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distributor of a defective product has an easier burden of proof than one who must sue in negligence. One of the main objectives of section 402A is to provide increased protection for consumers who are injured by defective products. By basing liability on proof of defect and thus making recovery against a distributor of a defective product much more likely than in a negligence action, section 402A has given the consumer increased protection.

Charles H. Cranford

Torts—Rejection of the Voluntariness Test in Assumption of Risk

The doctrine of assumption of risk in the law of negligence, while still relatively quite young, has for some time been roundly condemned by courts and commentators alike as a judicially created device affording legal insulation to defendants who have concededly breached their duty toward injured plaintiffs. Dissatisfaction with the doctrine has led some jurisdictions to restrict severely the application of assumption of risk and in some areas to wipe it out altogether. As a result of Hoar v. Sherburne Corp., it is arguable that as a practical matter assumption of risk is no longer available as a separate defense to a landowner in a negligence action in Vermont.

In Hoar, plaintiff sustained injuries while crossing an access road cutting through property which defendant owned and maintained as a ski resort. At the time of the mishap, plaintiff was returning from defen-
dant's ski shop where she had gone for the purpose of buying some "warm-up" pants and on the way to which a sudden snow storm had developed. On the return trip, plaintiff slipped and fell on the path leading across the access road, although she had been looking where she was going and had seen the unsanded ice beneath her feet. At least fifteen minutes had passed from the time the snow storm began to the time of the accident. On these facts, the jury was allowed to find that plaintiff was a business visitor of defendant, that she had carefully conducted herself while walking on an unsafe pathway that was subject to the control of defendant, and that she was entitled to recover damages for the injuries that she had suffered.

Defendant moved for judgment notwithstanding the verdict, contending inter alia that plaintiff had assumed the risk as a matter of law. The court denied the motion and in doing so sharply restricted the doctrine of assumption of risk itself, thereby going further than even those recent decisions in other jurisdictions that have extended the duty owed to others by certain owners and occupiers of land. In order to present the court's decision in its proper perspective, and with due credence to the complex issues involved, it will first be necessary to summarize briefly the background of the law in this area.

Assumption of risk as a defense in negligence actions originated in the reluctance of the common law courts to impose burdensome restrictions on expanding industry by way of untrammelled liability during the Industrial Revolution of the late eighteenth century. During these early stages the defense was designed to allow an admittedly negligent employer to escape liability through the use of a pure fiction that held the plaintiff to have "assumed" all risks arising out of the master-servant relationship. Later, this rigid rule was relaxed somewhat, and the employee was held to have assumed only those risks of which he was aware or which were so patent that reasonable men could not differ as to their existence. But in the meantime the rationale of assumption of risk in

6See text accompanying notes 25-32 infra.
7See, e.g., Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 58-59 (1943). This position had achieved popular and judicial acceptance in response to Priestly v. Fowler, 150 Eng. Rep. 1030 (Ex. 1837), a landmark case from which assumption of risk received its greatest impetus. PROSSER § 68 n.9.
8See, e.g., Focht v. Johnson, 51 Wash. 2d 47, 315 P.2d 633 (1957). This case was overruled in Siragusa v. Swedish Hospital, 60 Wash. 2d 310, 373 P.2d 767 (1962), which explicitly held that assumption of risk would no longer be recognized as a defense to an employer in a negligence action. See text accompanying notes 28-29 infra.
this context had come to be applied to other interpersonal relationships as well, until finally it had become quite thoroughly merged with the law of negligence in general. Ironically, the policy considerations that gave rise to the doctrine in the master-servant area—maximum freedom to expanding industry—steadily subsided with the establishment of industry as a burgeoning stronghold in this country, with the result that we have been left to struggle with a legal defense mechanism whose very *raison d’être* has now been expressly rejected, as will be seen, by a substantial number of jurisdictions.

