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## ASSUMPTION OF THE RISK IN ILLINOIS

Assumption of the risk, one of the three "sinister sisters" of the common law defenses of contributory negligence, assumption of the risk, and the fellow-servant rule, retains a limited vitality in Illinois law. The doctrine has received varied and confusing treatment by the courts in all jurisdictions as to just what the doctrine embodies and when it may be appropriately used.<sup>1</sup> Illinois represents the minority view that the defense of assumption of risk is limited to the master-servant relation.<sup>2</sup> This note will demonstrate that such an approach is perhaps not an unwarranted restriction, as the result reached in Illinois is not different from the result reached in other jurisdictions. Illinois merely uses other terms in place of the broad application of the doctrine to accomplish the same result. However, there are certain instances wherein the proper use of the doctrine may be helpful, such as in cases of strict liability, intentional tort or comparative negligence.

Assumption of the risk emerged as a defense to the common law action by a servant against his master, the greatest impetus being afforded the doctrine in 1837 by *Priestley v. Fowler*<sup>3</sup> in England. The court found that there was no duty owed by the master for the safety of his servant, as the plaintiff's declaration did not contain a charge that defendant knew of the dangerous condition. The court found for defendant because the court believed it would be inconvenient and absurd to allow recovery since it was most likely that the plaintiff knew as much as the defendant about the condition and thus should have declined to serve the defendant. The court failed to recognize the vast problems of the ever developing industrial age. Generally, it was an economic fact that if the plaintiff had declined to serve his master he might not only lose his job but not find employment elsewhere.

The doctrine of assumption of the risk was first articulated in Illinois in the 1874 case of *Camp Point Mfg. Co. v. Ballou*,<sup>4</sup> an action against an employer for the death of an employee by reason of alleged defective machinery provided by the employer. The Illinois Supreme Court cited other jurisdictions for the proposition that an employee cannot recover for an injury from machinery which the employee knew to be defective. The employee's choice of proceeding despite such defect showed an assumption of the risk.

The general principle of the doctrine is that a plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the

<sup>1</sup> See Bohlen, *Voluntary Assumption of Risk*, 20 Harv. L. Rev. 14 (1906); Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 La. L. Rev. 5 (1961); 82 A.L.R.2d 1218 (1962).

<sup>2</sup> *Maytnier v. Rush*, 80 Ill. App. 2d 336, 225 N.E.2d 83 (1st Dist. 1967); See Annot., 82 A.L.R.2d 1218 (1962).

<sup>3</sup> 3 M. & W. 1, 150 Eng. Rep. 1030 (1837); Prosser, *Torts* § 450 (3d ed. 1965).

<sup>4</sup> 71 Ill. 417 (1874).

defendant cannot recover for such harm.<sup>5</sup> In most situations, assumption of the risk is probably best understood by focusing upon the doctrine's primary and secondary meanings. In its primary meaning, the injured person's conduct in assuming a particular risk is reasonable, the defense being a denial that the defendant was negligent. The defendant states that he was under no duty or that he breached no duty of protecting the plaintiff against the source of his injury. Illustrative of the primary meaning of assumption of the risk is *Schmidt v. Cenacle Convent*.<sup>6</sup> In that case, the plaintiff, an invitee, was injured when she slipped and fell on a waxed floor, with no evidence as to exactly why she fell. Assumption of the risk was not even brought out by the defendant as an affirmative defense. However, the court stated that waxing floors is too common a practice to give rise to liability without showing negligence by the defendant. The result could have been stated that the plaintiff assumed the risk of walking on a normal, ordinary waxed floor and, absent the defendant's negligence, the plaintiff was barred from recovery.

In the secondary meaning of assumption of the risk, the injured plaintiff's conduct is unreasonable, in which case the doctrine overlaps or becomes identical with contributory negligence. Courts in general have confused assumption of the risk with contributory negligence, using terminology of the two defenses interchangeably.<sup>7</sup>

The courts have repeatedly stated that the defenses of assumption of the risk and contributory negligence are distinct from one another,<sup>8</sup> but their explanations have been somewhat confusing. It has been held that contributory negligence involves fault or lack of due care, while assumption of the risk does not;<sup>9</sup> that assumption of the risk rests on the law of contracts, whereas contributory negligence rests on the law of torts;<sup>10</sup> that contributory negligence involves inadvertance or unintentional failure to measure up to a proper standard of self-protection, while assumption of the risk involves the conscious and deliberate decision to encounter a known risk;<sup>11</sup> or that the standard to be applied to the issue of assumption of the

<sup>5</sup> Rest. 2d, Torts § 486A (1965).

<sup>6</sup> 86 Ill. App. 2d 150, 229 N.E.2d 413 (2d Dist. 1967).

