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Assumption of Risk as a Defense for a Negligent Employer

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NOTES

ASSUMPTION OF RISK AS A DEFENSE FOR A NEGLIGENT EMPLOYER

I. INTRODUCTION

The doctrine of assumption of risk is a judically created rule which was developed in response to the general impulse of the common-law courts during the eighteenth century in England. Its purpose was "to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost-to-someone of the doing of industralized business. The general purpose behind this development seems to have been to give maximum freedom to expanding industry."[1]

Since its infancy, this defense has taken on a harsh rigidity in the area of master-servant relationships in this country. However, in the recent landmark case of *Siragusa v. Swedish Hospital*,[2] Washington modified this stringent rule, becoming one of the first states since the turn of the century to do so.[3] This decision has again brought to light the inconsistencies of this rule where the master is negligent in creating or maintaining a dangerous condition. This study will make a comparative analysis between the old rule and its present day modifications. Policy reasons for the alteration will be discussed, as will North Dakota's law dealing with the doctrine.

II. BASIS OF ASSUMPTION OF RISK

Broadly stated, assumption of risk is based on contract, either express or implied.[4] According to this view an employee by his very act of entering the service of the employer assumes the ordinary risks of the employment, or such

1. Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 58 (1943).
2. 373 P.2d 767 (Wash. 1962).
3. Missouri and North Carolina have adhered to the modified rule since before the turn of the century. See e. g., Hines v. Continental Baking Co., 334 S.W.2d 140 (Mo. 1960); Sims v. Lindsay, 122 N.C. 678, 30 S.E. 19 (1898). Oregon adopted it in Ritter v. Beals, 358 P.2d 1080 (Ore. 1961).
4. Parker v. City of Wichita, 150 Kan. 249, 92 P.2d 86 (1939).

as usually are incident thereto. It is universally recognized that an employee injured solely by reason of such risks has no common-law right of recovery against the employer.[5] Usually no distinction is made between ordinary risks incidental to the service and that class of risks generally described as extraordinary—caused by the master's negligence—when they are or ought to be known to and appreciated by the servant.[6] Thus, the contract basis has been extended to cover the assumption of extraordinary risks. It is very generally declared that the consideration for such assumption is the fixing of the compensation with respect to the risks assumed.[7]

Some decisions have held that the doctrine does not rest on contract, but is based upon the principle expressed by the maxim, *"volenti non fit injuria."*[8] In other words, he who consents to an act will not be heard to claim he has been injured by it. These jurisdictions, however, appear to be in the minority.

III. A DEFENSE WHERE THE EMPLOYER IS NEGLIGENT

Generally, a master has a duty to use ordinary care to furnish a servant with a reasonably safe place in which to work and with reasonably safe instrumentalities.[9] The employer will be presumed to know of and to understand such dangers as ordinarily inhere in the business which he conducts. His failure to use reasonable care constitutes negligence.[10]

Inasmuch as voluntary action on the part of a servant is essential to the invocation of the doctrine, it is well settled that in all cases the basis for charging the servant with the assumption of the risks normally incident to his employment

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5. Lang v. United States Reduction Co., 110 F.2d 441 (7th Cir. 1940).
6. Gray v. Garrison, 49 Ga. App. 472, 176 S.E. 412 (1934); Stone v. Howe, 92 N.H. 425, 32 A.2d 484 (1943); Leach v. Oregon Short Line R.R., 29 Utah 285, 81 Pac. 90 (1905).
7. Makino v. Spokane, P. & S. Ry., 155 Ore. 317, 63 P.2d 1082 (1937); Seaboard Air Line Ry. v. Horton, 233 U.S. 492 (1914).
8. Denver & R.G.R.R. v. Gannon, 40 Colo. 195, 90 Pac. 853 (1907); Osterholm v. Boston & Montana Consol. Copper & Silver Co., 40 Mont. 508, 107 Pac. 499 (1910).
9. Cherry v. Hawkins, 137 So. 2d 815 (Miss. 1962); Hull v. Davenport, 93 Wash. 16, 159 Pac. 1072 (1916).
10. Symons v. Great Northern Ry., 208 Minn. 240, 293 N.W. 303 (1940); Wagner v. H. W. Jayne Chemical Co., 147 Pa. 475, 23 Atl. 772 (1892).
11. Chesapeake & O. Ry. v. Richardson, 116 F.2d 860 (6th Cir.), **cert. denied,** 313 U.S. 574 (1941); Parker v. City of Wichita, 150 Kan. 249, 92 P.2d 86 (1939); Symons v. Great Northern Ry., 208 Minn. 240, 293 N.W. 303 (1940).

