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NEGLIGENCE - ASSUMPTION OF RISK - NECESSITY FOR CONTRACTUAL RELATION

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NEGLIGENCE — ASSUMPTION OF RISK — NECESSITY FOR CONTRACTUAL RELATION — While walking behind defendant through woodland, plaintiff suffered an eye injury caused by the negligence of the defendant in bending over a small sapling and allowing it to fly back and strike plaintiff. Verdict and judgment were for plaintiff. Defendant moved for a directed verdict on the ground of assumption of risk, and appealed from a denial of the motion. *Held*, from the facts of the case, it cannot be ruled as a matter of law that the plaintiff knew and comprehended the danger which caused his injury and that he volun-

tarily exposed himself thereto, and, therefore, the judgment must be sustained. However, the case is a proper one for the application of the doctrine of assumption of risk, since no contractual relation is necessary to support this doctrine. *Craig v. Parkhurst*, (Vt. 1941) 18 A. (2d) 173.

One of the most commonly stated restrictions on the doctrine of assumption of risk is that it applies only when the plaintiff and defendant are in the contractual relation of master and servant.[1] But some few courts have required

[1] The basis of this restriction is that the doctrine rests solely upon an express or implied agreement from the circumstances of employment that the master shall not be liable for an injury incident to the service resulting from a known or obvious danger arising in the performance of the service. Southern Turpentine Co. v. Douglass, 61 Fla. 424, 54 So. 385 (1911) [probably overruled by Cooney-Eckstein Co. v. King, 69 Fla. 246, 67 So. 918 (1915)]; Pennsylvania Co. v. Backes, 133 Ill. 255, 24 N. E. 563 (1890); Chicago & E. I. R. R. v. Randolph, 199 Ill. 126, 65 N. E. 142 (1902); Chicago & E. I. R. R. v. Heerey, 203 Ill. 492, 68 N. E. 74 (1903); Shoninger Co. v. Mann, 219 Ill. 242, 76 N. E. 354 (1906) [all prior Illinois cases seriously weakened by Campion v. Chicago Landscape Co., 295 Ill. App. 225, 14 N. E. (2d) 879 (1938)]; Wilkins v. Water & Light Co. of Nebraska City, 92 Neb. 513, 138 N. W. 754 (1912) [yet Thompson v. Young Men's Christian Assn., 122 Neb. 843, 241 N. W. 565 (1922), applies the doctrine to a suit by an invitee who is in no contractual relation to the defendant]; Ames v. Western Pacific Ry., 48 Nev. 78, 227 P. 1009 (1924); Hauer v. French Brothers-Bauer Co., 43 Ohio App. 333, 183 N. E. 186 (1931) [yet Plotner v. Great Atlantic & Pacific Tea Co., 59 Ohio App. 367, 18 N. E. (2d) 409 (1938), applies the doctrine to a suit by an invitee who is in no contractual relation with the defendant]; Dubiver v. City Ry., 44 Ore. 227, 74 P. 915, 75 P. 693 (1904); Furbeck v. I. Gevurtz & Son, 72 Ore. 12, 143 P. 654, 922 (1914); Elred v. United Amusement Co., 137 Ore. 452, 2 P. (2d) 1114 (1931); Bodie v. Charleston & W. C. Ry., 61 S. C. 468, 39 S. E. 715 (1901); Barksdale v. Charleston & W. C. Ry., 66 S. C. 204, 44 S. E. 743 (1902); Montgomery v. Seaboard Air Line Ry., 73 S. C. 503, 53 S. E. 987 (1905); Hall v. Northwestern Ry., 81 S. C. 522, 62 S. E. 848 (1908); Hice v. Dobsen Lumber Co., 180 S. C. 259, 185 S. E. 742 (1936); Stogner v. Great Atlantic & Pacific Tea Co., 184 S. C. 406, 192 S. E. 406 (1937); Nelson v. Booth Fisheries Co., 165 Wash. 521, 6 P. (2d) 388 (1931); Roscoe, S. & P. R. R. v. Jackson, 60 Tex. Civ. App. 276, 127 S. W. 872 (1910); Kiechler v. Kelm, (Tex. Civ. App. 1922) 246 S. W. 1079; Texas Pacific Coal & Oil Co. v. Grabner, (Tex. Civ. App. 1928) 10 S. W. (2d) 441; Nesmith v. Magnolia Petroleum Co., (Tex. Civ. App. 1935) 82 S. W. (2d) 721; Cleveland, C. C. & St. L. Ry. v. Narramore, 175 U. S. 724, 20 S. Ct. 1021 (1899); Cudahy Packing Co. v. Luyben, (C. C. A. 8th, 1925) 9 F. (2d) 32; Southern Pacific Co. v. McCready, 284 U. S. 624, 52 S. Ct. 10 (1931); Schwartzman v. Lloyd, (App. D. C. 1936) 82 F. (2d) 822. A rather startling result is reached in Mississippi, where the doctrine obtains in any case but one involving the master-servant relation, where its application is expressly barred by the code. See McDonald v. Wilmut Gas & Oil Co., 180 Miss. 350, 176 So. 395 (1937). Three Missouri cases, completely out of line with the rest of the decisions in that state, have held that not only is the doctrine limited to master-servant cases, but also that it cannot apply where the master has been negligent: Tinkle v. St. Louis & S. F. Ry., 212 Mo. 445, 110 S. W. 1086 (1908); Fish v. Chicago, R. I. & P. Ry., 263 Mo. 106, 172 S. W. 340 (1914); Viermann Bricklaying Co. v. St. Louis Contracting Co., 335 Mo. 534, 73 S. W. (2d) 734 (1934).