<sup>7</sup> *Roberts v. King*, 102 Ga. App. 518, 116 S.E.2d 885 (1960); *Inouye v. Pacific Gas & Electric Co.*, 53 Cal. 2d 361, 348 P.2d 208 (1959); *King Soopers, Inc. v. Mitchell*, 140 Colo. 119, 342 P.2d 1006 (1959); *Warlich v. Miller*, 73 F. Supp. 593 (D.C. Pa. 1947); *Waddel's Adm'r. v. Brashear*, 257 Ky. 390, 78 S.W.2d 31 (1934); *Edwards v. Kirk*, 227 Iowa 648, 288 N.W. 875 (1939).

<sup>8</sup> *Wills v. Paul*, 24 Ill. App. 2d 417, 164 N.E.2d 631 (3d Dist. 1960); *Wheeler v. Chicago & W.I.R. Co.*, 267 Ill. 306, 108 N.E. 330 (1915); *Chicago & E.I.R. Co. v. Heerey*, 203 Ill. 492, 68 N.E. 416 (1900).

<sup>9</sup> *Holsman v. Darling State Street Corp.*, 6 Ill. App. 2d 517, 128 N.E.2d 581 (1st Dist. 1959); *Minters v. Mid-City Management Corp.*, 331 Ill. App. 64, 72 N.E.2d 729 (1st Dist. 1947); I.P.I. § 13 (1961).

<sup>10</sup> *Chicago Hair & Bristle Co. v. Mueller*, 106 Ill. App. 21 (1st Dist. 1903), aff'd. 203 Ill. 558, 68 N.E. 51 (1903).

<sup>11</sup> *Wade, The Place of Assumption of Risk in the Law of Negligence*, 22 La. L. Rev. 5 (1961).

risk is a subjective one, of what the particular plaintiff sees, knows, understands and appreciates, while in determining an issue of contributory negligence, the plaintiff's conduct is measured against an objective standard of what a reasonable and careful person would do under the same or similar circumstances.<sup>12</sup>

Confusion between the two doctrines is apparent in *Wheat v. Baltimore & Ohio R. Co.*,<sup>13</sup> which held that one cannot expose himself to danger which he might have avoided through reasonable care for his own safety and then recover damages for a resulting injury. Illinois thereby included the situation where the plaintiff unreasonably proceeds in the face of a known risk in the category of contributory negligence.

To arrive at a realistic and workable definition of assumption of the risk, one must first realize that the doctrine's general application in its primary and secondary sense is too broad. Assumption of the risk should be distinguished by the general use of a subjective standard as to whether the plaintiff saw, knew and appreciated the risk or danger and *unreasonably* chose to encounter such risk despite the plaintiff's knowledge. Where the plaintiff's choice was reasonable the defendant must be content with a defense of no duty or failure to breach a duty owed to the plaintiff or that the defendant's act was not the proximate cause of the plaintiff's injury. Where the plaintiff's choice was unreasonable, contributory negligence should be available as a defense unless the particular case is such that the defense of contributory negligence is not available, at which time the doctrine of assumption of the risk would be useful and appropriate.

#### TRADITIONAL APPLICATION OF THE DOCTRINE OF ASSUMPTION OF THE RISK IN ILLINOIS

Most Illinois courts have held that the doctrine of assumed risk grows out of the contractual relation of the parties<sup>14</sup> and that it comes into existence *only* as an incident of the contract of employment.<sup>15</sup> However, some cases have held that the doctrine is not limited to the master-servant re-

<sup>12</sup> *Clubb v. Main*, 65 Ill. App. 2d 461, 213 N.E.2d 63 (5th Dist. 1965); Rest. 2d, Torts § 496A (1965).

<sup>13</sup> *Wheat v. Baltimore & O.R. Co.*, 262 F.2d 289 (1959), cert. den. 359 U.S. 1005, 79 Sup. Ct. 1145 (1959); *Carter v. Winter*, 32 Ill. 2d 275, 204 N.E.2d 755 (1965), cert. den. 382 U.S. 825, 86 Sup. Ct. 56 (1965) (also denies existence of comparative negligence in Illinois).

<sup>14</sup> *Consolidated Barb Wire Co. v. Maxwell*, 116 Ill. App. 296 (2d Dist. 1904); *St. Louis National Stock Yards v. Morris*, 116 Ill. App. 107 (4th Dist. 1904); *Reed v. Zellers*, 273 Ill. App. 18 (3d Dist. 1933); *Walsh v. Moore*, 244 Ill. App. 458 (4th Dist. 1927).

