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PREMISES LIABILITY—THE TEXAS RULE OF LIABILITY OF
OWNERS AND OCCUPIERS OF LAND FOR INJURIES
SUSTAINED BY BUSINESS INVITEES ON THE
PREMISES—REVISITED AND
RECONSIDERED

LARRY R. PATTON

*Reason is the life of the law, nay the common law itself is nothing else but reason The law, which is perfection of reason.*¹

Sir Edward Coke

Liability for negligent conduct ordinarily is based upon a failure to exercise reasonable care in the conduct of one's activities.² Premises liability, the liability of the owner or occupier³ of land for injuries sustained by persons entering upon the land from defects or dangerous conditions thereon, has not followed this general rule. The applicable rule instead has been predicated upon a measuring of the extent and scope of the owner or occupier's duty which is established according to the status of the entrant at the time of his injury.⁴ Thus, differing standards of liability have been imposed, depending upon whether the entrant is a trespasser, a licensee, or a business invitee.⁵ The business invitee has enjoyed a special status because his entrance upon the premises has been considered an economic benefit to the landowner, or alternatively, because of implied representations of safety inherent in holding land open to the public.⁶

Recent decisions reflect a trend toward the abolition of the common law distinctions that have been made between the business invitee and other

1. INSTITUTES: COMMENTARY UPON LITTLETON, FIRST INSTITUTE § 138 (1628).

2. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 145 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS §§ 282, 283 (1965); 2 HARPER & JAMES § 27.1, at 1430 (1956).

3. Premises liability ordinarily refers to the liability of the owner or occupier to all parties entering upon the premises. In this comment the term premises liability is used to refer to that portion of the law which refers to the duties owed by the landowner or occupier to the business invitee.

The terms owner and occupier are used interchangeably throughout this comment. When one or the other is found singularly, it may be considered an application of the facts to a particular party's control of the premises.

4. *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 99 (D.C. Cir. 1972), cert. denied, — U.S. — (1973); Annot., 35 A.L.R.3d 230 (1971).

5. See 40 TEX. JUR. 2d *Negligence* §§ 55-76 (1962); W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 57-64, at 351-415 (4th ed. 1971).

6. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 61, at 386, 389 (4th ed. 1971).

entrants who have been accorded a lesser status.⁷ Contemporary courts and legislatures also have carved away many of the doctrines which have developed around the principles of negligence,⁸ and have adopted comparative negligence⁹ as an alternative method of establishing liability. In premises liability, the modern trend is to base recovery of damages "according to the standard of reasonable care under all the circumstances,"¹⁰ notwithstanding the fact that the plaintiff may be a trespasser upon the defendant's land. Thus, the current approach is to view premises liability according to the precepts which traditionally have applied exclusively to the business invitee.

In light of the persuasive arguments in favor of change in the basic approach to premises liability that have been propounded in other jurisdictions and the inclination of the Supreme Court of Texas to alter traditional tort concepts when the reasons for their existence no longer seem determinative,¹¹ questions concerning the need for modification of the Texas rule of premises liability are significant. The following discussion attempts to place the Texas rule of liability for injuries sustained by business invitees in developmental perspective. The objective sought is a reconsideration of the legal principles within the dictates of the ultimate common law test—the test of reason.

7. *E.g.*, *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97 (D.C. Cir. 1972), *cert. denied*, — U.S. — (1973); *Rowland v. Christian*, 70 Cal. Rptr. 97 (1968); *Mile High Fence Co. v. Radovich*, 489 P.2d 308 (Colo. 1971); *Pickard v. City & County*, 452 P.2d 445 (Hawaii 1969); *see* Annot., 35 A.L.R.3d 230 (1971).

8. The following states have either abolished assumption of the risk or severely limited its application: *Leavitt v. Gillaspie*, 443 P.2d 61, 68 (Alas. 1968); *Parker v. Redden*, 421 S.W.2d 586, 592 (Ky. 1967); *Felgner v. Anderson*, 133 N.W.2d 136, 153-54 (Mich. 1965); *Bolduc v. Crain*, 181 A.2d 641, 644 (N.H. 1962); *McGrath v. American Cyanamid Co.*, 196 A.2d 238, 239-40 (N.J. 1963); *Williamson v. Smith*, 491 P.2d 1147, 1152 (N.M. 1971); *Ritter v. Beals*, 358 P.2d 1080 (Ore. 1961); *Siragusa v. Swedish Hosp.*, 373 P.2d 767, 774 (Wash. 1962).

9. The first state to adopt a comparative negligence statute was Mississippi in 1910, MISS. CODE ANN. § 1454 (1943). Other jurisdictions include *e.g.*, Wisconsin (1913); Nebraska (1913); South Dakota (1941); Arkansas (1957); Maine (1964); and Hawaii, Massachusetts, Minnesota, New Hampshire, and Vermont (all in 1969). For a complete listing of the state statutes involving comparative negligence, see Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 657 n.11 (1973-74). *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 67, at 436 (4th ed. 1971).

The Texas Comparative Negligence Statute, TEX. REV. CIV. STAT. ANN. art. 2212a (Supp. 1974), discussed *infra*, became effective September 1, 1973.

10. *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 102 (D.C. Cir. 1972), *cert. denied*, — U.S. — (1973).

11. *See* *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. Sup. 1973) (recognition of right of privacy), *noted in* 5 ST. MARY'S L.J. 345 (1973); *Felderhoff v. Felderhoff*, 473 S.W.2d 928 (Tex. Sup. 1971) (altering parental immunity doctrine); Comment, *The Balance Between Individual Rights and Family Preservation: The Future of the Parent-Child Immunity Doctrine in Texas*, 4 ST. MARY'S L.J. 48 (1972); *Howle v. Camp Amon Carter*, 470 S.W.2d 629 (Tex. Sup. 1971).