is knowledge by him, either actual or constructive, of such risks.[11] It is his duty to know of and appreciate these, and the law charges him with the knowledge thereof.[12]

Risks which arise from the negligence of the master are not ordinary risks incident to the employment, but are "extraordinary."[13] Usually the servant does not assume these, but it is a general rule that he may assume them when they are or ought to be known to, and appreciated by him.[14] It is in this instance that the doctrine becomes harsh and unfair. In such a case, the defense of assumption of risk may bar recovery for injuries attributable to extraordinary dangers created by the master's own negligence, if the risk causing the injury is obvious and apparent.[15] The employee need not even be *actually* aware of the danger for the defense to apply.[16] Therefore, the employee not only is held to assume the risk of all dangers ordinarily incidental to his work, but also the extraordinary risks of the employment, although due directly to the master's negligence. Even though the servant acted as a reasonably prudent man and was not contributorily negligent, he may still be denied recovery. The master need only assert that the injured servant was aware of, or should have known of, the dangerous condition negligently created. To apply the rule in such a situation "is to affirm and deny, in the same breath, the employer's duty of care."[17]

IV. DISTINCTIONS BETWEEN ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE

Since contributory negligence will become involved under the modified doctrine, it is essential that the distinctions between assumption of risk and contributory negligence be pointed out. A Washington court stated:

"While [these defenses] are so closely allied that

12. New York C. & St. L.R.R. v. Boulden, 63 F.2d 917 (7th Cir.), **cert. denied,** 289 U.S. 753 (1933); Peters v. Tennessee Cent. Ry., 179 Tenn. 509, 167 S.W.2d 973 (1943).
13. Great Northern Ry. v. Nelson, 90 F.2d 84 (8th Cir. 1937); Brazeale v. Piedmont Mfg. Co., 184 S.C. 471, 193 S.E. 39 (1937).
14. Blaisdell v. Blake, 111 Vt. 123, 11 A.2d 215 (1940).
15. Stone v. Howe, 92 N.H. 425, 32 A.2d 484 (1943); Painter v. Nichols, 118 Vt. 306, 108 A.2d 384 (1954); Cummins v. Default, 18 Wash. 2d 274, 139 P.2d 308 (1943).
16. Bartlett v. Gregg, 77 S.D. 406, 92 N.W.2d 654 (1958); Wiggins v. E. Z. Waist Co., 83 Vt. 365, 76 Atl. 36 (1910).
17. Siragusa v. Swedish Hospital, 373 P.2d 767, 773 (Wash. 1962).

> it is sometimes difficult to draw the line between them, they are not synonymous, but are founded on separate, distinct principles of law. Contributory negligence involves some breach of duty on the part of the injured person, or failure on his part to use the required degree of care for his safety. . . . [A]ssumption of risk . . . may bar recovery even though the injured person may be free from contributory negligence."[18]

Assumption of risk rests in contract or upon the principle expressed by the maxim, *"volenti non fit injuria."* Contributory negligence rests in tort or an omission of duty.[19] Therefore, the denial of recovery on the scope of negligence on the part of the employee precedes upon a different principle than a refusal of compensation based on assumption of risk.