only that there be a contractual relation, whether master and servant or not.[2] However, a nearly unanimous application of the doctrine is made in the cases where spectators at athletic games sue the park owner and where passengers on "thrill rides" sue the ride owner, even though the mere payment of admission hardly creates the contractual relation conventionally required.[3] Similarly, the doctrine may be applied to a suit by a licensee, invitee, or guest against the property owner or host though relation based on contract is completely lacking.[4] Occasionally, the doctrine, though broadened to cover other relations not based on contract, is completely confused with, or intentionally merged with, the doctrine of contributory negligence and thus its value as an additional defense is defeated.[5] A comparatively large group of cases expressly require no contractual relation at all, holding that the doctrine arises from the maxim *"volenti non fit injuria,"* and will apply to any set of facts in which the plaintiff voluntarily incurred a known and appreciated risk.[6] Many of these cases clearly recog-

[2] Shelby Iron Co. v. Cole, 208 Ala. 657, 95 So. 47 (1922); Wilmot v. Golden Gate Investment Co., (Cal. App. 1940) 107 P. (2d) 263; Rutherford v. James, 33 N. M. 440, 270 P. 794 (1928). It might be remarked that the Alabama cases cite no authority for their holdings, and that the New Mexico case is based on an incomplete quotation from a Vermont case.

[3] The cases on this point are far too numerous to collect in a law review note. For a summary of some of the outstanding cases, see Campion v. Chicago Landscape Co., 295 Ill. App. 225, 14 N. E. (2d) 879 (1938). Often, however, the value of these cases as authority for the application of the assumption of risk doctrine is lessened by the fact that, as in the Campion case, the defendant is found not guilty of negligence and the rest of the case is dictum.

[4] This would seem to be an entirely independent doctrine. It is based on the nonexistence of duty in the owner or host, rather than the knowledge, appreciation, and voluntary assumption of a given risk. Warnke v. Griffith Co., 133 Cal. App. 481, 24 P. (2d) 583 (1933); Koppelman v. Ambassador Hotel Co. of Los Angeles, 35 Cal. App. (2d) 537, 96 P. (2d) 196 (1939); Thompson v. Young Men's Christian Assn., 122 Neb. 843, 241 N. W. 565 (1932); Plotner v. Great Atlantic & Pacific Tea Co., 59 Ohio App. 367, 18 N. E. (2d) 409 (1938); Tulsa v. Harman, 148 Okla. 117, 299 P. 462 (1931); Kauth v. Landsverk, 224 Wis. 554, 271 N. W. 841 (1937); Helgestad v. North, 233 Wis. 349, 289 N. W. 822 (1940). *Contra*, Texas Pacific Coal & Oil Co. v. Grabner, (Tex. Civ. App. 1928) 10 S. W. (2d) 441.

[5] The prime example of this confusion is Bolen v. Strange, 192 S. C. 284, 6 S. E. (2d) 466 (1940). The same confusion may also be found in all the South Carolina cases cited in note 1, supra. See also: Bianchi v. South Park Presbyterian Church, 123 N. J. L. 325, 8 A. (2d) 567 (1939); Weaver v. Shell Co. of California, 34 Cal. App. (2d) 713, 94 P. (2d) 364 (1939); Ingersoll v. Onandaga Hockey Club, 245 App. Div. 137, 281 N. Y. S. 505 (1935). Dubiver v. City Ry., 44 Ore. 227, 74 P. 915, 75 P. 693 (1904), limits the doctrine of assumption of risk to master-servant relation cases, then relaxes the doctrine of contributory negligence so as to cover every case in which a known risk is voluntarily incurred.

