ASSUMPTION OF RISK AND THE AUTOMOBILE GUEST: TIME TO REEVALUATE THEIR RELATIONSHIP

INTRODUCTION

In the past two decades many courts have been asked to reexamine the validity and value of the doctrine of assumption of risk.¹ The trend has been to abrogate the defense in negligence actions,² particularly where the jurisdiction has adopted a comparative negligence system.³

Recently, in Sandberg v. Hoogensen,⁴ the Nebraska Supreme Court was presented with the opportunity to abolish the defense of assumption of risk as a complete and independent defense in negligence actions. In that case, involving a fatal one-car accident in which the evidence indicated that the driver of the automobile and his guest passenger were both intoxicated, the supreme court held that there was no error in the submission of the guest passenger's assumption of risk to the jury.⁵ In refusing to abolish assumption of risk as an independent defense in Nebraska,⁶ the court stated that ever since Landrum v. Roddy⁷—a similar automobile guest case where both the plaintiff-guest and the defendant-driver had been drinking together—assumption of risk has existed under such circumstances as a complete defense in Nebraska.⁸

In cases involving automobile guests where either the driver is intoxicated or both the driver and the guest are intoxicated, the defenses of both contributory negligence and assumption of risk may be issues.⁹ A number of cases involving this factual situation

¹ See, e.g., cases cited in note 68 infra.
² Blackburn v. Dorta, 348 So. 2d 287, 289 (Fla. 1977). See also cases cited in note 68 infra.
³ Blackburn v. Dorta, 348 So. 2d 287, 289 (Fla. 1977). See also notes 79-84 and accompanying text infra.
⁴ 201 Neb. 190, 266 N.W.2d 745 (1978).
⁵ Id. at 199, 266 N.W.2d at 750.
⁶ Id. at 199, 266 N.W.2d at 750.
⁷ 143 Neb. 934, 12 N.W.2d 82 (1943).
⁹ Professor Rice suggests that this factual situation is illustrative of “the confusion in application of the two doctrines in automobile cases” because while “most of the courts have discussed this conduct as contributory negligence, others have concluded that it comes within the doctrine of assumption of risk.” Rice, The Automobile Guest and the Rationale of Assumption of Risk, 27 MINN. L. REV. 323, 349 (1943) (footnotes omitted).
have come before the Nebraska Supreme Court. With the exception of Landrum, in all these cases the court has apparently permitted an instruction to be given on contributory negligence and assumption of risk as defenses to the defendant-driver's alleged negligence.

The objective of this comment is to determine whether the Nebraska Supreme Court has been consistent in its analysis of assumption of risk as it applies to automobile guest cases in which the parties have been intoxicated, and whether the court's recent decision not to abolish assumption of risk under these circumstances was well considered.

ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE

Assumption of risk is a defense that is not generally favored by the courts, and there has been a great deal of discussion among writers whether the doctrine should exist as a defense. In those courts where the doctrine is recognized, assumption of risk can be used as a defense in an action brought by a plaintiff against a defendant whose conduct would otherwise subject him to liability to the plaintiff. Where a plaintiff "voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant" he may not recover for his injuries caused by such harm.

ASSUMPTION OF RISK DEFINED

The basis of assumption of risk is the plaintiff's willingness to accept the risk and watch out for himself. The defense is composed of two elements: (1) knowledge and appreciation of a risk, and (2) voluntary assumption of that risk. The standard to be applied in measuring knowledge and appreciation of the risk is a subjective one—one which measures what the particular plaintiff actually sees, knows, and understands and appreciates.

10. The cases permitting an instruction on both contributory negligence and assumption of risk are cited in note 149 infra.
13. See note 67 infra.
15. Id. § 496A.
16. Id. § 496D, Comment b.
17. Id. § 496D.
18. Id. § 496E.
19. Id. § 496D, Comment c. The subjective standard, however, is not absolute.
edge and appreciation of the risk notwithstanding, the plaintiff does not assume a risk of harm unless he voluntarily chooses to encounter that risk.\textsuperscript{20} If his words or conduct demonstrate that he refuses to accept the risk, then the plaintiff does not assume it.\textsuperscript{21} The purpose behind assumption of risk is based upon "the policy of the law which refuses to permit one who manifests willingness that another shall continue in a course of conduct to complain of it later if he is hurt as a result of it."\textsuperscript{22}

The defense of assumption of risk may involve an express or implied assumption of the danger by the plaintiff.\textsuperscript{23} A party expressly assumes the risk when he agrees in advance that another party is under no obligation to use reasonable care towards the former and that the other party will not be legally responsible for the consequences of his conduct which would otherwise be negligent.\textsuperscript{24} While there are certain situations where courts would refuse to uphold the plaintiff's express agreement to assume the risk,\textsuperscript{25} generally, where such an agreement is freely and fairly made between parties who are in an equal bargaining position, and there is no social interest with which it interferes, it will be upheld.\textsuperscript{26}

One impliedly assumes the risk where he knowingly and voluntarily encounters a risk, and without expressly agreeing to do so in advance, he is treated as if he agreed to watch out for himself and to relieve the defendant of any duty towards him.\textsuperscript{27} Although the basis of the defense is consent,\textsuperscript{28} this is generally considered a fictional term since the law deems the plaintiff to have given his consent to hold the defendant blameless without the manifestation of an express agreement.