THE TEXAS RULE OF PREMISES LIABILITY

Premises liability is most easily understood as the progeny of a legal system which recognizes the preeminence of property rights. The common law pragmatically recognized a need for differing standards of liability "in view of the sparseness of land settlements, and the inability of owners to inspect or maintain distant holdings."¹² Thus, emphasis was placed "on the economic and social importance of free use and exploitation of land over and above the personal safety"¹³ of those who might enter upon the land. This value system seems to have been particularly acceptable to the inhabitants of Texas; decisions dating back to 1883 disposed of premises liability cases on the principles of assumption of the risk, or *volenti non fit injuria*, as absolute defenses to liability.¹⁴

The Texas rule of premises liability was established early. In *Peck v. Peck*,¹⁵ a master-servant action, the supreme court stated that the invitee had a right to rely on the master providing a safe place for work and only under limited circumstances was this duty of the master as landowner or occupier discharged.¹⁶ The principles set forth in the *Peck* decision still control in questions of premises liability to business invitees in Texas. The basic rule entrenched in our common law heritage is that the landowner is not an insurer,¹⁷ but he must provide a safe place for his invitees to enter upon for the transaction of business.¹⁸ The landowner has an affirmative duty to inspect for defects,¹⁹ and must repair or take measures to repair the defects, or must adequately warn the invitee of all dangerous conditions which are not open and obvious.²⁰ Because the landowner is not an insurer, the true basis of liability is superior knowledge of the defect.²¹ Dangerous condi-

12. *Smith v. Arbaugh's Restaurant, Inc.* 469 F.2d 97, 101 (D.C. Cir. 1972), *cert. denied*, — U.S. — (1973).

13. *Id.* at 101.

14. *E.g.*, *McCue v. Klein*, 60 Tex. 168 (1883) wherein it was stated: "As a general principle, a man can recover no damages for an injury received at the hands of another, with his own consent, unless it arises from some act which is in itself a breach of the peace."

15. 99 Tex. 10, 87 S.W. 248 (1905).

16. *Id.* at 14, 87 S.W. at 249.

17. In *Franklin v. City of Galveston*, 256 S.W.2d 997 (Tex. Civ. App.—Galveston 1953, writ ref'd n.r.e.) it was stated:

It is well established in this and many other jurisdictions that the mere ownership of lands or buildings does not render the owner liable for injuries that may be sustained by those who enter thereon. He is not an insurer of such persons even though he invites them to enter his premises.

Id. at 1000, *quoting* *Forth Worth & D.C. Ry. v. Hambright*, 130 S.W.2d 436, 439 (Tex. Civ. App.—Amarillo 1939, writ dismiss'd jdgmt cor.).

18. *E.g.*, *Smith v. Henger*, 148 Tex. 456, 464, 226 S.W.2d 425, 431 (1950).

19. *Texas & Pac. Ry. v. Howell*, 117 S.W.2d 857, 860 (Tex. Civ. App.—Eastland 1938, writ dismiss'd).

20. *E.g.*, *Delhi-Taylor Oil Corp. v. Henry*, 416 S.W.2d 390, 394 (Tex. Sup. 1967).

21. *Western Auto Supply Co. v. Campbell*, 373 S.W.2d 735, 738 (Tex. Sup. 1963);

tions which do not exist at the time the invitee enters the premises, but which arise through the invitee's activities, are not ordinarily such defects for which the landowner is held liable.²²

Notwithstanding the extreme simplicity of the legal principles, application of these rules to a given factual situation historically has proven difficult. *Robert E. McKee, Gen. Contractor, Inc. v. Patterson*²³ perhaps best exemplifies the confusion which has characterized questions of premises liability. The plaintiff sought redress for injuries sustained in a fall from a ladder placed on a highly polished gymnasium floor. The essential question on appeal concerned the duty owed to employees of subcontractors; the court easily clarified the applicable principles:

There are two legal theories, wholly aside from the plaintiff's own negligence, for denying liability in a suit against an owner or occupier of land brought by an invitee for injuries growing out of open and obvious dangers thereon. One rests on the judicial concept that there is no breach of any duty the landowner owes to his invitees. The other arises out of the doctrine of *volenti non fit injuria*—voluntary encountering of the risk—which is regarded as a defense to all negligence actions.²⁴

In contrast to this simple predicate, the court's application of the rules has led to confusion. In deciding the case upon a theory of voluntary exposure to risk, the court did not reach the question of contributory negligence of the plaintiff,²⁵ but it did delimit the applicable test for ascertaining the discharge of the owner or occupier's duty to the business invitee:

It is now well established in this state that the duty [of the owner or occupier] does not extend to those invitees who *know or should know* of the existence of the particular condition and who *appreciate or should appreciate* its dangers.²⁶

At best, the court's language was an unfortunate mixture of two distinct concepts: fault (should) and consent (know, appreciate). The specific problem resulted from dicta in which the court asserted that "*the defenses of voluntary exposure to risk and contributory negligence are frequently treated as one and the same.*"²⁷ Treating two defensive measures as "one and

see Keeton, *Assumption of the Risk and the Landowner*, 22 LA. L. REV. 108, 116 (1961) who states:

It must be admitted that there is abundant authority for the proposition that the true ground upon which the occupier's liability for personal injuries arising from dangerous conditions on land rests in his *superior knowledge* of the dangers thereon. (Emphasis added).

22. *El Paso Natural Gas Co. v. Harris*, 436 S.W.2d 408, 414 (Tex. Civ. App.—El Paso 1968, writ ref'd n.r.e.). See also *Gulf Oil Corp. v. Bivins*, 276 F.2d 753 (5th Cir. 1960); *Gulf Oil Corp. v. Wright*, 236 F.2d 46 (5th Cir. 1956).

23. 153 Tex. 517, 271 S.W.2d 391 (1954).

24. *Id.* at 519, 271 S.W.2d at 393.

25. *Id.* at 525, 271 S.W.2d at 397.

26. *Id.* at 520-21, 271 S.W.2d 393 (emphasis added).

27. *Id.* at 520, 271 S.W.2d at 393 (emphasis added).

the same" might have limited the quantity of issues in a hearing on the merits; the logical inconsistency, however, is quite apparent. Voluntary exposure to risk erases the defendant's duty obligations,²⁸ whereas contributory negligence traditionally has barred recovery in spite of negligence or breach of duty on the part of the defendant-owner or occupier.²⁹ The *McKee* explanation created a need for revision, but the confusion reigned for almost a decade.