<sup>15</sup> *Maytnier v. Rush*, 80 Ill. App. 2d 336, 225 N.E.2d 83 (1st Dist. 1967); *Fosen v. Odell Grain & Coal Co.*, 70 Ill. App. 2d 384, 217 N.E.2d 126 (4th Dist. 1966); *Hensley v. Hensley*, 62 Ill. App. 2d 252, 210 N.E.2d 568 (5th Dist. 1965) (extensive discussion of doctrine); *Hammer v. Slive*, 27 Ill. App. 2d 196, 169 N.E.2d 400 (2d Dist. 1960); *Davis v. Springfield Lodge No. 158*, 24 Ill. App. 2d 102, 164 N.E.2d 243 (3d Dist. 1960); *Streeter v. Western Wheeled Scrapper Co.*, 254 Ill. 244, 98 N.E. 541 (1911); *Conrad v. Springfield Consolidated R.R. Co.*, 240 Ill. 12, 88 N.E. 180 (1909); *O'Rourke v. Sproul*, 241 Ill. 576, 89 N.E. 663 (1909); *Shoninger Co. v. Mann*, 219 Ill. 242, 76 N.E. 354 (1906).

relationship<sup>16</sup> and that the doctrine is applicable to any relation voluntarily assumed.<sup>17</sup> A review of Illinois law's application of assumption of the risk in the employment or master-servant situation will show how the doctrine generally has been used in this State.

The employee is said to assume the risks, hazards or dangers ordinarily incident to the discharge of his duties,<sup>18</sup> ordinary risks being those which are a part of the natural and usual method of conducting the business, even though they might fairly be called extraordinary with respect to other businesses.<sup>19</sup> However, although the employer is required to provide a reasonably safe workplace,<sup>20</sup> his duty would not extend to employees whose duty it is to make a dangerous workplace safe.<sup>21</sup> The employer's negligence is not considered an ordinary and usual risk incident to employment,<sup>22</sup> and merely because it is a hazardous occupation does not provide an immunity for the employer from his negligence.<sup>23</sup>

Following the primary meaning of assumption of the risk, it has been held that an employee assumes only those risks which will remain after the employer has exercised the reasonable care required of him to provide safe working conditions.<sup>24</sup> The employee has a right to assume that the employer will perform the duties imposed upon him,<sup>25</sup> unless such employee is chargeable with knowledge of the defect *and* that he appreciated or understood the danger therefrom.<sup>26</sup> Thus, there is a subjective rule imposed

<sup>16</sup> *Hargis v. Standard Oil Co.*, 10 Ill. App. 2d 119, 134 N.E.2d 518 (4th Dist. 1956); *Altepeter v. Virgil State Bank*, 345 Ill. App. 585, 104 N.E.2d 334 (2d Dist. 1952); *Smith v. Kroger Grocery & Baking Co.*, 339 Ill. App. 501, 90 N.E.2d 500 (4th Dist. 1950); *Macabee v. Miller*, 316 Ill. App. 157, 44 N.E.2d 341 (1st Dist. 1942); *Stickel v. Riverview Sharpshooters' Park Co.*, 159 Ill. App. 110 (1st Dist. 1910), *aff'd.* 250 Ill. 452, 95 N.E. 445 (1910); I.P.I. § 13.01 (1961).

<sup>17</sup> *Campion v. Chicago Landscape Co.*, 295 Ill. App. 225, 14 N.E.2d 879 (1st Dist. 1938) (this was the only case discovered which took such a strong stand on the doctrine's general applicability).

<sup>18</sup> *Chicago, R.I. & P. Ry. Co. v. Benson*, 352 Ill. 195, 185 N.E. 244 (1933), *cert. den.* 290 U.S. 636, 54 Sup. Ct. 53 (1933); *Kenney v. Marquette Cement Mfg. Co.*, 243 Ill. 396, 90 N.E. 724 (1910).

<sup>19</sup> *Chicago & A.R. Co. v. Wild*, 109 Ill. App. 38 (3d Dist. 1903).

<sup>20</sup> *Crawford v. Brockhouse*, 27 Ill. App. 2d 13, 169 N.E.2d 117 (3d Dist. 1960); *International Packing Co. v. Cichowicz*, 107 Ill. App. 234 (1st Dist. 1903), *aff'd.* 206 Ill. 346, 68 N.E. 1083 (1903); 35 Am. Jur., *Master and Servant*, § 138 (1941).

<sup>21</sup> *Romeo v. Western Coal & Mining Co.*, 157 Ill. App. 67 (4th Dist. 1910); *Tygett v. Sunnyside Coal Co.*, 140 Ill. App. 77 (4th Dist. 1908).

<sup>22</sup> *Lester v. Hennessey*, 20 Ill. App. 2d 479, 156 N.E.2d 247 (3d Dist. 1959); *Stone v. Guthrie*, 14 Ill. App. 2d 137, 144 N.E.2d 165 (3d Dist. 1957); *Richardson v. Wells Bros. Co.*, 159 Ill. App. 358 (1st Dist. 1911); *National Enameling & Stamping Co. v. Fagen*, 115 Ill. App. 590 (4th Dist. 1904).

<sup>23</sup> *Wenger v. Strobel Steel Const. Co.*, 170 Ill. App. 383 (1st Dist. 1912).

<sup>24</sup> *Hansell-Elcock Foundry Co. v. Clark*, 214 Ill. 399, 73 N.E. 787 (1905).