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There are some risks of harm which are so clear and obvious that the plaintiff will not be heard to say that he did not comprehend the risk. \textit{Id.} § 496D, Comment d.\textsuperscript{20} \textit{Id.} § 496E.\textsuperscript{21} On the other hand, the fact that the plaintiff protests against the risk and demands protection against it, does not necessarily establish that he refuses to accept the risk. \textit{Id.} If he still proceeds voluntarily in the face of that danger, this conduct evinces consent to accept the risk, and such conduct outweighs his words of protest. \textit{Id.} \textsuperscript{22} \textit{Id.} § 496C, Comment b. \textsuperscript{23} \textit{Id.} §§ 496B, 496C. \textsuperscript{24} PROSSER, \textsc{Handbook of the Law of Torts} § 68, at 442 (4th ed. 1971); \textsc{Restatement (Second) of Torts} § 496B (1965). Normally, such an agreement takes the form of a contract; however, it is not essential that there be consideration for the agreement. \textit{Id.} § 496B, Comment a. The consent to assume the risk may be gratuitous; e.g., where a person rides on a train or enters a place of amusement on a pass. \textit{Id.} See V. SCHWARTZ, \textsc{Comparative Negligence} § 5.2, at 158 (1974). \textsuperscript{25} \textsc{Restatement (Second) of Torts} § 496B, Comment e (1965). \textsuperscript{26} \textit{Id.} § 496B, Comment b. \textsuperscript{27} W. PROSSER, \textsc{supra} note 24, § 68 at 445-51; V. SCHWARTZ, \textsc{supra} note 24, § 9.1 at 155. \textsc{See} \textsc{Restatement (Second) of Torts} § 496C (1965). \textsuperscript{28} W. PROSSER, \textsc{supra} note 24, § 68 at 445.
of an express agreement.29 This consent to danger, or assumption of risk, may be implied from the plaintiff’s conduct, but such a conclusion must be based on facts which fairly indicate that the plaintiff was willing to take his chances, and relieve the defendant of responsibility.30 Where a plaintiff comprehends a risk of danger arising from the defendant’s conduct and he voluntarily elects to proceed in the face of that danger, the plaintiff impliedly assumes the risk and is therefore barred from recovery as if he had expressly assumed the risk.31

DISTINCTIONS BETWEEN ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE

Whether a plaintiff expressly or impliedly assumes a risk, he may be acting in a very reasonable manner and not be guilty of any negligence on his part, because the benefits of his conduct outweigh the risk of harm.32 The plaintiff may even use extra care since he is aware of the danger ahead.33 That being the case, assumption of risk operates merely to negate the defendant’s negligence by denying the duty of care which would give rise to it; the plaintiff is not allowed to recover since as to him the defendant’s conduct is not considered legally wrong.34 Conversely, the plaintiff’s conduct in incurring a known risk may be in itself unreasonable where the danger is out of proportion to the benefits the plaintiff seeks to obtain.35 Where this is the case, the plaintiff’s conduct is also a form of contributory negligence, in which the neg-

29. V. SCHWARTZ, supra note 24, § 9.1 at 155.
30. See RESTATEMENT (SECOND) OF TORTS § 496C, Comment h (1965).
31. Id. § 496C, Comment b.
32. W. PROSSER, supra note 24, § 68 at 440.
33. Id.
34. Id.
35. Id. at 440-41. Dean Prosser states that the same rationale exists where the plaintiff accepts an altogether reasonable risk but fails to exercise proper care for his own protection against the risk. Id. at 441 n.20. Where the plaintiff deliberately chooses to encounter a risk created by the negligence of the defendant, and the plaintiff unreasonably encounters that risk, some courts and writers have called this secondary assumption of risk. These authorities consider the defense in this form to be an affirmative defense to an established breach of duty. See Rosenau v. City of Estherville, 199 N.W.2d 125, 131 (Iowa 1972); Springrose v. Willmore, 292 Minn. 23, ——, 192 N.W.2d 826, 827 (1971); Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, ——, 155 A.2d 90, 94-96 (1959); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 21.1, at 1162 (1956). Another form of assumption of risk, called primary assumption of risk, is not considered an affirmative defense. Springrose v. Willmore, 292 Minn. 23, ——, 192 N.W.2d 826, 827 (1971). Primary assumption of risk is said to be an alternate way of saying that the defendant was not negligent because he either owed no duty to the plaintiff or did not breach the duty owed. Id. at ——, 192 N.W.2d at 827; Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, ——, 155 A.2d 90, 93 (1959).
lichness constitutes making the wrong choice and voluntarily confronting a known unreasonable risk.\textsuperscript{36} Contributory negligence arises as a defense when the conduct of the plaintiff falls below that which a normal prudent person would exercise for his own protection, and such conduct is a legally contributing cause which combines with the negligence of the defendant and brings about the plaintiff's injuries.\textsuperscript{37}

Where the plaintiff's conduct in voluntarily incurring a known risk can be considered unreasonable, "the defenses of assumption of risk and contributory negligence overlap, and are as intersecting circles, with a considerable area in common, where neither excludes the possibility of the other."\textsuperscript{38} Confusion has extended to the question of whether, in this area of overlap, any true distinctions exist between assumption of risk and contributory negligence.\textsuperscript{39} However, there are a number of distinctions that traditionally have been drawn.

