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THE DEFENSE OF ASSUMPTION OF RISK UNDER COMPARATIVE NEGLIGENCE

JOE E. ANDERSON*

INTRODUCTION

Prior to the adoption in 1973 of comparative negligence,¹ Texas courts applied the common law approach in negligent tort actions wherein contributory negligence and assumption of risk were absolute defenses.² This new law introduces a system of comparative negligence that changes the significance of a plaintiff's contributorily negligent conduct and may have a similar effect on his behavior indicating an assumption of the risk of a dangerous instrumentality or situation. To what extent this change has affected the defense of assumption of risk in those states which have previously adopted comparative negligence statutes, and a prospective view of the approach the Texas courts might take regarding the defense of assumption of risk under the Texas law are the subjects of the ensuing discussion.

DEFENSE OF ASSUMPTION OF RISK IN TEXAS

Historically, in Texas, a person who voluntarily assumed the risk of injury from a known danger was barred from recovery.³ In Texas the defense of assumption of risk was for many years available to a defendant in a negligent tort case only when there was a relational connection between the parties.⁴ This relationship was held to arise either through a contractual⁵ or master-servant relationship.⁶ Where this relational connection was lacking, the doctrine of *volenti non fit injuria* could be ap-

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1. TEX. REV. CIV. STAT. ANN. art. 2212a (Supp. 1974).

2. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 65, at 416 n.1 (4th ed. 1971).

3. *See, e.g.,* *Levlon v. Dallas Ry. & Terminal Co.*, 117 S.W.2d 876 (Tex. Civ. App.—Dallas 1938, writ ref'd).

4. *American Cooperage Co. v. Clemons*, 364 S.W.2d 705, 709 (Tex. Civ. App.—Fort Worth 1963, writ ref'd n.r.e.).

5. *Levlon v. Dallas Ry. & Terminal Co.*, 117 S.W.2d 876, 878 (Tex. Civ. App.—Dallas 1938, writ ref'd).

6. *Wood v. Kane Boiler Works*, 150 Tex. 191, 195, 238 S.W.2d 172, 174 (1951).

plied as a defense.⁷ Texas courts, however, no longer draw this distinction between *volenti non fit injuria* and assumption of risk and now "regard volenti as an extension to, as well as another name for, voluntary assumption of risk."⁸ Therefore, further usage of the term assumption of risk will include *volenti non fit injuria*, and no further distinction will be made between the two in this article.

The "no duty" doctrine is another doctrine applied by the Texas courts which is related to assumption of risk. As defined in *Halepeska v. Callihan Interests, Inc.*:⁹

[T]he occupier of land or premises is required to keep his land or premises in a reasonably safe condition for his invitees. . . . [I]f there are open and obvious dangers of which the invitees know, or of which they are charged with knowledge, then the occupier owes them 'no duty' to warn or to protect his invitees.¹⁰

Obviously this doctrine is limited in its application to occupiers of land and invitees, however, the doctrine differs from assumption of risk in a more important way. Since duty to the complaining injured party by the alleged tort-feasor is a necessary element or component of the tort, when such a duty is lacking, no tort has been committed.¹¹ Dean Page Keeton sums up the no duty concept by concluding that "[p]erhaps, in most instances where the plaintiff encounters a known danger, the fact that the danger is obvious makes it clear that the defendant is not negligent"¹²

The relationship of the doctrine of assumption of risk to contributory negligence is pronounced and confusing. They have been described as being so

closely related as sometimes to be almost, if not entirely, indistinguishable. In cases which do not arise between master and servant, the two terms may well be considered synonymous in the sense that one who voluntarily places himself in a perilous position, when the potential danger is apparent, is not exercising ordinary care for his own safety.¹³

Previous to the adoption of the Texas Comparative Negligence law, the Texas courts followed the common law principle with regard to the

7. *Id.* at 196, 238 S.W.2d at 175; *Levlon v. Dallas Ry. & Terminal Co.*, 117 S.W. 2d 876, 878 (Tex. Civ. App.—Dallas 1938, writ ref'd), quoting what is now 65A C.J.S. *Negligence* § 174(1), at 283-84 (1966).

8. *Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452, 458 (Tex. Supp. 1972).

9. 371 S.W.2d 368 (Tex. Sup. 1963).

10. *Id.* at 378.

11. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 1, at 4 (4th ed. 1971).