THE HALEPESKA CLARIFICATION

In *Haleska v. Callihan Interests, Inc.*,³⁰ the court was faced with a wrongful death action which resulted from a blowout of a gas well owned by the defendant. The court of civil appeals found no breach of duty to the deceased because the danger was open and obvious, and Haleska had voluntarily exposed himself to a risk of which in the exercise of ordinary care, he *should have known* and which he *should have appreciated*.³¹ The propriety of the issues concerning what the deceased should have known or appreciated, in support of a finding of voluntary exposure to risk, elicited the attention of the supreme court. In clarifying the applicable rules of law, the court has made *Haleska* the leading case in instances of injury to a business invitee resulting from defects on the premises.

Premises liability, per *Haleska*, is essentially a consideration of three separate doctrines: (1) "no duty"; (2) *volenti non fit injuria*; and (3) contributory negligence.³² The essential distinction between the three principles is one of the burden of pleading and proof. The "no duty" doctrine is a negating burden placed upon the invitee. As plaintiff, he must not only prove that his injuries were proximately caused by the dangerously defective condition of the premises which presented an unreasonable risk of harm, "but he must also prove . . . that the occupier owed him a *duty* to take reasonable precautions to warn him or protect him from such danger, *i.e.*, the plaintiff must negative 'no duty.'"³³ In essence the "no duty"

28. *Scott v. Liebman*, 404 S.W.2d 288, 293 (Tex. Sup. 1966) wherein it was stated: If with such knowledge and appreciation, or if after a warning, the plaintiff in the ordinary case nevertheless proceeds, the duty of the occupier is zero; *i.e.*, the occupier no longer owes any duty to the invitee, and the invitee may not recover because he has assumed the risk.

29. Conduct which would ordinarily be considered contributory negligence may be justified. *Gulf, C. & S.F. Ry. v. Gascamp*, 69 Tex. 545, 7 S.W. 227 (1888).

30. 371 S.W.2d 368 (Tex. Sup. 1963).

31. *Callihan Interests, Inc. v. Haleska*, 349 S.W.2d 758, 761 (Tex. Civ. App.—Eastland 1961), *rev'd*, 371 S.W.2d 368 (Tex. Sup. 1963).

32. *Haleska v. Callihan Interests, Inc.*, 371 S.W.2d 368, 378-80 (Tex. Sup. 1963).

33. *Id.* at 378 (court's emphasis). Where the defendant moves for summary judgment under Texas Rule of Civil Procedure 166-A, the plaintiff does not have to negative "no duty." In such proceedings, the defendant must proceed with proof that he owes "no duty" to the plaintiff, or that he has discharged this duty. *Guidry v. Neches Butane Prod. Co.*, 476 S.W.2d 666, 668 (Tex. Sup. 1972).

doctrine is a burden upon the plaintiff to show that the danger was not open and obvious, but rather was latent or hidden. In the latter instance, there is an affirmative duty placed upon the landowner or occupier to warn the invitee if the danger on the premises is such that he, being in control of the premises, knows or should know of such by the exercise of reasonable care. On the other hand, *there is "no duty" to warn one "of things he already knows, or of dangerous conditions or activities which are so open and obvious that as a matter of law he will be charged with knowledge and appreciation thereof."*³⁴

Volenti non fit injuria, most often referred to as *volenti*,³⁵ is an affirmative defense based upon the precept that one may not recover for injuries sustained "when he voluntarily exposes himself to a known and appreciated danger."³⁶ In Texas, "the decision to incur the risk must have been deliberate; made with the knowledge and appreciation of the danger so that it may be said that the person acted as a result of an intelligent choice."³⁷ Even where actual knowledge and appreciation is lacking, however, "the plaintiff may not close his eyes to obvious dangers; and he may not recover where it is shown that he is in possession of facts from which he would be legally charged with appreciation of the danger."³⁸ Contributory negligence is also a defensive burden of pleading and proof.³⁹

The basic difference between the concepts of "no duty," *volenti* and the theory of contributory negligence is that of justification.⁴⁰ The idea of acting as a reasonable man under the circumstances is a significant evidentiary matter in questions of contributory negligence, but the question of reasonableness, or justification, in the "no duty" and *volenti* doctrines is not relevant. A further distinction is found in the element of proximate cause; although vital to the question of contributory negligence, it has no part in "no duty" and *volenti* issues. The most significant distinction, however, is found in the applicable tests:

[T]he test in contributory negligence is generally objective: should plaintiff, as an ordinary, prudent person, have known by the exercise

34. *Haleska v. Callihan Interests, Inc.*, 371 S.W.2d 368, 378 (Tex. Sup. 1963) (emphasis added).

35. The elements of *Volenti* 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.

J & W Corp. v. Ball, 414 S.W.2d 143, 146 (Tex. Sup. 1967).

36. *Haleska v. Callihan Interests, Inc.*, 371 S.W.2d 368, 379 (Tex. Sup. 1963).

37. *Id.* at 379.

38. *Id.* at 379.

39. Tex. R. Civ. P. 94.

40. *Haleska v. Callihan Interests, Inc.*, 371 S.W.2d 368, 379 (Tex. Sup. 1963).

of ordinary care. The test in "no duty" and *volenti*, however, is subjective: did plaintiff know and appreciate.⁴¹

The common element shared by the "no duty" and *volenti* doctrines is that of knowledge and appreciation of the consequences of the danger, or such obviousness of danger that the law charges the plaintiff with such knowledge and appreciation. But the "no duty" principle is specifically limited to the question of whether the owner or occupier owes the plaintiff a duty; if not, recovery is defeated. In *volenti*, however, the duty question is irrelevant; the liability is established by the existence or absence of voluntary exposure to the known and appreciated risk.⁴²

Two notable deficiencies remained after the *Halepeska* clarification: the court's refusal to limit the "no duty" cases to static conditions;⁴³ and the failure to abolish the distinctions made between *volenti* and assumption of risk.⁴⁴ Later in the same year, the court did limit the applicability of the "no duty" doctrine to injuries sustained through activities in which the "movement is generally rigidly circumscribed and easily predictable."⁴⁵ Therefore, the plaintiff's burden of negating "no duty" of the owner or occupier is now mandatory only where static conditions of open and obvious danger exist, *e.g.*, holes, pits, etc.⁴⁶ The court has also defined the term "open and obvious,"⁴⁷ thus simplifying the "no duty" and *volenti* cases.