First, assumption of risk requires that the element of knowledge be measured subjectively as to what the particular plaintiff actually knew.\textsuperscript{40} Contributory negligence objectively evaluates the plaintiff as to what he should have known.\textsuperscript{41} It has been contended, however, that no real distinction exists in the standard of knowledge required by the two defenses, since most courts allow circumstantial evidence to be presented to rebut a plaintiff's claim that he did not comprehend a risk which must have been quite clear and obvious to him.\textsuperscript{42} If the plaintiff denies having knowledge of an obvious danger, a jury may still infer such knowledge where under the facts and circumstances any person of normal intelligence would have known of the danger.\textsuperscript{43} This is perhaps due to the fact that the law acknowledges a person's mental attitude only to the extent it is manifested in the person's overt acts.\textsuperscript{44} Hence, an investigation to determine a plaintiff's ac-

\textsuperscript{36} W. Prosser, supra note 24, § 68 at 441.
\textsuperscript{37} Restatement (Second) of Torts § 463 (1965).
\textsuperscript{38} W. Prosser, supra note 24, § 68 at 441.
\textsuperscript{39} Id. See also Rice, supra note 9, at 335; Note, Contributory Negligence and Assumption of Risk—The Case for Merger, 56 Minn. L. Rev. 47, 52 (1971) [hereinafter cited as Merger]; Note, 7 Nat. Res. J. 657, 657 (1967).
\textsuperscript{40} Restatement (Second) of Torts § 496D, Comment c (1965); W. Prosser, supra note 24, § 68 at 447.
\textsuperscript{41} Restatement (Second) of Torts § 496D, Comment c (1965); W. Prosser, supra note 24, § 68 at 447-48.
\textsuperscript{42} Restatement (Second) of Torts § 496D, Comment d (1965); W. Prosser, supra note 24, § 68 at 448.
\textsuperscript{43} See Restatement (Second) of Torts §§ 496D, 496E; W. Prosser, supra note 24, § 68 at 448.
\textsuperscript{44} Rice, supra note 9, at 377.
tual knowledge of the danger may involve the same factors used to ascertain whether or not the plaintiff was contributorily negligent.\textsuperscript{45}

A second distinction suggested is that assumption of risk refers to a plaintiff's state of mind, or "intelligent acquiescence" in a known danger, whereas contributory negligence refers to conduct.\textsuperscript{46} The element of consent in assumption of risk has been suggested as an alternate expression for the proposition that the plaintiff acquiesced in the danger created by the defendant.\textsuperscript{47} In this sense, consent implies that the plaintiff either passively or affirmatively agrees to accept the danger.\textsuperscript{48} The element of conduct in contributory negligence suggests that the plaintiff actively participated in causing his injuries either by his unreasonable action or inaction.\textsuperscript{49} On the other hand, it has been argued that intelligent acquiescence is in itself conduct since, for example, intelligent acquiescence in a known risk has been considered contributory negligence.\textsuperscript{50} It has been said that in many cases the plaintiff did not just passively agree to accept the risk caused by the defendant's negligence, but that he performed an act or conducted himself in such a manner that he could be found to have assumed the risk.\textsuperscript{51} The consent which is required for assumption of risk is found in the plaintiff's conduct, and therefore, no practical distinction exists between assumption of risk and contributory negligence by the use of the terms consent and conduct.\textsuperscript{52}

A third distinction arises under implied assumption of risk which requires that the plaintiff know of the danger and either acquiesce in it\textsuperscript{53} or voluntarily choose to encounter the danger created by the negligence of the defendant.\textsuperscript{54} Contributory

\textsuperscript{45} Id. "The jury cannot consider these circumstances from the plaintiff's subjective point of view, but rather must view these circumstances objectively in retrospect. Viewing these circumstances retrospectively, it is unlikely that the jury would be able to distinguish between what the plaintiff actually knew and what he should have known." Comment, Distinction Between Assumption of Risk and Contributory Negligence in Wisconsin, 1960 Wis. L. Rev. 460, 466. See also Merger, supra note 39, at 59-60.
\textsuperscript{46} Rice, supra note 9, at 339.
\textsuperscript{47} Comment, Distinction Between Assumption of Risk and Contributory Negligence in Wisconsin, 1960 Wis. L. Rev. 460, 467.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Rice, supra note 9, at 341.
\textsuperscript{51} Comment, Distinction Between Assumption of Risk and Contributory Negligence in Wisconsin, 1960 Wis. L. Rev. 460, 468.
\textsuperscript{52} Id.
\textsuperscript{53} W. Prosser, supra note 24, § 68 at 441.
\textsuperscript{54} Merger, supra note 39, at 51. Another distinction is that assumption of risk is not only a defense to negligent conduct but also to reckless conduct and conduct that may subject the defendant to strict liability. Contributory negligence, how-
negligence, on the other hand, rests upon the plaintiff being guilty of some fault or departure from the conduct a reasonable and prudent man would pursue.\textsuperscript{55} This distinction has been emphasized by a number of commentators who have concluded that there is no reason under any circumstances to permit implied assumption of risk to exist as an independent defense.\textsuperscript{56} According to these commentators, where a plaintiff is not negligent in voluntarily encountering a known risk, the problem should be analyzed in terms of an absence of any duty on the part of the defendant.\textsuperscript{57} Where the plaintiff is reasonable in assuming the risk of harm, the effect of the defense is that the defendant is not considered negligent.\textsuperscript{58} Negligence connotes a breach of a duty of care normally owed to the plaintiff.\textsuperscript{59} By impliedly consenting to the risk, however, the plaintiff has agreed to release the defendant from the duty of care that he would normally owe the plaintiff.\textsuperscript{60}

