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OLD WINE IN A NEW FLASK—RESTRUCTURING ASSUMPTION OF RISK IN THE PRODUCTS LIABILITY ERA

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Several years ago Professor Fleming James in an article entitled *Assumption of Risk: Unhappy Reincarnation*¹ took the second *Restatement of Torts* to task for recognizing anew the defense of assumption of risk. The basis of the attack on the Restatement was that a *reasonable* assumption of risk should not bar a plaintiff when defendant's duty requires him to do more for the plaintiff's safety than warn him against a specific danger.² Where defendant's duty is such that he is required to obviate dangers even to those who are fully aware of them,³ James argued that the law would be self-defeating if it should subsequently relieve a defendant from liability merely because a plaintiff has reasonably and voluntarily encountered the very risk which defendant had no right to put to him in the first instance.⁴ Although the James thesis is simplicity itself, one must admit

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This paper was prepared during a period in which the author was involved in a study sponsored by the National Science Foundation, entitled *PRODUCT LIABILITY: A Study of the Interaction of Law and Technology*, Grant Number GI-34857. The report of the study appears in 12 Duquesne U.L. Rev. 425 (Spring 1974). Although this paper developed apart from that study, the contributions of Professor William Donaher of the Duquesne Law School and Professors Alvin Weinstein and Henry Piehler of Carnegie-Mellon University—co-members of that NSF study team to my overall thinking—are gratefully acknowledged.

1. James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968).

2. See *id.* at 188-90.

3. By formulating the duty rules to cover all situations in which plaintiffs are fully aware of the danger Professor James has made assumption of risk a logical impossibility. The expanded duty rules which impose responsibilities on defendants to protect plaintiffs require more careful definition than Professor James has given them. These rules, developed over the past decade, do not necessarily seek to protect plaintiffs from risks of which they are fully aware. For full discussion of this problem see text accompanying notes 91, 106-21 *infra*.

4. James, *supra* note 1, at 192. Although Professor James specifically disclaims dealing with the issue of unreasonable assumption of risk, *id.* at 185-86 n.4, it is clear that he

with candor that the advocates of a continued broad application of the assumption of risk doctrine remain unconvinced.⁵

The advent of strict liability for defective and dangerous products has substantially raised the stakes in the debate. The flood of cases⁶ based on implied warranty or strict tort liability pursuant to section 402A of the second *Restatement* has caused the profession to focus attention on the appropriate role of the affirmative defenses.⁷ While initially there was great preoccupation with the advantages which inured to the plaintiff in pursuing a cause of action for strict liability, the storm has calmed and there is widespread recognition that Dean Prosser's assessment that "there is not one case in a hundred in which strict liability would result in recovery where negligence does not"⁸ is an accurate one indeed.⁹ Courts and scholars alike have now set themselves about the business of working out the details of strict liability litigation.¹⁰ It should surprise no one to learn that very little has changed. The doctrines of limited duty,¹¹ causation in fact,¹² and proximate

would agree that voluntary and unreasonable assumption of risk should be a valid defense to a cause of action under strict liability. See *id.* The author's critique of the James analysis will frontally attack this problem. See text accompanying notes 123-31 *infra*.

5. For the sharp rebuttal of the Reporter, Dean William L. Prosser, to the arguments of the group opposed to assumption of risk see RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 893, at 78-83 (Tent. Draft No. 9, 1963). See also note 35 *infra*.

6. In a recent article, Professor Dix Noel has noted that some 36 jurisdictions have expressed their general approval of section 402A of the second *Restatement of Torts*. Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93 n.4 (1972).

7. See, e.g., Epstein, *Products Liability: Defense Based on Plaintiff's Conduct*, 1968 UTAH L. REV. 267; Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627 (1968); Noel, *supra* note 6.

8. Prosser, *The Assault Upon the Citadel (Strict Liability To The Consumer)*, 69 YALE L.J. 1099, 1114 (1960). Dean Prosser's remark was directed toward the manufacturer's liability. He observed that since courts were prone to let the negligence issue go to the jury on a *res ipsa loquitur* theory, the plaintiff's two most difficult tasks were to prove that (1) his injury was due to a defect in the product, and (2) that the defect existed in the product when it left the hands of the manufacturer. *Id.* at 1114-15. In Prosser's words, "For neither of these is strict liability of any aid to him whatever." *Id.* at 1114. Strict liability did of course make a great difference in the case of parties in the distributive chain against whom negligence could not be inferred. They can now be held without any proof of negligence. See *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 262-63, 391 P.2d 168, 171-72, 37 Cal. Rptr. 896, 899-900 (1964); *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill. 2d 339, 344, 247 N.E.2d 401, 403-04 (1969); W. PROSSER, *THE LAW OF TORTS* § 100, at 665 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 402A, comment f (1965).

9. See Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 8-9 (1965). See generally P. Keeton, *Products Liability—Problems Pertaining to Proof of Negligence*, 19 SW. L.J. 26 (1965).

10. See Dickerson, *Products Liability: How Good Does a Product Have to Be?*, 42 IND. L.J. 301 (1967); P. Keeton, *Manufacturer's Liability: The Meaning Of "Defect" In The Manufacture And Design Of Products*, 20 SYR. L. REV. 559 (1969); P. Keeton, *Products Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30 (1973); Noel, *supra* note 6; Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973).

11. See, e.g., *Evans v. General Motors Corp.*, 359 F.2d 822, 824-25 (7th Cir.), cert. denied, 385 U.S. 836 (1966); *Fanning v. LeMay*, 38 Ill. 2d 209, 211-12, 230 N.E.2d 182, 184-85 (1967); *Bartkewich v. Billinger*, 432 Pa. 351, 355, 247 A.2d 603, 605-06 (1968).

12. See, e.g., *Midwestern V.W. Corp. v. Ringley*, 503 S.W.2d 745, 747 (Ky. 1973); Long

cause¹³ are at work once again limiting liability and preventing strict liability from turning into the dreaded "absolute liability" which defense lawyers so feared at the outset.¹⁴ Although these doctrines undergo slight shifts in interpretation when they are applied to strict product liability, the theoretical framework remains essentially unchanged from that developed in common law negligence cases. To be sure there is a new vocabulary which has been created to give the old doctrines modern respectability.¹⁵ However, one need not probe very hard to pierce the veil of modernity and rediscover the same comfortable concepts traditional to tort cases.¹⁶

Assumption of risk as a defense to strict liability stands apart from the other doctrinal changes in that its contours have yet to be shaped despite the fact that the problem has surfaced in a fair number of litigated cases.¹⁷ The second *Restatement* has indicated that the defense now may be an amalgam of assumption of risk and contributory negligence, but its language is vague, inexact and somewhat delphic. It provides:

Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand, the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.¹⁸

It is the thesis of this article that the trend of the law toward expanding the

v. Winchester Repeating Arms Co., [1970-73 Transfer Binder] CCH PROD. LIAB. REP. ¶ 6958, at 11,964 (Tenn. Ct. App. 1973); *Technical Chem. Co. v. Jacobs*, 480 S.W.2d 602, 606 (Tex. 1972).

13. See, e.g., *McDevitt v. Standard Oil Co.*, 391 F.2d 364, 370 (5th Cir. 1968); *Balido v. Improved Mach., Inc.*, 29 Cal. App. 3d 633, 643-49, 105 Cal. Rptr. 890, 897-901 (1972); *Ritter v. Narragansett Elec. Co.*, 109 R.I. 176, 184-85, 283 A.2d 255, 260 (1971).

14. See Smyser, *Products Liability and the American Law Institute: A Petition for Rehearing*, 42 U. DET. L.J. 343, 359 (1965).

15. See RESTATEMENT (SECOND) OF TORTS § 402A (1965). The accompanying comments speak of a product being safe for "normal handling," *id.*, comment *h* at 351, or more dangerous than "contemplated by the ordinary consumer who purchases it," *id.*, comment *i* at 352, or whether the product underwent "substantial change," *id.*, comment *p*, at 357. These terms are all veiled references to proximate cause or limited duty rules, and have been so recognized by courts and scholars. See *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 132-35, 501 P.2d 1153, 1161-63, 104 Cal. Rptr. 433, 441-43 (1972); *Finnegan v. Havir Mfg. Corp.*, 60 N.J. 413, 423-24, 290 A.2d 286, 292 (1972). See generally Noel, *supra* note 6.

16. Thus, for example, a limited duty rule which focuses on the open and obvious nature of a defect can be expressed in products liability language. See RESTATEMENT (SECOND) OF TORTS § 402A, comment *i* at 352 (1965) (stating that a product is not legally defective unless it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it").

17. See, e.g., *Messick v. General Motors Corp.*, 460 F.2d 485, 489-94 (5th Cir. 1972); *Elder v. Crawley Book Mach. Co.*, 441 F.2d 771, 773-74 (3rd Cir. 1971); *Bartkewich v. Billinger*, 432 Pa. 351, 356, 247 A.2d 603, 606 (1968).

18. RESTATEMENT (SECOND) OF TORTS § 402A, comment *n* (1965) (citation omitted).

duty of defendants to more than merely warn plaintiffs of impending danger should not be viewed as signaling the demise of the assumption of risk defense. It is crucial, however, to delimit the area in which assumption of risk can legitimately operate. To accomplish this it is first essential to define the scope of protection which the new duty rules confer on plaintiffs as a class. We shall find that the protective nature of the duty rules may indeed require defendants to actively take steps to guard against plaintiffs who are not consciously making choices at the time they encounter the danger. By focusing on the scope of protection which society wishes to demand from its manufacturing defendants, we shall also determine that even *voluntary and unreasonable* activity on the part of plaintiffs should not always operate to bar recovery. In short, we shall ask of each product and each situation: is it the desire of the law to impose a duty upon *defendants to preclude plaintiffs from choice-making*? That question, admittedly a difficult one, is crucial to a sophisticated understanding of assumption of risk. Only after squarely facing this major policy question can assumption of risk as a doctrine of the law designed to evaluate *plaintiff's behavior* come into play.

All this, however, is the conclusion of our story. To critically evaluate our present attitudes on assumption of risk we must first exhume the past to discover why there has been such shrill controversy about this very specialized form of plaintiff conduct.

I. A PAGE OF HISTORY

In the first *Restatement of Torts*, a section dealing with assumption of risk was added only after the death of Professor Bohlen, a vigorous opponent of the defense who served as the original Reporter for the *Restatement*. The first *Restatement* provided:

A person who knows that another has created a danger or is doing a dangerous act or that the land or chattels of another are dangerous, and who nevertheless chooses to enter upon or to remain within or permit his things to remain within the area of risk is not entitled to recover for harm unintentionally caused to him or his things by the other's conduct or by the condition of the premises, except where the other's conduct constitutes a breach of duty to him or to a third person and has created a situation in which it is reasonably necessary to undergo a risk in order to protect a right or avert a harm.¹⁹

A careful reading of this section, its comments and illustrations, reveals that notwithstanding Professor Bohlen's demise, his thinking dominated its formulation. In a landmark article Professor Bohlen had argued that there should be no recognition of assumption of risk as a separate defense.²⁰ All cases, he contended, that dealt with this defense were explainable on the ground that either defendant owed no duty to the plaintiff or that the plaintiff was contributorily negligent.²¹ In an age where a landowner's or chattel seller's maximum duty to anyone was to warn him of hidden or latent dangers the argument was strong indeed. Since the sole purpose of any warning was to apprise the plaintiff that a danger was present, then if the plaintiff became aware on his own of the presence of the dan-

19. RESTATEMENT OF TORTS § 893 (1939).

20. Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 16 (1906).

21. *Id.* at 16-18.

ger the defendant's duty had been discharged.²² True, the discharge of the duty did not take place through the good works of the defendant; but one could hardly charge him with fault if the plaintiff became aware of the danger on his own and continued to stay and make use of the hazardous premises or chattel.²³ The plaintiff's own internal warning mechanism was an acceptable ersatz for the warning which the defendant was duty-bound to give the plaintiff.²⁴ On the other hand, there existed a vast repository of cases where plaintiff's conduct was clearly unreasonable and fully explainable on the grounds of contributory negligence. Although the plaintiff often knowingly encountered the risk in these cases, the true reason for his non-recovery was that he had acted unreasonably.²⁵ Thus, Bohlen found no need for assumption of risk. Even in the "pure" case of assumption of risk—where plaintiff voluntarily and reasonably confronted a risk which defendant had no legal right to put to him—Bohlen took the position that it was wrong to recognize the defense. His argument was that given such a situation

22. *Id.* at 15-16.

23. In a perceptive footnote Professor Bohlen argued that causation (as opposed to duty) terminology should not be used to defend this result. *Id.* at 16 n.1. In theory, one could say that defendant breached a duty by creating a dangerous condition, but, once plaintiff became aware of the condition and proceeded to encounter it, defendant's breach of duty was no longer the proximate cause of plaintiff's harm. However, if one posits an unaware plaintiff standing next to one who is aware of the danger, it becomes clear that causation terminology becomes unwieldy. Could one say that defendant's negligence is a cause of the unaware plaintiff's harm but is not a cause of the harm to the plaintiff who was aware? *See id.*

This selfsame argument has shifted to the no duty/assumption of risk controversy. Those advocating assumption of risk as an independent defense find it anomalous to speak of defendant violating a duty to the unknowing plaintiff but fulfilling his duty to a plaintiff who has independently become aware of the risk. The transformation from duty to no-duty takes place because of plaintiff's awareness, not through the act of the defendant. *See R. Keeton, Assumption of Products Risks*, 19 Sw. L.J. 61, 68 (1965). For a replication to this argument see James, *supra* note 1, at 194. *See generally* RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 893, at 78-79 (Tent. Draft No. 9, 1963) (In his "Reply by the Reporter," Dean Prosser states that "If [duty] is to be extended to include defenses arising from the subsequent conduct of the plaintiff, it becomes such an overworked word that it falls of its own weight.").

24. As Professor Robert Keeton has noted, in this type of case there is general agreement that plaintiff does not recover. Whether the result is explained on the basis of the no-duty formulation or assumption of risk makes little substantive difference. *See R. Keeton, supra* note 23, at 68-69. Professor James agrees with Professor Keeton that there is little more than semantics to much of the controversy. He is, however, concerned that independent recognition of the defense will lead courts to recognize the defense even when defendant's duty is to take steps in addition to warning the plaintiff against a particular danger. James, *supra* note 1, at 195. *See also* RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 893, at 85-86 (Tent. Draft No. 9, 1963) ("Replication of Dean John W. Wade" to the "Reply by the Reporter").

25. Bohlen, in his own inimitable style, put it this way:

If the risk be so great and imminent and out of proportion to the right asserted, so that a prudent man would not encounter it, even to vindicate his right, to attempt to assert it would be contributory negligence; in fact, the earliest cases in which the doctrine of contributory negligence was foreshadowed were cases of this kind. No man, even an Englishman, may insist even on his rights in the face of certain injury. Bohlen, *supra* note 20, at 26 n.2.

one could not speak in any real sense of the assumption of risk being truly "voluntary." In criticizing Lord Bramwell's rather narrow concept of voluntariness Bohlen declared:

To [Lord Bramwell] all acts are entirely voluntary where the actor is not physically constrained In a long line of cases he states this conception in his own singularly striking and forcible manner He appears strangely unable to appreciate the true spirit of English freedom,—the peculiar tenacity of their privileges, that insistence upon the exercise of their legal rights even in the face of danger which has been the most marked influence in making them the free nation they are. Nothing could be more un-English than the conception that a right must be relinquished if it cannot be exercised with perfect safety,—that one who finds himself confronted with some slight risk must relinquish his right and seek the aid of the courts to give him damages for its deprivation.²⁶

There in a nutshell is Bohlen's view. No one can pose risks which he is duty-bound not to put to the plaintiff and then turn the tables on plaintiff and deny him relief simply because he chose not to select an alternative course of action which is more reasonable because it involves no risks. If the risk which plaintiff assumed was placed there by defendant's violation of his duty, and if plaintiff behaved reasonably under the circumstances, he should be entitled to recover.

This dilemma, which Bohlen so decisively faced and which remains a major area of controversy among present day scholars,²⁷ was never directly faced by the drafters of the first *Restatement* in writing section 893.²⁸ Nevertheless, one can

26. *Id.* at 26 (footnotes omitted).

27. See *RESTATEMENT (SECOND) OF TORTS*, Explanatory Notes § 893, at 70-87 (Tent. Draft No. 9, 1963); James, *supra* note 1, at 186 n.6.

28. The comments and illustrations to section 893 do not squarely face the question as to whether a voluntary and reasonable assumption of risk is a defense in a situation where the defendant violated a duty to the plaintiff by exposing him to the particular risk.

It is arguable that comment *b* and the illustrations thereunder take the position that voluntary and reasonable assumption of a risk is a defense even in the face of a clear duty. Comment *b* provides:

There are two types of situations in which the defense is effective. First, where the defendant's conduct would be wrongful to the plaintiff but for the plaintiff's assent to its continuance and where the plaintiff is willing or desirous of having the conduct continue. This is true when the defendant is doing a dangerous act at a place in which the plaintiff is entitled to be or to remain, or in which the defendant has no right to object to the plaintiff's presence, and where the plaintiff enters or remains within the dangerous area, *not for the protection of his own or another's legally protected interests but merely because he is willing or desirous that the activity, although dangerous, should continue.* *RESTATEMENT OF TORTS* § 893, comment *b* at 492 (1939) (emphasis added).

The workings of this principle are demonstrated by the following illustration:

A is illegally and dangerously setting off fireworks on his land adjacent to a public highway, thereby endangering people on the highway. B, a neighbor, fully conscious of the risk of so doing, approaches on the highway for the sole purpose of seeing the fireworks and without A's knowledge stops to watch A. B is hurt by an apparently sound but defective rocket. A is not liable to B. *Id.* at 494.