The most significant post-*Halepeska* decision is *Adam Dante Corp. v. Sharpe*,⁴⁸ in which the court reiterated its approval of the *Restatement (Sec-*

41. *Id.* at 379.

42. *Id.* at 380.

43. Greenhill, *Assumption of Risk*, 28 Tex. B.J. 21, 67 (1965).

44. *Id.* at 22. Justice Greenhill's prospective comments should be examined:

Ultimately, the Texas Supreme Court may come to the point of deliberately wiping the slate clean and attempting to start over. It may entirely abandon the concepts of "no duty," *volenti non fit injuria*, and assumed risk in favor of simple negligence and contributory negligence; or it may limit the assumed risk doctrine to a very narrow band of cases.

A question which the Justice raises, but which remains unanswered is whether assumption of risk might be considered fault, thus enabling the court to approach the problem of premises liability on the strict principles of negligence and contributory negligence. *Id.* at 22.

It is noteworthy that the Supreme Court of Wisconsin has opted to treat some matters as contributory negligence despite the fact that the factual considerations would traditionally be treated as assumption of the risk. See *Gilson v. Drees Brös.*, 120 N.W.2d 63, 67 (Wis. 1963).

45. *Hernandez v. Heldenfels*, 374 S.W.2d 196, 201 (Tex. Sup. 1963).

46. Edgar, *Voluntary Assumption of Risk in Texas Revisited—A Plea For Its Abolition*, 26 Sw. L.J. 849, 863 (1972).

47. In *Massman-Johnson v. Gundolf*, 484 S.W.2d 555, 556 (Tex. Sup. 1972), the court explained:

Whether a condition is or is not open and obvious to an invitee is not a question of fact. The phrase, "open and obvious," is often incorrectly used in such a manner as to suggest that it concerns a separate concept or issue. Its correct use means that there is no dispute in the evidence concerning the facts which charge him [the plaintiff] with knowledge and full appreciation of the nature and extent of the danger, and that those two facts are established as a matter of law.

48. 483 S.W.2d 452 (Tex. Sup. 1972).

ond) of Torts position on premises liability for injuries received by business invitees,⁴⁹ and also refined the "basic issues for a conventional occupier-invitee case."⁵⁰ *Adam Dante*, however, has even greater value: the court

49. *Id.* at 454. RESTATEMENT (SECOND) OF TORTS § 343 (1965) provides:

Dangerous Conditions Known to or Discoverable by Possessor

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

Among the notable critics of the Restatement position are Harper and James. James, *Tort Liability of Occupiers of Land: Duties Owed Licensees and Invitees*, 63 YALE L.J. 605, 628 (1954); 2 HARPER & JAMES, *THE LAW OF TORTS* 1494 (1956).

50. *Adam Dante Corp. v. Sharp*, 493 S.W.2d 452, 455 n.1 (Tex. Sup. 1972) sets out the conventional issues thusly:

Plaintiff's Issues

(Duty and Breach of Duty)

1. Defendant created or maintained a dangerous condition (stating it) on its premises. (Objective Test)
2. Defendant knew (or should have known) of the condition. (Objective Test)
3. Plaintiff *did not have actual knowledge* of the condition. (Subjective Test)
4. Plaintiff *did not fully appreciate* the nature and extent of the danger. (Subjective Test)
5. Negligence in some particular act or omission (failure to inspect, failure to correct, failure to warn, etc.).
6. Proximate cause.

Defendant's Issues

(Volenti)

7. Plaintiff *actually knew* of the particular condition. (Subjective Test)
8. Plaintiff *fully appreciated* nature and extent of the danger. (Subjective Test)
9. Plaintiff voluntarily encountered the danger. (Subjective Test)
(Contributory Negligence)
10. Plaintiff was negligent (in some particular, such as failure to keep a proper lookout, walking too fast, etc.) in encountering the risk.
11. Which was a proximate cause of the injury. (Court's emphasis).

This traditional approach in fact inquired about the plaintiff's knowledge and appreciation of the dangerous condition three separate times. *Id.* at 456-57. Acknowledging and condemning this multiple submission of the same issue, Justice Pope refined the issue submission so as to avoid this problem in future cases as follows:

Plaintiff's Issues

1. Defendant created or maintained a dangerous condition (stating it) on its premises. (Objective Test)
2. Defendant knew (or should have known) of the condition. (Objective Test)
3. Negligence in some particular act or omission (failure to inspect, failure to correct, failure to warn, etc.).
4. Proximate cause.

Defendant's Issues

(Assumption of Risk)

5. Did plaintiff voluntarily assume the risk of (stating it)? (Subjective Test)
You are instructed that in order for the plaintiff (naming), to assume the risk, she must have actually known of the condition which caused her injury and she also must have actually and fully appreciated the nature and extent of the danger involved in encountering the condition, and she must have voluntarily and of her own free will encountered the danger of the condition causing her injuries, if any.

abolished the confusing distinction which previously had been made between assumption of risk and *volenti non fit injuria*. Acknowledging criticism of the distinction as "one without a difference," Justice Pope stated:

In the present status of the law we do not limit voluntary assumption of risk to master-servant and contractual relationships, and we regard *volenti* as an extension to, as well as another name for, voluntary assumption of risk.⁵¹

In the 90 years since *Peck v. Peck*,⁵² premises liability in Texas has been defined and redefined, classified and reclassified. Yet in substance the precepts established in the *Peck* decision have not changed substantially. Before entertaining thoughts of equating the status of trespassers, licensees, and invitees, our courts would do well to reconsider the rule which presently determines business invitee controversies.

THE TEXAS RULE OF PREMISES LIABILITY—RECONSIDERED

A reconsideration of the Texas rule of premises liability should be approached from the vantage point of ultimate effect. The pervading question is one of adequacy: Is the current approach adequate to deal with the demands of a highly sophisticated industrial society? In at least two distinct situations, the application of the common law in Texas has produced results which are conclusively contrary to reason: injuries received by employees of independent contractors working on the premises, and slip and fall injuries sustained in public business establishments.

Injury to Employees of Independent Contractors

When the employee of an independent contractor is injured by a defect in the premises, recovery may be defeated by the employee's contributory negligence, the absence of any duty on behalf of the owner to the employee, or a finding that the employee voluntarily assumed the risk.⁵³ In

(Contributory Negligence)

6. Plaintiff was negligent (in some particular, such as failure to keep a proper lookout, walking too fast, etc.) in encountering the risk.