12. Keeton, *Assumption of Risk and the Landowner*, 20 TEX. L. REV. 562, 574 (1942).

13. *Weber v. Eaton*, 160 F. Supp. 577, 578 (D.C. Cir. 1947).

defense of contributory negligence. Justice Greenhill of the Texas Supreme Court succinctly stated the position in *Parrott v. Garcia*.¹⁴

The present Court has inherited the well established common law principle that contributory negligence proximately causing injury is a bar to recovery against a negligent defendant. The comparative degree of negligence is not material. . . . Contributory negligence is a defense even to the gross negligence required for a recovery under the guest statute.¹⁵

The Texas comparative negligence law provides in section 1 that contributory negligence will not bar recovery by a party if such negligence is not greater than that of the parties against whom recovery is sought.¹⁶ Thus the law of Texas regarding contributory negligence as stated in *Parrot* was laid to rest by the Texas Legislature.

The question now arises of what effect this law will or should have on the defense of assumption of risk. The obvious relation or similarity of the two defenses would seem to indicate that the effect of the law on the application of assumption of risk as a defense will be pronounced.

THE DEFENSE OF ASSUMPTION OF RISK IN STATES HAVING COMPARATIVE NEGLIGENCE STATUTES

There are several different approaches to the application of comparative negligence among the states that have adopted laws providing for it; the major categories being pure, slight-gross and modified.

Mississippi¹⁷ and Puerto Rico¹⁸ have statutes which provide for pure comparative negligence. Under this system a plaintiff may recover if the defendant is negligent in any degree, even though the plaintiff's negligence is greater than the defendant's.¹⁹ Many agree that this system goes too far and would introduce inequities as great as the ones it would eliminate.²⁰ One example of a negative experience with a pure comparative negligence system was Arkansas which originally adopted such a statute in 1955;²¹ however, in 1957, became dissatisfied with its results and adopted a modified form of comparative negligence.²²

14. 436 S.W.2d 897 (Tex. Sup. 1969).

15. *Id.* at 901.

16. TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Supp. 1974).

17. MISS. CODE ANN. § 11-7-15 (1972).

18. P.R. LAWS ANN. tit. 31, § 5141 (1957).

19. HEFT & HEFT, COMPARATIVE NEGLIGENCE MANUAL § 3.310 (1971).

20. *Id.* § 1.50.

21. Ark. Acts 1955, No. 191, §§ 1, 2 (repealed 1957).

22. ARK. STAT. ANN. § 27-1730.2 (1962). See Note, *Comparative Negligence, A*

A second approach is that followed by Nebraska²³ and South Dakota.²⁴ Under the system adopted in these states, a plaintiff in a negligent tort action may have been guilty of contributory negligence, but this will not bar his recovery when his negligence was slight and the negligence of the defendant was gross by comparison. This system is only a partial step in alleviating the effects of contributory negligence because a plaintiff whose contributory negligence is more than slight when compared with the negligence of the defendant is still barred from recovery.²⁵ Some critics of this system feel that a more pure form of comparative negligence is more desirable than the slight-gross form.²⁶

The modified comparative negligence system as adopted by New Hampshire,²⁷ Wisconsin,²⁸ Massachusetts,²⁹ and Minnesota³⁰ most nearly approximates the system adopted by Texas. The Texas statute, providing that "Contributory negligence shall not bar recovery in an action by any person or party . . . to recover damages for negligence resulting in death or injury to persons or property if such negligence is *not greater than* the negligence of the person or party . . . against whom recovery is sought,"³¹ has been referred to as the "51 percent Bar Rule."³² This allows the plaintiff to recover, in a negligence action, if his negligence does not constitute more than 50 percent of the cause of his injuries.

Whatever form of comparative negligence is adopted by a state, the effect is to eliminate contributory negligence as a complete bar to plaintiff's recovery, but the doctrine of assumption of risk may not be so affected. Such is the case in the pure comparative negligence state of Mississippi where assumption of risk has continued to be a complete defense during the 60 years that comparative negligence has been recognized in that state.³³

Survey of the Arkansas Experience, 22 ARK. L. REV. 692, 693 (1969).

23. NEB. REV. STAT. § 25-1151 (1965).

24. S.D. CODE ANN. § 20-9-2 (1969).

25. *See, e.g.*, *Sayers v. Witte*, 107 N.W.2d 676 (Neb. 1961); *Nugent v. Quam*, 152 N.W.2d 371 (S.D. 1967).