As applied today, assumption of risk is subject to so much confusion that not a few learned legal scholars have advocated its abolition. By means of the defense a defendant is effectively insulated from liability potentially arising from his own negligence if he establishes that the plaintiff voluntarily chose to encounter the known risk created by the defendant’s negligence. Thus, there are two primary ingredients of the defense, which the defendant has the burden of proving by a greater weight of the evidence: first, the plaintiff’s knowledge and appreciation of the risk created by the defendant, and second, the plaintiff’s voluntary decision to encounter this risk despite such knowledge. If the plaintiff, with full knowledge and appreciation of all the facts and with no compulsion whatsoever to do so, makes an entirely free and voluntary decision to incur the risk anyway, he is barred on grounds of assumption of risk from recovering for consequential injuries. The same idea is often expressed in the alternative by saying that the decision is not a free and voluntary one when the advantages to be gained by the plaintiff’s meeting the risk outweigh the relative disadvantages thereof or when the defendant has not afforded the plaintiff a reasonably safe alternative choice of action. In either event, it is presumed that the plaintiff has

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9See text accompanying note 29 infra.
10See, e.g., James, *supra* note 2; Wade, *supra* note 3.
11See note 23 infra.
12PROSSER § 68, at 447.
13Id. at 440.
14Id. at 451. It should be noted that these alternative expressions of the voluntariness requirement involve two clearly distinguishable concepts. Firstly, the term “voluntary” can be applied to behavior directed to the end which the plaintiff contemplates in choosing whether or not to encounter an unreasonable risk created by the defendant. Attainment of the objectives sought by the plaintiff may be, on balance, so socially important as to compel on policy grounds a holding that the plaintiff's ultimate decision to encounter the risk cannot be legally voluntary. In the converse situation, when the plaintiff's goal is not so vital, the doctrine of assumption of risk may be applied to deny recovery—in other words, the advantages to be gained from meeting a known risk are held
actual knowledge of the negligently created risk.\textsuperscript{15}

Assumption of risk is also generally extended to cover situations in which the plaintiff has expressly consented to take his chances with the risk\textsuperscript{16} or in which such consent may safely be implied.\textsuperscript{17} In such cases, however, a lack of duty on the part of the defendant is the basis for a denial of recovery, and the issue of negligence is never reached at all. Still other courts appear to confuse the distinctions between assumption of risk and contributory negligence\textsuperscript{18} by applying either or both to situations in which the plaintiff unreasonably encounters or negligently fails to discover the risk. The net chaos has led some writers to suggest that

\textsuperscript{15}If the plaintiff is to be saddled with constructive knowledge of the risk because of its obvious or apparent nature, this is equivalent to saying that he was contributorily negligent in not in fact discovering the danger. \textit{Cf.} Prosser \S 68, at 447-49.

\textsuperscript{16}\textit{Id.} at 442. Indeed, some courts expressly purport to limit application of assumption of risk to situations involving a contractual relation between the parties. \textit{E.g.}, Walsh v. West Coast Mines, 31 Wash. 2d 396, 406, 197 P.2d 233, 238 (1948).

\textsuperscript{17}Prosser \S 68 n.29.

\textsuperscript{18}\textit{See} note 22 \textit{infra}. Any precise and unequivocal distinction between these two defenses is exceedingly difficult to pinpoint without a thorough analysis of the issues which each raises. It is often said that contributory negligence is measured by the objective standard of the reasonable man as applied to the plaintiff's behavior, while assumption of risk is properly confined to the subjective knowledge and appreciation of the risk which the plaintiff encounters. Prosser \S 68, at 441. That this distinction is not satisfactory for all purposes is evidenced by the fact that contributory negligence may be used in two senses, one employing an objective and the other an ostensibly subjective standards: the defect is apparent, but the plaintiff negligently fails to notice it; and the plaintiff is fully aware of a patently obvious and unreasonable risk yet proceeds to encounter it. It should be noted, however, that even the latter situation does not present a pure application of the subjective standard. Although the plaintiff concededly has actual knowledge of the danger, his conduct in choosing to meet it is nevertheless compared with that of the ordinary reasonable man under like circumstances. This overlapping of contributory negligence and assumption of risk has caused some confusion in the courts. \textit{Id.}
assumption of risk as a separate doctrine is quite dispensable and that the issues traditionally disposed of by that defense are much less confusingly treated under the headings of consent, lack of duty, and contributory negligence.

It appears unlikely, however, that there will be a direct renunciation of the doctrine in the near future, if only for the reason that it provides an attractive and convenient vehicle for the denial of recovery in cases in which a highly intricate network of competing interests would otherwise have to be dealt with and resolved. On the other hand, a growing number of jurisdictions have effectively approached the same result by coming in through the back door, so to speak, in dealing with the scope of liability in negligence cases. Instead of affirmatively restricting the reach of assumption of risk and thereby imposing a greater procedural burden on the defendant, these courts have imposed a broader scope of duty on certain owners and occupiers of land, thereby rendering assumption of risk inappropriate in situations in which it would have traditionally been applied.