7. Which was a proximate cause of the injury.

Id. at 458 n.2. Subsequent to *Adam Dante* the issue of assumption of risk is, therefore, limited to a simple issue with suitable definitions and instructions. The defendant will be allowed to submit special issues which separately inquire about each pleaded act or omission which allegedly constitutes contributory negligence. *Id.* at 459. *But see* revised Tex. R. Civ. P. 277 (Supp. 1973) which allows the court to submit general charges to the jury. Address by Jack Pope, Associate Justice, Supreme Court of Texas, Amarillo, Texas, September 23, 1973 (this subject of general verdict submission is discussed by Justice Pope in a forthcoming article to be published in 27 Sw. L.J. — (November 1973).

51. *Id.* at 458.

52. 99 Tex. 10, 87 S.W. 248 (1905).

53. *Halespeska v. Callihan Interests, Inc.*, 371 S.W.2d 368, 378-80 (Tex. Sup. 1963).

considering the owner's duty to repair defects or dangerous conditions, how is he to meet his obligation, if in the process of repairing he may be held liable for injuries sustained by the workman? Is an adequate warning to the contractor or the employee's supervisor sufficient? May the owner dispense with the possibility of liability by contract with the employer?

Attempted discharge of liability of the owner by warnings of dangerous conditions on the premises to an independent contractor-employer was disapproved in 1924 by the supreme court.⁵⁴ But the rule which required the owner to personally give notice or warning of danger to the individual employee was not strictly followed; later decisions by the courts of civil appeals⁵⁵ and the Court of Appeals for the Fifth Circuit held to the contrary.⁵⁶ Forty years later, in *Delhi-Taylor Oil Corp. v. Henry*,⁵⁷ the Texas Supreme Court also found the requirement unnecessarily burdensome⁵⁸ and reversed the prior decision:

While an owner owes a duty to employees of an independent contractor to take reasonable precautions to protect them from hidden dangers on the premises or to warn them thereof, an adequate warning to or full knowledge by the independent contractor of the dangers should and will be held to discharge the landowner's alternative duty to warn the employees.⁵⁹

The *Taylor* opinion reflects a more pragmatic approach to premises liability. There is, however, an inherent defect in that the adopted rule is replete with opportunity for litigation: What is adequate warning or full knowledge?

An indemnity agreement obtained from the contractor covering injuries received by his employees would appear to be the solution to the owner's dilemma. Contracts of absolute indemnity are not in violation of public policy;⁶⁰ both the Supreme Court of Texas and the Court of Appeals for the Fifth Circuit have upheld such agreements.⁶¹ Unfortunately, attempts to

54. *Galveston-Houston Elec. Ry. v. Reinle*, 113 Tex. 456, 258 S.W. 803 (1924).

55. See *Tyler v. McDaniel*, 386 S.W.2d 552 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.); *Texas Elec. Serv. Co. v. Holt*, 249 S.W.2d 662 (Tex. Civ. App.—Fort Worth 1952, writ ref'd n.r.e.).

56. *Turner v. West Texas Util. Co.*, 290 F.2d 191 (5th Cir. 1961); *Gulf Oil Corp. v. Bivins*, 276 F.2d 753 (5th Cir. 1960).

57. 416 S.W.2d 390 (Tex. Sup. 1967).

58. *Id.* at 393.

59. *Id.* at 394.

60. As announced in *Ohio Oil Co. v. Smith*, 365 S.W.2d 621, 624 (Tex. Sup. 1963): "In this state, contracts written or construed so as to allow indemnity for liability arising out of the indemnitee's own negligence have long been held not to be violative of the public policy."

61. The cases in which the Supreme Court of Texas has enforced total indemnity contracts include: *Ohio Oil Co. v. Smith*, 365 S.W.2d 621, 623 (Tex. Sup. 1963) ("all claims and damages of every kind . . . arising out of or attributed directly or indirectly to the operations of the contractor hereunder"); *Houston & T.C.R.R. v. Diamond Press Brick Co.*, 111 Tex. 18, 22, 222 S.W. 204, 205 (1920) ("harmless from any and

hold the contractor to such liability is no simple matter. The most recent supreme court case which deals with indemnity provisions, *City of Beaumont v. Graham*,⁶² reveals the use of very strict rules of construction. Justice Hamilton, dissenting, read one of two applicable clauses broadly enough to require the contractor to indemnify the city for "the cost of any lawsuit . . . irrespective of causation, if it arises out of contractual activities."⁶³ The majority, on the other hand, found both provisions applicable only to acts or conduct of the contractor:

The [first] provision . . . expressly stipulates that indemnity is to be against claims for injuries or damages sustained "on account of any negligent act or fault of CONTRACTOR . . .", and that contractor will be required to pay any judgment obtained against city "growing out of such injury or damage." The [second] provision . . . [though] broader . . . nevertheless limits the contractor's indemnification obligation to claims and damages "arising out of *his acts* in connection with the construction of the said improvements, or *occasioned by said contractor*, his agents, servants, or employees."⁶⁴

The *Graham* decision presents significant difficulty in prospective drafting of indemnity provisions. Proper sentence structure does support the majority position. The two provisions relating to negligence of the contractor, however, appear to be surplusage. Furthermore, as Justice Hamilton noted,

all claims for damages arising from any cause whatsoever growing out of the construction, maintenance, and operation of said spur track."). In *Mitchell's Inc. v. Friedman*, 157 Tex. 424, 430-31, 303 S.W.2d 775, 779 (1957), the court also upheld an indemnity provision:

An obligation to hold harmless from claims, liability or damage resulting from a specified operation or instrumentality will be enforced in accordance with its terms even though the indemnitee may thereby be relieved of the consequences of his own negligence.

A representative case from the Court of Appeals for the Fifth Circuit wherein an indemnity agreement was approved is *Alamo Lumber Co. v. Warren Petroleum Corp.*, 316 F.2d 287, 288 (5th Cir. 1963) ("from any and all liability . . . resulting from injuries . . . while contractor is performing the work, which arises out of or in connection with the activities of contractor, contractor's servants, agents and employees.")

62. 441 S.W.2d 829 (Tex. Sup. 1969).

63. *Id.* at 841.