If the plaintiff is negligent in voluntarily encountering a known risk, then contributory negligence is seen as the appropriate defense.\textsuperscript{61} When the plaintiff's decision to confront a risk is an unreasonable one, this is careless conduct despite the fact that it may be voluntary.\textsuperscript{62} Voluntary conduct can be described as careless when the risk would not have been accepted by a reasonably prudent

\textsuperscript{55} W. PROSSER, supra note 24, § 88 at 441.
\textsuperscript{57} 2 F. HARPER & F. JAMES, supra note 35, § 21.1 at 1162, James, supra note 56, at 186-88; Merger, supra note 39, at 56; Note, 7 NAT. RES. J. 657, 662 (1967). See also RESTATEMENT (SECOND) OF TORTS, Memorandum of Prof. Laurence H. Eldredge at 73 (Tent. Draft No. 9, 1963). For a discussion of this approach, see W. PROSSER, supra note 24, § 88 at 454-57. Dean Prosser suggests that changing assumption of risk to a question of whether a defendant owed a duty to the plaintiff places upon the plaintiff "a real procedural disadvantage, with no corresponding gain." Id. § 88 at 455. The burden of proof to establish the duty and its breach is normally upon the plaintiff, and if he is unable to show that he did not consent or otherwise establish the duty of the defendant owed to the plaintiff, the plaintiff will lose. Id. The defense of assumption of risk, on the other hand, requires the defendant to plead and prove its elements, and if he fails, the plaintiff will recover. Id.
\textsuperscript{58} See note 57 supra.
\textsuperscript{59} See id.
\textsuperscript{60} See id.
\textsuperscript{61} 2 F. HARPER & F. JAMES, supra note 35, § 21.1 at 1162; Merger, supra note 39, at 58; Note, 7 NAT. RES. J. 657, 662-63 (1967).
\textsuperscript{62} Merger, supra note 39, at 61.
Therefore, the voluntary unreasonable conduct of the plaintiff can be described as contributory negligence as well as assumption of risk. Consequently, it is the view of these commentators that assumption of risk can be fit within the negligence paradigm, and that there is no reason to permit implied assumption of risk to exist as an independent defense whether the plaintiff's conduct is reasonable or unreasonable.

Since it is arguable that the distinctions outlined above "are not significant enough to warrant retaining assumption of risk as a separate doctrine," the defense has been criticized by both commentators and courts. While a number of authorities have ad-