[6] Cooney-Eckstein Co. v. King, 69 Fla. 246, 67 So. 918 (1915); Jacksonville Beach v. Jones, 101 Fla. 95, 131 So. 369, 133 So. 562 (1931); Campion v. Chicago Landscape Co., 295 Ill. App. 225, 14 N. E. (2d) 879 (1938); Standard Oil Co. v. Titus, 187 Ky. 560, 219 S. W. 1077 (1920); McLeod Store v. Vinson, 213 Ky. 667, 281 S. W. 799 (1926); Adams' Admr. v. Callis & Highes, 253 Ky. 382, 69 S. W. (2d) 711 (1934); Miner v. Connecticut River Ry., 153 Mass. 398, 26 N. E. 994

nize that the doctrine may be founded on two entirely separate fact situations: assumption of the risk by contract, or incurring the risk by voluntary act.[7] Missouri and Indiana were perhaps the first states to indicate there might be two separate doctrines, rather than coexisting bases for one doctrine.[8] Missouri finally promulgated the solution to the above demonstrated confusion: the doctrine of "assumption of risk" is based on an express or implied term of the contract of employment whereby the servant assumes the ordinary risks of that employment; the doctrine of "incurred risk" is based on the maxim *"volenti non fit injuria,"* and may be applied in any case in which the plaintiff knew and appreciated the nature and extent of a given danger, and incurred the risk thereof by his own voluntary act.[9] In the majority of master-servant cases, the result of the two doctrines would be the same; but it should be noted that it could be held by a court which recognized both doctrines that a servant might incur the risk of a known and appreciated danger which, because of its unusual nature, would not be considered to be one of the assumed risks of his employment.

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(1891); O'Maley v. South Boston Gas & Light Co., 158 Mass. 135, 32 N. E. 1119 (1893); Warren v. Boston & M. Ry., 163 Mass. 484, 40 N. E. 895 (1895) [but see the latest Massachusetts case in point—Keough v. E. M. Loew's, 303 Mass. 364, 21 N. E. (2d) 971 (1939)]; Reedy v. Goodin, 285 Mich. 614, 281 N. W. 377 (1938); Garton v. Public Service Electric & Gas Co., 117 N. J. L. 520, 189 A. 403 (1936); Bianchi v. South Park Presbyterian Church, 123 N. J. L. 325, 8 A. (2d) 567 (1939); Rutherford v. James, 33 N. M. 440, 270 P. 794 (1928); Zurich General Accident & Liability Ins. Co. v. Childs Co., 253 N. Y. 324, 171 N. E. 391 (1930); Christiansen v. Fantle Bros., 56 S. D. 350, 228 N. W. 407 (1929); Bouchard & Sons Co. v. Keaton, 9 Tenn. App. 467 (1928); Drown v. New England Tel. & Tel. Co., 80 Vt. 1, 66 A. 801 (1907); Lavelle's Admr. v. Central Vermont Ry., 94 Vt. 80, 108 A. 918 (1919); Gover v. Central Vermont Ry., 96 Vt. 208, 118 A. 874 (1922); Cole v. North Danville Cooperative Creamery Assn., 103 Vt. 32, 151 A. 568 (1930); Goodwin v. Gaston, 103 Vt. 357, 154 A. 772 (1930); Hutchinson v. Knowles, 108 Vt. 195, 184 A. 705 (1936); Hunn v. Windsor Hotel Co., 119 W. Va. 215, 193 S. E. 57 (1937); Adolff v. Columbia Pretzel & Baking Co., 100 Mo. App. 199, 73 S. W. 321 (1903); Fillingham v. St. Louis Transit Co., 102 Mo. App. 573, 77 S. W. 314 (1903); Stein v. Battenfield Oil & Grease Co., 327 Mo. 804, 39 S. W. (2d) 345 (1931); Arnold v. May Department Stores Co., 337 Mo. 727, 85 S. W. (2d) 748 (1935); Dietz v. Magill, (Mo. App. 1937) 104 S. W. (2d) 707. It is interesting to note that Professor Bohlen supports this view, but cites no authority whatsoever. BOHLEN, TORTS 441 (1926). Harper also supports this view, citing Bohlen as his sole authority. HARPER, TORTS 290 (1933).

[7] Cooney-Eckstein Co. v. King, 69 Fla. 246, 67 So. 918 (1915); Jacksonville Beach v. Jones, 101 Fla. 95, 131 So. 369, 139 So. 562 (1931); all the Vermont cases cited in note 6, supra, recognize this; Hunn v. Windsor Hotel Co., 119 W. Va. 215, 193 S. E. 57 (1937).

[8] Indiana Natural Gas & Oil Co. v. O'Brien, 160 Ind. 266, 65 N. E. 918, 66 N. E. 742 (1902); Parry Mfg. Co. v. Crull, 56 Ind. App. 77, 101 N. E. 756 (1913); Adolff v. Columbia Pretzel & Baking Co., 100 Mo. App. 199, 73 S. W. 321 (1903); Fillingham v. St. Louis Transit Co., 102 Mo. App. 573, 77 S. W. 314 (1903).

[9] Arnold v. May Department Stores Co., 337 Mo. 727, 85 S. W. (2d) 748 (1935); Dietz v. Magill, (Mo. App. 1937) 104 S. W. (2d) 707. The court is careful to declare that both doctrines are entirely independent of contributory negligence, depending solely upon assent, express or implied, by contract or voluntary act, to the danger from which the injury results.