This comment and illustration present a difficult problem for those adhering to the Bohlen position (no-duty advocates). Since the plaintiff had a *right* to be at the place where he was at the time of the mishap and since defendant was negligent in setting off the fireworks and was in violation of a duty to plaintiff, by their reasoning, assumption of a risk would not be a defense. Yet, there is apparent good sense in a rule which denies a plaintiff who has sought out the defendant and exposed himself to the danger from recovering. Perhaps, the no-duty advocates would argue that the relationship between the parties negates the duty when defendant does not pose the choice to the plaintiff as to whether he may continue in

legitimately read Bohlen thinking in the black letter of section 893 which specifically states that assumption of risk will not be a defense

where the other's conduct constitutes a breach of duty to him or to a third person and has created a situation in which it is reasonably necessary to undergo a risk in order to protect a right or avert a harm.²⁹

It is not altogether clear whether this language refers only to a situation in which plaintiff is forced to the kind of alternatives which today would cause his action to be considered non-voluntary. One searches the comments and illustrations for a clue as to the meaning of this language. Comment *c* seems at first blush to answer the question. It provides that:

[W]here the defendant had no right to act dangerously or to maintain a dangerous condition after knowledge of it by the plaintiff, the fact that the plaintiff chooses to subject himself to a known risk does not necessarily bar him from recovery.³⁰

Yet what the right hand giveth the left hand taketh away. The principle of the comment is illustrated by reference to the following hypothetical:

While walking on the sidewalk, A sees that icicles on an adjacent house are about to fall upon the walk immediately in front of him. To avoid being struck he goes into the adjacent road, realizing that there is substantial danger of being struck by passing traffic. While there he acts with caution commensurate with the risks, but is struck by an automobile driven by B, who fails to use due care to avoid A. A is entitled to recover damages from B.³¹

the reasonable exercise of his rights but, rather the plaintiff imposes himself on the defendant and seeks out the danger for the very purpose of benefiting from the dangerous condition. Professor Mansfield, who is certainly no friend of the assumption of risk defense, has seriously considered whether a plaintiff who exposes himself to a risk-creating activity for the purpose of obtaining advantage from the situation should be barred from recovery. Mansfield, *Informed Choice in the Law of Torts*, 22 LA. L. REV. 17, 59-60 (1961). Perhaps this is the very "easy-choice" type of situation in which Professor Robert Keeton would insist on the defense of assumption of risk. See R. Keeton, *supra* note 23, at 69-72 (In "hard-choice" cases Professor Keeton would not allow the defense to be operative.). On the other hand, it appears that Professor James would resist assumption of risk even in this situation. Professor James has criticized the second *Restatement* for including the above-quoted fireworks illustration as an example of assumption of risk in section 496C. He contends that there is little authority for this position, and argues that *Scanlon v. Wedger*, 156 Mass. 462, 31 N.E. 642 (1892), does not support the *Restatement*. See James, *supra* note 1, at 192-93. The inference to be drawn from his remarks is that if the defendant did in fact breach a duty to this particular plaintiff who had a right to remain on the public ways, then assumption of risk should not be a defense.

In sum, in attempting to determine whether section 893 was basically faithful to Professor Bohlen's views one cannot draw any startling conclusions from its treatment of the fireworks illustration. (A second illustration included in comment *b* raises almost the identical issue and will not be dealt with separately. It does not shed any light on the crucial question of whether the defense exists where there is a clear duty which plaintiff reasonably encounters.) It is altogether possible that even faithful adherents to the no-duty formulation would find no difficulty in supporting the results reached by the *Restatement*.

29. RESTATEMENT OF TORTS § 893 (1939).

30. *Id.*, comment *c*, at 495.

31. *Id.*, comment *c*, illustration 4. The remainder of the illustrations dealing with reasonable assumption of risk describe situations from which the no-duty advocates can claim no support in resolving their controversy as to the applicability of the defense when the duty is clear and the plaintiff has acted voluntarily in encountering the risk. Illustrations 4-10 all stem from the now famous Bohlen list of situations where assumption of risk will not operate as a defense. The list includes the use of a highway by a traveler; use of public utility

Plaintiff's bypass to the street was under the kind of compulsion that no one is prepared to denote as voluntary. It is apparent that this hypothetical sheds no light on whether the drafters of the first *Restatement* intended to recognize voluntary and reasonable assumption of a known risk as a defense. It is a fruitless task; the first *Restatement* carries the secret locked within itself and there is no way to break the lock. Nevertheless, the general tone of the *Restatement* does not appear to be at odds with Bohlen's thinking.³² Why then did the Restaters grant separate recognition to the defense?

The question is a difficult one to answer. But, it is conceivable—even probable—that the Restaters thought that some grudging recognition should be given to the widespread use of the language of the defense by the courts. Thus, even though they may have believed that there was no separate defense of assumption of risk and that theoretically the cases could be analyzed on grounds of no-duty or contributory negligence, it is likely that they wanted to pay tribute to the courts who were making their no-duty analysis on the grounds that plaintiff discovered

premises by a patron; use of an improperly impeded access to plaintiff's own property; cases where defendant's wrong injures plaintiff where he has a right to be without regard to defendant's consent; where plaintiff moves to a nuisance; and where plaintiff is injured in rescuing a third person endangered by defendant's negligence. See Bohlen, *supra* note 20, at 18-21. In these situations Professor James has perceptively pointed out that there is no disagreement in result between those opposed to assumption of risk and those advocating its retention. The no-duty advocates would argue that in this situation defendant cannot absolve himself of the duty. This is apparently the thrust of the language in the first *Restatement* comments. Those advocating assumption of risk would agree that the defense would not be operative in the above-stated cases because plaintiff's choice could not be said to be voluntary. See James, *supra* note 1, at 189.

32. The first *Restatement* took the position that assumption of risk, like the defense of consent,

negatives the existence of a breach of duty by the defendant as a legal cause of the harm, thereby differing from the defense of contributory negligence which comes into operation only on the assumption of a prior or concurring violation by the defendant of a duty of care to the plaintiff. RESTATEMENT OF TORTS § 893, comment a (1939).

This language should not be lightly regarded. It was challenged prior to the adoption of section 893. The forerunner to section 893 was presented for consideration by the American Law Institute in May, 1939. The new Reporter, Professor Warren Seavey, defended the section as written. Mr. Snow suggested that the above-stated lines of comment a be deleted. Professor Seavey responded as follows:

Mr. Seavey: That, you will see, is what Mr. Bohlen thinks is the underlying basis of what he wrote on this topic approximately thirty years ago and is one of the things in which I think he made a real contribution. Contributory negligence presupposes some fault on the part of the defendant. Assumption of the risk presupposes no fault on his part. There may have been a prior fault, but the defense is not based on that. The defense is based on the fact that the plaintiff with his eyes wide open, with no coercion, has alternative courses of conduct and voluntarily chooses this. So I would not like to take it out, if you don't mind. 16 ALI PROCEEDINGS 326-27 (1938-39).

In a prior exchange between Professor Seavey and Mr. Snow, Professor Seavey strongly defended the Bohlen analysis. See *id.* at 325-26. It would seem that the Restaters simply had no occasion to consider the situation which has become the focal point of present day controversy—the voluntary and reasonable assumption of risk where defendant owed a duty to plaintiff to protect him from the very harm which befell him. The duty situations were limited at that time and no one felt the need to face that problem.

the risk and voluntarily assumed it.³³ Furthermore, even at this early stage the drafters of the first *Restatement* may have been cognizant that in those instances where defendant did not fulfill his duty by warning and sought relief from liability on the grounds that plaintiff was cognizant of the risk, there were complex burden of proof problems to be faced.³⁴ The first *Restatement* provided a simple working rule governing the allocation of the risk of non-persuasion. In such a situation it was quite clear that under section 893 the defendant would affirmatively bear the burden of proving no duty or assumption of risk.³⁵

When the famous 1963 Battle of the Wilderness took place within the American Law Institute³⁶ as to the wisdom of including a section on assumption of risk in the second *Restatement*, the legal climate had changed substantially from 1939. The second *Restatement* had for the first time included a section dealing with the duty of a landowner to a business invitee which required him to do more than simply warn in those instances where he could foresee harm arising to the invitee even if a warning was given.³⁷ Furthermore, a manufacturer of a dangerous chattel did not always fulfill his duty to the consumer by warning of the hazards involved in using the product.³⁸ Under these expanded duty rules it became crucial to decide whether the Bohlen philosophy would prevail. The Confederate army that sought to abolish the defense was fighting for more than a

33. See RESTATEMENT OF TORTS § 893, comment *b* at 492-93 (1939) (assumption of risk recognized as a defense in situations in which a land or chattel owner has "no greater duty than to inform the plaintiff of the danger of which the defendant knows or should be aware").

34. See RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 893, at 79-80 (Tent. Draft No. 9, 1963).

35. Even today the burden of proof issue remains a sore point in the argument over the recognition of the defense. See W. PROSSER, THE LAW OF TORTS § 67, at 452-56 (3rd ed. 1964) ("If the question is only one of duty, then the burden of proof must fall upon the plaintiff. . . . *Id.* at 453); James, *supra* note 1, at 196 ("While the assumption of risk formulation is *theoretically* more likely to induce courts to put the burden of proof on defendant than is the no-duty formulation of the same problem, this is not likely to be the result in practice."); W. PROSSER, THE LAW OF TORTS § 68, at 456 (4th ed. 1971) ("It is difficult to see how [the James approach] amounts to anything more than a change of terminology, or how it offers any advantage, other than the elimination of a phrase which is so cordially disliked by some writers and courts as to amount almost to a phobia."). See also note 43 *infra*.

36. In *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368 (Tex. 1963), Justice Greenhill described the skirmish:

In preparing Restatement of the Law of Torts, Second, the advisors sharply divided. A group mainly of distinguished deans and professors, favored striking the entire chapter of Assumption of Risk. They would use contributory negligence. The group includes Deans Page, Keeton and Wade, and Professors James, Malone, Morris, Seavey and Thurman. Mr. Eldredge prepared a "dissent" for this group. The group is referred to in the notes to the draft as "The Confederacy." Others including Prosser, Professor Robert Keeton, and Judges Fee, Flood, Traynor and Goodrich supported the existence of the defense of assumed risk. The distinguished scholars refer to the debate, among themselves, as "The Battle of the Wilderness." The Reporter, Prosser, states in the draft that the American Law Institute Council voted unanimously to follow the recommendations of the sections on assumption of the risk. *Id.* at 378 n.3 (citations omitted).

37. RESTATEMENT (SECOND) OF TORTS § 343A (1965).

38. RESTATEMENT (SECOND) OF TORTS § 389, comments *d,e,f* (1965); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 28.7, at 1550-51 (1956).

change of terminology. They were concerned that a recognition of the defense would actually affect results in those cases in which defendant breached his newly-defined expanded duty and plaintiff voluntarily and reasonably encountered the risk.³⁹ Although the Union forces ultimately prevailed, Dean Prosser's sharp rebuttal⁴⁰ in defense of assumption of risk is not well taken. Contrary to Prosser's argument, there is no real support in the first *Restatement* for the substantive position which he sought to take. Such evidence as there is from the language indicates that there may well have been a substantial underlying agreement with the Bohlen view that once the defendant owed the plaintiff a duty to eradicate a danger there was no way that he could relieve himself from liability if plaintiff acted reasonably in encountering the risk.⁴¹ This, of course, is no answer to the merits of the issue. But, it is helpful in fighting the merits to recognize that forty years of history are not necessarily against the opponents of assumption of risk.

II. NARROWING THE GAP

The protagonists in the battle over assumption of risk have long recognized that there are large areas of agreement between them.⁴² In those instances where a landowner or a seller of a chattel fulfills his duty by warning of the dangerous condition inhering therein, whether one labels the reason for non-liability as no-duty or assumption of risk is ordinarily merely a matter of terminology.⁴³ Simi-

39. See RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 893, at 72-77 (Tent. Draft No. 9, 1963).

40. See *id.* at 78-83.

41. See text accompanying notes 28-33 *supra*.

42. See James, *supra* note 1, at 189.

43. See RESTATEMENT (SECOND) OF TORTS § 496C, comment *d* (1965); James, *supra* note 1, at 189. There may, however, be some difference with regard to burden of proof. If defendant has violated a duty because he has failed to adequately warn and if plaintiff has become aware of the danger, the defendant would carry the burden of proving that plaintiff did know of the risk. Advocates of assumption of risk argue that by recognizing the negation of duty in the form of an affirmative defense, the burden of proof is placed on the defendant. To insist on the no-duty rationale would require the plaintiff to prove that his own act of allegedly recognizing the danger did not negate the duty. Dean Prosser has made much of this point. See W. PROSSER, THE LAW OF TORTS § 68, at 455 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 893, at 79-80 (Tent. Draft No. 9, 1963) (Dean Prosser's "Reply by the Reporter"). Professor James has countered that Prosser is making much ado about nothing since courts rarely lose sight of the duty issue where burden of proof is concerned. James, *supra* note 1, at 196. This author is in strong agreement with Professor James. In a situation where the defendant has not met his duty to warn and there is evidence introduced that plaintiff may have appreciated the danger, Prosser suggests that if the plaintiff is dead or unable to produce evidence that he did not consent or if the evidence is no more than evenly balanced, then plaintiff must lose. W. PROSSER, THE LAW OF TORTS § 68, at 455 (4th ed. 1971). I fail to follow this argument. If the posture of the case is that defendant has violated his duty by failing to warn, plaintiff has made out a prima facie case. Evidence to the effect that the case presents a limited duty situation must be brought forward and proven by the defendant. Otherwise we have no reason to displace the proven violation of duty with a no-duty rule. Prosser's view presupposes a *tabula rasa*. The law suit does not proceed with no-duty but with a rather clear violation of duty from which defendant seeks to remove himself. There is every reason to believe that courts will impose the burden of proof on this issue on the defendant.

larly, in those situations where plaintiff has been deprived by the defendant of a reasonable alternative course of action—whether one finds liability because the defendant has violated a duty to the plaintiff which he had no right to put to him, or whether one says that the plaintiff's choice was non-voluntary—is again a matter of semantics.⁴⁴ The difference between the pro and anti-riskers lies in those cases where defendant's duty is to do more than warn or fully disclose the danger and includes the taking of some additional precaution for plaintiff's safety.⁴⁵ Professor James argues as follows:

The adoption of this view [imposing a duty to do more than warn] represents a judgment that the dangers of the premises or the product are unreasonable ones *even to those who are fully aware of them*. Thus, if the maker of an appliance with obvious and exposed moving parts is held to the duty to equip it with some safety appliance, then the law no longer accepts the user's ability to take care of himself as an adequate safeguard of interest which society seeks to protect; the law has put some of the burden of looking out for the plaintiff on the defendant. If now the law should relieve the defendant from liability for breach of that duty because plaintiff encountered the unreasonable danger voluntarily but carefully, then indeed the law would defeat itself. It would be applying a doctrine born of the notion that an actor owes no duty of affirmative care for the protection of others to a situation in which the law has imposed just such a duty.⁴⁶

The argument propounded by Professor James is very good indeed. He would have us believe that the *Restatement* and the pro-riskers oppose his position. Perhaps, in part they do; but only because Professor James has painted with exceedingly broad strokes the implications of expanded duty rules.⁴⁷ While there does exist an area of legitimate disagreement, the following analysis will reveal that it is far narrower than Professor James' sweeping statement suggests.

A. Inadvertent Plaintiffs and the Volenti Defense

In attempting to evaluate those situations in which the law has imposed a duty other than simply to warn the plaintiff of a danger, section 343A of the second *Restatement of Torts* provides a convenient starting point. The section is entitled "Known or Obvious Dangers" and provides in part:

(1) 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*.⁴⁸

Under what type of conditions should one anticipate harm to a plaintiff who, despite having knowledge of the danger or despite its obviousness, will still be subjected to risk of injury? The comments and illustrations accompanying section 343A set forth two categories of cases of particular interest.⁴⁹ In the first cate-

44. See RESTATEMENT (SECOND) OF TORTS § 496E, comment c (1965); James, *supra* note 1, at 189.

45. See James, *supra* note 1, at 190-91.

46. *Id.* at 192.

47. See note 3 *supra*.

48. RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965) (emphasis added).

49. See RESTATEMENT (SECOND) OF TORTS § 343A, comments e & f (1965). Comment f also states that the possessor may be held liable when he "has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk." Illustration 5 (employee falls on obviously slippery waxed stairway; building owner liable because employ-

gory the defendant is held liable despite the obviousness of the danger to most people because it is quite foreseeable that there will be plaintiffs who will not see the danger and thus unwittingly encounter it. In the second category of cases the duty of the defendant extends to one who uses the premises with knowledge of the danger because it is foreseeable that the user will forget the danger he has discovered. Each prototypical section 343A situation and some analogous product liability cases will be examined in greater detail in the following sections.

1. *The "Obvious Danger" Which is Not So Obvious*

It should first be recognized that the broadening of the duty concept to include open and obvious dangers which the plaintiff did not observe carries no implications for the controversy surrounding the defense of subjective assumption of risk.⁵⁰ The plaintiff in these instances cannot fairly be said to have assumed the risk. He never perceived any risk and could thus assume none. The issue was purely whether the courts were going to impose a duty on a defendant to either eradicate a harm which was "open and obvious" or take steps to bring it to plaintiff's awareness.⁵¹ Once that issue was faced and decided in favor of imposing a duty, the only possible affirmative defense was contributory negligence. The duty imposed by section 343A was not, as Professor James has suggested,⁵² to provide benefits to plaintiffs "who are fully aware" of the danger. The opposite

ee's only alternative to attempting to negotiate stairs was to forgo employment) makes it clear that this language was meant to refer only to the noncontroversial situations described in illustrations 4-10 to section 893 of the first *Restatement*. See generally note 31 *supra*; note 82 *infra*.

50. It is in fact questionable with regard to this first category of cases whether the second *Restatement* reflected any major theoretical advance. There are cases extant at the turn of the century recognizing that when the defendant could foresee that plaintiff's attention would be diverted from the point of danger that defendant had a duty either to bring the danger to his attention or to eradicate it. See *Kean v. Schoening*, 103 Mo. App. 77, 82-83, 77 S.W. 335, 336-67 (1903); *Bloomer v. Snellenburg*, 221 Pa. 25, 26-28, 69 A. 1124 (1908). This principle arises with great frequency today in the supermarket or department store situation. Invariably the fact situation involves a danger which is open and obvious to one who is looking or paying attention to where he is walking. The accident occurs because plaintiff has his attention riveted on the display shelves. In most instances the courts pay little attention to the issue of "open and obvious" danger but rather focus on the foreseeability of harm to an inattentive plaintiff. See, e.g., *Safina v. Safeway Stores, Inc.*, 150 Cal. App. 2d 80, 87-88, 309 P.2d 470, 474-75 (1957); *Walsh v. Maurice Mercantile*, 20 Cal. App. 2d 45, 47-49, 66 P.2d 181, 182-84 (1937); *Ober v. The Golden Rule*, 146 Minn. 347, 348-49, 178 N.W. 586, 586-87 (1920). But see *Johnson v. Brand Stores, Inc.*, 241 Minn. 388, 390-94, 63 N.W.2d 370, 372-74 (1954). Both the issues of foreseeability of harm and contributory negligence are typically held to be questions for the jury, and the courts are not wont to disturb jury findings which almost invariably favor the plaintiff.

