liability cases.

CONCLUSION

It is doubtless that many will cite the cliché "bad facts make bad law" and maintain that *Messick* was decided on "bad facts." Here the plaintiff discovered the defect and pursued every avenue of recourse available to him, yet received no relief. Are these facts uncommon? Viewed realistically, if not pragmatically, it must be conceded that these facts arise all too frequently. Seldom is there an instance without mitigating factors to justify the plaintiff's assumption of the risk. For this reason, as pointed out by many jurists,[83] the strict defense of *volenti* or assumed risk is antiquated. It has been suggested that the doctrine be extensively narrowed, as in the case of the English or Canadian view which requires an express agreement to assume risk,[84] or abolished entirely, as is the case in a growing number of jurisdictions.[85]

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80 *Id.* at 492.
81 *Id.* at 494.
82 *Id.* at 494.
83 *See* Greenhill, *Assumed Risk*, 20 Sw. L.J. 1, 19 (1966); Keeton, *Assumption of Products Risks*, 19 Sw. L.J. 61 (1965).
84 Greenhill, *Assumed Risk*, 20 Sw. L.J. 1, 15 (1966); 49 TEXAS L. REV. 591 (1971).
85 McGrath v. American Cyanamid Co., 196 A.2d 238 (N.J. 1963); Siragusa v. Swedish Hosp., 373 P.2d 767 (Wash. 1962); McConville v. State Farm Mut. Auto. Ins. Co., 113 N.W.2d 14 (Wis. 1962). *See also* 50 N.C.L. REV. 425 (1972).

The controversies over *volenti* will become moot, should Texas dispose of assumption of risk and adopt a system of comparative negligence. Conversely, if Texas is to retain the doctrine of *volenti non fit injuria* it must be sharply restricted. While *Messick* does not introduce the defense of economic coercion to *volenti* in negligence actions, it may provide the impetus to allow such justification in the future.