26. Comment, *Comparative Negligence: A Look at the South Dakota Approach*, 14 S.D.L. REV. 92, 99 (1969).

27. N.H. REV. STAT. ANN. § 507:7-a (Supp. 1972).

28. WIS. STAT. ANN. § 895.045 (1966).

29. MASS. GEN. LAWS ANN. ch. 231, § 85 (Supp. 1972).

30. MINN. STAT. ANN. § 604.01 (Supp. 1973).

31. TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Supp. 1974) (emphasis added).

32. Abraham & Riddle, *Comparative Negligence—A New Horizon*, 25 BAYLOR L. REV. 411, 414 (1973).

33. *E.g.*, *Herod v. Grant*, 262 So. 2d 781 (Miss. 1972).

In *Dendy v. City of Pascagoula*³⁴ the court stated that the plaintiff's diving off a city-owned recreation pier into 15 inches of water and suffering serious injuries was not an assumption of risk because the plaintiff was not aware of "a condition inconsistent with his safety." Had the elements of assumption of risk, of which the above is one, been present, the plaintiff would not have recovered.³⁵ The plaintiff's acts were considered as constituting contributory negligence which affected the amount he was able to recover from the more negligent defendant. The most recent Mississippi case dealing with the effect of comparative negligence upon the doctrine of assumption of risk was *Herod v. Grant*.³⁶ In this case a deer hunter was injured when he fell from the back of a pickup truck which swerved when being driven after deer in a planted field at night. The lower court allowed recovery against the truck driver, however, the Mississippi Supreme Court reversed and rendered the case for the failure of the trial court to sustain the defendant's motion for a directed verdict, the grounds for which were the plaintiff's assumption of risk.³⁷

A natural result of this dichotomy, which arises when contributory negligence is not a bar to recovery but assumption of the risk is, is that the plaintiff will want to call his behavior contributory negligence. The defendant, however, will urge that the plaintiff's conduct amounted to assumption of risk. The purpose is obvious. Recovery will hinge upon the label placed upon plaintiff's conduct, for in one instance comparative negligence applies; in the other instance it does not.³⁸

In Nebraska, one of the states that applies the slight-gross approach to comparative negligence, the effect of such a system on assumption of risk is somewhat different. One authority has characterized the treatment thusly:

[D]ecisions clearly indicate that although a plaintiff may have assumed a risk of harm, it must be further shown that the plaintiff was negligent by assuming the risk in order for defendant to set up this defense. Assumption of risk exists as a defense in this jurisdiction, but it has vitality only as one type of contributory negligence.³⁹

34. 193 So. 2d 559 (Miss. 1967).

35. *Id.* at 563.

36. 262 So. 2d 781 (Miss. 1972).

37. *Id.* at 783.

38. See Note, *Effect of Mississippi's Comparative Negligence Statute on Other Rules of Law*, 39 Miss. L.J. 493, 500 (1968).

39. Note, *Assumption of Risk as a Defense in Nebraska Negligence Actions Under the Comparative Negligence Statute*, 30 NEB. L. REV. 608, 628 (1950).

In *Anthony v. City of Lincoln*,⁴⁰ the Nebraska Supreme Court set out the elements of assumption of risk, although no attempt was made to categorize them as such.⁴¹ The opinion further announced that the existence of these elements did not indicate that the plaintiff was necessarily guilty of contributory negligence as a matter of law.⁴² There has been little or no use of the term assumption of risk in the subsequent Nebraska cases and the presumption is that the defense of assumption of risk has become just another aspect of contributory negligence.⁴³

In Wisconsin, one of the states with a comparative negligence statute similar to the new Texas statute, the subject of assumption of risk within a comparative negligence context has been directly faced. The Wisconsin Supreme Court, in *McConville v. State Farm Mutual Automobile Insurance Co.*⁴⁴ and *Colson v. Rule*,⁴⁵ held that assumption of risk by a plaintiff did not bar recovery, but would be considered as contributory negligence, and might only eliminate recovery if the plaintiff's negligence exceeded that of the defendant.⁴⁶

The *McConville* case was an automobile guest case in which the plaintiff guest accepted a ride with a driver he knew to have been drinking. The trial court found that plaintiff *McConville* assumed the risk with respect to management and control on the highway and dismissed his complaint. In reversing and remanding, Justice Fairchild stated:

A guest's assumption of risk, heretofore implied from his willingness to proceed in the face of a known hazard is no longer a defense separate from contributory negligence . . . [i]f a guest's exposure of himself to a particular hazard be unreasonable and a failure to exercise ordinary care for his own safety, such conduct is negligence, and is subject to the comparative negligence statute.⁴⁷

40. 41 N.W.2d 147 (Neb. 1950).

41. *Id.* at 151.

42. *Id.* at 152.

43. Note, *Assumption of Risk as a Defense in Nebraska Negligence Actions Under the Comparative Negligence Statute*, 30 NEB. L. REV. 608, 628 (1950).