51. Professor Page Keeton has suggested that the primary reason for the limited duty concept is jury mistrust. P. Keeton, *Personal Injuries Resulting From Open and Obvious Conditions*, 100 U. PA. L. REV. 629, 641-642 (1952). Under this rationale, to insure that a landowner's actual liability is limited to warning plaintiffs, we deny plaintiffs recovery in all situations in which the danger is obvious, thus avoiding the question of whether any particular plaintiff was truthful in denying his cognizance of the danger.

52. See James, *supra* note 1, at 191-92 & n.30.

is true. Protection was extended to unaware plaintiffs who were being prevented from recovery by a truncated duty concept which focused on the metaphysics of the situation rather than the ability of a particular plaintiff to recognize the danger.

Although the expanded duty concepts of section 343A have been generally applied to possessors of land,⁵³ in the product liability area vestiges of the limited duty concept still permit courts to reach draconian conclusions. One such vestige is the rule which provides that a manufacturer of a product is under no duty to guard against injury from a patent peril or from a source manifestly dangerous.⁵⁴ This rule, which has rightfully come under heavy fire from Harper and James,⁵⁵ still maintains surprising vitality.⁵⁶ Yet its abolition should not be viewed as

53. See, e.g., *Adams v. R.S. Bacon Veneer Co.*, 162 N.W.2d 470, 472-74 (Iowa 1968); *Peterson v. W.T. Rawleigh Co.*, 274 Minn. 495, 496-500, 144 N.W.2d 555, 557-58 (1966); *Dawson v. Payless for Drugs*, 248 Ore. 334, 337-41, 433 P.2d 1019, 1021-23 (1967).

54. See *Campo v. Scofield*, 301 N.Y. 468, 471-75, 95 N.E.2d 802, 803-06 (1950).

55. See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 28.5 (1956).

56. The New York Court of Appeals has recently given witness to the tenacious hold that limited duty rules have on product liability law. In *Bolm v. Triumph Corp.*, 33 N.Y.2d 151, 305 N.E.2d 769, 350 N.Y.S.2d 644 (1973), plaintiff was seriously injured when the Triumph motorcycle he was operating collided with an automobile which negligently turned across his lane of traffic. On impact with the car, plaintiff was projected forward over the automobile, coming to rest in the street some five or six feet beyond it. In the course of the accident, plaintiff came into contact with a metal luggage rack or "parcel grid" which was affixed to the top of his motorcycle's gas tank about three inches in front of the saddle. Contact with the grid—which immediately followed the initial impact between the cycle and the automobile—allegedly caused severe pelvic and genital injuries including a resultant sterility.

In the action against Triumph plaintiff alleged that his injuries were aggravated by the unreasonably dangerous design of the parcel grid in that it was placed strategically where it could cause serious injuries to the rider upon impact. The New York court first acknowledged its willingness to impose second collision liability—thus granting recovery to the plaintiff even though the defect did not cause the original impact. It thus joined the more forward looking courts in extending liability to a non-crashworthy vehicle which aggravates a plaintiff's injury. Then in an about face the court remanded the case for trial on the issue of the patentness of the design defect. The court declared:

Here the duty and, thus, the liability of the manufacturer turn upon the *perception of the reasonable user* of the motorcycle as to the dangers which inhere in the placement of the parcel grid on top of the gas tank. That is a question of fact which should be submitted, with the other issues, for jury consideration. *Id.* at —, 305 N.E.2d at 774, 350 N.Y.S.2d at 651 (emphasis added).

Thus, if the jury finds that the design was patent to a reasonable user, defendant will have discharged his duty to the consumer.

Bolm equals *Patten v. Logemann Bros. Co.*, 263 Md. 364, 283 A.2d 567 (1971); see text accompanying notes 57-63 *infra*, in the potential injustice of its result. The parcel grid was admittedly a frill item. Since the utility of the grid was clearly not outweighed by the risk of harm, if the issue to be decided by the jury were whether the grid was unreasonably dangerous, there is a good chance that the court would have to direct a verdict against the manufacturer. The majority of the New York Court of Appeals nevertheless assures us that a jury could justifiably return a verdict for the defendant based on the ground that the defect was patent. It should be noted that as in *Patten*, the issue of assumption of risk would not necessarily come into play if the patent-danger rule was laid to rest. Even if the danger was patent to a reasonable user, as long as the danger was unreasonable, defendant can be found liable. For this author's treatment of the problem, see text accompanying notes 106-17 *infra*.

necessarily forcing the conclusion that liability will flow to a plaintiff who voluntarily encounters a risk of which he is fully aware. A recent Maryland case illustrates this principle.⁵⁷ Plaintiff Joshua Patten worked as a paper baler for approximately five years prior to his injury. The paper baling machine on which he worked had a lubrication and maintenance opening about seven or eight inches wide located 25 inches above the floor. Inside the opening the sliding piston that compressed the paper into bales passed by the opening within one inch of the inside wall of the machine. This piston did not move constantly, but was automatically activated when the paper in the compaction chamber had reached a predetermined level. In a deposition Patten indicated that prior to the accident he had seen the piston passing by the hole. On the day of the accident the plaintiff tripped on a bundle of paper baling wire lying loose on the floor next to the baling machine. As he fell his left hand went into the lubricating hole and the piston closed over several fingers of his hand.

The Maryland court affirmed a previous decision,⁵⁸ and insisted on retaining the rule which held that there could be no recovery for a patent danger.⁵⁹ The decision is an unconscionable one. The lubricating hole was clearly unreasonably dangerous. The cost of a simple protective screen would have been minimal. Including such a screen would have had no adverse affect on the operation or usefulness of the machine. In standard negligence parlance the probability of harm to someone from the unscreened hole was substantial, the utility of maintaining the risk was negligible, and the burden of precaution was minimal.⁶⁰ The finding of negligence was probably so clear that in the absence of the limited duty rule a court should have directed a verdict on the standard of care issue. As Harper and James have pointed out,⁶¹ the obviousness of the harm is only one of a number of factors that should be evaluated in assessing the calculus of risk.⁶² By concluding that the danger must be non-obvious to permit the imposition of liability, the Maryland court simply took a factor which should go into the overall assessment of the negligence issue and elevated it into a *sine qua non* for recovery.

Let us move one step ahead, however, and consider the position of the Maryland court if it were to abandon the patent-danger rule. It is important to realize that by doing so the court would not necessarily be recognizing a duty to a plaintiff who has voluntarily and reasonably encountered a known risk. The plaintiff's awareness of the risk in *Patten* was irrelevant to the happening of the accident. He fell and his hand somehow found its way into the hole. Voluntary assump-

57. *Patten v. Logemann Bros. Co.*, 263 Md. 364, 283 A.2d 567 (1971).

58. *Blankenship v. Morrison Mach. Co.*, 255 Md. 241, 243-47, 257 A.2d 430, 431-33 (1969).

59. 263 Md. at 366-68, 283 A.2d at 569-70.

60. Under strict liability courts utilize the risk-utility theory to determine the issue of unreasonable danger. See *Wade, Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 17 (1965). Thus whether proceeding under negligence or strict liability we can determine that the safety feature should have been designed into the machine.

61. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 28.5, at 1543 (1956).

62. See *Dorsey v. Yoder Co.*, 331 F. Supp. 753, 759-60 (E.D. Pa. 1971), *aff'd sub nom. Yoder Co. v. General Copper & Brass Co.*, 474 F.2d 1339 (3rd Cir. 1973).

tion of risk simply would not come into play in this instance.⁶³ Thus the James statement that the recognition of a broader duty concept necessarily precludes the recognition of the affirmative defense of assumption of risk is not warranted. The expanded duty concept could very well have been created to take care of this very type of case, *i.e.*, where plaintiff's awareness of the danger does not significantly affect his ability to prevent the occurrence of the injury.

That the abolition of archaic limited duty concepts need not affect the resolution of the difficult assumption of risk question was openly recognized in *Pike v. Frank G. Hough Co.*⁶⁴ In *Pike*, decedent was some 30 to 40 feet behind a paydozer, standing on an angle with his back to the paydozer, when it backed up and struck him. The operator of the paydozer had looked to the rear to ascertain if it was clear, but did not see the decedent. The paydozer had no rear-view mirror and no audible or visible back-up warning signal. Plaintiff's expert testified that the design of the paydozer, with its large engine box to the rear, created a blind area behind the paydozer of such dimension, that, if the operator looked behind him while sitting in the cab, he could not see a man six feet tall standing anywhere between one and forty-eight feet to the rear of the machine. This situation could have been substantially alleviated with the installation of rear-view mirrors. The California Supreme Court recognized that the first order of business was to focus on the danger to foreseeable plaintiffs rather than to make some metaphysical judgment as to whether in the world of Platonic forms the danger would be considered patent or latent. In rejecting the defendant's argument that since the peril was obvious no duty had been breached, the court stated:

First, although all vehicles contain the potential of impact, it is not necessarily apparent to *bystanders* that the machine operator is incapable of observing them though they are 30 to 40 feet behind the vehicle and in its direct path. The danger to bystanders is not diminished because the purchaser of the vehicle is aware of the deficiencies of design. . . . Second, the obviousness of peril is relevant to the manufacturer's defenses, not to the issue of duty.⁶⁵

It would thus seem quite clear that the initial thrust of the cases and the supporting *Restatement* sections⁶⁶ which have overthrown the limited duty rules which denied relief for injuries caused by "obvious" and "patent" dangers was not to impose an all-encompassing liability covering even those situations in which

63. It could be said that the plaintiff, by agreeing to work with the machine, voluntarily assumed the risk of injury to his hands or limbs. This would require a reading of the concept of risk far broader than courts have been willing to undertake. See *Dorsey v. Yoder Co.*, 331 F. Supp. 753, 765-67 (E.D. Pa. 1971), *aff'd sub nom.* *Yoder Co. v. General Copper & Brass Co.*, 474 F.2d 1339 (3rd Cir. 1973); *Guerrero v. Westgate Lumber Co.*, 164 Cal. App. 2d 612, 617-19, 331 P.2d 107, 110 (1958). See generally W. PROSSER, *THE LAW OF TORTS* § 68, at 447-50 (4th ed. 1971); text accompanying notes 69-90 *infra*.

64. 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).

65. *Id.* at 473, 467 P.2d at 234, 85 Cal. Rptr. at 634. The court went on to suggest that even if the obviousness of the danger is conceded, and even if the buyer or user appreciates the danger, there may be good grounds for holding the manufacturer liable, at least for injuries to third parties. See *id.* at 474, 467 P.2d at 235, 85 Cal. Rptr. at 635.

66. Sections 343A and 389 are cited by James as examples of the second *Restatement's* acknowledgment of an expanded duty concept designed to protect even those who are fully aware of the risk. James, *supra* note 1, at 191-92 & n.30.

plaintiff was fully aware of the danger. The *Restatement's* purpose was simply to rid the law of wooden rules which denied liability to the aware and unaware alike. Advocates of the assumption of risk defense should not be unduly perturbed by these decisions. In truth, as James has pointed out,⁶⁷ the defense is of unique significance only in those cases in which the old inflexible duty rules are discarded.

2. A Priori Assumption of Risk

a. Some Preliminary Observations

As previously noted,⁶⁸ in the second group of section 343A cases a duty is imposed on a defendant to foresee that in certain circumstances the user may forget the danger he has discovered. In advocating this expanded duty the American Law Institute rejected the principle of hornbook law that once a plaintiff fully appreciates a risk, the fact that he has momentarily forgotten it will not protect him.⁶⁹ The traditionally approved statement is a most unfortunate one. It draws its strength from an illegitimate analogy,⁷⁰ and does not accurately reflect past case law.⁷¹ It is clearly out of tune with the developing law in both the landowner and product liability areas.⁷² It is also responsible for considerable conflict between the pro and anti-riskers⁷³—a conflict which, in the opinion of this author, would evaporate once this issue was squarely confronted.

Does it or should it make a difference at what point in time a plaintiff assumes a known risk? *Walgreen-Texas Co. v. Shivers*,⁷⁴ a much cited Texas case, presents a factual pattern which typifies this problem. Plaintiff had entered Walgreen for the second time on the day of the accident to be served at the soda fountain. The soda fountain was located on a raised platform some nine and three-quarters inches from the floor. The platform was twenty-four feet long and two feet wide. The patrons sat on high stools located on the platform. Seeking to alight from the counter stool after drinking some coffee, the plaintiff failed to advert to her position on the platform, and sustained serious injuries in falling to the floor. The court first upheld the jury finding that Walgreen was negligent in maintaining counter stools on a platform of such narrow width.⁷⁵ The court then recognized that since the plaintiff had stepped up and down and then up once again on the same day the accident occurred, it was clear that she knew

67. *Id.* at 191.

68. See text accompanying note 49 *supra*.

69. See W. PROSSER, *THE LAW OF TORTS* § 68, at 449 (4th ed. 1971); P. Keeton, *supra* note 51, at 646-47.

70. See note 83 *infra*.

71. See *Austin v. Riverside Portland Cement Co.*, 44 Cal. 2d 225, 234, 282 P.2d 69, 74 (1955); *Maloy v. City of St. Paul*, 54 Minn. 398, 403, 56 N.W. 94, 95 (1893).

72. See, e.g., *Powell v. Vracin*, 150 Cal. App. 2d 454, 458-59, 310 P.2d 27, 29-30 (1957); *Bexiga v. Havir Mfg. Corp.*, 60 N.J. 402, 412, 290 A.2d 281, 286 (1972); *Simpson v. Doe*, 39 Wash. 2d 934, 941-42, 239 P.2d 1051, 1055 (1952).

73. Cf. James, *supra* note 1, at 190-92.

74. 137 Tex. 493, 154 S.W.2d 625 (1941).

75. *Id.* at 499-500, 154 S.W.2d at 629.

"in a way" that the counter stools were elevated on a narrow platform.⁷⁶ Strangely enough, however, the Texas court did not even discuss the assumption of risk issue. In remanding the case for a new trial, it concerned itself solely with the question of whether plaintiff's lapse of memory was contributory negligence.⁷⁷

The focus of our earlier discussion⁷⁸ was on cases in which the risks, although obvious to most, would still present a hazard to some foreseeable plaintiffs who might fail to notice the dangerous condition. The *Walgreen* case presents the second half of the expanded duty concept. In *Walgreen* the condition was open and obvious, and there was virtual assurance that plaintiff had adverted to it. But, one fact cannot be ignored—plaintiff was merely mortal. She had come to the city of Beaumont, Texas, that day because her daughter was to undergo surgery. She was preoccupied with her private thoughts and momentarily forgot that her step down to the floor would take her down an extra nine and three-quarter inches. Will defendant be absolved from liability merely because the open and obvious danger he created was noticed by the plaintiff? In other words, if a duty on the part of defendant exists not only to give notice and warning (for the condition of the premises has accomplished that) but to eradicate the danger, should assumption of risk be recognized as an affirmative defense? The illustration of the *Restatement* taken from the *Walgreen* case sets forth a situation where plaintiff discovered the danger and forgot it. Although the authors of the second *Restatement of Torts* have matched the Texas court in their failure to confront the assumption of risk question directly,⁷⁹ the conclusion reached by the *Restatement*

76. *Id.* at 501, 154 S.W.2d at 630.

77. *Id.* at 502-03, 154 S.W.2d at 630-31. See also *Powell v. Vracin*, 150 Cal. App. 2d 454, 457-59, 310 P.2d 27, 29-30 (1957); *Hechler v. McDonnell*, 42 Cal. App. 2d 515, 517, 109 P.2d 426, 428 (1941); *Simpson v. Doe*, 39 Wash. 2d 934, 941-42, 239 P.2d 1051, 1055 (1952). These cases share with *Walgreen* the dubious distinction of not confronting the question of assumption of risk. They consider only the contributory negligence of the plaintiff and reason that it is a jury issue.

78. See text accompanying notes 50-67 *supra*.

79. Section 343A, comment *f*, deals primarily with the duty question, and mentions assumption of risk only in an oblique fashion. It discusses under what circumstances one can expect a defendant to have a duty to do more than warn of the danger. It provides as follows:

There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.

Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. (See

is that Walgreen would be subject to liability to the plaintiff. The implication is clear that in this type of case there is no room for assumption of risk. The reason is quite simple. To recognize assumption of risk of this *a priori* nature would be ludicrous. Having just expanded the duty concept to open and obvious conditions which may be momentarily forgotten by a plaintiff, it would make no sense to say that assumption of risk operates as a defense. It will be recalled that this was the sense of Professor James' attack on assumption of risk.⁸⁰ But again, it should be noted that we are not talking about a plaintiff who is *fully aware of the risk when he is encountering it*. The duty of the defendant has been broadened to include liability to a plaintiff who is unaware of the danger at the time the injury occurs, even though at a previous point in time he had some appreciation of the situation. The prime reason for the expanded duty was the need to foresee forgetful plaintiffs. If now a forgetful plaintiff were to come along and we were to deny him recovery on the basis of assumption of risk, we could save ourselves the bother of expanding the duty concept. It would hardly be worth the trouble.⁸¹ This is, however, a far cry from saying that the expanded

§§ 466 and 496D.) It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.

The *Restatement* comment has been quoted in full because it is impossible to fully communicate its ambivalence and vagueness on the issue of assumption of risk. It would seem at first blush that it bears out Professor James' criticism that after having created the duty to the forgetful plaintiff it turns around and negates the duty by stating that the obviousness of the danger is to be considered in determining whether the plaintiff was guilty of assumption of risk.

Fortunately, in illustration 3 the *Restatement* clarifies the situation. This illustration is based on the *Walgreen* case and reads as follows:

The A Drug Store has a soda fountain on a platform raised six inches above the floor. The condition is visible and quite obvious. B, a customer, *discovers the condition* when she ascends the platform and sits down on a stool to buy some ice cream. When she has finished, *she forgets the condition*, misses her step, falls, and is injured. If it is found that this could reasonably be anticipated by A, A is subject to liability to B. *RESTATEMENT (SECOND) OF TORTS* § 343A, comment f, illustration 3 (1965) (emphasis added).

From the use of this illustration it is quite clear that the *Restatement* is not involved in marching up the hill for the sole purpose of descending again. It would have been desirable for the authors to qualify their statement as to the applicability of assumption of risk in these new expanded duty situations. Illustration 3 makes it evident that it does not apply to the forgetful plaintiff. Its prime importance would seem to be in those cases where even though defendant violated a duty because he should have expected that a plaintiff might be diverted and thus encounter the risk unknowingly, there is available independent evidence that plaintiff became aware of the risk. Thus, defendant has violated a duty to plaintiffs in general but he has available to him the defense of assumption of risk.