In the usual situation, the general rule is that a landowner has no duty to render affirmative precautions, even to the extent of a warning, "against dangers which are known to the [invitee], or so obvious to him

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19See authorities cited note 3 supra.

20In the field of intentional torts the plaintiff's consent to the tortious invasion has long been recognized as a defense. Consent has not been an established rubric in the law of negligence, but there is no reason why it cannot exist here too. Consent to what? In both intentional torts and negligence the consent is to the defendant's conduct. In the intentional tort this involves consent to the actual invasion of the plaintiff's interest in person or property. In negligence it involves only his agreement to being subjected to a danger of possible invasion. In other words the plaintiff "assumes the risk."

Wade, supra note 3, at 7.

21The "defendant's duty and the plaintiff's assumption of risk are not correlative and it is misleading to define one in terms of the other." Id. at 11.


23It should be emphasized that assumption of risk is a defense which must in all instances be pleaded and proved by the defendant in order to defeat the plaintiff's recovery. PROSSER § 68, at 455. On the other hand, while most courts likewise treat contributory negligence as a defense, there are a few jurisdictions which impose the burden on the plaintiff to plead and prove his freedom from contributory negligence as well as the defendant's negligence in order to state a cause of action. This was the position adopted, for example, in Kotler v. Lalley, 112 Conn. 86, 151 A. 433 (1930), despite a vigorous dissent by Chief Justice Wheeler.
that he may be expected to discover them." Assumption of risk, then, would normally be a perfectly legitimate defense here in the absence of qualifying circumstances. There has been a recent tendency, however, to roll back this general "no-duty" rule with respect to certain classes of landowners on the basis of the anticipatory nature of the harm despite the obviousness of the risk or the plaintiff's knowledge thereof.

There appears to be no difficulty in making an exception to the rule with respect to public utilities and government agencies. The reason generally given for treating these concerns more strictly than other landowners is that the former hold out their services and facilities to members of the public, who are entitled to make use of them and who may reasonably expect and demand to be able to use them in reasonable safety. Neither knowledge nor obviousness of the risk should be a defense here, for the obligations of the public utility and government agency are such that they may not be relieved from responsibility by forcing members of the visiting public to choose between carefully meeting an unreasonable risk which acts as an obstacle to attainment of the proffered right and foregoing that right altogether. It follows that under these circumstances the public utility or government agency should reasonably foresee that such members would choose to encounter known or obvious dangers that they would not otherwise encounter, solely because of their reluctance to give up the public right to which they are entitled.

Similar considerations prevail in the employer-employee relationship, although liability here is couched in terms of abandonment of assumption of risk rather than an extension of duty. It has already been intimated that several jurisdictions have by decision or statute expressly

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24Restatement (Second) of Torts § 343A(1), Comment e (1965). See cases cited Restatement (Second) of Torts, Appendix § 343A, Comment e at 233-34 (1966).
26See Restatement (Second) of Torts § 343A(1), Comment a (1965).
27North Carolina adopted this position many years ago. E.g., Sibbert v. Scotland Cotton Mills, 145 N.C. 308, 59 S.E. 79 (1907); Marks v. Harriet Cotton Mills, 135 N.C. 287, 47 S.E. 432 (1904). The North Carolina Supreme Court has occasionally paid lip service to assumption of risk in extending liability to employers, but as often as not it has brought in contributory negligence as well without attempting to distinguish the two and without acknowledging that they may be anything but identical. See note 22 supra.
eliminated assumption of risk from this area, for reasons such as those persuasively stated in Siragusa v. Swedish Hospital. 28

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 employers’ responsibility. In almost all areas of industrial activity, social insurance has replaced the common law rules of liability and defenses which grew out of the judicial inclination to foster a growing economy. No longer can it be said that a judicially-imposed doctrine of assumption of risk is necessary or desirable to protect expanding industry from being crippled by employers’ responsibility for tortious conduct toward their employees. 29

The rule which has emerged from this metamorphosis of public sentiment is that an employee never assumes risks arising from the employer’s negligence but does assume those which remain after due care has been exercised by the employer—in other words, those risks which are inherent in the work and which are contractually borne by the employee. 30 This qualification prevents the employer from being treated as an insurer of his employees’ safety, yet leaves the employer liable for his own culpable acts and omissions. This in turn relieves the employees of having to choose between meeting unreasonable risks and forgoing their means of livelihood altogether.