V. THE MODIFIED DOCTRINE: THE MISSOURI RULE

It is held without exception, under the modified doctrine, that a servant never assumes risks occasioned by the carelessness or negligence of the master[20] unless that risk is so open, obvious, and imminent that no person of ordinary prudence would incur it. Under such circumstances, the employee who continued to work, without using due care, would be guilty of contributory negligence.[21] This was evidenced in *Siragusa v. Swedish Hospital,*[22] where the court held:

> "[I]f the employee's voluntary exposure to the risk is unreasonable under the circumstances, he will be barred from recovery because of his contributory negligence. Knowledge and appreciation of the risk of injury, on the part of the employee, are properly important factors which should be given weight in the determination of the issues of whether the employer is *negligent* in maintaining the dangerous condition and whether the employee is *contributorily negligent* in exposing himself to it."

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18. Walsh v. West Coast Coal Mines, 31 Wash. 2d 396, 197 P.2d 233, 240 (1948).
19. St. Louis Cordage Co. v. Miller, 126 Fed. 495 (8th Cir. 1903); Dale v. Hill-O'Meara Constr. Co., 108 Mo. App. 97, 82 S.W. 1092 (1904).
20. Fischer v. City of Cape Girardeau, 345 Mo. 122, 131 S.W.2d 521 (1939); George v. St. Louis & S.F.R.R., 225 Mo. 364, 125 S.W. 196 (1910); Leggett v. Atlantic Coast Line R.R., 152 N.C. 110, 67 S.E. 249 (1910).
21. Fischer v. City of Cape Girardeau, 345 Mo. 122, 131 S.W.2d 521 (1939); Maulden v. High Point Bending & Chair Co., 196 N.C. 122, 144 S.E. 557 (1928).
22. 373 P.2d 767, 773 (Wash. 1962).

The maxim then, under this rule, is, "the moment negligence comes in at the door, the doctrine of assumption of risk goes out the window."[23] In other words, the master may not assert, as a defense to an action based upon a breach of his duty, that the injured employee was aware, or should have known, of the dangerous condition negligently created or maintained.[24] The servant assumes only such risks as are inherent in his work after the master has exercised due care, and within these confines the ultimate fact question is for the jury, but under instructions which would preserve these limitations.[25]

In *George v. St. Louis & San Francisco R.R.*,[26] it was *held*:

> "The servant, when he enters his master's employ, impliedly agrees with him, for the compensation named, to assume the risk of usual dangers incident to the work. But the servant does not assume the risk of the master's negligence, for a very good reason; and that is, because it is a fundamental proposition that it is against public policy for a master to contract against his own negligence. So, too, in the assumption of risks by a servant it is well to consider a certain assumption by the master; and that is, that the master impliedly contracts with the servant that he will exercise ordinary care to protect such servant from injury by providing a reasonably safe place for him to work. When these two assumptions are considered as proceeding hand in hand, it will be perceived that the risks assumed by the servant are those risks alone which remain after the master has exercised ordinary care."

The reasoning behind this modified doctrine is not new. It was best described in the words of Labatt, in his treatise on *Master and Servant*.[27]

> "The acceptance of this principle would not in-

23. Patrum v. St. Louis & S.F.R.R., 259 Mo. 109, 168 S.W. 622, 624-25 (1914).
24. Williams v. Terminal R.R. Ass'n of St. Louis, 339 Mo. 594, 98 S.W.2d 651, **cert. denied,** 300 U.S. 669 (1936); Schaum v. Southwestern Bell Tel. Co., 336 Mo. 228, 78 S.W.2d 439 (1934); Siragusa v. Swedish Hospital, 373 P.2d 767 (Wash. 1962).
25. Markley v. Kansas City So. Ry., 338 Mo. 436, 90 S.W.2d 409 (1936); George v. St. Louis & S.F.R.R., 225 Mo. 364, 125 S.W. 196 (1910); Siragusa v. Swedish Hospital, 373 P.2d 767 (Wash. 1962).
26. 225 Mo. 364, 125 S.W. 196, 209 (1910).
27. 3 LABATT, MASTER AND SERVANT § 964 (2d ed. 1913).