80. See text accompanying notes 46-47 *supra*.

81. Theoretically it might be possible to impose liability, in an expanded duty/forgetful plaintiff situation, for the benefit of others who have not assumed the risk. Thus, in the *Walgreen* case, if plaintiff fell from the platform and injured a third party, although the plaintiff would be barred by assumption of risk, the third-party plaintiff, should he decide to sue, would not be barred. Here the expanded duty concept, which has imposed a duty in a situation in which plaintiff may forget the danger, could inure to the benefit of one who has not assumed the risk. See generally *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 473-74, 467 P.2d 229, 234-35, 85 Cal. Rptr. 629, 634-35 (1970). Fortunately, section 343A, illustration 3, of the *Restatement* has indicated that even the plaintiff who perceived the risk would not be barred in this type of situation. See note 79 *supra*.

duty concepts of the second *Restatement* necessarily imply the demise of assumption of risk in such cases where plaintiffs consciously, voluntarily, and reasonably encounter the negligence of a defendant.⁸² There has as yet been no clear statement by courts who pay allegiance to the *Restatement* that expanded duty concepts should reach that far. This author, for reasons to be stated later, is in agreement with Professor James that assumption of risk is an inappropriate defense in many instances. But to present the courts and the *Restatement* in a light of total illogic will not help us in facing the central policy issue, viz., whether or not a plaintiff who truly assumes a risk at the time of injury should be barred from recovery if his actions are reasonable.⁸³

82. It may appear that section 343A, comment *f*, establishes a duty in the true assumption of risk setting. In discussing the expanded duty concept the comment states that it may arise in a situation

where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.

In such a situation to create a duty and then negate it by immediately recognizing assumption of the risk does appear folly. It should be noted, however, that the illustration which apparently demonstrates the intent of the authors reads as follows:

A owns an office building, in which he rents an office for business purposes to B. The only approach to the office is over a slippery waxed stairway, whose condition is visible and quite obvious. C, employed by B in the office, uses the stairway on her way to work, slips on it, and is injured. Her only alternative to taking the risk was to forgo her employment. A is subject to liability to C. RESTATEMENT (SECOND) OF TORTS § 343A, comment *f*, illustration 5 (1965).

This hypothetical raises the problem discussed earlier in which the no-duty advocates and the pro-riskers are in agreement. The no-duty advocates would claim that in the above-stated hypothetical the defendant clearly had a duty to plaintiff to permit her reasonable access to her office and thus liability would issue. The pro-riskers would claim that by no stretch of the imagination could plaintiff's act be considered voluntary. In any event illustration 5 does not recognize a duty which the advocates of assumption of risk would negate by recognition of the defense. It therefore seems fair to conclude that the *Restatement* was not designed to signal by implication the demise of the assumption of risk defense in section 343A expanded duty situations.

83. Although it is quite clear that courts today do not consider assumption of risk (as opposed to contributory negligence) to be a viable defense in forgetful-plaintiff cases, it is interesting to speculate as to why courts thought the defense to be appropriate. See *New York, C. & St. L. R.R. v. McDougall*, 15 F.2d 283, 283-85 (6th Cir. 1926); cf. *Jacobs v. Southern Ry.*, 241 U.S. 229, 236-37 (1916). The reasons for non-recognition of the defense in these situations appear rather basic. While contributory negligence turns on an objective evaluation of plaintiff's conduct, assumption of risk is based on subjective voluntary exposure to some recognized danger. RESTATEMENT (SECOND) OF TORTS § 496D, comment *c* (1965). In the forgetful plaintiff cases if we seek to bar the plaintiff from recovery, it is because we are upset with his failure to advert to the danger. We tell him you "should have" remembered the danger. There is no contention that he saw the danger and voluntarily encountered it at the time when he last could have avoided it. The attempt to use assumption of risk forces us back to the time when the plaintiff did advert to the harm. What we are saying to the plaintiff is "you agreed to take your chances and now can't go back on your agreement." This rather common sense statement of the attitude of the law takes us back to the consent and the express assumption of risk cases. One is easily reminded of the casebook favorite *Herd v. Wear-dale Steel, Coal & Coke Co. Ltd.*, [1913] 3 K.B. 771, *aff'd*, [1915] A.C. 67 (1914), in which a coal miner sought to get the elevator to bring him up from the coal mine during working hours. When the employer refused and the miner was detained underground he

b. *Product Liability and the Forgetful Plaintiff*

Recent cases in the product liability field have highlighted the problem of the inadvertant or forgetful plaintiff who at an earlier stage of product use had become aware of the dangers which were ultimately to cause his injury. Consider, for example, *Bexiga v. Havir Manufacturing Corp.*⁸⁴ Plaintiff, John Bexiga, Jr., 18 years of age, was employed by the Regina Corporation as a power punch press operator. The ten-ton punch press that he was operating, manufactured by Havir Corporation, was almost totally devoid of safety features. Plaintiff testified that the particular operation he was directed to do required him to place round metal discs, about three inches in diameter, one at a time by hand on top of the die. He would then depress a foot pedal activating the machine and causing a ram

brought suit for false imprisonment. The court dismissed the suit based on the defense of consent. The plaintiff could not indulge in the luxury of inducing the defendant to lower him into the mine for employment purposes with the understanding that he was to stay there for normal working hours and then retract his consent at will. The analogue to this situation in assumption of risk arises in those cases where plaintiff encourages the defendant to act by expressly agreeing to assume the risk presented by the defendant's negligent act. We would indeed react negatively if the plaintiff sought to withdraw from his agreement to assume the risk. Even die-hard anti-riskers agree that express assumption of risk should be recognized as a defense. See RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 893, at 70 (Tent. Draft No. 9, 1963). See generally Mansfield, *supra* note 28.

Although one may be tempted to move very easily from the agreement concept of express assumption of risk to the statement that one who appreciates the risk and then forgets the risk is held to his original assumption of risk and is barred from recovery, the difference between the two situations is very great indeed. Where a defendant has been encouraged to act by plaintiff, it is easy to appreciate the reason for not permitting the plaintiff to welch on his agreement. Defendants, as a class, would not undertake action if plaintiff's favors were granted only to be subject to recall after the harm occurred. However, when a defendant has acted independently and without consideration of plaintiff's will, the policy considerations are altogether different. If we have condemned the defendant's actions as negligent and defendant consequently would be liable to a plaintiff who did not appreciate the harm, why should he be exonerated from liability to a plaintiff who did appreciate the harm and reasonably encountered it? This question is difficult enough to answer when we are faced with a plaintiff who at the time of injury faced the risk and chose to encounter it. It is, however, impossible to answer when faced with a plaintiff who faced the risk and then non-negligently failed to advert to it. The policy reasons which normally stand behind the recognition of pure assumption of risk are absent here. There is no shred of logical reasoning which can support the defense in this situation. The defendant's act has been condemned by society as negligent. The plaintiff's choice to encounter the risk has had nothing to do with defendant's course of action. By hypothesis, plaintiff has not been contributorily negligent in forgetting. The lone argument remaining for assumption of risk is that we ought not to relieve plaintiff of his conscious choice to encounter the risk of injury. That argument is weak enough when plaintiff is facing the risk and decides to take it. But, when all that can be said is that plaintiff at some earlier time saw the risk and did not act unreasonably in forgetting that risk, there seems to be no logical grounds for holding him to that choice. No one has been adversely affected by his earlier choice to encounter the risk. This argument would hold true even in those cases where defendant's duty is not specifically to guard against plaintiff's forgetfulness or inadvertance. It is a fortiori correct in the expanded duty cases in which defendant's duty is pin-pointed at protecting against a forgetful or inadvertant plaintiff.

84. 60 N.J. 402, 290 A.2d 281 (1972).

to descend about five inches and punch two holes in the disc. After this operation the ram would ascend and the equipment on the press would remove the metal disc and blow the trimmings away so that the die would be clean for the next cycle. The entire cycle just described would take about ten seconds. Plaintiff, John Jr., related the events leading up to the accident as follows:

Well, I put the round piece of metal on the die and the metal didn't go right to the place. I was taking my hand off the machine and I noticed that a piece of metal wasn't in place so I went right back to correct it, but at the same time, my foot had gone to the pedal, so I tried to take my hand off and jerk my foot off too and it was too late. My hand had gotten cut on the punch, the ram.⁸⁵

Plaintiff's expert testified that the punch press amounted to a "booby trap" because there were no safety devices in its basic design. He described two different types of protective safety devices, both of which were known in the industry at the time of the manufacture and sale of the press.⁸⁶ The trial court had dismissed the action at the close of the plaintiff's case, and the appellate division affirmed. The latter reasoned that since it was the custom of the trade that purchasers, rather than manufacturers, provide safety devices on punch presses like the one in question, Havir could not be held liable.⁸⁷ The New Jersey Supreme Court noted that "[t]he only way to be certain that [safety devices] will be installed on all machines . . . is to place the duty on the manufacturer where it is feasible for him to do so," and remanded the case for trial, holding that a jury might well find the defendant negligent or the machine unreasonably dangerous.⁸⁸

Having resolved the duty issue in favor of the plaintiff, the court dealt with the defendant's contention that plaintiff must as a matter of law be held contributorily negligent.⁸⁹

We think this case presents a situation where the interests of justice dictate that contributory negligence be unavailable as a defense to either the negligence or strict liability claims.

The asserted negligence of plaintiff—placing his hand under the ram while at the same time depressing the foot pedal—was the very eventuality the safety devices were designed to guard against. *It would be anomalous to hold that defendant has a duty to install safety devices but a breach of that duty results in no liability for the very injury the duty was meant to protect against.*⁹⁰

The court's reasoning will warm the hearts of Professor James and his confederates who opposed assumption of risk for the fear that it would wipe out the new duties which courts were creating to protect people from their own folly. I believe, however, that the analogy between this case and the forgetful plaintiff in the *Walgreen* case is exact. In *Walgreen*, because of momentary forgetfulness,

85. *Id.* at 406, 290 A.2d at 283.

86. One was a push-button device with the buttons so spaced as to require the operator to place both hands on them away from the die area to set the machine in motion. The other device was a guardrail or gate to prevent the operator's hands from entering the area between the ram and die when the machine was activated. *Id.* at 406, 290 A.2d at 283.

87. *Id.* at 405, 408, 290 A.2d at 282, 284.

88. *Id.* at 409-12, 290 A.2d at 284-86.

89. Since New Jersey does not recognize assumption of risk as a separate defense, *see* *Meistrich v. Casino Arena Attractions, Inc.*, 31 N.J. 44, 53-56, 155 A.2d 90, 95-97 (1959), the court did not consider the difficult question of whether the plaintiff had knowingly and voluntarily been taking his chances in momentarily placing his hand under the press.

90. 60 N.J. at 412, 290 A.2d at 286 (emphasis added).

the plaintiff failed to advert to her position on the platform. Likewise in *Bexiga* plaintiff, through inadvertence, placed his hand in a machine which was operational. In neither case did the plaintiff voluntarily choose to encounter the risk at the critical moment. Thus, although James would certainly approve the *Bexiga* court's reasoning, the decision does not support the James thesis that assumption of risk should be abolished as a defense. Plaintiff simply was not assuming the risk at the moment of encounter.

The *Bexiga* case with a slight variation will present us with the real problem—the pure assumption of risk case. Let us assume that the plaintiff placed the metal disc on the die and, as actually happened, he noticed that the disc was not in the correct position. This time, though fully cognizant of the risk, he intentionally (not inadvertently) engaged the foot pedal in the belief that he would be able to fix the position of the disc and remove his hand with ample time to avoid injury. A choice was available and he decided that he would chance the risk. One may argue that his act was unreasonable—perhaps it was and perhaps it wasn't. Reasonableness will depend on why he took the risk. Perhaps he was under the impression that his boss was looking and if he slowed down on his production he would be fired. Perhaps he had a history of misplacing the metal discs on the die and causing excessive spoilage, and feared dismissal if he ruined any more discs. It is at least conceivable that his act would be found to be reasonable under the circumstances. Will the law now impose liability in this type of situation? To that question we now turn our attention.

B. Pure Assumption of Risk

Should the law of torts impose liability on a defendant when a plaintiff faces the danger created by a defendant and voluntarily, knowingly, and reasonably decided to encounter it? At this point I am unconcerned as to whether this issue is framed in terms of duty or assumption of risk. The issue is whether or not a defendant should *ever* be held liable to a plaintiff who at the time he encounters a risk is fully appreciative of its nature and nevertheless voluntarily decides to encounter it. As pointed out above,⁹¹ the question cannot be answered by looking towards those cases which impose liability on a defendant because we require him to foresee that a plaintiff will not observe an open and obvious danger, or that a plaintiff will forget the danger that was clear to him a short while ago. While we can easily admit a duty on the part of the defendant in the nonobservant or forgetful plaintiff cases, we may still be most uncomfortable in assessing liability on a defendant in favor of a plaintiff who faces the risk voluntarily at the very moment of encounter. The stark realities of a pure assumption of risk case are now before us. A dangerous situation created by the defendant confronts a fully aware plaintiff sensitive to the risk and with the option not to encounter it if he so chooses. Despite the fact that defendant may be negligent or that the product he has created may be unreasonably dangerous, we must also admit that our plaintiff is making a clear judgmental decision, at the very

91. See text accompanying notes 50-52, 81-82 *supra*.

moment of risk. He has decided to take a chance. Has the law then reached that stage of paternalism where it seeks to intervene in this free choice encounter? As interesting as this question is, there is good reason for seeking further clarification of the situation before reaching a definitive answer. Before facing the issue of paternalism we must focus on the possible object of our paternalism. The question as formulated above postulated a plaintiff fully aware of the risk who had the option to choose another course of action. Students of the subject will immediately recognize these factors as constituting the two traditional elements of voluntary assumption of the risk: (1) that the plaintiff act voluntarily and (2) that he know and appreciate the risk. Since we are narrowing our inquiry to the pure assumption of risk case, we need not deal with the second of the elements. By definition, the plaintiff fully knew and appreciated the risk. The first of the elements, however, that of voluntariness, focuses on the range of choices available to plaintiff. In this more narrowly defined context, just what should be deemed a "voluntary" act? |

C. *Voluntariness—The Environment for Decision-Making*

In what type of atmosphere do plaintiffs make their potential assumption of risk decisions? The range is broad indeed. Some have the luxury of deciding in an atmosphere of great freedom. The plaintiff in *Scanlon v. Wedger*⁹² who decided that he would like to watch a dangerous fireworks display taking place near a public highway was under no compulsion whatsoever to make a hurried decision. He had ample time for deliberation and thought. But that situation is rather atypical. In many—if not most—cases plaintiffs face risks in duress-type situations.⁹³ A decade ago Professor Robert Keeton set forth a hypothetical situation which put the problem in sharp focus:

[B]lack and Blue are persons to whom the purchaser of a defectively designed motorcycle lends it, after discovering the defect and with full warning to Black but not to Blue, the plaintiffs having need of a vehicle and reasonably choosing to take this, the only vehicle available. If, as would surely be possible in some courts, both plaintiffs could overcome any arguments that the defendant manufacturer's duty was one of warning only and, in any event, that its unreasonably risky design was not a legal cause of the harm suffered by plaintiffs, Blue, who did not know of the defect, would recover. As in the case of Blue, Black was not contributorily negligent, but, having known of the defect and having fully appreciated the danger, he consented to the risk.⁹⁴

Professor Keeton then raises a most interesting question. Is not the plaintiff's choice to use the motorcycle made under duress? If Black had to use the motorcycle to rush Blue to a hospital can it be said that his choice was voluntary? The defendants have presumably restricted the options available to the plaintiff. Had the defendant not marketed this motorcycle with a defective design the owner presumably would have had another and safer vehicle to lend to the plaintiffs.⁹⁵

92. 156 Mass. 462, 31 N.E. 642 (1892).

93. See generally W. PROSSER, *THE LAW OF TORTS* § 68, at 451-53 (4th ed. 1971).

94. R. Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 157-58 (1961) (footnote omitted).

95. See *id.* at 158.

When Professor Keeton raised this problem in 1961 he concluded that the defendant could not be held responsible for the emergency situation which created the environment for the agonizing choice that faced the plaintiff. Relying in part on the language of the first *Restatement*, which said that the choice would be considered nonvoluntary if the defendant "*has created a situation in which it is reasonably necessary to undergo a risk in order to protect a right or avert a harm,*"⁹⁶ Professor Keeton argued:

[I]t is probably more realistic to ascribe the compulsion under which the plaintiff Black made his choice to other factors (e.g., an emergency need for medical attention to Blue) than to duress from defendant's substandard conduct . . . Does the defendant "create" the situation by contributing one factor to it? Does not the answer depend on the relative significance of that factor among others?⁹⁷

It is interesting to note that several years later Professor Keeton apparently had somewhat of a change of heart.⁹⁸ Although still recognizing the viability of assumption of risk as a defense he suggests that perhaps it ought to be narrowed considerably. He accepts the argument of the anti-riskers that

[I]t should not be enough to escape liability that the defendant warns of danger and the plaintiff understands the warning, *if the defendant's conduct has nevertheless created a situation in which he can foresee, if viewing the circumstances reasonably, that the hard choice he has presented to the plaintiff will cause the latter to chance the danger when that is a reasonable thing to do.*⁹⁹

Keeton's suggested limitation of the defense to easy-choice type of cases is a rather substantial one. For example, in the Black and Blue case it is foreseeable on the part of a manufacturer of motor vehicles that sometime or other the vehicle will have to be used for emergency purposes. If the "creation of the situation" standard which the first *Restatement* advocated is abandoned in favor of a test emphasizing the foreseeability of a hard choice situation, we are a long way toward the abolition of assumption of risk as a viable defense. The reason for this conclusion is rather elementary. As we move across the spectrum from hard choice cases to easy choice cases we will encounter more and more situations in which the defenses of contributory negligence and no proximate causation will come into play. As the plaintiff's choice between alternative courses of action become easier, the more likely it is that the choice to encounter the risk is unreasonable and thus plaintiff's behavior constitutes contributory negligence.¹⁰⁰ And even when plaintiff's conduct is not unreasonable, the more freedom the plaintiff has in choosing his course of action the greater is the chance that courts will be unwilling to find the defendant's act to be the legal or proximate cause of the harm.