Any tendency toward expanding the duty owed by landowners other than public utilities, government agencies, and employers has understandably been much more sluggish. This is probably a reflection of the general reluctance of the judiciary to break new ground in an area strongly rooted in tradition, 31 but it by no means indicates that such inroads have not in fact been made. The next such extension of duty would logically seem to attach to the commercial landowner who invites

2860 Wash. 2d 310, 373 P.2d 767 (1967); see, e.g., cases cited therein.
29Id. at 318, 373 P.2d at 773.
30See, e.g., Goodwin v. Missouri Pac. R.R., 335 Mo. 398, 406, 72 S.W.2d 988, 991 (1934).
31Concepts of property and ownership of land have held a lofty position among English-speaking peoples since feudal times, and it is thus understandable that immediate suspicion and hostility should attach to any attempts of the judiciary to undercut the absolute dominion of the property owner over his land. 2 HARPER & JAMES, THE LAW OF TORTS 1432 (1956). This accounts in large part for the glacial extension of liability into this general area and the resulting inhibition which has persisted to the present day.
members of the public onto his premises in order to have a pecuniary benefit conferred upon him and who in doing so has impliedly established the reasonable safety of these premises. This progressive step, in fact, has recently been taken in several jurisdictions, motivated in large part by the theory that a commercial landowner who has held out defective premises for the public's use should not be heard to complain on grounds of assumption of risk when a member of that public suffers injuries as a result of having chosen to make use of those premises for the very purpose for which they were tendered.

The court in *Hoar* lent its full support to this position by quoting with approval section 343A(1) of the *Restatement (Second) of Torts*:

"'A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.'" In holding that a commercial landowner may be held liable even to an invitee who had knowledge of the risk which caused the injury, the court joined those other jurisdictions which have imposed an active duty on the part of the commercial landowner to provide reasonably safe premises for invitees, which goes beyond the common law obligation to protect against known or foreseeably dangerous conditions that are not known by the invitee or apparent to him.

But *Hoar* goes even further than this. Faced with the argument that the plaintiff in that case voluntarily encountered the risk of the icy path when she was under no compulsion to do so, the court simply rejected the rule which bars a plaintiff from recovery because of assumption of risk where the choice of action has been a free and voluntary one. The duty of the landowner is thus not limited by the fact that the invitee voluntarily and reasonably encounters the known or obvious risk, if it could be anticipated by the landowner that harm arising from that risk would nevertheless occur. Under the facts of the *Hoar* case, it therefore appears that there is no room for assumption of risk by any stretch of the imagination—the voluntariness of the plaintiff's choice of action is immaterial under the new rule, and the fact that the plaintiff had actual

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24See note 32 & accompanying text *supra*.

25327 F. Supp. at 577-78.
knowledge of the dangerous condition is equally meaningless in view of the affirmative duty imposed on the defendant to make the premises safe as against known or obvious dangers which may be anticipated to cause harm. Liability may be denied only by a finding that the plaintiff, having discovered the dangerous condition, proceeded to encounter it in an unreasonable manner, which properly gives rise to an issue of contributory negligence and not assumption of risk. 36

It would appear that the court in Hoar has performed an inestimable service to the legal profession in having taken a giant step toward the elimination of much of the confusion surrounding the application of assumption of risk by focusing instead on intelligent consideration of the primary issue in these cases. That issue, simply enough, is whether or not the defendant should be held liable despite the plaintiff's knowledge of the risk he chose to encounter. In dealing with this question, it must be decided whether or not the plaintiff's choice of action under the circumstances was a reasonable one. Another way of putting this is by asking whether or not a duty will be imposed on the defendant to the extent that the plaintiff's choice will be deemed as a matter of law to have been a reasonable one. Sidetracking on the issue of voluntariness by asking whether the advantages gained by the plaintiff's having met the risk negligently created by the defendant outweighed the disadvantages thereof serves only to obscure the determinative question. Perhaps cognizant of this, some courts seem to have gone out of their way in finding a lack of voluntariness on the part of the plaintiff's action in order to permit recovery. 37 Consideration of this question should not be necessary at all if in fact it can be determined that the duty of the defendant shall be extended to protect the plaintiff under the attendant circumstances, as it was so determined in Hoar. 38