<sup>25</sup> *Stone v. Guthrie*, *supra* note 22; *McCulloch v. Illinois Steel Co.*, 243 Ill. 464, 90 N.E. 664 (1910).

<sup>26</sup> *Crawford v. Brockhouse*, 27 Ill. App. 2d 13, 169 N.E.2d 117 (3d Dist. 1960); *Wheeler v. Chicago & W.I.R. Co.*, 182 Ill. App. 194 (1st Dist. 1913), *aff'd.* 267 Ill. 306, 108 N.E. 330 (1915); *Richter v. Tegtmeier*, 167 Ill. App. 478 (1st Dist. 1912).

upon the doctrine that the plaintiff knew of the risk and was aware of the accompanying danger.<sup>27</sup>

If the danger has come to the employee's attention and he continues in spite of it, the employee assumes the risk of injury,<sup>28</sup> unless the employer in some way negatives such assumption, such as by a direct order,<sup>29</sup> an assurance that everything is all right,<sup>30</sup> or a promise to remedy the defect.<sup>31</sup>

It is also held that a servant who chooses the more hazardous of two or more methods by which he may perform his duties does so at his own risk,<sup>32</sup> but it must appear that a reasonably safe method of doing the work was available which the servant knew about and that the employee selected the unsafe method voluntarily, knowing of the danger involved.<sup>33</sup>

Workmen's Compensation has virtually eliminated the common law defenses of contributory negligence, assumption of risk and the fellow-servant rule in employee-employer relationships<sup>34</sup> by imposing a strict liability upon "covered" employment. The employer is charged with injuries "in the course of" and "arising out of" his business, without regard to the negligence of the employer or employee. Under the Illinois Workmen's Compensation Act an employer who is not "covered" may elect to come under the Act or may later reject the Act with proper notice.<sup>35</sup> This would imply that non-covered employers may still benefit from the three common law defenses, but it has been held that despite the employer's election not to come under the provisions of the Act, such employer was nevertheless precluded from asserting these defenses.<sup>36</sup>

Assumption of the risk is expressly removed as an affirmative defense in

<sup>27</sup> *Fox v. Beal*, 314 Ill. App. 144, 41 N.E.2d 126 (2d Dist. 1942); *Lilly v. Grand Trunk Western Ry. Co.*, 312 Ill. App. 73, 37 N.E.2d 888 (1st Dist. 1941); *Byrne v. Marshall Field & Co.*, 237 Ill. 384, 86 N.E. 748 (1908).

<sup>28</sup> *Wheeler v. Chicago & W.I.R. Co.*, 267 Ill. 306, 108 N.E. 330 (1915).

<sup>29</sup> *Ibid.*

<sup>30</sup> *Harte v. Fraser*, 104 Ill. App. 201 (1st Dist. 1902); *City of Kinmundy v. Anderson*, 103 Ill. App. 457 (4th Dist. 1902).

<sup>31</sup> *Russell v. Halyama*, 27 Ill. App. 2d 359, 170 N.E.2d 8 (4th Dist. 1916); *Scott v. Parlin & Orendorff Co.*, 245 Ill. 460, 92 N.E. 318 (1910).

<sup>32</sup> *Stone v. Guthrie*, 14 Ill. App. 2d 137, 144 N.E.2d 165 (3d Dist. 1957); *Crowe v. Northwestern Malt & Grain Co.*, 171 Ill. App. 285 (1st Dist. 1912); *Alcorn v. Chicago, B. & Q.R. Co.*, 158 Ill. App. 331 (3d Dist. 1910); *Kath v. East St. Louis & Suburban Ry. Co.*, 232 Ill. 126, 83 N.E. 533 (1907).

<sup>33</sup> 56 C.J.S., *Master and Servant* § 450 p. 1277 (1948); See also, *Wills v. Paul*, 24 Ill. App. 2d 417, 164 N.E.2d 631 (3d Dist. 1960) and *Stahl v. Dow*, 332 Ill. App. 233, 74 N.E.2d 907 (2d Dist. 1947) (in both cases plaintiff was injured by the very circumstances confronting him when he took the job).

<sup>34</sup> *Mount Olive & Stanton Coal Co. v. Industrial Comm.* 355 Ill. 222, 189 N.E. 296 (1934); *Imperial Brass Mfg. Co. v. Industrial Comm.*, 306 Ill. 11, 137 N.E. 411 (1922); Ill. Rev. Stat., ch. 48, § 138.1 et seq. (1965).

<sup>35</sup> Ill. Rev. Stat. ch. 48, § 138.2 (1965); (common law defenses may still be available as to farmers who are specifically excluded by § 138.3).