That is not to say that no case can be conjured up in which a "reasonable" easy choice is made by a plaintiff which is within the scope of the risk created by defendant's negligent act. But since the maneuvering room for assumption of

96. RESTATEMENT OF TORTS § 893 (1934) (emphasis added).

97. R. Keeton, *supra* note 94, at 158.

98. See R. Keeton, *supra* note 23, at 69-72.

99. *Id.* at 69 (emphasis added).

100. The issue of voluntary and unreasonable assumption of risk will still have to be faced in the area of strict products liability. See generally text accompanying notes 124-31 *infra*.

risk will become very narrow, one must ask if it is worthwhile to permit the existence of an independent defense. Would we not be better off if courts were encouraged to pay scrupulous attention to the duty issue?¹⁰¹ By determining whether the defendant could foresee that the plaintiff might well be faced with an easy choice situation in which he could reasonably choose to encounter the risk, it should be possible to identify at the outset those rather exceptional cases in which the assumption of risk question becomes crucial.

III. THE NEW PRODUCT DUTY—PROTECTING THE PLAINTIFF FROM HIMSELF

A startling recent case demonstrates the importance of directly focusing on the scope of the defendant's duty. In *Messick v. General Motors Corp.*¹⁰² plaintiff sued both in negligence and under a strict tort liability theory for injuries sustained when his four month old Oldsmobile ran off the road. In the four months that plaintiff had owned the car before the accident he had used the car for business and had run the odometer to a reading of over 15,000 miles. From the outset, plaintiff experienced acute front-end vibration problems which were exacerbated by driving at speeds in excess of 50 miles per hour. Messick also had trouble keeping the car on the road surface when driving over a bump or encountering rough roads. Although the car was brought in for repair and replacement of defective parts at least eight times, the problem continued unabated. Messick finally took the car to a private mechanic, who, though unable to explain the origin of the problem or repair it, did inform the plaintiff that if he continued to drive the car it would kill him. Messick made a demand upon General Motors to replace the car, but had received no reply at the time of the accident.

On appeal the defense argued that voluntary assumption of risk was present as a matter of law, and that a verdict should have been directed for defendant. After finding that under Texas law the negligence count of Messick's complaint was effectively barred by the *volenti* defense,¹⁰³ the court turned to *Restatement* section 402A, comment *n*, and its requirement that in order to make out the defense in a products liability case, defendant must prove that plaintiff voluntarily and unreasonably assumed a known risk.¹⁰⁴ Since the private mechanic had prognosticated the possible dangers with such precision, the court could not find that plaintiff failed to appreciate a known danger. Two escape hatches were left: (1) plaintiff did not act voluntarily, and (2) plaintiff was acting reasonably under the circumstances. The court was here faced with a plaintiff whose use of the car was not for luxury purposes. Messick had testified that he used his automobile in earning his livelihood and that he drove approximately 1,000 miles per week. He submitted evidence that the Oldsmobile had been financed at a monthly cost of about one-sixth of his income and that he thus had to continue

101. See R. Keeton, *supra* note 23, at 69.

102. 460 F.2d 485 (5th Cir. 1972).

103. *Id.* at 489.

104. For a further discussion of the *Restatement* approach see text accompanying notes 124-31 *infra*.

using his car while seeking recourse against General Motors under the law of sales. Was the plaintiff's act either involuntary or reasonable? In affirming Messick's jury verdict, the Fifth Circuit unreservedly endorsed the trial court's instruction on these issues:

In connection with determining whether the Plaintiffs' exposure was voluntary, you are instructed that a person is not at fault in voluntarily exposing himself to a known and appreciated danger, if; under the same or similar circumstances, an ordinarily prudent person would have incurred the risk which such conduct involved. Thus, if there was some reasonable necessity or propriety which justified Plaintiffs in exposing themselves to the known risks involved, or if by the exercise of care proportionate to the danger Plaintiffs might reasonably have expected to have avoided the danger, or if there was no other reasonable course open to them but to make continued use of this automobile, then Plaintiffs cannot be found to have voluntarily exposed themselves to the risk.¹⁰⁵

What have we wrought? Are voluntariness and reasonableness to be measured by the same criteria? Traditional teaching is certainly contrary to this suggestion.¹⁰⁶ A reasonable decision to choose a dangerous alternative certainly can be meaningfully described as "voluntary".¹⁰⁷

To appreciate what has happened we must recognize that courts have adopted the approach which Professor Keeton discussed in 1965. In analyzing the hard-choice type of case they have frequently concluded that plaintiff is really not making the choice; that defendant is unfairly putting the choice to the plaintiff. Especially in the products area the courts have recognized that there is a high degree of foreseeability on the part of defendants that plaintiffs will have to use their products in a variety of situations in which the options available to plaintiffs for alternative actions will be limited. If the product is defective, the burden of this foreseeable use of the product is placed on the defendant. Having defined the duty to protect plaintiff from his reasonable decision to use the product, the courts are understandably not ready to back down at the last moment and say that the choice, though reasonable, was an act of free will such that the assumption of risk defense may be put to the jury. That all this ultimately reflects back to the duty question is clear. Given the nature of the product and its foreseeable use, is it the desire of the law of torts to protect the plaintiff from himself—from his own reasonable choice? Section 402A, comment *n*, has answered the question in the affirmative. The tragedy is that the answer is at the same time too broad and too narrow—too liberal and too conservative. For this author it would all depend on the product and the desire of society in any given instance to protect people from their own choice. One might say that determining whether or not plaintiff is to have a choice should depend on how "voluntary" the act of plaintiff

105. *Id.* at 493.

106. *See James, supra* note 1, at 188-89.

107. It should be noted that the *Messick* court, which was supposedly following section 402A, comment *n*, could have chosen the option of describing the plaintiff's conduct as *either* nonvoluntary or reasonable. Since the *Restatement* requires that plaintiff act voluntarily and unreasonably in facing a known risk, the failure to account for one of the elements will destroy the defense. In this author's opinion the court equated voluntariness and reasonableness because it sought to define defendant's duty to protect the plaintiff from making certain reasonable choices. It then became awkward to define the choice as reasonable and yet involuntary. For a further discussion of this problem, *see* text accompanying notes 124-31 *infra*.

was and how much he really "appreciated the risk." The argument would then be that assumption of risk is truly a proper question to grapple with. But this would in fact be approaching the problem backwards.

The real question in each instance is the character of defendant's act and the scope of liability we wish to impose on him. There are many situations in which society should be willing to permit defendants to create "choice situations." We can reasonably admit that a plaintiff who is not aware of the choice should recover because of the defendant's negligent act or defective product and yet, when faced with a plaintiff aware of the risk, conclude that the danger level of this act or product is not so great that we are willing to completely condemn it. By doing so we have stated that defendant has a right to create a "choice situation". We will make this decision based not only on the character of the plaintiff's act but on our assessment of the defendant's act as well. This is a pure duty question. The law of torts has never been good at defining just what a duty is and how we are to arrive at the conclusionary statement that there is or is not a duty.¹⁰⁸ For example, the trend in the cases to treat an injury related to employment as non-voluntary and thus not subject to the assumption of risk defense is a rather clear expression of a new duty rule.¹⁰⁹ Manufacturers' efforts to keep the liability question from the jury have been greeted with less and less favor in those cases in which employees have been injured in operating machines not equipped with safety devices designed to protect potential plaintiffs from their reasonable assumption of risk.¹¹⁰ The reason for this is partially that in a tight employment market plaintiff's encountering of the risk is rarely voluntary. But it would be naive to focus on that point alone. Consideration is also given to the high foreseeability that such accidents will occur and the relative ease with which corporate defendants could reduce the frequency of employee injuries. The high interest in fail-safe devices to protect people against their own foolishness, and the almost religious zeal of the Nader consumer movement is clearly a contributing factor in the decision to hold the manufacturer liable. Most important, the only party with immediate control over the safety situation (the employer) sits back under the immunity of workmen's compensation liability and thus has no vested interest in controlling the situation at the plant level. Since workmen's compensation awards rarely provide anything close to adequate recovery,¹¹¹ the

108. See W. PROSSER, *THE LAW OF TORTS* § 53, at 325-26 (4th ed. 1971).

109. See *Rhoads v. Service Mach. Co.*, 329 F. Supp. 367, 378-81 (E.D. Ark. 1971); Noel, *supra* note 6, at 126-28.

110. See, e.g., *Rhoades v. Service Mach. Co.*, 329 F. Supp. 367, 381 (E.D. Ark. 1971); *Bexiga v. Havir Mfg. Corp.*, 60 N.J. 402, 409-12, 290 A.2d 281, 284-86 (1972); *Finnegan v. Havir Mfg. Corp.*, 60 N.J. 413, 421-24, 290 A.2d 286, 291-93 (1972).

111. In July 1972 the National Commission on State Workmen's Compensation Law submitted its report recommending broad reform of state workmen compensation laws. The essential elements recommended by this Commission are: compulsory coverage in all acts; elimination of all numerical and occupational exemptions to coverage, including domestic and farm labor; full coverage of work-related diseases; full medical and physical rehabilitation services without arbitrary limits; a broad extra-territoriality provision; elimination of arbitrary limits on duration or total sum of benefits; and a weekly benefit maximum that rises from an immediate 66-2/3 percent to an ultimate 200 percent of average weekly wages in the state.

courts have been led to find the third-party defendant and impose upon him the primary duty to effect safety. To put all this under the rubric of voluntary assumption of risk is, in this author's opinion, sheer nonsense. This is the duty problem in all its glory. Assumption of risk cannot bear the load of these very difficult policy questions.¹¹²

Once we determine that a defendant has a right to present the risk to the plaintiff, we can investigate the nature of the plaintiff's decision-making process. But that investigation should never be undertaken before the duty question is fully explored. Then and only then can we turn to the plaintiff and inquire into how he personally reacted to a set of events which defendant forced him to face. At this point, whether we call the question that of "assumption of risk" or "no duty" is largely a matter of terminology. We could say that defendants have no duty to plaintiffs who voluntarily assume the risk, or we could say that assumption of risk is an affirmative defense. I rather agree with Professor Keeton that the latter is a more elegant way of phrasing the issue;¹¹³ but what is crucial is that we directly face the duty question. Does the defendant have a right to confront the plaintiff with the "choice situation?" If the answer to that question is negative, whatever the reason, our inquiry is at an end. To those who feel that a duty formulation is in reality a cop-out on the basic question of the right of defendants in general to create choice situations, a backward glance at the development of the law of duty in the field of torts may be helpful. From the abolition of priv-

A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 5.30 (Supp. 1973). The above litany does not include the most significant exclusion from workmen's compensation coverage—lack of compensation for pain and suffering. *See id.* § 65.00 (1970).

112. In a provocative article, Professors Calabresi and Hirschoff take the position that the focus in strict liability cases should not be on whether the product was "unreasonably" dangerous. They argue that the central question should be which of the parties to the accident is in the better position to make the cost-benefit analysis between accident costs and accident avoidance costs, and to act on that decision once it is made. Thus, instead of requiring a judgment as to whether an injurer should have avoided the accident costs because the costs of avoidance were less than the foreseeable accident costs, the Calabresi-Hirschoff strict liability test would simply require a decision as to whether the injurer or the victim was in the better position both to judge whether avoidance costs would exceed foreseeable accident costs and to act on that judgment. Under this analysis the issue becomes not whether avoidance is worth it, but which of the parties is relatively more likely to find out whether avoidance is worthwhile. *See* Calabresi and Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 *YALE L.J.* 1055, 1060-61 (1972).

Calabresi and Hirschoff also contend that the core concept of assumption of risk in its primary sense is in reality an inquiry as to whether the plaintiff is in a better position to make the cost-benefit analysis as to a particular activity irrespective of defendant's negligence. *Id.* at 1065. While the reader will find similarities between the Calabresi-Hirschoff analysis and parts of the thesis of this paper, the policy factors which this author is willing to consider in deciding whether the defendant has a duty to protect plaintiff from his own decision-making are more comprehensive than simply who is in the better position to make a decision. That consideration, although an important factor in evaluating the duty issue, is not the sole determinant under the proffered analysis. *See* text accompanying notes 113-21 *infra*.

113. R. Keeton, *supra* note 23, at 69.

ity¹¹⁴—the granddaddy of all duty rules—to the imposition of liability on savings and loan associations to mortgagors for the lending institution's failure to properly supervise an undercapitalized developer¹¹⁵ and to the erosion of limited duty rules for landowners,¹¹⁶ the law has made tough individual policy judgments based on complex factors. Although the results across the nation are uneven, courts have expanded or contracted on the rigid duty concepts of the common law as they have seen fit. Each industry and each policy issue must be met by taking into account its peculiar problems and the willingness of society to accept or at least tolerate certain risks. Thus we may be quite prepared to hold the makers of punch presses liable for failing to put safety guards on their machinery to protect a workman against his own foolish risk taking, and yet conclude that a landowner bears no liability to a plaintiff who saw an icy path on his front walk and with full awareness of the risk decided to encounter it. /

It is rather difficult to express this thesis outside of the context of concrete opinions. Each fact situation creates its own peculiar duty problem. In the *Messick* case discussed earlier one would have expected that the automobile's blatant danger, which fairly exclaimed to the user that it was a most hazardous instrument with the real potential to kill, should have sufficed to make this an acceptable case for a consumer to assume a known risk. Yet, reading between the lines, one finds the court extremely upset with the Oldsmobile dealer who failed to correct the defect on any of eight separate occasions. Had this defect resurfaced after only one repair job and had plaintiff been told by his mechanic that the front-end vibration problems were deadly dangerous and that a week was needed to repair the car, perhaps the court would have concluded that voluntary assumption of risk would operate as a defense. I rather think that would have been the result. But could such a decision be defended under the assumption of risk formulation proposed in *Restatement* section 402A, comment *n*? I think not. The plaintiff's need for the car after the first unsuccessful repair job is identical with that of his need for the car after repair number eight. He is no more unreasonable in driving the car after the first time he is told by the mechanic that he is going to get killed than he is after the eighth unsuccessful repair job. His act is equally "voluntary" in both instances. Nevertheless, one intuitively feels that there is a difference between eight unsuccessful repair jobs and one. Placed in the context of voluntary and unreasonable assumption of risk, there are no analytical tools to differentiate the cases.¹¹⁷

114. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 390-94, 111 N.E. 1050, 1053-54 (1916).

115. *Connor v. Great Western Sav. and Loan Ass'n.*, 69 Cal. 2d 850, 865-71, 447 P.2d 609, 617-20, 73 Cal. Rptr. 369, 377-80 (1968).

116. See *RESTATEMENT (SECOND) OF TORTS* § 343A (1965); authorities cited note 53 *supra* and accompanying text.

117. One could argue that plaintiff should have rented a car to allow for one repair but need not be subjected to car rental for a full year while awaiting the outcome of litigation against G.M. The burden of precaution is clearly different in the two situations. Nevertheless, the magnitude of the risk is so high in this case that the plaintiff's action must be judged primarily on that basis. Thus, whether plaintiff acted voluntarily and unreasonably should

Yet, facing the duty issue, the mystery disappears. Whether or not General Motors can be held liable on an agency theory for the incompetency of its dealer repair services, there is little question that it is quite foreseeable to General Motors that its dealers will either refuse or be unable to detect a serious problem. It does not seem unfair for General Motors to create a choice situation and present the plaintiff with an option after one unsuccessful repair job. Cars do break down, and it is not always possible to de-bug a car the first time. If the car signals to its user that the de-bugging process has not been completed, it is not unfair to ask him to return to the dealer once again to complete the process. How does one determine that in this case General Motors should have the right to ask the buyer to do this? The answer is not easy in coming. One would have to evaluate the common experience of consumers with the normal problems of de-bugging cars. The complexity of this important piece of consumer machinery would have to be taken into account. Perhaps the phenomenon of employee lethargy and monotony on the assembly line would figure into the picture. In every case, the problem must be evaluated differently, depending on whether the item is an automobile, an electric pencil sharpener, or a complex piece of custom made industrial machinery which takes months to fully assemble at the plant site.

A graphic example of the untoward results which emanate from the emphasis placed on voluntariness and knowledge under the traditional assumption of risk analysis is presented by the decision of the New Jersey Superior Court in *Devaney v. Sarno*.¹¹⁸ Plaintiff sued the manufacturer and distributor of Volkswagen for aggravation of injuries which resulted from his inability to use a defective seat belt. Plaintiff had used the seat belt when he drove his new car home from the showroom, but had great difficulty in attempting to unfasten the belt. He reported the problem to the dealer on the 1,000-mile checkup, and was told that the parts needed to repair the seat belt were on order and that he would be notified when they arrived. In the interim plaintiff continued to drive the car without utilizing the seat belt. Plaintiff offered proof through accident reconstruction experts that his injuries would have been substantially reduced had he been wearing a seat belt. The New Jersey Superior Court reasoned as follows:

If defendant had a duty to provide for the protection of plaintiff against the injuries complained of, its duty was only coextensive with that of plaintiff, once plaintiff became aware that the vehicle was not equipped with a functional seat belt. In all logic, it is inconsistent to maintain that a manufacturer must provide a working safety feature but that the individual for whose benefit the safety feature was designed may act in conscious disregard of the fact that the safety feature is in effect unavailable to perform its function.¹¹⁹

In granting the defendants' motion for summary judgment, the court went on to stress that since plaintiff was driving on the occasion of the accident on a pure pleasure trip, his action must be deemed voluntary.

The trial court's resolution of the *Devaney* controversy provides us with an excellent example as to how *not* to deal with the duty issue. It is also of consid-

not depend on what point during the sequence of repairs the accident actually occurred.

118. 122 N.J. Super. 99, 299 A.2d 95 (Super. Ct.), *rev'd*, 125 N.J. Super. 414, 311 A.2d 208 (App. Div. 1973).