> volve any very startling changes in the law as we now have it. It would merely require us to fix the standard of care incumbent on the master, with a view to the consideration that, as the implied agreement of the servant is merely that he will use ordinary diligence in the discharge of his functions, it is a breach of duty in the master to keep his instrumentalities in such a condition that ordinary diligence will not always save the servant from injury. A rule formulated upon this basis would not make the master an insurer, nor would it necessarily render him liable simply for the reason that his appliances were old and imperfect. It would merely make his liability dependent upon whether he had or had not acted unreasonably, and, therefore, negligently, in holding out inducements to do work which, at certain conjunctures not unlikely to arise, could not be performed without the exercise of a degree of care which no fair-minded, considerate person would demand from a servant."

As was earlier stated, in order to charge the servant with the assumption of risk, the master had only to plead that the servant was aware of, or should have known of, the dangers negligently created and maintained by the master. He based the assumption of risks on contract, either express or implied. This appears to be a misconception, for the master also implies in his contract that he will furnish and maintain a reasonably safe place to work and reasonably safe appliances.[28] The advocates of the old doctrine appear to overlook this fact, for when it is included, the servant is left to assume only ordinary risks. The servant could not possibly be held to assume those created by the master's negligence in that case, and to so hold is artifical and harsh. It is not just or fair to permit a master to escape liability for a failure to perform his duty, simply because the servant was aware of, or should have known of, the danger. The servant may have reasonably elected to expose himself to it. Such an exposure does not establish prima facie that the servant was negligent. Whenever there is room for a reasonable difference of opinion as to whether the servant so appreciated the danger as to make it reckless to proceed, the question is one of contributory negligence and is for the jury.[29]

28. George v. St. Louis & S.F.R.R., 225 Mo. 364, 125 S.W. 196 (1910).
29. Siragusa v. Swedish Hospital, 373 P.2d 767 (Wash. 1962).

VI. POLICY CONSIDERATIONS

The doctrine of assumption of risk was originally created to protect the employer as much as possible from bearing the burden of human overhead while carrying on an industralized business. It was meant to give maximum freedom to expanding industry.[30] However, these policy reasons no longer support the doctrine. Realizing this, the Supreme Court of Washington modified their rule. In *Siragusa v. Swedish Hospital,*[31] the court had this to say:

> "The policy reasons which gave rise to the doctrine of assumption of risk in the master-servant area no longer suffice to support the harsh effects upon injured employees who seek redress for their employer's negligence. Public opinion, reflected in workmen's compensation legislation, has dictated a change in the underlying concepts of the employer's responsibility. . . .No longer can it be said that a judically-imposed doctrine of assumption of risk is necessary or desirable to protect expanding industry from being crippled by employer's responsibility for tortious conduct toward their employees. . . .Such a presumption has no basis in experience, and is not founded upon any current social policy."

It is held that an employee who continues working when he is aware of a negligently created danger assumes the risk.[32] This brings to light another weakness of the old doctrine, for it commits the courts to the anomalous position that actual constraint is something different from legal constraint. The frightening consequences of the failure to obtain work or from the loss of a position will almost always operate as a very strong coercive influence upon the employee. To speak of one, whom that fear drives into or detains in a dangerous employment, as assuming the risk, is a mere trifling of words.[33] To hold that a servant must quit work, or be held to assume dangers negligently created by the master by the continuance of such work, even though the servant is not himself negligent, is absurd. It is an unrealistic and rigid presumption.