<sup>36</sup> *Lumaghi Coal Co. v. Industrial Comm.*, 318 Ill. 151, 149 N.E. 11 (1925); *Brooks Tomato Products Co. v. Industrial Comm.*, 311 Ill. 207, 142 N.E. 451 (1924); *New Staunton Coal Co. v. Fromm*, 286 Ill. 254, 121 N.E. 594 (1918); See *Prosser, Torts* § 82 (3d ed. 1965).

any action to recover damages under the Occupational Diseases Act,<sup>37</sup> whether the risk was expressly or impliedly assumed. The defense is also unavailable under the Scaffolding Act,<sup>38</sup> its purpose being to prevent injuries to persons employed in dangerous and extrahazardous occupations.<sup>39</sup>

#### APPLICATION OF THE DOCTRINE IN ILLINOIS OUTSIDE OF THE MASTER-SERVANT AREA

Outside of cases involving the master-servant relationship, Illinois courts have seldom allowed the doctrine of assumption of the risk to be utilized successfully as a defense. The one area where the doctrine has found fairly frequent use is in suits arising from injuries at places of amusement.<sup>40</sup> In *Maytnier v. Rush*,<sup>41</sup> a thirteen year old boy was struck on the head by a baseball thrown into the stands from the bullpen while the game was in progress and the boy was watching the ball in use in the game. The defendant urged the court to recognize that assumption of the risk is applicable to contractual relationships, not just the traditional master-servant relationship, but the court distinguished each of the defendant's cited cases and relied on the judicial precedents recognizing the limited applicability of the doctrine. The court noted with approval the Ohio decision of *Cincinnati Baseball Club Co. v. Eno*,<sup>42</sup> wherein it was stated that a spectator at a ballpark does not assume the risk of being hit by a baseball he does not see when more than one ball is being used regardless of whether the game was in progress or not. Apparently, the court in *Maytnier* was saying in effect that Illinois does not recognize assumption of the risk in cases of this nature, but if it did, this spectator would not be subject to the defense under the circumstances, as the ball was not being used in the game.

A case relied upon by defendant in *Maytnier* which represents the broadest opinion on the subject of assumption of risk in the area of amusement park injuries is *Campion v. Chicago Landscape Co.*<sup>43</sup> In that case, it is argued as dicta that the doctrine was applicable in any relation voluntarily assumed. In *Campion*, a golfer was held to have assumed the risk of being struck by a golf ball by another player, the suit having been brought against the golf course. But what of the golfer who actually injured the

<sup>37</sup> Ill. Rev. Stat., ch. 48 § 172.38 (1965).

<sup>38</sup> Ill. Rev. Stat., ch. 48, § 60.69 (1965).

<sup>39</sup> Contributory negligence also is not a defense to an employee covered by the Scaffolding Act. See *Brackett v. Osborne*, 44 Ill. App. 2d 441, 195 N.E.2d 8 (2d Dist. 1963); *Thomas v. Carroll Const. Co.*, 14 Ill. App. 2d 205, 144 N.E.2d 461 (2d Dist. 1957); *Panky v. Hiram Walker & Sons, Inc.*, 167 F. Supp. 609 (S.D. Ill., 1958); *Fetterman v. Production Steel Co. of Illinois*, 4 Ill. App. 2d 403, 124 N.E.2d 637 (1st Dist. 1954).

<sup>40</sup> I.L.P. 13.00 (1961) (Comment states that no Illinois cases extend the doctrine of assumption of risk to an invitee other than in master-servant cases and amusement-equipment cases).

<sup>41</sup> 80 Ill. App. 2d 336, 225 N.E.2d 83 (1st Dist. 1967).

<sup>42</sup> 112 Ohio St. 175, 147 N.E. 86 (1925).

<sup>43</sup> 295 Ill. App. 225, 14 N.E.2d 879 (1st Dist. 1938) (extensive discussion of doctrine of assumption of risk).

plaintiff? Could he claim the defense? Such golfer is obviously not in a master-servant relationship, nor is he in a contractual relationship with the injured golfer. Under Illinois law the doctrine would not be available as an affirmative defense, neither of the aforementioned relationships being present. The question then becomes whether such a defense should be available, or whether the doctrine is unnecessary outside the traditional boundaries Illinois has followed.

It can reasonably be said that the plaintiff golfer must assume the reasonable and ordinary risks attendant to the game of golf, such as when the plaintiff is out of sight and hearing when another golfer hits his ball, injuring the plaintiff. Can it also be reasonably said, under the guise of assumption of the risk in its primary meaning, that the plaintiff assumes the risk of injury from a fellow golfer's negligent participation in the game as to suits between such golfers? Such negligent golfer should not be able to rely on assumption of the risk to escape liability for his own negligence. The rights of the parties can be explained in terms of the negligent golfer's duty not to injure the plaintiff if such injury can be avoided by reasonable care. The result is that absent the defendant's negligence or unreasonable conduct toward the plaintiff there should be no recovery, the injury being of the type the plaintiff might expect under the circumstances, but without necessitating the use of assumption of the risk as a defense.