119. 122 N.J. Super. at 103-04, 299 A.2d at 97-98.

erable value in demonstrating that merely convincing a court to adopt the no-duty terminology of the anti-riskers is no guarantee that they will face the true duty questions head-on. Where does the problem lie? Under the proffered thesis the superior court's error was fundamental. The defect involved in this case was a seat belt that would not unbuckle. The duty question should be whether defendant has a right to present plaintiff with a choice situation to be without service of his car, or alternatively, to drive without a seat belt for a three week period of time. Note that in formulating the question I did not ask whether plaintiff acted voluntarily. Whether he was driving his wife to the hospital or going on a fishing trip should be of monumental indifference in formulating the duty issue. The question of voluntariness *vel non* is or could be of considerable importance at a later stage of the litigation,¹²⁰ but, it should not be faced at all until the duty question is definitively answered. The attempt to answer this complex duty question under an assumption of risk rubric can lead only to inadequate analysis. Again, I ask, as in the *Messick* case, hypothesize that the Volkswagen dealer had offered to fix the belt if given the requisite two hours time but plaintiff, under the pressure of business, found it necessary to drive his car to an important business engagement. Would we necessarily answer the duty question the same way? I think not. Yet, plaintiff's act would have been less voluntary and more reasonable than under the actual facts of the *Devaney* case.¹²¹

IV. THE ULTIMATE DUTY—PROTECTING THE PLAINTIFF FROM VOLUNTARY AND UNREASONABLE CHOICES

As demonstrated in the foregoing section of this Article,¹²² a duty analysis leads to a most desirable result in cases where the plaintiff has made a reasonable choice. There are, however, other situations in which the duty issue may profitably be emphasized. As previously noted,¹²³ Professor Keeton has indicated that perhaps in hard choice cases where plaintiff has voluntarily and reasonably encountered a risk it is not unjust to hold a defendant liable for putting the plaintiff to the choice. Implicit in this approach is the decision that defendant had no right to put the plaintiff to a choice and then limit his freedom of action because he (the defendant) acted negligently. By focusing on duty, we may find ourselves willing to limit the operation of assumption of risk even further. Consider, for example, the assumption of risk defense as set forth by section 402A of the second *Restatement*. At first glance the *Restatement* formulation of the defense seems very favorable to the plaintiff. It precludes liability in products cases only for "the form of contributory negligence which consists in voluntarily and unrea-

120. See text accompanying notes 139-44 *infra*.

121. In reversing the superior court's decision and remanding the case for trial, the appellate division relied heavily on the voluntary-unreasonable assumption of risk test set out in *Restatement* § 402A, comment *n*. The court held that while *Devaney* acted "voluntarily," it could not be said as a matter of law that he had behaved unreasonably. 125 N.J. Super. at 418, 311 A.2d at 210. The *Restatement* approach approved on appeal in *Devaney* is discussed in detail in Part IV of this Article. See text accompanying notes 124-31 *infra*.

122. See text accompanying notes 102-21 *supra*.

123. See text accompanying notes 98-99 *supra*.

sonably proceeding to encounter a known danger."¹²⁴ In the words of the *Restatement*:

If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.¹²⁵

Now that defendant must prove that plaintiff *voluntarily* and *unreasonably* encountered the risk it may appear that he has all the protection he needs. This is not true, however. If we pay more careful attention to the duty question we may find that plaintiff needs product protection from even a voluntary and *unreasonable* act on his part. *Barikewich v. Billinger*¹²⁶ is a case in point. Plaintiff was an experienced factory worker who at the time of the accident was helping to operate a machine designed to break glass and stack glass strips. Plaintiff was working on the west side of the machine while his supervisor operated the controls on the east side of the machine. At some time prior to the accident the supervisor left the scene, leaving the plaintiff alone at the machine. As he continued to operate the machine Bartkewich noticed that the glass appeared to be jamming the mechanism, and became concerned that the machine was being damaged. To thwart this possibility plaintiff attempted to remove a piece of glass with his hand, but his glove caught in the machinery and he was injured. The plaintiff presented expert testimony that the machine was defectively designed in that it did not contain adequate safety features such as on-off switches on both sides of the machine, or a barrier or guard to keep individuals from putting their extremities into the machine.

In reversing a jury verdict for the plaintiff, the Pennsylvania court took the position that in certain instances the lack of proper safety devices could constitute an unreasonable danger. This result would follow, however, only where the absence of the safety device caused an accidental injury of the type that could be expected from the normal use of the product. In this case defendant did exactly what was obviously dangerous—he reached into an operating glass-breaking machine. The court in righteous indignation asked the following question of plaintiff:

If he thought the machine was being damaged, what did he think would happen to his hand? It is unfortunate that [plaintiff] incurred a serious injury, but we do not believe that appellant was obligated to build a machine that was designed not only to keep glass in, but also to keep people out.¹²⁷

Having defined defendant's duty in this fashion, the Pennsylvania Supreme Court directed that the defendant's motion for a judgment notwithstanding the verdict be granted.¹²⁸

I should like to turn the tables on the Pennsylvania court, and ask exactly how they interpreted the plaintiff's action. There are several possible explanations. Plaintiff may have made a bet in Las Vegas that he could insert his hand into the machine cutting edge and pull it out in time without getting injured. He might

124. RESTATEMENT (SECOND) OF TORTS § 402A, comment *n* (1965).

125. *Id.*

126. 432 Pa. 351, 247 A.2d 603 (1968).

127. *Id.* at 355, 247 A.2d at 605.

128. *Id.* at 356-57, 247 A.2d at 606.

have coolly and calmly evaluated the jamming at the machine's point of operation and then have evaluated the time-motion problems of getting his hand in and out safely. If the above alternatives were true, one could sympathize with the court's decision in favor of defendant. However, we know that the accident did not happen that way at all. Plaintiff saw the jamming of the machine and realized the danger to the machine. In a split second he made a judgment which was both voluntary and unreasonable. He decided to chance his hand believing that his knowledge of the cutting process in the machine was such that he had enough time to get in and out before injury. He was wrong. His reaching into the machine certainly was not "involuntary" in any common sense of the word. And his actions could be found by a jury to be most unreasonable. Thus, whether we face the issue on traditional duty grounds, or apply the section 402A comment *n* formulation of assumption of risk, plaintiff appears to have lost.

There is something terribly distasteful about this result, however. Was it not foreseeable on the part of the manufacturer that workmen who operate these machines for endless hours at a stretch will make the kinds of voluntary and unreasonable judgments that the *Bartkewich* plaintiff actually made? Is the product then not unreasonably dangerous on these grounds? Is it not common knowledge that employees who work with dangerous machinery develop psychological resistance to the danger level? And shouldn't the safety features be embodied to care for one who may make voluntary and unreasonable choices? If nothing else, should we not be required to evaluate the time factor in the decision making process? The defendant-manufacturer's decision to design a safety guard or not is made at the design drawing board and in the testing laboratory. It is made or not made with great deliberation and with cost and marketing considerations in mind. The plaintiff's decision to encounter the harm, be it voluntary or involuntary, reasonable or unreasonable, is made in a split second under the most adverse and pressing circumstances. Should not the product have been manufactured so as to protect a *Bartkewich*-type plaintiff from his own foolish decision making? This is a duty question to be made taking into consideration the nature of the product, the general kinds of situations in which plaintiffs will have to confront the product, and the nature of intermediate decision makers such as employers. This kind of analysis cannot be successfully telescoped into the inquiry as to whether plaintiff voluntarily and unreasonably assumed a known risk. The question is far too broad to overload the affirmative defense of assumption of risk with these considerations.

When the overload takes place, as it has, the result is that courts in each jurisdiction begin developing law equipped with three possible escape hatches: (1) voluntariness; (2) reasonableness; and (3) knowledge of risk. We then find courts telling us that an activity which is not under real duress may in fact be involuntary,¹²⁹ or that an activity that no person in his right mind would denote as reasonable presents a legitimate question of reasonableness for a jury,¹³⁰ or that

129. See *Vernon v. Lake Motors*, 26 Utah 2d 269, 274, 488 P.2d 302, 305 (1971).

130. See *Messick v. General Motors Corp.*, 460 F.2d 485, 489-94 (5th Cir. 1972).

although plaintiff appreciated the risk, he did not appreciate the risk fully.¹³¹ It must be admitted that the elasticity which these factors provide to a court "hell bent" on insuring a plaintiff's verdict is not altogether undesirable. There is, however, a great danger in working with elastic factors which do not address themselves to the crucial issue in the case. Appellate decisions affirming trial court decisions based upon these factors are bound to return to haunt us in cases which are not distinguishable. In short, even elasticity has its limits. More important, however, by failing to address the major conceptual issue (that is, does the defendant have a duty to manufacture a product which will prevent the plaintiff from entering the decision making process?), we commit two fundamental errors. First, we create a propensity for reaching unjust results in cases where the facts are such that a court unwilling to strain the "escape hatch" concepts can reach a plaintiff's verdict only by focusing on the duty issue. *Bartkewich* in my opinion is such a case. Second, by concentrating on the affirmative defense and plaintiff's conduct as the crucial criterion, we fail to communicate to the world of manufacturing defendants the reasons why verdicts are returned in favor of plaintiff. The hodgepodge of discussion of voluntariness, duress, and knowledge of risk is not informative. Manufacturers can only view this as some mysterious doctrine created by the courts, a doctrine which has something to do with the morality of plaintiff's action. It does not inform defendants that the fault lies with their failure to control the decision making process.

V. IMPOSING A NEW ORDER—OLD WINE IN A NEW FLASK

The time has come to concretize the thoughts set forth above into a working scheme. The proposed approach does *not* eliminate voluntary assumption of risk as a defense, but does sharply delimit its operation by focusing on the kinds of situations in which it should operate. Once it is determined that circumstances are rife for the affirmative defense to come into play, the scope of inquiry as to plaintiff's conduct is to be far more limited than that which is traditionally undertaken. In short, voluntary assumption of risk is to be used much more sparingly, but when it may appropriately be invoked, it will be easier for a defendant to establish the defense.

A. *The Initial Duty Inquiry*

As suggested earlier,¹³² the major area of inquiry in every case where plaintiff's choice comes into play is whether the defendant by his act or by his product has a right to put plaintiffs who will encounter his act or product to a choice. It is important here to distinguish those situations where the obviousness of the danger is such that it reduces the probability of harm to the point where the defendant's act becomes non-negligent, or the product becomes not unreasonably dangerous. Since the standard operation of the risk-utility theory will then simply negate all

131. See *Dorsey v. Yoder Co.*, 331 F. Supp. 753, 765-67 (E.D. Pa. 1971), *aff'd sub nom.* *Yoder Co. v. General Copper & Brass Co.*, 474 F.2d 1339 (3rd Cir. 1973).

132. See text accompanying notes 106-21 *supra*.

liability, these situations do not require a sophisticated duty analysis. Instead, let us focus upon cases where the risk of harm remains substantial, even taking into account the obviousness of the harm. My concern is with those cases where plaintiffs can be expected to face and appreciate the harm at the moment of encounter. In this kind of case the court must face the very real issue—should the actor or manufacturer bear the duty of protecting the plaintiff against himself? In other words, should the defendant be permitted to put plaintiffs to a choice? The standard answer to this question has been that the defendant's liability depends on the voluntariness and knowledge of the plaintiff. If the author has been at all successful in formulating his ideas it should be clear at this point that this approach is drastically off the mark. The courts should not face or evaluate the plaintiff's conduct until such time as they have evaluated that of the defendant. In determining whether the defendant's act or product should be condemned, we must face directly the likelihood of plaintiffs as a class being put in choice-creating situations which we as a society believe they should not be required to face. These are policy decisions of the first order, and they should not be confused with the decision making process of an individual plaintiff. In those cases in which a duty to protect plaintiffs from their own choices may appropriately be imposed, assumption of risk has no place in the law suit. There may be other operative defenses which can check liability,¹³³ but since the decision has been made that the burden of preventing choice is to fall on the defendant, assumption of risk as an independent defense would be eliminated.

An excellent example of this approach is found in *Dawson v. Payless for Drugs*.¹³⁴ Plaintiff, a 68 year old woman, was injured when she slipped and fell on ice in defendant's parking lot in LaGrande, Oregon. Plaintiff and her husband drove into defendant's parking lot to shop at defendant's store. After making her purchase she left the store, and on the way back to her car slipped and fell on the icy surface of the parking lot. Two inches of snow had fallen that day, and there had been measurable precipitation for eight days prior to the accident. Ice formed on the ground as a result of the rain freezing at night. Plaintiff admitted that she knew that it was icy on the parking lot, and that her previous experience had been that defendant did not do anything to remove snow or ice from the area.

In a carefully reasoned decision, Mr. Justice O'Connell quoted at length from the second *Restatement of Torts* in ridding the Oregon court of the open and obvious danger rule:

There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm. 2 *Restatement* (second), *Torts*, Explanatory Notes § 343A, comment f at 220 (1965).¹³⁵

133. See generally text accompanying notes 139-41, 150-52 *infra*.

134. 248 Ore. 334, 433 P.2d 1019 (1967).

135. *Id.* at 338, 433 P.2d at 1021.

The court went on to find that whether or not plaintiff was contributorily negligent was a factual matter for jury determination, and remanded the case for retrial.

It is significant to note the methodology of the decision making process in *Dawson*. The court first abandoned the archaic limited-duty rule which absolved the landowner from liability when the danger was open and obvious. It then proceeded to determine whether the condition was unreasonably dangerous. The court concluded that a finding of unreasonable danger was permissible even in the face of admitted knowledge on the part of plaintiff of the danger at the very moment she was encountering it. In fact, the evidence was that plaintiff walked especially carefully because of her perception of the danger.¹³⁶ Having faced the duty-to-protect issue, and having resolved it against the defendant, the court did not even mention voluntary assumption of risk. The court simply turned its attention to the only remaining possible escape from liability—plaintiff's arguable contributory negligence. What is crucial for our discussion is the technique of the court in facing the duty issue without any consideration as to plaintiff's activity. Whether the icy condition which was open and obvious was unreasonably dangerous even to those aware of its condition was a matter of law to be passed on by the courts. It was mercifully decided without belaboring whether or not plaintiff went to the drug store to purchase antibiotics or underarm deodorant. And we were spared an inquiry as to whether the spot on which she actually slipped was really as dangerous as she had expected. The *Dawson* case clearly demonstrates that there is much indeed to be said for a clean duty analysis.

In the products liability area it should be no more difficult analytically to formulate the expectancies we as a society wish to demand from a product. If a decision is made that the product should protect the aware as well as the unaware—the unreasonable user as well as the reasonable user—so be it. All I ask is that the courts articulate this finding with clarity. The virtue of an up-front duty analysis is that it then becomes clear that assumption of risk is no longer operative as a defense. It should again be noted that in formulating the duty issue the focus is on the product and the environment of product usage. The decision as to whether we desire a product to operate to protect a plaintiff from himself is a significant one. Under the analysis proposed herein, the decision is given the high visibility it deserves.¹³⁷

136. *Id.* at 336, 433 P.2d at 1020.

137. As previously noted, Professor James has argued that if the defendant is negligent in creating a danger to a plaintiff who is unaware of the harm, then there is little point in denying recovery to a plaintiff who has voluntarily and reasonably faced the harm. See text accompanying notes 46-47 *supra*. Given the traditional framework for the discussion of the issue of assumption of risk the argument has considerable vitality. However, under the expanded duty analysis suggested above, the courts can on a *case by case* basis decide the scope of protection they want to give plaintiffs. It may well be that the entire situation is so non-coercive, so open to choice, that the court may decide that even if defendant has been negligent to an unaware plaintiff he has the right to confront the fully aware plaintiff with a choice situation. Assume for the moment that the shopping center in the *Payless for Drugs* case had five drug stores all equidistant from the point in the parking lot where plaintiff parked, but that plaintiff chose to shop at Payless because they had advertised a special sale. In such a case a court might very well decide that the defendant should be permitted to con-

B. *Proximate Cause*

As set out above,¹³⁸ if the choice-creating question is answered in the negative, assumption of risk should not operate as a defense. This does not mean, however, that plaintiff's action may under no circumstances re-enter the liability picture to defeat recovery. Let us return for a moment to *Bartkewich v. Billinger*.¹³⁹ It will be recalled that in that case plaintiff inserted his hand into a glass-cutting machine at the point of operation. Although the *Bartkewich* court denied plaintiff's claim for recovery, it has been suggested herein that the glass-cutting machine was the kind of product which should be designed to protect an impulsive plaintiff from his own voluntary and unreasonable action. If a court were to make this determination, then voluntary assumption of risk, be it reasonable or unreasonable, would not be operative as a defense. Assume, however, that the plaintiff in *Bartkewich* had a minute's time for reflection before deciding to insert his hand, and with full appreciation of the dangers inherent in the risk went ahead with his reckless chance taking. He may then be barred from recovery on proximate cause grounds. A product is legally defective only if it creates certain risks. The danger encountered in this hypothetical may in fact be outside the scope of the risks which made the product unreasonably dangerous. Thus, even though assumption of risk is not in issue, the question of the plaintiff's reasonableness may become operative in the overall assessment of whether or not the injury that occurred was outside the scope of the risk created by the product's danger. As the scope of plaintiff's options and his knowledge of and freedom to avoid the danger increase, the greater the chance that he will reach the stage where we are prepared to deny liability on proximate cause grounds.

While it has always been recognized that assumption of risk and proximate cause are concepts with considerable overlap,¹⁴⁰ assumption of risk has traditionally been retained as an analytical tool designed to deny recovery in those cases in which plaintiff's action was foreseeable and within the scope of the defendant's duty. Given, however, the suggested framework in those cases in which the burden for eliminating choice-making is placed on the defendant, there is no operating room for the intermediate tool of assumption of risk. When plaintiff's activity within the total environment of the accident reaches the point where it is no longer within the scope of the risk created by defendant's act or product, liability

front the plaintiff with an acknowledged danger. On the other hand, a court could conclude that the sale was so unusual, the item so desirable, and inflation so high that the defendant in this situation should be required to protect both reasonable and unreasonable plaintiffs from their own decisions. Note again that under the duty approach the policy question is framed in the context of the defendant's action. Could all these considerations be brought together in the context of voluntariness and knowledge of risk? Is the plaintiff's act any more or less voluntary simply because he is faced with an irresistible sale? No court would daign to call such action nonvoluntary. Yet there clearly remains an important policy issue worthy of legal decision. It is simply not correct to place all the choice questions in the plaintiff's venue. They are relational. Whether plaintiff should be required to choose is primarily a function of the nature of the choice to which he has been put by the defendant.

138. See text accompanying notes 131-33 *supra*.

139. 432 Pa. 351, 247 A.2d 603 (1968).

140. See R. Keeton, *supra* note 94, at 122-23 & n.3.

may appropriately be terminated—not simply because plaintiff chose, but because given the overall environment of his choice it is not rational to assign the cause of harm to the offending act or product.