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30. See Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943).
31. 373 P.2d 767, 773 (Wash. 1962).
32. Geis v. Hodgman, 95 N.W.2d 311 (Minn. 1959).
33. 3 LABATT, MASTER AND SERVANT § 963 (2d ed. 1913).

Social and economic notions have changed since the creation of the doctrine of assumption of risk. Regardless of the dignity of the doctrine's common-law origin, "it does not follow that tort-feasors have a vested interest in early cases which may have afforded some immunity from liability for fault."[34] It is a rather startling position to take, that public policy requires judges to protect such a doctrine. The judiciary ought not to accord it active encouragement.

VII. NORTH DAKOTA'S VIEW

Section 34-02-03 of the North Dakota Century Code provides: "An employer, in all cases, shall indemnify his employee for losses caused by the former's want of ordinary care." From outward appearances, it looks as if this section imposes absolute liability upon a negligent employer. However, the above quoted statute has been on the books for many years in this state.[35] In no case has it been held that it imposes absolute liability.

It is held in this state that if an employer negligently fails in the performance of his duty, and the employee is injured thereby *while in the exercise of due care,* the master will be liable.[36]

In *Umsted v. Colgate Farmers' Elevator Co.,*[37] the court quoted with approval the following:

> "The doctrine of assumption of risks applies only to known dangers or those which are so obvious as to be readily perceived. . . .It is the duty of a servant to use reasonable care to inform himself of the hazards to which he may be exposed."

Therefore, in this state, a servant assumes only the ordinary risks which are obvious, or those which an ordinarily prudent man, using reasonable diligence, would have discovered. But the courts have yet to clearly distinguish between assumption of risk and contributory negligence, where risks are created by the master's negligence. In such situations, the test of

34. Ritter v. Beals, 358 P.2d 1080, 1087 (Ore. 1961).
35. N.D. Rev. Code § 1131 (1895).
36. Abelstad v. Johnson, 41 N.D. 399, 170 N.W. 619 (1919); Cameron v. Great Northern Ry., 8 N.D. 124, 77 N.W. 1016 (1898).
37. 18 N.D. 309, 122 N.W. 390, 393 (1909).

reasonable care on the servant's part is applied.[38] Therefore, it is submitted that the "Modified" or "Missouri" rule be followed. Assumption of risk should never be the test where the employer is negligent. In other words, if the servant is contributorily negligent, he will be denied recovery. To apply this test and then say it is assumption of risk, is erroneous, as assumption of risk and contributory negligence are separate and distinct defenses.[39] This would be made clearer if section 34-02-03 were revised to read thus:

> "An employer, in all cases, shall indemnify his employee for losses caused by the former's want of ordinary care, *unless the employee was contributorily negligent.*"

VIII. CONCLUSION

It was this writer's purpose to show the general harshness of the old doctrine of assumption of risk, where the master was negligent. To deny a servant recovery by merely permitting the employer to plead that the servant was aware of, or should have known of, the dangerous conditions, is harsh and unfair. As was shown, the servant may have acted as a reasonable prudent man in the face of the dangers, and still have been denied recovery. The better rule would be the abolition of the doctrine of assumption of risk in such cases. The subjection of the employee's conduct to the test of contributory negligence as followed in the Missouri doctrine is the more just rule.

A word of caution might be in order. Any contemplated abolition of the defense should be resolved by legislative action, if possible, as piece-meal judicial destruction of the doctrine may only breed additional conceptual insecurity.

It is hoped that the recent critical look at the doctrine by the courts in Washington and Oregon will bring about the correction of its general harshness and rigidity in this area.

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38. Smith v. Knutson, 76 N.D. 375, 36 N.W.2d 323 (1949); See Wyldes v. Patterson, 31 N.D. 282, 153 N.W. 630 (1915); Cameron v. Great Northern Ry., 8 N.D. 124, 77 N.W. 1016 (1898).

39. Walsh v. West Coast Coal Mines, 31 Wash. 2d 396, 197 P.2d 233 (1948).