Beside the amusement park situation, the doctrine has been attempted in other areas. In *Reed v. Zellers*,<sup>44</sup> assumption of the risk was raised by a defendant-host in an auto-guest case involving the plaintiff-minor who was injured in an auto collision in dense fog and on a wet highway. The court denied the applicability of the doctrine. The plaintiff had voluntarily taken the trip. The court said there was no contractual relation which was essential to raise the defense.

The defendant-carriers in *Coloyza v. Iowa Central Ry. Co.*<sup>45</sup> were permitted to rely on both contributory negligence and assumption of the risk as defenses in an action for personal injury against lessee and lessor railroad corporations, despite the fact that the plaintiff was only the employee of one of the defendants. In *Sass v. Chicago City Ry. Co.*,<sup>46</sup> the defendant was refused an instruction that a streetcar passenger assumes the risk of injury from sudden motions or jerks, the court finding that assumption of the risk did not apply to the relationship of carrier and passenger. In *Hickey v. Chicago City Ry. Co.*,<sup>47</sup> the plaintiff was injured in a streetcar collision as a result of having taken a position of danger on the outside of the crowded streetcar. On a public policy basis, the court denied assumption of the risk as a defense, stating the doctrine is founded upon contract and a common

<sup>44</sup> 273 Ill. App. 18 (3d Dist. 1933).

<sup>45</sup> 182 Ill. App. 89 (1st Dist. 1913).

<sup>46</sup> 182 Ill. App. 364 (1st Dist. 1913).

<sup>47</sup> 148 Ill. App. 197 (1st Dist. 1909).

carrier cannot relieve itself of liability for negligence by express or implied contract.

Consent by the decedent to the unlawful act of abortion in *Castronovo v. Murawsky*<sup>48</sup> was held a bar to the plaintiff's recovery in a death action. The defense raised in that case appears to be a cross between the equitable doctrine of unclean hands and assumption of the risk. In *Presley v. Kinlock-Bloomington Telephone Co.*,<sup>49</sup> the plaintiff's intestate was electrocuted as a result of the defendants' alleged negligence. The court held the doctrine of assumption of the risk was inapplicable because the intestate was not in either the defendants' service or an employee.

In an innkeeper case, *Duncan v. Chelsea Hotel Co.*,<sup>50</sup> the court held that the plaintiff assumed the risk of injury from a "Murphy bed" where evidence showed the plaintiff knew the bed came down from the wall too quickly. The court also discussed failure to exercise due care and stated that the plaintiff's negligence contributed to her injury. Thus the court concluded both that the plaintiff assumed the risk and was contributorily negligent as a matter of law.

Assumption of the risk has found limited use in the landlord-tenant cases, usually under the doctrine's primary meaning, as in *Mack v. Woman's Club of Aurora*.<sup>51</sup> In that case, the plaintiff slipped and injured herself on a waxed floor while attending her regular club meeting. The court held that the defendant was not negligent and the plaintiff assumed the risk. In *Soibel v. Oconto Co.*,<sup>52</sup> the plaintiff-employee of the tenant sued the defendant-landlord for injury arising from the floor of defendant's building falling into the basement. The court found that, absent concealment or fraud by landlord, the tenant's employee assumed the risk of personal injury from defects, defendant's liability being no greater than that to the tenant. However, in another landlord-tenant case, *Minters v. Mid-City Management Corp.*,<sup>53</sup> assumption of the risk was held applicable only in the relationship of master-servant, and also in *Mueller v. Phelps*,<sup>54</sup> since there was no contractual relation between the tenant's servant and the landlord, the court precluded the defense of assumption of the risk.

An Illinois products liability case, *Cedar Rapids & Light Co. v. Sprague*

<sup>48</sup> 3 Ill. App. 2d 168, 120 N.E.2d 871 (2d Dist. 1954).

<sup>49</sup> 158 Ill. App. 220 (3d Dist. 1910).

<sup>50</sup> *Duncan v. Chelsea Hotel Co.*, 326 Ill. App. 241, 61 N.E.2d 769 (1st Dist. 1945).

<sup>51</sup> 303 Ill. App. 217, 24 N.E.2d 898 (2d Dist. 1940). See also: *Myrick v. Herrmann*, 17 Ill. App. 2d 301, 149 N.E.2d 792 (4th Dist. 1958) (recognizes defense but says landlord cannot rely on it where injury is in area of common control); *Farmer v. Alton Building & Loan Ass'n.*, 294 Ill. App. 206, 13 N.E.2d 652 (4th Dist. 1938); *Helbig v. Slaughter*, 95 Ill. App. 623 (3d Dist. 1900).

<sup>52</sup> 299 Ill. App. 518, 20 N.E.2d 309 (1st Dist. 1939).

<sup>53</sup> *Minters v. Mid-City Management Corp.*, 331 Ill. App. 64, 72 N.E.2d 729 (1st Dist. 1947). See also: *Shoninger Co. v. Mann*, 219 Ill. 242, 76 N.E. 354 (1905).