64. *Id.* at 838 (court's emphasis). The contractual provisions in question were:

The CONTRACTOR and his Sureties shall indemnify and save harmless the OWNER and all its officers, agents, and employees from all suits, actions or claims of any character, name and description brought for or on account of any injuries or damages received or sustained by any person or persons or property, on account of any negligent act or fault of the CONTRACTOR, his agents or employees, in the execution of said contract; . . . will be required to pay any judgment, with costs, which may be obtained against the OWNER growing out of such injury or damage.

The CONTRACTOR agrees to fully indemnify and save the City whole and harmless from all costs, expenses and damages arising out of any real or asserted cause of action, and from any and all costs arising from wrong, injury, or damage that may be occasioned to any person or property or to his employees, arising out of his acts in connection with the construction of the said improvements, or occasioned by said CONTRACTOR, his agents, servants or employees.

Id. at 837-38.

the language used in the *Graham* contract does not differ distinctly from that which has been approved in prior cases. A conclusion of form over substance may well be warranted. It should be recognized that even specific language may not withstand the test of construction. Thus, enforcement may be expected only where the contractual language offers no other intention. Perhaps the safest approach would be an allocation of a portion of the total contract price to reflect the extra burden being assumed by the contractor. Specific language, of course, should be emphatically used if the owner elects this approach to resolve questions concerning prospective liability.

The predicament of incurring liability for injury to repairmen becomes acute when the totality of the danger is not known or has not been fully ascertained by the performance of the requisite inspection. It would seem illogical to expect the landowner to warn the specially skilled person he has employed to repair the dangerous condition.

The old master-servant rule quite emphatically denied recovery to the employees for injuries caused by defects which he had been hired to repair. In *City of Teague v. Radford*,⁶⁵ the court, in determining that the employee had assumed the risk and denying recovery, stated:

It is the settled law that an employee or servant cannot recover for damages or injuries which arise from defects in a thing, for the safe condition of which such employee is himself responsible. This rule applies with the same force to a case where the employee undertakes, with the master, to see to the safety of the premises . . .⁶⁶

A distinction to the *Radford* rule was subsequently drawn in *Wood v. Kane Boiler Works, Inc.*⁶⁷ The plaintiff's decedent in *Wood*, an employee of a subcontractor, had been hired as an inspector of the welding of a gas pipe line being fabricated for the premises owner by the respondent. The decedent had ordered a defect in the pipe to be chipped out and rewelded. After approving the rewelding, Wood initiated a hydrostatic test on the pipe. Before completion of the test, however, the pipe burst and Wood was killed by the escaping pressurized water.

The defendants sought to avoid liability for Wood's death by asserting assumption of the risk and that there was "no duty" owed since the decedent had been employed to see that the pipe passed the hydrostatic test. The court responded that the doctrine of assumed risk applied only to master-servant relationships⁶⁸ and, therefore, was not available since the injured

65. 63 S.W.2d 376 (Tex. Comm'n App. 1933, holding approved).

66. *Id.* at 377.

67. 150 Tex. 191, 238 S.W.2d 172 (1951).

68. This curious holding of the court in *Wood* is responsible for the irreconcilable distinction which Texas courts have made between the doctrines of assumption of risk and *volenti non fit injuria*. *Id.* at 195, 238 S.W.2d at 176. This anomaly of Texas

party was not an employee of the defendant. More significant, however, was the finding that *recovery for Wood's death was not barred because he was not employed to repair defects in the pipe.*⁶⁹ The court thus restricted the application of the doctrine of assumed risk to those instances in which the employee is specifically employed to remedy the injuring defect. A stringent drawing of the lines of liability and duty around the specific defect which a repairman has been employed to repair is a questionable approach to the problem of premises liability. Several jurisdictions have opted in favor of an exception to the safe place requirement in which the owner is under no duty to protect employees from risks arising from or intimately connected with defects of the premises.⁷⁰ This recognition stems from a decision of the Supreme Court of Missouri, *Hammond v. City of El Dorado Springs*,⁷¹ in which the city was absolved from liability for injuries received by the employee of an independent contractor who contracted to repair the city's water storage tank. Closely parallel to the reasoning in the *Radford* master-servant rule, the Missouri court found that the employee could not recover for injuries arising from defects which the contractor has undertaken to repair.⁷²

In 1969, the Supreme Court of Texas was presented with an opportunity to adopt the exception announced in the Missouri decision. In *City of Beaumont v. Graham*,⁷³ the factual considerations were substantially identical: injuries were sustained by employees of independent contractors while making repairs on water storage tanks owned by the cities. Yet, the Texas Supreme Court managed to distinguish the *Hammond* decision, finding that the contract presented to the Missouri court was one calling for a *general repair*.⁷⁴ Thus, *Graham* was decided in full agreement with *Wood v. Kane Boiler Works, Inc.*,⁷⁵ where the plaintiff's injuries resulted from defects which the contractor had not been employed to repair.

Whether the exception announced in *Hammond v. City of El Dorado Springs*⁷⁶ will prospectively apply in Texas is not adequately answered in the *Graham* opinion. In response to the City of Beaumont's assertion that *Hammond* should control the factual considerations in *Graham*, the court stated:

This court recognized the exception to an owner's or occupier's duty to an invitee and discussed it at some length in *Wood v. Kane Boiler*

law was recently abolished in *Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452, 458 (Tex. Sup. 1972).

69. *Wood v. Kane Boiler Works*, 150 Tex. 191, 198, 238 S.W.2d 172, 176 (1951).

70. Annot., 31 A.L.R.2d 1375, 1385 (1951).

71. 242 S.W.2d 479 (Mo. 1951); Annot., 31 A.L.R.2d 1367 (1951).

72. *Hammond v. City of Eldorado Springs*, 242 S.W.2d 479, 485 (Mo. 1951).

73. 441 S.W.2d 829 (Tex. Sup. 1969).

74. *Id.* at 835.

75. 150 Tex. 191, 238 S.W.2d 172 (1951).

76. 242 S.W.2d 479 (Mo. 1951).