It is important to bear in mind, however, that while the duty imposed in Hoar affected a commercial landowner under the limiting facts of that case, it is by no means certain that the court would further extend this duty to ordinary landowners should the question arise in the future. Neither can it safely be said that the court's rejection of the voluntariness test under the facts in Hoar necessarily eliminates that requirement

36 See notes 18, 22 supra.
38 "Any general doctrine denying recovery to one who voluntarily elects to take a chance is an unwarranted limitation on the landowner's duty." Keeton, Assumption of Risk and the Landowner, 22 L.A. L. Rev. 108, 120 (1961) (emphasis by the author).
as to all situations in which assumption of risk may present itself.\(^3\) Still, it undoubtedly appears that this case goes beyond the limitations in this general area imposed by the Restatement (Second) of Torts, and in this regard it is in keeping with the recent tendency to extend liability to commercial owners and occupiers of land by virtue of broadening concepts of duty.\(^4\)

Comment \(a\) to section 343A(1) of the Restatement states that that subsection "includes in particular the patrons of a public utility who enter land in its possession seeking its services, to which as members of the public they are entitled,"\(^4\)\(^1\) and it also applies to invitees of a government or of a government agency. Commercial landowners are not mentioned at all in this context, let alone ordinary owners and occupiers of land, and it thus seems that the Restatement has taken an overly cautious stand on the extension of duty owed to invitees, a stand which has rightly been disapproved in Hoar. This case, then, strikes a balance between the Restatement position and the logical end result of the recent liberal expansion with respect to landowners—a sweeping imposition of duty without regard to the specific label which might properly be attached to a given landowner.\(^4\)\(^2\) Other jurisdictions have gone further than Hoar in the direction of imposing the same standard of duty on all landowners regardless of classification,\(^4\)\(^3\) but none has taken the bold step of holding that the voluntariness of the plaintiff's choice of action may not be held to negate the effects of the duty so imposed. It is at

\(^{3\text{See note 14 supra.}}\)

\(^{4\text{For excellent discussions of the problems involved in this general area, see Keeton, Personal Injuries Resulting from Open and Obvious Conditions, 100 U. Pa. L. Rev. 629 (1952); Keeton, Assumption of Risk and the Landowner, 20 Tex. L. Rev. 562 (1942).}}\)

\(^{4\text{RESTATEMENT (SECOND) OF TORTS § 343A(1), Comment \(a\) (1965). "In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated." Id. § 343A(2).}}\)

\(^{4\text{Professor James would seem to adhere to the latter position in all instances save those in which there is an express agreement to assume the risk. See James, supra note 2, at 187-88.}}\)

\(^{4\text{Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968), is the landmark case which has broken all precedent in abolishing the arbitrary common law classification of plaintiffs as trespassers, licensees, and invitees usually applied in determining the duty owed by a defendant landowner to the plaintiff. The thrust of the decision is to impose on landowners a single duty of reasonable care in all situations regardless of the plaintiff's status. The plaintiff's particular status is still one factor to be considered in determining the reasonableness of the defendant's conduct, but under Rowland it is no longer solely determinantive of the standard by which that conduct is measured. Accord. Pickard v. City & County of Honolulu, 51 Hawaii 134, 452 P.2d 445 (1969); cf. Wolfson v. Chelist, 284 S.W.2d 447 (Mo. 1955).}}\)
present uncertain where the line may ultimately be drawn with respect to those classes of landowners affected by the rejection of the voluntariness test, if indeed one is drawn at all. Nevertheless, Hoar's innovative approach may well prove to be the legal catalyst long needed in this area to remove some of the injustices which result when assumption of risk is mechanically applied to situations in which it is not warranted and in which the plaintiff cannot conscionably be allowed to go uncompensated. If so, the change can only be a beneficial one.

Without specifically so holding, the court in Hoar arguably may have done away with assumption of risk in Vermont in all landowner cases by expressly eliminating one of the two primary elements of the defense. The other element—actual or implied knowledge of the risk—has been severely emasculated as well by the aforementioned extension and expansion of duty with respect at least to commercial owners and occupiers of land. Whether or not other jurisdictions will follow the Vermont example in rejecting the voluntariness test in cases raising the issue of assumption of risk remains to be seen, but it is submitted that this is a refreshing approach to the modification of an outdated legal doctrine which has done more harm than good through the years by often denying without just cause the deserved redress of innocent plaintiffs' invaded interests.

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*Cf. Osborne v. Imperial Irrig. Dist., 8 Cal. App. 2d 622, 47 P.2d 798 (1935).*