63. Id.
64. Id.
65. See note 56 supra.
68. Leavitt v. Gillaspie, 443 P.2d 61, 68 (Alas. 1968) ("the traditional notions of negligence and contributory negligence should govern cases such as we have here and . . . assumption of risk should not be a defense and should not be used."); Frelick v. Homeopathic Hosp. Ass'n, 51 Del. 568, 150 A.2d 17, 19 (Super. Ct. 1959) (injury due to dangerous conditions of premises: "In this type of case, where a risk has been created by a defendant's breach of duty toward the plaintiff, the problem of voluntary assumption of risk overlaps the contributory negligence problem, or rather is a phase of that problem"); Blackburn v. Dorta, 348 So. 2d 287, 293 (Fla. 1977) (merging assumption of risk with contributory negligence); Bulatao v. Kauai Motors, Ltd., 49 Hawaii 1, -, 406 P.2d 887, 895 (1965) ("[W]e join the growing number of courts which decline to permit reliance on both of these defenses where one would serve."); Huckabee v. Bell & Howell, Inc., 47 Ill. 2d 153, —, 265 N.E.2d 134, 139 (1970) ("However, it is now clear that so-called assumption of risk is not a defense to an action based on common-law negligence."); Rosenau v. City of Estherville, 199 N.W.2d 125, 133 (Iowa 1972) ("We thus abolish assumption of risk as a separate defense in all cases in which contributory negligence is now available as a defense."); Parker v. Redden, 421 S.W.2d 586, 592 (Ky. Ct. App. 1967) ("We have reached the point in this discussion where we must say what we are going to do about assumption of risk. The answer is that we are going to abolish it."); Felgner v. Anderson, 375 Mich. 23, —, 133 N.W.2d 136, 153 (1965) (separate existence of assumption of risk as a defense rejected except in cases involving master-servant and express contractual assumption of risk); Springrose v. Willmore, 292 Minn. 23, —, 192 N.W.2d 826, 827 (1971) ("The doctrine of implied assumption of risk must, in our view, be recast as an aspect of contributory negligence. . . ."); Bolduc v. Crain, 104 N.H. 163, —, 181 A.2d 641, 644 (1962) ("[I]t was long ago settled that the defense of assumption of risk is not available to a defendant in a common-law tort action such as this."); Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, —, 155 A.2d 90, 95 (1959) ("[W]e think it clear that assumption of risk in its secondary sense is a mere phase of contributory negligence. . . ."); McWilliams v. Parham, 269 N.C. 162, —, 152 S.E.2d 117, 120 (1967) ("It is well established in this jurisdiction that assumption of risk is not available as a defense to one not in a contractual relationship to the plaintiff."); Ritter v. Beals, 225 Or. 504, —, 358 P.2d 1080, 1086 (1961) ("Nothing is added to contributory negligence, except confusion, when facts
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vocated the total abolishment of assumption of risk,\(^6\) the general dissatisfaction with implied assumption of risk arises where the plaintiff unreasonably encounters a danger with knowledge and appreciation of that danger.\(^7\) As discussed above, an unreasonable encounter of danger is also contributory negligence and the courts may apply either that defense or assumption of risk.\(^7\) In this instance a defendant has available two separate defenses for the same conduct of the plaintiff. For this reason a number of courts have advocated the abolishment of unreasonable assumption of risk as an independent defense.\(^7\) The defense of assumption of risk is said to create confusion when applied to the issue of whether the plaintiff unreasonably encountered a risk of harm.\(^7\) Where there is evidence that the plaintiff may have acted unreasonably in assuming the risk, contributory negligence would also apply.\(^7\) Yet, even if the jury were to find that the plaintiff was not contributorily negligent in this instance, the presence of assumption of risk as a separate defense still makes it possible for the jury to conclude that the plaintiff unreasonably assumed the risk.\(^7\) Thus, this creates the potential of a verdict for the defendant notwithstanding the fact that the jury may conclude that the plaintiff exercised the care of a reasonably prudent man under all the

which constitute contributory negligence are pleaded in a separate defense of assumption of risk.”); Farley v. M.M. Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975) (“We therefore hold that . . . henceforth in the trial of all actions based on negligence, volenti non fit injuria—he who consents cannot receive an injury—or, as generally known, voluntary assumption of risk, will no longer be treated as an issue.”); Lyons v. Redding Constr. Co., 515 P.2d 821, 826 (Wash. 1973) (“Our review of the history and function of assumption of risk leads us to the conclusion that . . . the doctrine, assumption of risk, should have no continued existence. . . . where the defense of contributory negligence is now available.”); McConville v. State Farm Mut. Auto. Ins. Co., 15 Wis. 2d 374, ———, 113, N.W.2d 14, 16 (1962) (A guest’s implied assumption of risk “is no longer a defense separate from contributory negligence”); Ford Motor Co. v. Arguello, 382 P.2d 886, 891 (Wyo. 1963) (“Distinctions between assumption of risk and contributory negligence have not been adopted in Wyoming.”).

69. For cases which have explicitly abolished assumption of risk in all instances except where there has been an express contractual assumption of risk, see Blackburn v. Dorta, 348 So. 2d 287, 290-93 (Fla. 1977); Felgner v. Anderson, 375 Mich. 23, ———, 133 N.W.2d 136, 153 (1965); Bolduc v. Crain, 104 N.H. 163, ———, 181 A.2d 641, 644 (1962); McWilliams v. Parham, 269 N.C. 162, ———, 152 S.E.2d 117, 120 (1967). For an authority who also advocates the abolishment of assumption of risk except where there is an express actual agreement to assume the risk, see F. HARPER & F. JAMES, supra note 35, § 21.8 at 1191.


71. W. PROSSER, supra note 24, § 68 at 441.

72. See cases cited in note 70 supra.

73. Id.

74. Id.

75. Id.
In essence, then, these courts have concluded that the function performed by assumption of risk in this situation is adequately handled by contributory negligence and it is therefore unwise to allow assumption of risk to exist, so as to potentially deprive a reasonably prudent plaintiff of recovery.\textsuperscript{77}

In a jurisdiction that recognizes both doctrines as a complete bar to the plaintiff's recovery, the choice of which defense to apply may not always be significant.\textsuperscript{78} But where the state has a comparative negligence statute the choice could make a significant difference.\textsuperscript{79} A comparative negligence statute may permit some recovery by the plaintiff notwithstanding his contributory negligence.\textsuperscript{80} Since assumption of risk bars all recovery, treating the plaintiff's conduct as assumption of risk in addition to contributory negligence may defeat the intent of the statute; "the purpose of the act would appear to be to reduce the damages in the case of all such negligent conduct, whatever the defense may be called."\textsuperscript{81} Of thirty-one states which have comparative negligence statutes,\textsuperscript{82} courts from seven states have merged implied assumption of risk with contributory negligence.\textsuperscript{83} Four more states have eliminated assumption of risk as an absolute defense by express language in their comparative negligence statutes.\textsuperscript{84}