*Works. . . . We also recognized that the rationale of the exception rested upon the doctrine . . . "volenti non fit injuria" It is but an extension to an employer-independent contractor relationship of the doctrine of assumed risk applied in similar factual situations in master-servant relationships.*⁷⁷

The court's language would seem to support the application of the *Hammond* exception in future actions; however, in a subsequent portion of the opinion, the court also stated:

Assuming that we would apply the exception . . . to risks only intimately connected with defects which the contractor has undertaken to repair . . . that obviously was not what the jury found. The finding is that *the work being performed* was intimately connected with *the work contracted to be performed. . . . The work being performed . . . was expressly required* by the contract.⁷⁸

It is most unfortunate that the court prefaced its subsequent remarks with the word "assuming." On the one hand, the court indicates that the *Hammond* exception would apply under appropriate circumstances. Yet, the word "assuming" creates doubtful prospective application of the exception which it has supposedly "recognized." Does the *Graham* opinion reveal an intention to apply the old master-servant rule to similar factual situations which involve employers of independent contractors? Was the court recognizing a difficulty in ascertaining what constitutes "risks . . . intimately connected with defects"? Does the court indicate a desire to limit these "intimately connected risks" to those which have been expressed in the contract between the parties? Or, would a contract for general repairs absolve the landowner from all liability? The ambiguity in the opinion creates substantial opportunities for litigation.

Slip and Fall Injuries Sustained in Public Business Establishments

The Texas cases clearly establish that the "no duty" doctrine applies where the defendant has given an adequate warning of a dangerous condition—the warning *discharges* the owner's duty to the invitee.⁷⁹ There is "no duty," furthermore, to warn of open and obvious conditions⁸⁰ as the invitee will be held to have assumed the risk when he proceeds in the face of known and appreciated dangers.⁸¹ From the owner's vantage point, the rules are logical and fairly effective; however, they have operated in an inequitable manner in the slip and fall cases.

In *Western Auto Supply Co. v. Campbell*,⁸² the plaintiff was injured when

77. *City of Beaumont v. Graham*, 441 S.W.2d 829, 834 (Tex. Sup. 1969) (emphasis added).

78. *Id.* at 835 (court's emphasis).

79. *E.g.*, *Delhi-Taylor Oil Corp. v. Henry*, 416 S.W.2d 340 (Tex. Sup. 1967).

80. *Harvey v. Seale*, 362 S.W.2d 310, 312-13 (Tex. Sup. 1962).

81. *See Smith v. Henger*, 148 Tex. 456, 468, 226 S.W.2d 425, 433 (1950).

82. 373 S.W.2d 735 (Tex. Sup. 1963).

he slipped and fell on a recently mopped floor. The judgment of the lower court, based on a jury finding that the plaintiff was not negligent in failing to heed a warning given by the appellant's employee, was found to be erroneous.⁸³ The rule of premises liability is clearly a discharge of duty in those instances of adequate warning to the invitee! An analysis of the facts, however, reveals significant questions: (1) the company had always roped off the freshly mopped areas in the past; (2) the film on the floor was difficult to see; (3) the evidence was contradictory on whether a warning had been given; and (4) according to the employee's own testimony, he was leading the customer to obtain a particular item of merchandise when the slip and fall occurred.⁸⁴ Considering the totality of these circumstances, it would indeed be difficult to find that one had assumed the risk, but this case was decided on the "no duty" doctrine.⁸⁵ In other words, in spite of the fact that the customer was following the defendant's salesman when the injury occurred, the mere fact of a warning negated any further duty to the invitee. The important question is whether any reasonable man would not have followed the salesman. However, the rule of law is clear. The Supreme Court of Texas had no choice but to reverse and render for the defendant-company.⁸⁶ But is the result fair?

Assumption of risk has been widely criticized as a harsh doctrine. The fact that the doctrine has functioned as an inequitable instrument of law is well demonstrated in *Houston National Bank v. Adair*.⁸⁷ The plaintiff's wife, a regular customer of the bank, was injured when she slipped and fell on stairs leading to the statement window in the basement. In affirming the trial court's decision to grant the defendant's motion for instructed verdict, on the grounds that "the condition of the stairs was open, visible and obvious to any reasonably careful person,"⁸⁸ the supreme court gave no consideration to negligence on the part of the bank. Thus, despite the fact that the stairs were made of a white, smooth marble and had not been "altered, rebuilt or repaired"⁸⁹ after 20 years of use, and the failure of the bank to provide a handrail except a balustrade which "was so wide that it could not be grasped or gripped by a person's hand,"⁹⁰ Mrs. Adair's recovery was barred because she had "voluntarily exposed herself to such risks as existed."⁹¹

The rules of "no duty" and assumption of the risk may be logical in the-

83. *Id.*

84. *Id.* at 737.

85. *Id.* at 739-40.

86. *Id.* at 740.

87. 146 Tex. 387, 207 S.W.2d 374 (1948).

88. *Id.* at 376.

89. *Id.* at 375.

90. *Id.* at 375.

91. *Id.* at 376.

ory, but the consequences are repugnant to the basic concept of negligence—the existence of fault. The essential question should be: Who was more at fault in either the *Campbell* or *Adair* cases? The predicates of premises liability impose a duty on the landowner to provide a safe place for the invitee. Yet *Western Auto* and the *Houston National Bank* both failed to meet this primary responsibility. Are we obtaining the ends which the law of premises liability is designed to foster? To the contrary, the application of premises liability law has provided an escape to the landowner's liability for failure to repair defective conditions on a premises which is held open, and supposedly safe, to the public. The Texas rule of premises liability has provided, by judicial fiat, a licensing of defective conditions. A more reasonable approach should be sought to deal with the demands of this society.

THE SUPERIOR KNOWLEDGE CRITERION

Texas precedent reveals a limited, yet continuing, thread of reference to superior knowledge as the true basis of liability in defective premises actions. If the determination of liability were based upon a test of ascertaining which party was most able to avoid the resulting injury, *i.e.*, who was more at fault, more equitable results would necessarily follow. The most recent expression of superior knowledge as a determinative factor occurs in *Shell Chemical Co. v. Lamb*,⁹² where the supreme court denied recovery against a landowner because the employee's independent contractor was in a "*superior position to prevent the existence of, to inspect for, and to eliminate or warn its employees of this dangerous condition.*"⁹³

The recognition of superior knowledge as a criterion in determining liability for injuries sustained by invitees stems from the case of *Worth Food Markets, Inc. v. LeBaume*,⁹⁴ where the court, in absolving the store owner from liability, stated:

The true ground of liability is the proprietor's superior knowledge of a perilous instrumentality and the danger therefrom to persons going upon the property. It is when the perilous instrumentality is known to the owner, or the occupant, and not known to the person injured, that a recovery is permitted.⁹⁵

The rule was also applied in *Hall v. Medical Building*,⁹⁶ where a door dangerously opened into that portion of the lobby of the building where business invitees necessarily waited for elevators. The plaintiff, although aware of

92. 493 S.W.2d 742 (Tex. Sup. 1973).