44. 113 N.W.2d 14 (Wis. 1962).

45. 113 N.W.2d 21 (Wis. 1962).

46. *Id.* at 24; *McConville v. State Farm Mut. Auto. Ins. Co.*, 113 N.W.2d 14, 19 (Wis. 1962). In explanation of one facet of the court's rationale in *McConville* was the statement in *Dippel v. Sciano*, 155 N.W.2d 55, 64 (Wis. 1967): "An obvious reason why the court . . . determined that acts or failures traditionally denominated assumption of risk should be treated as contributory negligence was to extend the benefit of our comparative negligence statute to the plaintiff."

47. *McConville v. State Farm Mut. Auto. Ins. Co.*, 113 N.W.2d 14, 16 (Wis. 1962).

The *Colson* case involved a farm laborer who fell from the roof of a corn crib, which offered an obviously dangerous situation. The Wisconsin Supreme Court again weakened the defense of assumption of risk when Justice Currie stated:

[A]ny conduct of a farm laborer which evinces want of ordinary care [*sic*] for his own safety [*sic*], constitutes contributory negligence and is subject to comparison under the latter section [of the comparative negligence law]. This will have the effect of largely, if not entirely, abrogating in farm labor cases the defense of assumption of risk as an absolute bar to recovery where the conduct alleged falls short of express consent.⁴⁸

The Wisconsin Supreme Court, relying on *Colson* and *McConville*, reversed and remanded the trial court decision in a case where a cattle buyer sat inside the display ring for cattle and was gored by a bull.⁴⁹ The trial court had ruled that the cattle buyer plaintiff assumed the risk, however, the supreme court stated:

The defense of assumption of risk has been abolished by this court as it applies to certain cases. [citing *McConville* and *Colson*]

The policy reasons which prompted the court to abrogate the doctrine of assumption of risk as an absolute defense in those cases do not apply with comparable clarity in the instant case. However, it is our opinion that greater fairness will result if the claimed negligence of Mr. Gilson is couched in terms of contributory negligence rather than in the terms of assumption of risk. This will be true whenever the alleged assumption of risk arises by implication, as here, as opposed to an express assumption of a known risk. This would serve to extend the rule adopted in the *McConville* and *Colson* cases to all situations involving the tacit assumption of risk.⁵⁰

As can be seen by the foregoing cases, the Wisconsin courts have abolished completely assumption of risk as a separate defense and merged it with contributory negligence which, under the comparative negligence statute, is not a bar to plaintiff's recovery.⁵¹

48. *Colson v. Rule*, 113 N.W.2d 21, 25 (Wis. 1962).

49. *Gilson v. Drees Bros.*, 120 N.W.2d 63 (Wis. 1963).

50. *Id.* at 67; see *Raszeja v. Brozek Heating & Sheet Metal Corp.*, 130 N.W.2d 855, 859-60 (Wis. 1964) (plaintiff's "assumption of risk type negligence" was sufficiently causal to amount to 60 percent of the negligence, defeating any recovery).

51. Later cases have also continued this scheme. See *Dippel v. Sciano*, 155 N.E.2d 55 (Wis. 1967); *Bishop v. Johnson*, 152 N.W.2d 887 (Wis. 1967); *Heath v. Zellmer*, 151 N.W.2d 664 (Wis. 1967); *Vroman v. Kempke*, 150 N.W.2d 423 (Wis. 1967); *Murray v. Reidy*, 124 N.W.2d 120 (Wis. 1963); *Alberts v. Rzepiejewski*, 119 N.W.2d 441 (Wis. 1963); *Baker v. Herman Mut. Ins. Co.*, 177 N.W.2d 725 (Wis. 1962); *Huntley v. Donlevy*, 114 N.W.2d 848 (Wis. 1962).

A Minnesota slip and fall case, *Parness v. Economics Laboratory, Inc.*,⁵² involved a plaintiff cafe employee who, knowing that a floor was wet and soapy, walked across it and was injured. The court, denying recovery, acknowledged that assumption of risk is a separate defense from contributory negligence, both of which could bar a plaintiff's recovery before Minnesota's comparative negligence statute became effective.⁵³ Subsequently, in *Springrose v. Willmore*,⁵⁴ a 1971 case that was tried after the Minnesota comparative negligence statute was adopted, the Minnesota Supreme Court was faced with the distinction earlier drawn in *Parness* as to contributory negligence and assumption of risk. In speaking of the distinction the court stated:

We had an opportunity in *Parness* . . . to follow the lead . . . in abolishing assumption of risk as a separate and distinct defense. Although we declined to do so then, in a situation where both contributory negligence and assumption of risk constituted absolute defenses, we expressly anticipated that "the question will be more meaningfully presented under the recently enacted statute abolishing contributory negligence as a complete defense." The time has now come. . . .