**Assumption of Risk in Automobile Guest Cases**

Commonly, in order for the doctrine of assumption of risk to apply to a guest or passenger in a motor vehicle, a hazard or danger inconsistent with the safety of the guest must exist, the occupant must have knowledge or appreciation of the risk, and he must acquiesce or willingly continue to ride despite the danger.\textsuperscript{85} In assuming the risk of riding with the driver, the passenger assumes all the ordinary risks of injury from dangers and accidents which are incidental to motor vehicle travel.\textsuperscript{86} To determine what are ordinary risks, the purpose and character of the outing can be con-

\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} W. PROSSER, supra note 24, § 68 at 441.
\textsuperscript{79} Id. at 456-57.
\textsuperscript{80} Prosser, Comparative Negligence, 51 Mich. L. Rev. 465, 465 n.2 (1953).
\textsuperscript{81} RESTATEMENT (SECOND) OF TORTS § 496A, Comment d (1965); see W. PROSSER, supra note 24, § 68 at 456-57.
\textsuperscript{82} V. SCHWARTZ, supra note 24, Appendix A at 367-69 and Supp. 147-48.
\textsuperscript{83} Id. § 9.4 at 167-71 and Supp. 58-59. Those seven states are: Florida, Maine, Minnesota, North Dakota, Texas, Washington, and Wisconsin. Id.
\textsuperscript{84} Id. §§ 9.2, 9.4 at 159-61, 165-67 and Supp. 54, 55, 57. Those states include: Connecticut, New York, Oregon, and Utah. Id.
\textsuperscript{85} 5 BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 215.6, at 306 (1966).
\textsuperscript{86} Id. § 215.6 at 307.
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sidered.\textsuperscript{87} Where the purpose and character entail driving in a negligent manner, which is understood by all passengers, each is said to assume the risks of such negligence.\textsuperscript{88} The concepts of assumption of risk and contributory negligence have been applied interchangeably by courts hearing substantially similar factual situations involving the automobile guest.\textsuperscript{89} The best illustration of this confusion occurs where the guest accepts a ride from an intoxicated driver.\textsuperscript{90} If the guest voluntarily enters the vehicle knowing that the driver is intoxicated and understanding the danger in riding with a driver in such an impaired state, the guest can be said to have assumed that risk of harm.\textsuperscript{91} On the other hand, the guest's conduct in riding with the intoxicated driver may be said to be unreasonable and to constitute contributory negligence as well.\textsuperscript{92} While most courts have treated this conduct as constituting contributory negligence, others have concluded that it should be treated as assumption of risk.\textsuperscript{93}

As in other types of negligence,\textsuperscript{94} the defense of assumption of risk has not escaped criticism in its application to automobile guest cases.\textsuperscript{95} In addition to the reasons for abrogating the doctrine that have already been discussed,\textsuperscript{96} it is also thought that in an area where deterrence is singularly attractive, assumption of risk does not serve to deter drunken drivers from driving while intoxicated even though that conduct is generally considered unlawful.\textsuperscript{97} Secondly, it would also appear to be desirable to distribute a guest's loss among drivers via liability insurance premiums rather than leaving a substantial portion of the loss for the guest alone to bear.\textsuperscript{98}

NEBRASKA LEGISLATION AND CASE LAW

Notwithstanding the many arguments for abrogating the de-

\textsuperscript{87} Id. § 215.6 at 308.
\textsuperscript{88} Id.
\textsuperscript{89} Rice, supra note 9, at 347-49.
\textsuperscript{90} Id. at 349.
\textsuperscript{91} See, e.g., Borstad v. LaRoque, 98 N.W.2d 16, 25-26 (N.D. 1959).
\textsuperscript{93} Rice, supra note 9, at 349.
\textsuperscript{94} See discussion at notes 71-90 and accompanying text supra.
\textsuperscript{95} See generally Pedrick, supra note 67.
\textsuperscript{96} See notes 66-84 and accompanying text supra.
\textsuperscript{97} Pedrick, supra note 67, at 102, 104, where contributory negligence is a complete defense it may also not deter drunken drivers from driving. But where the state has a comparative negligence system, contributory negligence by reducing, rather than extinguishing, recovery will serve as a deterrent for both the driver and the passenger. See notes 258-260 and accompanying text infra.
\textsuperscript{98} Id. at 103-04. See also note 261 and accompanying text infra.
fense of implied assumption of risk in general, and especially in comparative negligence jurisdictions, the Nebraska Supreme Court has recently affirmed a line of decisions upholding the defense in automobile guest cases. The court refused to reconsider its position on assumption of risk despite the fact that most of the Nebraska decisions which uphold the application of the defense in automobile guest cases had cited as authority for their conclusion a case which seemed to hold that the guest's conduct in such cases should be treated as contributory negligence and not as assumption of risk. An analysis of Nebraska legislation and case law specifically dealing with this problem follows.