It would of course be possible to incorporate the proximate causation inquiry in the duty issue. Professor Leon Green has long argued that proximate cause is generally a duty question to be discharged by the court.¹⁴¹ In the proposed scheme for dealing with the problem of choice-making, we have suggested that the court, not the jury, must control the issue of which type of products or acts should be found to be non-choice creating. The decision to give this law-making responsibility to the courts within the duty framework was made for several reasons. First, and foremost, the kinds of policy determinations that are involved in removing choice-making from plaintiffs as a class and placing the duty on defendants are far-reaching. The decision must be made with the realization that a broad policy question is being decided rather than simply the outcome of a particular case. Second, if we are to break out of the present pattern in which these issues are illegitimately framed as a jury question of voluntary assumption of risk, a tool to create judicial control over the issue is necessary. Third, this kind of policy decision is deemed to be of such importance that high visibility seems desirable. If defendants are to understand their responsibilities in the product liability field they should be told quite clearly just what it is that courts want of them. The individualization of that decision within the context of voluntary assumption of risk has not provided that guidance.

When we reach the issue of proximate cause, however, it seems wholly appropriate to return to normal operating procedure in which the jury is asked to evaluate the injury-producing event and to place it within the context of the risks created by defendant's act or product. It is recognized that there is a slight danger in the proffered approach. Voluntary assumption of risk is a defense personal to the plaintiff and negates liability to him alone. Proximate cause assigns final responsibility for the entire event. Thus, in *Bartkewich*, when plaintiff inserts his hand into the machine, and the machine is thrown out of kilter injuring not only the plaintiff but also a fellow employee standing further down the assembly line, it is of major importance what theory is used to defeat plaintiff's recovery. If plaintiff is denied recovery on the grounds of voluntary assumption of risk, his cohort down the assembly line might still recover since he had not acted to assume a risk. On the other hand, if we assess the injury-producing event as outside the scope of the risk attributable to the defendant, then plaintiff's act in setting off the injury-producing event is a superseding cause. Whether a certain fact pattern is or is not within the risk is of course a matter of judgment; but there is always the danger that a limitation of the assumption of risk defense could lead to a tendency on the part of some courts to broaden the scope of the proximate cause question and to use that tool to deny plaintiff's recovery. If the plaintiff has in effect actually caused his own injury, a ruling based on proximate causation would be disturbing only if such a finding would drag down an innocent plaintiff/bystander

141. See Green, *Duties, Risks, Causation Doctrines*, 41 TEX. L. REV. 42, 58-64 (1962); Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 562-74 (1962).

who would have been unaffected by an assumption of risk finding against the actor/plaintiff. In balance, however, it appears that the risk of working an injustice on an innocent third-party plaintiff is minimal. If the duty question is honestly faced and a court determines that the defendant must protect the plaintiff from his own choice-making, we can expect that juries will give rather broad reading to that policy judgment and will deny liability on proximate cause grounds only in those cases where plaintiff's choice is so far beyond the pale of the risk that he ought to be saddled with responsibility for the event.

C. *Assumption of Risk—The Limited Doctrine*

At the point when a court determines that a defendant has a legitimate right to confront a plaintiff with a choice-making situation, assumption of risk may come into play. This does not mean that the defendant has not acted negligently or that his product is not unreasonably dangerous. It only means that the scenario is such that as a matter of policy we have decided that, despite the unreasonableness of defendant's act or the defects in his product, he may legitimately confront a plaintiff with a choice as to whether he wishes to venture into the dangerous situation. Let us return again to the *Messick* fact pattern¹⁴² in which plaintiff was warned by a mechanic that the front end vibrations of his car were so serious that he might be killed if he continued to drive the car. We hypothesized earlier that if the front end vibrations had arisen soon after the car was purchased, and if a competent repairman could have put the car in a fully operational state, then the defendant might legitimately face the plaintiff with the choice-demanding defective product. By deciding that this choice-demanding situation should not be absolutely proscribed as a matter of duty, we have concluded that the defendant may ask the plaintiff to choose between driving a dangerous car and accepting the inconvenience and expense of taking it in for repair. It is in this context that assumption of risk should and can operate effectively. The questioning may now properly focus on the quality of the plaintiff's action. Note that all elements of duress stemming from the defendant's act or product are now removed from the scene. Since we have decided that the act or product is such that defendant has a right to ask plaintiff to choose, defendant's activity is accounted for. We admit his act is negligent or his product unreasonably dangerous, and at the same time we allow the defendant to face the plaintiff with a choice. However, permitting the defendant to face the plaintiff with the choice does not end the inquiry. It is still necessary to decide whether plaintiff did in fact exercise a choice. We cannot close our eyes to the fact that plaintiff has been injured by the defendant's negligent act or unreasonably dangerous product.

Thus the question that must now be faced is whether the quality of plaintiff's choice-making which resulted from the *particular situation* which he happens to be in at the time of encounter is sufficient grounds for denying recovery. We must now confront the issue of voluntary assumption of risk in its purest and most meaningful form. Just what will be the elements of the assumption of risk de-

142. See text accompanying notes 102-05 *supra*.

fense in those cases in which the defendant is deemed to be within his rights in presenting the plaintiff with the choice-making situation in question?

1. *Voluntariness*

In facing the first leg of the *volenti* defense—the issue of voluntariness—it is significant to note that we are no longer asking whether defendant “has created a situation”¹⁴³ which makes the plaintiff’s choice exercisable only under duress. He clearly did not. We are now dealing with those cases in which the defendant has justifiably asked the plaintiff to choose. Our inquiry is whether the plaintiff did in fact choose. In those defendant-created situations where plaintiff’s scope of choice due to his own particular situation is such that he had no maneuvering room—no options—we may fall back on the negligence of defendant’s act or the unreasonable danger of the product as a grounds for allowing recovery. But when we face the question of voluntariness in the suggested context, it would seem that we should be very careful in permitting plaintiff to escape on grounds of non-voluntariness. If the defendant may ask plaintiff to choose whether or not he wishes to encounter a danger, then plaintiff should not be absolved from his choice unless the duress situation he faces is extreme. Perhaps the *Messick* car with the bad front-end vibration might be used by plaintiff if faced with an emergency medical situation. It would seem unjust, however, to open up the voluntariness inquiry to all the social factors which can impinge on plaintiff’s decision-making. Those factors should have been considered in making the initial determination as to whether the defendant has a duty to protect plaintiffs as a class from themselves. If it has been decided that no such duty may appropriately be imposed, then we should not readily reopen the inquiry in the plaintiff’s case. In other words, by divorcing the duty issue (which focuses on the defendant’s act or product, a matter which he can control) from the issue of voluntariness (which focuses on the peculiarities of plaintiff’s situation, a matter which he cannot control) we have the luxury, for the first time, to decide just how much maneuvering room plaintiff must have before we are willing to deny him recovery. This question is now being asked purely within the context of the plaintiff’s *own* actions and his *own* environment. Our general policy judgment that defendants can pose the choice to plaintiffs as a class will not be undermined by an occasional finding that a particular plaintiff on a particular day was so bereft of options that he was literally forced to encounter a danger. Thus a defective car presenting a “fix-me” choice which a defendant manufacturer admittedly has a right to force on plaintiff can still result in the imposition of liability on the defendant. Such a finding would be in order if plaintiff was in no position to make any real choice whatsoever. The focus, however, would be on the plaintiff’s ability to find alternatives, not the reasonableness *vel non* of his action. Voluntariness would be negated only where the choice level was truly negligible.

2. *Knowledge*

Just as “voluntary” acts must be redefined to comport with the proposed limited

143. See generally notes 49, 82 *supra*; text accompanying notes 96-100 *supra*.

assumption of risk formulation, there is a similar need to re-examine the concept of knowledge of risk within this new framework. Under the classical approach the requirement that plaintiff fully perceive the risk was used as an escape hatch to permit the plaintiff to counter the *volenti* defense in cases where we were primarily concerned with the need to protect the plaintiff against his own choice. To deny the defense all one had to do was to describe the risk in a particularized form. It could then be rationalized that plaintiff was encountering a risk different from that which actually caused the harm.¹⁴⁴ Having faced the duty issue frontally, there is no longer a need to become involved in contorted reasoning with regard to knowledge of risk. Once we have determined that defendant had a right to ask the plaintiff to choose whether he wishes to face the risk, it would seem that a more modest assessment of knowledge of the risk is in order.

Just how much knowledge plaintiff must have of the risk has long been recognized as a multi-faceted problem. First, as a leading commentator has pointed out, the term risk implies a degree of want of appreciation of the forces that are at work in a factual setting.¹⁴⁵ Were plaintiff to understand all the forces that are at work, he would know that injury was certain to occur or that it was certain not to occur. To break through this enigma it becomes necessary to define the risk from some human point of view. Professor Robert Keeton has formulated the following test:

The risk referred to in "assumption of risk" is a risk that causes defendant's conduct to be characterized as infringing a legal standard. Where the basis of liability is negligence, that risk is determined from the point of view of the ordinarily prudent person in the position of the defendant at some one or more times prior to the occurrence of the harm. Thus, saying that plaintiff had . . . full appreciation of [the] risk required for subjectively consensual assumption of risk is in most circumstances the same as saying that he in fact understood [the] risk to himself and his property as well as the defendant should have understood it.¹⁴⁶

In a landmark article Professor Mansfield has taken sharp issue with the Keeton analysis.¹⁴⁷ He argues that the notion of risk as it applies to defendant's conduct is a rather specialized concept. It is designed for the achievement of a particular purpose in that it is the means by which we decide whether we wish to deter the defendant from engaging in this sort of conduct. The state of mind of plaintiff is examined in subjective assumption of risk not to determine whether to deter the plaintiff's act, but to decide whether plaintiff's conduct has been such that it becomes correct to deny him recovery in the face of defendant's opprobrious conduct. Professor Mansfield suggests that perhaps in order to deny recovery a more particularized estimate of likelihood of harm should be found necessary. In the final analysis he concludes that:

The most acceptable answer would seem to be that the plaintiff must have that state of mind that, according to the underlying philosophy, provides an adequate basis for the decision of matters importantly affecting his welfare. This is not necessarily

144. See, e.g., *Fred Harvey Corp. v. Mateas*, 170 F.2d 612, 615-17 (9th Cir. 1948); *Weis v. Davis*, 28 Cal. App. 2d 240, 243-44, 82 P.2d 487, 488-89 (1938); *Jewell v. Schmidt*, 1 Wis. 2d 241, 249, 83 N.W.2d 487, 491 (1957).

145. R. Keeton, *supra* note 94, at 124.

146. *Id.* at 125 (footnote omitted).

147. Mansfield, *supra* note 28, at 38-39 n.29a.

the same as the test that governs our determination of risk in the context of the defendant's negligence.¹⁴⁸

The application of this debate to the problem of assumption of risk as defined herein is of considerable consequence. We have determined that assumption of risk is to operate only within the context of a situation in which a defendant has a right to place the plaintiff in a choice situation. Just how much knowledge on the part of the plaintiff will the defendant be required to show in order to escape liability? Now that we have removed the interplay between duty and voluntary assumption of risk, the issue of knowledge is purely a question of plaintiff's action and his choice-making criteria. We need no longer be concerned with using knowledge as a dodge which places original protective liability on the defendant through a narrow reading of risk. At this point the *Messick* automobile situation may again fruitfully be reconsidered. Assume that the plaintiff in *Messick* had noticed front end vibrations, but had in no way gauged the seriousness of the defect and had not brought the car in for repair. Let us assume that a court would decide that a car manufacturer has the right to put the plaintiff to a choice as to whether he wishes to continue to drive the car. That is, the car is unreasonably dangerous to the unaware, but as to one who is aware this is not the kind of case where we wish to protect the plaintiff from his own decision-making. We have thus decided that there is at least the possibility of a successful invocation of the assumption of risk defense. In such a case the undisguised question is the choice-making mechanism of the plaintiff. At what point will the plaintiff's knowledge deprive him of his cause of action?

While the question is a difficult one to answer, the philosophical outline seems rather clear—risk analysis need be nowhere as detailed as required under the traditional formulation. If defendants may ask plaintiffs as a class to choose, it would seem that we should be primarily concerned with asking at what point does the choice-making mechanism become engaged? To that question Professor Mansfield's approach provides a superb answer: a choice is made when plaintiff has enough information to provide him with an "adequate basis for the decision of matters importantly affecting his welfare."¹⁴⁹ Looking back to *Messick* again, if this author were the driver of the *Messick* car, it might well be that voluntary assumption of risk would come into play very early. I happen to be one of those people who knows nothing about automobile behavior. Furthermore, I am cognizant of the scope of my ignorance. Perhaps I would not appreciate the magnitude of the risk (that is the great likelihood), but I would know that something was amiss and that I should get it checked. Why should it be necessary in order to make out voluntary assumption of risk to demonstrate that I was aware of the precise danger? We have already determined that the defendant has the right

148. *Id.* at 39 n.29a.

149. It may seem that the Mansfield test is tautological. In a sense it is; but one should not lose sight that the issue is for the jury. There is a common-sense ring to the test that gives it a strong sense of reality. Since we are seeking to determine only whether plaintiff's decision-making process has come into play (rather than how sophisticated his decision-making actually was in fact), within the context of the proffered analysis it makes particularly good sense.

to force me to choose between continuing to drive the car in its present state and bringing it in for repair. If I am fully apprised of the need for repair or the need to check for repair, should it also be necessary that I appreciate the magnitude of the risk? I think not. If plaintiffs know that an important matter is at stake then the knowledge criteria would seem to be satisfied.

3. Reasonableness

As previously noted,¹⁵⁰ section 402A, comment *n*, of the second *Restatement* provides that if a products liability defendant is to successfully rely on the assumption of risk defense, he must show that the plaintiff voluntarily and unreasonably encountered a known risk. Under the suggested analysis, in those cases where defendant has a right to put plaintiff to a choice, it would seem that the reasonableness of the plaintiff's activity should not come under scrutiny. If plaintiff has acted with the minimal level of voluntariness discussed above and with the knowledge that a decision of some importance is to be made, then no liability should be imposed. The issue of the reasonableness of plaintiff's activity responds to a policy question which is not necessarily choice oriented.¹⁵¹ It deserves separate exploration under the independent defense of contributory negligence but there is no reason to saddle the choice issue with the question of reasonableness. One has the distinct impression that in section 402A the Restaters sought to lessen the probability that assumption of risk would operate as a defense by adding the proviso that assumption of risk must also be unreasonable to bar the plaintiff. In this author's opinion the relevance of the plaintiff's reasonableness is an either/or proposition. In those cases where the duty has been defined to protect the plaintiff from himself, it may be necessary to protect him from his own unreasonable actions as well.¹⁵² And in those situations in which defendant, even though the author of a negligent act or an unreasonably dangerous product, is deemed to legitimately face plaintiff with a real choice, the fact that plaintiff was acting reasonably should not absolve him from his choice.¹⁵³

VI. FOCUSING ON THE CHOICE ISSUE—THE FALLOUT

Some of the benefits that inure under an honest and forthright duty analysis have already been described.¹⁵⁴ An additional advantage of the proposed approach is that it may make it possible to explain otherwise inexplicable decisions in which the true rationale lies in a policy analysis which focuses on the duty of the defendant to protect the plaintiff either from choosing at all, or in some cases, from making a decision without sufficient information to make an intelligent choice.

150. See text accompanying notes 124-25 *supra*.

151. Whether a plaintiff's choice is reasonable or not may have a bearing on whether it is voluntary but a finding of reasonableness is not dispositive. Plaintiff may because of circumstances peculiar to his own situation be acting reasonably in deciding to encounter a danger, but he may not be so bereft of choices or under such duress that we are willing to denote his action as nonvoluntary.

152. See text accompanying notes 124-31 *supra*.

153. See text accompanying notes 118-21 *supra*.

154. See text accompanying notes 102-37 *supra*.

A prime example of inadequate "choice analysis" is that recent casebook favorite *Davis v. Wyeth Laboratories, Inc.*¹⁵⁵ Plaintiff, a thirty-nine year old male responded in March, 1963, to a mass polio immunization campaign in which residents of Eastern Idaho and Western Montana were being inoculated with Sabin Type III vaccine. Within thirty days after taking the vaccine the plaintiff contracted polio, ultimately resulting in paralysis from the waist down. Davis sued Wyeth Laboratories, the manufacturer of the vaccine, under negligence, breach of warranty, and strict liability theories. Plaintiff relied on the fact that in September, 1972, almost simultaneous reports were issued by the Surgeon General and a national association of health officers which suggested that there was a small but definite risk of contracting polio from the use of the vaccine. The risk was remote—in the range of less than one case for every one million doses. On the other hand, the risk of not taking the vaccine for persons over the age of 20 was calculated by the Surgeon General to be somewhat less than one in a million as well. It was therefore the recommendation of the Surgeon General that Type III oral vaccine be administered primarily to preschool and school age children, and that it be used for adults "only with the full recognition of its very small risk."¹⁵⁶

The Ninth Circuit undertook a most careful analysis of the arguments presented. The court focused on Davis' contention that the district court had erred in instructing on warranty, and that the test is whether the drug "was reasonably fit and reasonably safe for use by the public as a whole."¹⁵⁷ Appellant contended that the warranty was that the drug was safe and fit for him. Circuit Judge Merrill, mindful that the concept of absolute enterprise liability in the absence of finding a drug to be unreasonably dangerous had not been generally accepted, was deeply concerned with the propriety of granting the appellant his requested instruction. The obvious out for the court was to treat this case as a "failure to warn" problem. The court did in fact reason that where a warning was necessary the drug became unreasonably dangerous if the proscribed warning was absent.¹⁵⁸ But, the matter was not quite so simple, and Judge Merrill recognized that here he was faced with a peculiar problem:

There are many cases, however, particularly in the area of new drugs, where the risk, although known to exist, cannot be . . . narrowly limited and where knowledge does not yet explain the reason for the risk or specify those to whom it applies. It thus applies in some degree to all, or at least a significant portion, of those who take the drug. This is our case; there seems to be no certain method of isolating those adults who may be affected adversely by taking Type III Sabin vaccine.

In such cases, then, the drug is fit and its danger is reasonable only if the balance is struck in favor of its use. Where the risk is otherwise known to the consumer, no problem is presented, since choice is available. Where not known, however, the drug can properly be marketed only in such fashion as to permit the striking of the balance; that is, by full disclosure of the existence and extent of the risk involved.¹⁵⁹

Then in a comment pregnant with meaning the court concludes:

155. 399 F.2d 121 (9th Cir. 1968).

156. *Id.* at 124.

157. See *id.* at 126-31.

158. *Id.* at 127.

159. *Id.* at 129 (footnote omitted).