<sup>54</sup> 252 Ill. 630, 97 N.E. 228 (1912).

*Electric Co.*,<sup>55</sup> hinted at the applicability of assumption of the risk but the court would not bring itself to express the defense by name. The court distinguished contributory negligence as a failure to discover the defect, but then stated that contributory negligence was unreasonable exposure to a known risk, it being necessary that the plaintiff discover the defect not that it merely be discoverable upon inspection—all of which point to requirements peculiar to assumption of the risk.

Assumption of the risk was even attempted in the divorce action of *Hall v. Hall*,<sup>56</sup> but the court held that the doctrine did not preclude the wife from a second divorce from the same husband after she had remarried him and again suffered acts of extreme and repeated cruelty.

#### AREAS IN WHICH ASSUMPTION OF THE RISK MAY FIND VALID USE

In an action for strict liability, it is generally held that contributory negligence is not a defense but assumption of the risk is.<sup>57</sup> In the leading American case, *Muller v. McKesson*,<sup>58</sup> the court held that the full knowledge of the vicious propensities of an animal and the voluntary and unnecessary placement by the plaintiff of himself in the way of such animal precludes recovery. Keeping the animal did not produce the injury, rather it was the plaintiff's acts, in spite of full knowledge of the danger, which resulted in injury. The defendant should not be relieved from liability for slight negligence by the plaintiff as the defendant's duty is higher than that of ordinary care, but when the plaintiff voluntarily brings harm on himself, he should not be permitted to recover. For instance, the defendant's blasting would impose strict liability but the plaintiff cannot recover when he sees the flagman and deliberately proceeds in the face of the appreciated danger.<sup>59</sup> However, the plaintiff may recover if he was merely inattentive in not seeing the flagman. Such conduct amounts to contributory negligence; however, this defense, as mentioned, cannot be raised to a strict liability tort.<sup>60</sup>

Willful misconduct, an intentional tort, transcends negligence, an unintentional tort. Such willful misconduct justifies an award of punitive damages and precludes contributory negligence as a defense.<sup>61</sup> But plain-

<sup>55</sup> 280 Ill. 386, 117 N.E. 461 (1917).

<sup>56</sup> *Hall v. Hall*, 148 Ill. App. 630 (2d Dist. 1909).

<sup>57</sup> Prosser, *Torts* § 78 (3d ed. 1965); *Graety v. McKenzie*, 9 Wash. 696, 35 Pac. 377 (1893); *Lothscher v. Campo*, 107 Conn. 568, 141 Atl. 652 (1928).

<sup>58</sup> 73 N.Y. 195, 29 Am. Rep. 123 (1878).

<sup>59</sup> *Worth v. Dunn*, 98 Conn. 51, 118 Atl. 467 (1922). See also: *Twohy Bros. Co. v. Kepon*, 21 Ariz. 606, 193 Pa. 296 (1920); *Adams' Adm'r v. Callis and Hughes*, 253 Ky. 382, 69 S.W.2d 711 (1934); 39 Am. Jur., *Nuisance*, § 11 (1942); *Jacko v. City of Bridgeport*, 26 Conn. 73, 213 A.2d 452 (1965); *Krauth v. Geller*, 54 N.J. Super. 442, 149 A.2d 271 (1959), *aff'd*, 31 N.J. 270, 157 A.2d 129 (1960); *Llewellyn v. City of Knoxville*, 33 Tenn. App. 632, 232 S.W.2d 568 (1950).

<sup>60</sup> *Wells v. Knight*, 32 R.I. 432, 80 Atl. 16 (1911).

<sup>61</sup> 38 Am. Jur., *Negligence*, § 178 (1941); *Gibbard v. Cursan*, 225 Mich. 311, 196 N.W. 398 (1923); *Niagara Oil Co. v. Ogle*, 177 Ind. 292, 98 N.E. 60 (1911); *Rischer v. Acken Coal Co.*, 147 Iowa 459, 124 N.W. 764 (1910); *Higginbotham v. Kearse*, 111 W. Va. 264, 161 S.E. 37 (1931); *Brown v. Illinois Terminal R. Co.*, 319 Ill. 326, 150 N.E. 242 (1925); *Restat. 2d, Torts* § 481 (1965).

tiff's own willful or wanton misconduct will deny recovery despite defendant's wanton misconduct.<sup>62</sup>

A new area wherein the defense of assumption of the risk may see limited use is comparative negligence. The Illinois Appellate Court decision of *Maki v. Frelk*<sup>63</sup> has attempted to implement comparative negligence rules through judicial decision. The case details the history of contributory negligence and the need for the new doctrine, but it fails to mention assumption of the risk. However, much of the court's discussion centers upon what actually is assumption of the risk in its secondary meaning wherein the doctrine overlaps contributory negligence.