In order for an automobile guest to successfully bring an action in Nebraska against the owner or operator of a motor vehicle, he must prove that the injury resulted from the gross negligence or intoxicated state of the driver. Additionally, the Nebraska comparative negligence statute has been held to apply to actions arising under the automobile guest statute. Thus, when an automobile guest brings an action in Nebraska against the owner or operator of a motor vehicle he must prove either that the defendant was driving while under the influence of liquor or that he was grossly negligent in driving in order to comply with the state's guest statute. If he fails to do so, the owner will not be liable. Furthermore, if the defense of contributory negligence is permitted under the facts of the case, the guest is entitled to some recovery only if his contributory negligence was slight and the negligence of the owner or operator of the vehicle was gross in comparison.

One of the first cases in Nebraska to approve of assumption of risk as a defense in an automobile guest case was Kelly v. Gagnon. Five years later the court expressly rejected the defense in guest cases but removed this discussion in the final report of the

100. Landrum v. Roddy, 143 Neb. 934, 12 N.W.2d 82 (1943).
104. Landrum v. Roddy, 143 Neb. 934, 943, 12 N.W.2d 82, 88 (1943).
105. 121 Neb. 113, 236 N.W. 160 (1931). The court stated: "'Guests who accept the hospitality of the driver of an automobile accept whatever risk attends the degree of proficiency of such driver and his usual and customary habits of driving with which they are familiar'..." Id. at 119, 236 N.W. at 163. This case preceded the Nebraska guest statute which became effective that same year and placed plaintiff's recovery as a guest dependent upon gross negligence. 1931 Neb. Laws Ch. 105, § 1, at 278-79 (current version at Neb. Rev. Stat. § 39-6, 191 (Reissue 1974)).
106. Baylor, Assumption of Risk and Contributory Negligence Under the Guest Statute, 15 Neb. L. Bull. 318, 322 (1937) (quoting Hendren v. Hill, 5 S.C.J. 723, ——, (1936)). The court stated in the advance report of its opinion: "The doctrine of assumption of risk does not apply where the relation of the parties is that of guest and
The court simply stated that even if the doctrine of assumption of risk did apply to this particular case, the evidence was insufficient to establish the defense. So it seems that at that point in time the status of assumption of risk in Nebraska was uncertain.

The most extensive discussion of assumption of risk in Nebraska is found in Landrum v. Roddy, where the Nebraska Supreme Court sought to determine whether assumption of risk was available in a tort action in Nebraska based on negligence. The plaintiff in Landrum averred the following facts. The plaintiff and the defendant had often embarked on automobile trips together, where it was customary for them to drink while traveling at high speeds. On the trip in the instant case the plaintiff testified that the defendant drove at a speed of eighty to ninety miles per hour and had consumed four or five drinks. Numerous stops were made along the way, including one shortly before the accident, where each had another drink. The plaintiff testified that after this stop the defendant proceeded to drive the car about eighty miles per hour. The car subsequently was driven into a ditch injuring the plaintiff. The defendant disputed the majority of plaintiff's evidence, specifically denying that she had that many drinks of liquor and that the plaintiff had protested against the host. It is true that a guest acquiescing in the undue speed with which a car is being driven is barred from recovering for an injury caused by such excessive speed, but the bar exists from the doctrine of negligence, and not from assumption of risk.” Hendren v. Hill, 5 S.C.J. 723, —, (1936), quoted in Baylor, supra, at 322. Baylor believes one of the reasons the court denied the right to raise the assumption of risk defense was because the defense is identical to contributory negligence and can only be presented when the latter may be raised. Baylor, supra, at 323.

Baylor, supra note 108, at 322. The final opinion of the Hendren court is at 131 Neb. 163, 267 N.W. 340 (1936).

108. 131 Neb. at 169, 267 N.W. at 343. The court stated that even “[i]f we concede that the doctrine of assumption of risk applies in this case, which we do not, still the evidence falls far short of disclosing a situation” that the plaintiff had assumed the risk. Id.

109. But see Note, Assumption of Risk as a Defense in Nebraska Negligence Actions Under the Comparative Negligence Statute, 30 Neb. L. Rev. 608, 621 (1951) [hereinafter cited as Nebraska Negligence Actions]. This author suggests that these early cases “would seem to indicate that assumption of risk might be a separate and complete defense.” Id. The author distinguishes Kelly, however, “because there was no evidence of negligence by the defendant; hence, the issue of assumption of risk should not have arisen in the case.” Id. at 621 n.70.

110. 143 Neb. 934, 12 N.W.2d 82 (1943).
111. Id. at 936-37, 12 N.W.2d at 85.
112. Id. at 938, 12 N.W.2d at 85.
113. Id.
114. Id.
115. Id.
speed at which the defendant was driving. At the trial the plaintiff asserted that the defendant was driving while under the influence of intoxicating liquors and was grossly negligent in operating the automobile. The defendant denied she was grossly negligent and affirmatively pled that the plaintiff was contributorily negligent and had assumed the risks of harm incidental to the trip. The court refused to give an instruction with reference to assumption of risk. The jury rendered a verdict in favor of the plaintiff and the defendant appealed to the supreme court. The supreme court first addressed the issue of whether the facts were sufficient to sustain a finding of gross negligence on the part of the defendant. The court concluded "that under the facts as disclosed by the record the question of whether the defendant was in this case guilty of gross negligence is for the jury." The court went on to find that the comparative negligence statute applied in an action under the guest statute when the action is based on gross negligence.