As comment k recognizes, human experimentation is essential with new drugs if essential knowledge ever is to be gained. No person, however, should be obliged to submit himself to such experimentation. *If he is to submit it must be by his voluntary and informed choice or a choice made on his behalf by his physician.*¹⁶⁰

As a result of this analysis the Court found that the failure to warn in this case "rendered the drug unfit in the sense that it was thereby rendered unreasonably dangerous."¹⁶¹

The decision is in many ways a puzzling one. First, the Court took great pains to inform the reader that it was not prepared to impose absolute liability, and that without some finding of unreasonable danger in the product there could be no liability.¹⁶² It then acknowledged that there is no way in which a user can determine that he is a member of a class that should avoid the product.¹⁶³ This would seem to lead to the conclusion that the drug is *not* unreasonably dangerous, since the warning in this case cannot reduce the danger level of the drug. Indeed, the fact that the Surgeon General recommended the warning to the adult population is indicative that a judgment was made in favor of the product (*i.e.*, that it was *not* unreasonably dangerous) as long as the adult population was properly warned of the risk. Why then did the court conclude that because the plaintiff was denied the opportunity to make an informed choice as to whether or not to use the drug that the drug itself was unreasonably dangerous? It may be that consumer choice is important, but how does that choice relate to the unreasonable danger of the drug?¹⁶⁴ Second, if the consumer choice as to whether to submit oneself to a particular product is dependent on the amount of consumer knowledge about the general dangers of the product—even though there is no way that the consumer can make a reasonable determination as to whether he is within a class peculiarly susceptible to those dangers—then how does the court hope to differentiate those cases in which idiosyncratic allergic users have been denied relief?¹⁶⁵ The court appeared to be somewhat sensitive to this question when it took the position that the statistical risk was only one factor which it would consider in deciding whether a consumer is entitled to the information. The court said:

When, in a particular case, the risk qualitatively (e.g., of death or major disability) as well as quantitatively, on balance with the end sought to be achieved, is such as

160. *Id.* (emphasis added).

161. *Id.* at 130.

162. *See id.* at 126-28.

163. *Id.* at 129.

164. The informed choice question may of course be included by definition under the "unreasonably dangerous" rubric. *See id.* at 130; RESTATEMENT (SECOND) OF TORTS § 402A, comment j (1965). It is submitted, however, that for a number of reasons a commingling of the concepts of consent and danger should be avoided. *See* text accompanying notes 169-74 *infra*.

165. *See* *Bish v. Employers Liab. Assur. Corp.*, 236 F.2d 62, 69 (5th Cir. 1956); *Bonowski v. Revlon, Inc.*, 251 Iowa 141, 145-49, 100 N.W.2d 5, 7-9 (1959); *Kaempfe v. Lehn & Fink Prod. Corp.*, 21 App. Div. 2d 197, 201-05, 249 N.Y.S.2d 840, 845-47 (1964), *aff'd mem.*, 20 N.Y.2d 818, 231 N.E.2d 294, 284 N.Y.S.2d 708 (1967). *But see* 399 F.2d at 130 n.16; *Sterling Drug, Inc. v. Cornish*, 370 F.2d 82, 85 (8th Cir. 1966); *Wright v. Carter Prod.*, 244 F.2d 53, 56-58 (2d Cir. 1957).

to call for a true choice judgment, medical or personal, the warning must be given.¹⁶⁶

The thrust of this argument seems to be that where the danger to the plaintiff is one of allergic reaction to a deoderant, for example, then the risks are so qualitatively different that choice need not be provided to plaintiff. Again, the reason cannot be that the *product* without the warning is unreasonably dangerous. The objective danger level of the product remains constant with or without the warning. Furthermore, the test as framed by the court is tautological. Whether a product calls for a choice to plaintiff depends on whether the risk is qualitatively and quantitatively sufficient to call for a true choice judgment. This is certainly a strange way of formulating the risk-utility theory embodied in the concept of unreasonable danger.

Finally, if the issue is the unreasonable danger of the drug without the warning, how is the causation problem to be addressed? Even if a court is to conclude that the product without the choice information is unreasonably dangerous, it still must conclude that but for the danger plaintiff would not have been injured. Since the causation-in-fact question in such attenuated risk cases is a difficult but often crucial issue,¹⁶⁷ it would seem that the *Davis* court should not have limited its treatment of this matter to a rather brief oblique discussion which concluded only that it was not clear that Davis would have taken the vaccine had he been warned of the danger.¹⁶⁸ Why then did the court choose to not deal directly with the causation problem?

To respond adequately to the above stated questions it is necessary to focus on the "choice" issue which pervades the entire case. It is clear that the court felt that the plaintiff was entitled to the information about the remote dangers of the Sabin vaccine. To accomplish this goal it felt that it had to somehow fit the defendant's product into the procrustean bed of "unreasonable danger." Yet, if one applies a duty analysis to the facts of the *Davis* case it becomes evident where the court's error lay. To say that defendant owes a duty to a plaintiff to inform him of the possible harmful nature of a drug so that he can intelligently choose whether to ingest that drug is a perfectly respectable statement. It suggests that in defining the relationship between defendant and plaintiff vis-a-vis the drug, defendant owes a duty to tell the plaintiff something. The duty is then a duty to communicate information. Must we say that without that information the drug is unreasonably dangerous? It would seem not. If we focus on the duty of the defendant to inform the plaintiff about his ensuing encounter with a potentially harmful yet *not* unreasonably dangerous substance, it becomes apparent that we are into an entirely different area of the law. The issue is not that of unreasonable product danger, but rather one of informed consent. The defendant manufacturer of the product had a *duty to inform* potential plaintiffs that certain risks are inherent in the drug. If the plaintiff's consent to take the drug is based on inadequate knowledge, then his consent to a battery was fraudulently ob-

166. *Id.* at 129-30 (footnote omitted).

167. See generally W. PROSSER, *THE LAW OF TORTS* § 41 (4th ed. 1971).

168. See 399 F.2d at 130.

tained. Whether or not there has been sufficient communication of information to the plaintiff depends on the scope of informed consent law. Clearly the defendant need not inform plaintiff of all risks. The most liberal test now in vogue only requires that the plaintiff be given the information that a reasonable man in plaintiff's position would like to have before making a decision of such moment.¹⁶⁹ The advantages, however, of focusing on the issue of choice rather than on the unreasonable nature of the product are several. First, by determining whether plaintiff's consent must be obtained before facing him with the risk, it becomes possible to rationally distinguish those cases in which courts feel that plaintiffs would not desire to have the information before making a choice. Two products may have the same risk potential, but because of the diverse nature of the product benefits plaintiffs may desire to have the risk potential information in one case and yet not be particularly concerned with the matter in the other. This is generally a jury issue. What is important to note here is that the danger of the product itself is only one element on the overall scene of consent. Whether plaintiff has the information which a reasonable man would want before submitting himself to potential harm (reasonable or unreasonable) is dependent on factors far more complex than the risk of harm that may be incurred in using the product. Second, once the informational dimension is found lacking, it becomes possible to impose liability without wrenching over the impossibly difficult causation issue. The issue in battery is not whether but for the failure to warn the plaintiff would not have taken the drug; but rather, whether plaintiff was subjected to an unconsented touching.¹⁷⁰ If defendant failed to adequately inform plaintiff, then the administration of the drug was a battery on the part of the drug manufacturer, and consequently the causation issue need not be pursued.

Discussing the true issue in the case also has the distinct advantage of permitting controversy on truly contested points. For example, there is considerable difference of opinion as to whether a defendant-oriented or plaintiff-oriented standard should be used in the informed consent cases.¹⁷¹ A strong traditional view has advocated submitting the issue of informed consent to a jury based on what a reasonable doctor would tell the patient.¹⁷² As indicated earlier, some recent decisions have sought to change the focus of the inquiry by asking what would a reasonable patient want to know.¹⁷³ This controversy is of no small practical consequence in litigation. How should the issue be framed within the context of a drug disclosure case? Should there be something akin to the concept of therapeutic privilege,¹⁷⁴ in that revealing risk information might tend to scare off

169. See *Canterbury v. Spence*, 464 F.2d 772, 783-88 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); *Cobbs v. Grant*, 8 Cal. 3d 229, 241-45, 502 P.2d 1, 8-11, 104 Cal. Rptr. 505, 512-15 (1972); *Cooper v. Roberts*, 220 Pa. Super. 260, 265-69, 286 A.2d 647, 649-51 (1971).

170. See W. PROSSER, *THE LAW OF TORTS* § 9, at 36 (4th ed. 1971).

171. See Comment, *Informed Consent in Medical Malpractice*, 55 CALIF. L. REV. 1396, 1399-1414 (1967); 75 HARV. L. REV. 1445, 1446-49 (1962).

172. Comment, *Informed Consent in Medical Malpractice*, 55 CALIF. L. REV. 1396, 1402 (1967).

173. See authorities cited note 169 *supra*.

174. See Note, *Restructuring Informed Consent: Legal Therapy for the Doctor-Patient Relationship*, 79 YALE L.J. 1533, 1564-71 (1970).

those who truly need the vaccine from taking it? These are valid questions which deserve direct and forthright answers. Such questions were neither asked nor alluded to by the *Davis* court, however. Since the focus of the case was the unreasonable danger of the product and product liability law, these more refined informed consent issues remained buried. Had the issue of defendant's duty to present the true choice situation to the plaintiff been clearly presented, it would have become clear that the focus should have been on the informational dimension of the case rather than the unreasonable nature of the product.

VII. CONCLUSION

In formulating the scope of affirmative defenses to product liability cases courts must become aware that they are not merely passing on the acceptability of plaintiff's behavior. To the degree that product defendants are absolved from liability because plaintiffs have used a product in an unacceptable manner, the courts are in fact deciding that the manufacturer need not protect against a certain type of use of his product. By definition, when we have reached the affirmative defense stage plaintiff has already proven his *prima facie* case. Defect has thus been established, its causality has been made out, and the court has decided that the harm was within the scope of the risk of the danger created by defendant. Very simply, the question of foreseeability within the context of the particular accident and its relation to the defect has been considered by the court and jury to be within the ambit of the risk illegitimately created by the defendant. All this of course is not new. Even when the defendant has acted in substandard fashion the law has always asked whether a particular plaintiff may rightfully recover or whether, in view of the nature of his conduct in encountering the substandard act of the defendant, it would be better to deny the plaintiff any compensation for his injuries.

What is new, and requires express recognition, is that in products cases defendants and plaintiffs are not acting independently of each other. In the standard contributory negligence case, the defendant is involved in negligent activity (*e.g.*, speeding) and the plaintiff in contributory negligent activity (*e.g.*, negligent lookout). An accident occurs. Although each party could reasonably foresee the possibility of the other's act, the defendant did not really provide the matrix for the plaintiff's action. Those non-products assumption of risk cases in which the plaintiff was forced to act on a scene created for him by the defendant¹⁷⁵ may seem to present the problem of the plaintiff responding to the defendant's negligent act. However, the atmosphere of plaintiff's choice-making in such a situation is so narrow and particularized that it cannot be said that by recognizing the affirmative defense we are realistically describing the limits of defendants' duty to plaintiffs. To be sure one can broadly state that defendant owes no duty to a plaintiff who perceives a risk and encounters it, but the realities of the litigated cases are that an *individual plaintiff* has been barred because of his peculiar relationship to a risk. The duty of the defendant to act or not to act and the scope of his responsibility to others remains essentially untouched.

175. See notes 31, 49, 82 *supra*. See generally text accompanying notes 92-100 *supra*.

The product liability case is clearly different. Foreseeability of plaintiffs' use of products is a moot question. Defendants can and do know the incidence of plaintiffs' uses of their products. How a consumer will interact with a product is a function of product design and even of quality control. A finding that a certain category of product use is subject to an affirmative defense is in fact a statement that defendants bear no responsibility to protect plaintiffs from that form of product failure. A category exemption has been created which will inevitably effect the quality of product design or quality control. It is no answer to say that defendants will be responsible to those plaintiffs who are not contributorily negligent or who have not assumed the risk and that they will therefore maintain high standards. By barring plaintiffs who arguably are subject to the *volenti* defense from recovery, we reduce the manufacturer's incentive to produce a safer product. While particular manufacturers may in some cases nevertheless maintain high product standards, others will undoubtedly respond to this reduced incentive by not concerning themselves with making their products less hazardous.

A recent opinion emanating from the New York Court of Appeals demonstrates the problem graphically.¹⁷⁶ The plaintiff, Christino Paglia was driving a four month old Chrysler sedan with just over 4,000 miles on the odometer when suddenly the vehicle crossed the solid double line on the highway and collided with an auto coming from the opposite direction. At no time prior to the accident had Paglia experienced any difficulty with the steering mechanism. There was evidence that at no time prior to impact did the plaintiff either blow his horn or apply his breaks. Paglia sued Chrysler for negligence and breach of implied warranty. The jury returned a verdict for the plaintiff based on the implied warranty claim. In its discussion of the case the New York Court of Appeals set forth the basic elements which plaintiff must establish in a product liability suit:

We accordingly hold that, under a doctrine of strict products liability, the manufacturer of a defective product is liable to any person injured or damaged if the defect was a substantial factor in bringing about his injury or damages; provided: (1) that at the time of the occurrence the product is being used (whether by the person injured or damaged or by a third person) for the purpose and in the manner normally intended, (2) that if the person injured or damaged is himself the user of the product he would not by the exercise of reasonable care have both discovered the defect and perceived it's danger, and (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted his injury or damages.¹⁷⁷

The court went on to conclude that the jury had been properly instructed on the misuse and failure to discover the defect issues, but remanded the case for a new trial on the third element—contributory fault separate and apart from the plaintiff's action vis-a-vis the defective mechanism. The remand states:

There remains, however, the question whether Paglia independently exercised that degree of care for his own safety that a reasonably prudent person would have exercised under the same circumstances, quite apart from the defective steering mechanism. Thus, in this case, the issue whether Paglia as plaintiff had exercised reasonable care in the operation of his automobile, quite separate and distinct from the defective steering mechanism, and if he did not whether such lack of care was a substantial factor in producing his damages, was never submitted to the jury.¹⁷⁸

176. *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

177. *Id.* at 342, 298 N.E.2d at 628, 345 N.Y.S.2d at 469-70.

178. *Id.* at 343-44, 298 N.E.2d at 629, 345 N.Y.S.2d at 471.

We can only speculate as to the kind of offending behavior of which plaintiff Paglia may have been guilty. Perhaps his failure to brake after the loss of steering concerned the court. There is a possibility that Paglia may have been speeding at the time the steering mechanism went awry. Be that as it may, the real question is whether or not Chrysler has a duty to produce a car that will steer speeders as well as nonspeeders, slow reactors as well as fast ones. The answer relates only partially to the plaintiff's behavior. By exempting Chrysler from liability we are delimiting Chrysler's duty to a whole range of foreseeable users. Admittedly Chrysler will be liable to bystanders and to non-negligent plaintiffs.¹⁷⁹ We must face the fact, however, that defendant, having presented society with a defective mechanism, has been permitted to exclude a broad range of foreseeable users of its product from its liability picture. Despite the fact that the product was used in a wholly predictable manner, the defendant was found to owe them no protection. By not limiting the availability of the contributory negligence defense in products liability cases,¹⁸⁰ the New York court has placed itself in a distinct minority.¹⁸¹ But since the majority of jurisdictions do continue to recognize the defense of voluntary and unreasonable assumption of risk,¹⁸² we cannot evade the question of what kind of protection should be built into our products. In short, need manufacturer's protect us from voluntary folly?

The scope of defendant's duty in protecting people from their own choice-making is not a question which lends itself to sweeping generalizations. Those who would do away entirely with this question by abolishing assumption of risk refuse to recognize that even though a product may be unreasonably dangerous, there still may be a place for choice-making, and that courts will justifiably insist on focusing on the ability of plaintiff to choose. Wholehearted pro-riskers, and even those who would permit the defense only when the plaintiff has behaved unreasonably, fail to recognize that in certain instances the plaintiff simply does not belong in the decision making process. If courts will undertake the task of inquiring into whether a product or situation is legitimately choice-creating we shall be a long way toward establishing a rational framework for deciding this class of cases.

In a limited area courts have already openly confronted the question of protecting people from their own choice-making.¹⁸³ To date this approach has been adopted only in some rather clearly delineated situations, e.g., violation of child

179. See *id.* at 335-43, 298 N.E.2d at 624-29, 345 N.Y.S.2d at 465-70.

180. See *id.* at 343-44, 298 N.E.2d at 629, 345 N.Y.S.2d at 470-71.

181. See W. PROSSER, THE LAW OF TORTS § 103, at 670-71 (4th ed. 1971). See generally Noel, *supra* note 6, at 107-08.

182. See W. PROSSER, THE LAW OF TORTS § 103, at 671 (4th ed. 1971); R. Keeton, *supra* note 94, at 138-46.

183. The second *Restatement* provides that:

The plaintiff's assumption of risk bars his recovery for the defendant's violation of a statute, unless such a result would defeat a policy of the statute to place the entire responsibility for such harm as has occurred upon the defendant. RESTATEMENT (SECOND) OF TORTS § 496F (1965).

A similar section bars contributory negligence as a defense where the statute in effect places "the entire responsibility for such harm as has occurred upon the defendant." See *id.* § 483.

labor acts,¹⁸⁴ sale of firearms to minors,¹⁸⁵ safety acts for the protection of workmen,¹⁸⁶ and prohibiting the sale of liquor to intoxicated persons.¹⁸⁷ We must now be prepared to move past such restricted categorizations, and to make individual product judgments. In each instance we shall have to examine the offending product and determine whether we wish the manufacturer to protect the plaintiff from decision-making. That determination can only be made on a case-by-case basis, taking into account the kind of policy considerations which are best expressed within the framework of tort duty law. Only after having decided that choice-making is a viable policy option can we turn to the plaintiff's activity and examine his voluntariness and appreciation of the risk. In sum, the first order policy judgments that must be made in evaluating defendant's conduct and the more limited questions that typically arise under the assumption of risk defense require independent treatment. The consumerism of the seventies demands that we face the issue of product protection honestly. Happily, in this instance, pragmatism and expediency go hand in hand with correct and exact legal thinking. The marriage of the two should bode well for product liability law.

184. See *Pitzer v. M.D. Tomkies & Sons*, 136 W. Va. 268, 273-75, 67 S.E.2d 437, 441-42 (1951).

185. See *Tamiami Gun Shop v. Klein*, 109 So. 2d 189, 190-91 (Fla. Ct. App.), *cert. discharged*, 116 So. 2d 421 (Fla. 1959).

186. See *Koenig v. Patrick Constr. Corp.*, 298 N.Y. 313, 317-19, 83 N.E.2d 133, 134-36 (1948).

187. See *Soronen v. Olde Milford Inn, Inc.*, 46 N.J. 582, 589-93, 218 A.2d 630, 634-36 (1966).