Our retention of the terminology of implied assumption of risk, although only as an element of negligence, may be an unnecessary precaution in most cases.⁵⁵

Arkansas, whose modified comparative negligence statute is similar to Texas', has, through its courts, chosen to retain the absolute defense of assumption of risk. *Bugh v. Webb*⁵⁶ was a guest-host automobile accident case in which the plaintiff guest was injured when he voluntarily rode with the plaintiff who became involved in a drag race on a busy highway. Justice Ward in the opinion for the Arkansas Supreme Court stated: "In this State our court has recognized that the defense of the assumption of the risk applies not only in master and servant cases but that it also applies in ordinary cases of negligence."⁵⁷

52. 170 N.W.2d 554 (Minn. 1969).

53. *Id.* at 557.

54. 192 N.W.2d 826 (Minn. 1971).

55. *Id.* at 827-28 (citations & footnotes omitted); *accord*, *Fick v. Wolfinger*, 198 N.W.2d 146, 151 (Minn. 1972); *Renne v. Gustafson*, 194 N.W.2d 267, 269 (Minn. 1972). Unlike Minnesota, New Hampshire courts did not recognize the defense of assumption of risk in common law tort actions, therefore the passage of a comparative negligence statute similar to Texas' brought about no new change. *Bolduc v. Crain*, 181 A.2d 641, 644 (N.H. 1962).

56. 328 S.W.2d 379 (Ark. 1959).

57. *Id.* at 381; *accord*, *Page v. Boyd-Bilt*, 438 S.W.2d 307, 310 (Ark. 1969); *Citizens Coach Co. v. Collier*, 348 S.W.2d 873, 875 (Ark. 1961); *Cousins v. Cooper*, 339 S.W.2d 316, 318 (Ark. 1960).

The court thereupon reversed and rendered, holding the trial court in error for not sustaining defendant's motion for a directed verdict.⁵⁸

The Georgia courts are in agreement with Arkansas in holding that the doctrine of assumption of risk is a bar to plaintiff's recovery, notwithstanding the state's comparative negligence statute. In *Henry Grady Hotel Corp. v. Watts*,⁵⁹ the Georgia Court of Appeals stated that

One who knowingly and voluntarily takes a risk of physical injury, the danger of which is so obvious that the act of taking such a risk, in and of itself, amounts to a failure to exercise ordinary care and diligence for his own safety cannot hold another liable for damages resulting from a hurt thus occasioned, although the same may be in part attributable to the latter's negligence In all other cases the comparative negligence rule applies.⁶⁰

TEXAS AND THE FUTURE

The adoption of a comparative negligence statute is a giant stride forward for Texas in the field of tort law. The progressive attitude of the Texas Legislature in the field of tort law is further evidenced by the changes in the Texas Guest Statute expanding the liability of hosts for negligent injury to their guests.⁶¹ Texas courts are now afforded an excellent opportunity to develop a consistent pattern in keeping with this progressive trend by limiting other outmoded defenses such as "no duty," *volenti non fit injuria* and assumption of risk. Consideration of these defenses as contributory negligence and subject to the statute allows the full expression of the comparative negligence scheme.

The philosophy of the Texas contributory negligence statute appears to be similar to that of Wisconsin and Texas courts can find guidance from the decided cases of that state. "Wisconsin's evolution of the comparative negligence concept may well be adopted as a workable and just procedure that meets the needs of social justice as well as preserving the adversary system."⁶² The effect of this approach would be to eliminate these doctrines as absolute defenses to recovery by plaintiffs whose injury is caused in whole or in part by the negligence of the defendant. The soundness of this approach becomes apparent when one considers

58. *Bugh v. Webb*, 328 S.W.2d 379, 382 (Ark. 1959).

59. 167 S.E.2d 205 (Ga. Ct. App. 1969).

60. *Id.* at 209.

61. TEX. REV. CIV. STAT. ANN. art. 6701b, § 1(a), (c) (Supp. 1974).

62. HEFT & HEFT, COMPARATIVE NEGLIGENCE MANUAL 16 (1971).

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the tenuous distinction between contributory negligence and the assumption of risk doctrines.

Whatever approach the Texas courts apply in the application of the comparative negligence statute, it is obvious that the effect on Texas tort law will be profound, and like a newborn child, the growth and development that is sure to come will be a new source of interest to Texas lawyers over the coming years.