Contributory negligence approaches a type of comparative negligence but fails to recognize degrees or net detriment to one or the other litigant, unlike the comparative negligence doctrine imposed by *Maki* and based in part upon rules familiar in admiralty.

Should comparative negligence become a reality in Illinois, through case decision or statute, it would seem likely that contributory negligence would not be a complete bar to a plaintiff's recovery but assumption of the risk may well be. This view has been taken by Wisconsin courts<sup>64</sup> under its comparative negligence statute.<sup>65</sup> However, Illinois may continue to satisfy its aversion to assumption of the risk in comparative negligence cases by merely finding the plaintiff negligent in excess of any negligence of the defendant, rather than admit to the doctrine and deny the plaintiff recovery under the defense of assumption of the risk.

#### ASSUMPTION OF THE RISK IN OTHER JURISDICTIONS

Other jurisdictions have discussed assumption of the risk in a critical manner. In 1965, Michigan virtually abolished assumption of the risk as an affirmative defense in the case of *Felgner v. Anderson*,<sup>66</sup> in which the court stated that certain risks of accident attend all outdoor sports and recovery may be had only if an injury is the result of negligence that could and should have been avoided by the use of ordinary care. The court further states that the spectator's suit is barred by lack of negligence on the part of the park owner, not by the spectator's assumption of the risk. Although this does not answer the question where the spectator knew of the owner's negligence and voluntarily faced the danger, this is precisely the area where the doctrine overlaps that of contributory negligence, assumption of the risk being considered in its secondary meaning. The court refers to a law

<sup>62</sup> *Lane v. Babis*, 340 Ill. App. 10, 91 N.E.2d 106 (1950); *Schneiderman v. Interstate*, 331 Ill. App. 143, 72 N.E.2d 705 (1947); *Learned v. Hawthorne*, 269 Mass. 554, 169 N.E. 557 (1930); *Johnson v. Pierce*, 262 Wis. 367, 55 N.W.2d 394 (1952).

<sup>63</sup> *Maki v. Frelk*, 85 Ill. App. 2d 439, 229 N.E.2d 284 (2d Dist. 1967).

<sup>64</sup> *Schiro v. Oriental Realty Co.*, 272 Wis. 537, 76 N.W.2d 355 (1956); *Scory v. LaFave*, 251 Wis. 21, 254 N.W. 643 (1934).

<sup>65</sup> Wis. Stat. 331.045 (1959).

<sup>66</sup> 375 Mich. 23, 133 N.W.2d 136 (1965).

review article<sup>67</sup> where it is suggested that, except for express assumption of the risk, the term and concept should be abolished. The court said that it would limit the doctrine to the employer-employee relationship where workman's compensation does not apply and perhaps where there is an express contractual assumption of the risk. The court further stated that the only purpose served by the doctrine is to limit the scope of the defendant's liability for injuries caused to the plaintiff.

Similarly, in *Meistrich v. Casino Arena Attractions, Inc.*,<sup>68</sup> the New Jersey Supreme Court held that assumption of the risk should be used only in its "primary sense" to mean the defendant either owed no duty or did not breach the duty owed. The court also said that should the term be used, the jury should be instructed that it is merely another way of expressing the thought that the defendant is not liable in the absence of negligence, and if the defendant is found negligent, the plaintiff is barred only if the defendant proves contributory negligence. This view was later extended in *McGrath v. American Cyanamid Co.*,<sup>69</sup> the New Jersey court holding that it should concentrate on the terms negligence and contributory negligence and not use assumption of the risk at all, either in its primary or secondary sense.

#### CONCLUSION

Despite a few decisions to the contrary, Illinois restricts the doctrine of assumption of the risk at least to contractual relationships if not strictly to the traditional master-servant relationship. This restriction does not usually work hardship upon a defendant as his proof of lack of duty or adequate performance of a duty or the plaintiff's failure to reasonably care for his own safety and welfare is sufficient to relieve him of liability. However, contributory negligence as a defense is an admission of negligence by the defendant, unlike assumption of the risk which should be a valid defense in certain limited areas, especially where the defendant is not negligent at all, but is being sued under circumstances such as strict liability for carrying on an ultrahazardous activity.

It would be to the court's advantage to avoid the confusion over a period well in excess of one hundred years of misuse by restricting the doctrine, not to master-servant or contract relationships, but to strict liability, intentional torts and cases involving comparative negligence. Previous use of the doctrine in its primary and secondary meaning should be relegated to the defenses of lack of duty on the part of the defendant or failure to breach such duty, coupled with contributory negligence or comparative negligence where applicable.

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<sup>67</sup> James, *Assumption of Risk*, 61 Yale L.J. 141 (1952).

<sup>68</sup> 31 N.J. 44, 155 A.2d 90 (1959).

<sup>69</sup> *McGrath v. American Cyanamid Co.*, 41 N.J. 472, 196 A.2d 238 (1963).