93. *Id.* at 748 (emphasis added). Superior knowledge was also considered in *Western Auto Supply Co. v. Campbell*, 373 S.W.2d 735, 738 (Tex. Sup. 1964), but the case was decided on discharge of duty by adequate warning.

94. 112 S.W.2d 1089 (Tex. Civ. App.—Forth Worth 1938, writ dismiss'd).

95. *Id.* at 1091 (quoted source omitted).

96. 151 Tex. 425, 151 S.W.2d 497 (1952).

the door, was without knowledge that the condition presented potential peril. Recovery was allowed because "the evidence . . . tend[ed] to prove that the proprietor's knowledge of the danger was *superior* to that of the petitioner."⁹⁷

The difficulty in transposing the *Hall* and *LeBaume* cases into controlling principles is found in the absence of knowledge of the dangerous condition by one party. Thus, the criterion applied was not really "superior knowledge" but one in which there was an absence of knowledge by one party. The *Lamb* case, on the other hand, did apply a form of "superior knowledge" in determining liability upon a finding of "superior position" to avoid the consequences of the danger.

A true test of "superior knowledge" should consider the relative negligence of the parties. The opportunity to decide premises liability questions upon the strict principles of negligence and contributory negligence has been presented to the supreme court,⁹⁸ and a few cases have been decided on that basis.⁹⁹ The principle of *stare decisis*, however, has convinced the court to continue to apply the "no duty" and *volenti* doctrines where applicable.¹⁰⁰ Further criticism of the court's choice is not necessary,¹⁰¹ but an opportunity to reconsider this decision is afforded by the adoption of the new comparative negligence statute. The new statute does not abolish the common law doctrines of assumption of risk and contributory negligence, however, application of the latter doctrine is restricted to a function of apportioning damages except where the plaintiff's negligence is not greater than that of the defendant.¹⁰² Similar application of the doctrine of assumed

97. *Id.* at 501 (emphasis added).

98. *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368, 377 (Tex. Sup. 1963).

99. *Id.* at 377. See *Triangle Motors v. Richmond*, 152 Tex. 354, 258 S.W.2d 60 (1953); *Blanks v. Southland Hotel, Inc.*, 149 Tex. 139, 229 S.W.2d 357 (1950); *United Gas Corp. v. Crawford*, 141 Tex. 332, 172 S.W.2d 297 (1943); *Walgreen-Texas Co. v. Shivers*, 137 Tex. 493, 154 S.W.2d 625 (1941); *McAfee v. Travis Gas Corp.*, 137 Tex. 314, 153 S.W.2d 442 (1941); *J. Weingarten, Inc. v. Brockman*, 135 S.W.2d 698 (Tex. Comm'n App. 1940, jdgmt adopted); *Gulf, C. & S.F. Ry. v. Gascamp*, 69 Tex. 545, 7 S.W. 227 (1888).

100. *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368, 377 (Tex. Sup. 1963); see *Greenhill, Assumption of the Risk*, 28 TEX. B.J. 21 (1965).

101. For a recent scholarly consideration see Edgar, *Voluntary Assumption of Risk in Texas Revisited—A Plea For Its Abolition*, 26 SW. L.J. 849 (1972). See Keeton, *Assumption of Risk and the Landowner*, 22 LA. L. REV. 108 (1961). For a general discussion of the Texas rule of assumption of risk, see *Greenhill, Assumed Risk*, 20 SW. L.J. 1 (1966).

102. TEX. REV. CIV. STAT. ANN. art. 2212a (Supp. (1974) states in part:

Contributory negligence shall not bar recovery in an action by any person or party or the legal representative of 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 or persons or parties against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person or party recovering.

risk would appear in concert with the ultimate consideration of apportioning liability according to the relative fault of the parties.¹⁰³

CONCLUSION

Whether the supreme court will respond to the legislative mandate to apportion damages by restricting the effect of the judicially created doctrine of assumption of risk remains a question of prospective import. A criterion of superior knowledge of dangerous conditions on the premises would not only function well in apportioning damages, but would also suffice as precedent for the much needed revision of the Texas rule of premises liability.

The foregoing cursory reconsideration of the application of the Texas rule of premises liability hopefully has revealed the more glaring inadequacies of the present approach. In retrospect, it seems very difficult to favorably advise one's client without accompanying warnings of potentially adverse rulings by the appellate courts. The prospect of pretrial settlement is at least made more difficult by the intricate detail which has been promulgated by the supreme court in its review of premises liability. Reason dictates that a manageable solution is needed to avoid the opportunity for protracted litigation. The Supreme Court of Texas should, at its earliest opportunity, revisit, reconsider and redefine the precepts of premises liability to meet contemporary needs.

103. The Supreme Court of Wisconsin has abolished assumption of the risk in certain instances, *e.g.*, *McConville v. State Farm Mut. Auto. Ins. Co.*, 113 N.W.2d 14 (Wis. 1962) (host to guest in automobile); *Colson v. Rule*, 113 N.W.2d 21 (Wis. 1962) (employer to employee on farm). More importantly, however, in a case in which it appeared that "greater fairness" would result if conduct were "couched in terms of contributory negligence rather than in terms of assumption of risk," the court found no reason to abolish assumption of risk. *Gilson v. Drees Bros.*, 120 N.W.2d 63, 67 (Wis. 1963). Although the conduct in question would clearly fall into the dictates of assumption of risk, the court sought to assign liability according to the negligence of the parties. *Id.* at 67. In other words, the court treated assumption of risk as negligent conduct.

Justice Greenhill has parenthetically noted the possibility of treating assumption of risk as a matter of fault. See Greenhill, *Assumption of Risk*, 28 TEX. B.J. 21, 22 (1965).