The court next considered whether an instruction on assumption of risk should have been given to the jury. The court conducted a fairly exhaustive discussion on assumption of risk as a defense in a negligence action. The court first noted that assumption of risk in Nebraska had initially been confined to the master-servant relationship, but later extended to situations involving an obvious risk of harm to a person invited upon the premises of another. The court indicated that Kelly v. Gagnon.

116. Id. at 938-39, 12 N.W.2d at 85-86.
117. Id. at 935-36, 12 N.W.2d at 84. The trial court did not submit to the jury the question of whether the defendant was driving while under the influence of liquor and the supreme court approved this action. Id. The court went on to point out that this did not "affect the evidence of her drinking with reference to the question of whether or not she [defendant] was guilty of gross negligence." Id.
118. See id. at 940, 12 N.W.2d at 86.
119. Id. at 943, 12 N.W.2d at 88 assumption of risk. There is no explicit statement in the case regarding the issue of contributory negligence at the trial level, but the supreme court reversed a judgment for the plaintiff and ruled that an instruction on contributory negligence should have been submitted to the jury. Id. at 943, 12 N.W.2d at 90.
120. Id.
121. Id. at 935, 12 N.W.2d at 84.
122. Id. at 939, 12 N.W.2d at 86.
123. Id. at 940, 12 N.W.2d at 86.
124. Id. at 943, 12 N.W.2d at 88.
125. Id.
126. Id. at 943-49, 12 N.W.2d at 88-90.
127. Id. at 944, 12 N.W.2d at 88 (quoting Wilkins v. Water & Light Co., 92 Neb. 513, 521, 138 N.W. 754, 757 (1912)).
128. Id. (quoting Thompson v. YMCA, 122 Neb. 843, 851, 241 N.W. 565, 568 (1932)).
129. 121 Neb. 113, 236 N.W. 160 (1931).
established in Nebraska that automobile guests assume the risk of a driver’s skill and customary habits of driving with which the guest is familiar.\textsuperscript{130} The court opined that such a rule had been inferentially approved in two later Nebraska decisions.\textsuperscript{131} The \textit{Landrum} court deduced that “[f]rom a survey of the many cases on the subject it now seems well established that one who voluntarily assumed the risk of injury from a known danger is barred from a recovery in a negligence case within the maxim of ‘volenti non-fit injuria.’”\textsuperscript{132} The \textit{Landrum} court did not culminate its discussion with this conclusion, however, and emphasized that “[s]ince the application of the maxim is extending beyond contractual relations the doctrine of assumption of risk, its application must be strictly limited to the terms thereof.”\textsuperscript{133} The court stated that:

This principal operates in a rather strictly limited view. A person, in entering upon an undertaking, may be fully aware of the danger and may use all the care that it is possible to use; in fact, the very danger involved may make him more careful than usual. Certainly in such a case it cannot be said that he is guilty of contributory negligence. However, there is a question involved of whether or not he has voluntarily assumed the risk of the danger . . . Within the limits of its terms the maxim of “volenti non-fit injuria” is applicable to negligence actions in this jurisdiction.\textsuperscript{134} This language suggests that assumption of risk is limited in its application to those situations where the defense of contributory negligence is not applicable. In other words, the doctrine of assumption of risk could only apply where the plaintiff was reasonable in assuming the risk.

Support for this conclusion can be found in the court’s attempt to carefully distinguish assumption of risk from contributory negligence. Contributory negligence, the court stated, implies the failure of the plaintiff to exercise due care, whereas assumption of risk “involves a choice made more or less deliberately and negatives liability without reference to the fact that the plaintiff may have acted with due care.”\textsuperscript{135} While under a certain set of facts the court acknowledged that the two defenses “may be difficult to distin-

\textsuperscript{130} 143 Neb. at 944, 12 N.W.2d at 88.
\textsuperscript{131} \textit{id.} at 944, 12 N.W.2d at 88 (citing Swengil v. Martin, 125 Neb. 745, 252 N.W. 207 (1933) and McGrath v. Nugent, 133 Neb. 237, 274 N.W. 549 (1937)).
\textsuperscript{132} \textit{id.} at 944, 12 N.W.2d at 88. The maxim has been defined as “he who consents cannot receive any injury.” \textit{Sandberg v. Hoogensen}, 201 Neb. 190, 196, 266 N.W.2d 743, 749 (1978).
\textsuperscript{133} 143 Neb. at 945, 12 N.W.2d at 89.
\textsuperscript{134} \textit{id.} at 945-46, 12 N.W.2d at 89.
\textsuperscript{135} \textit{id.} at 947, 12 N.W.2d at 89.
guish and sometimes seem to overlap, yet when carefully considered they can be distinguished and are distinct and separate and not inconsistent.\textsuperscript{136}

Turning to the facts before it, the court squarely addressed the question of whether these facts presented an issue of contributory negligence, or assumption of risk, or both.\textsuperscript{137} The court recognized that situations may exist where the conduct of the guest cannot be said to be unreasonable or negligent.\textsuperscript{138} The court said that in those situations, if the guest had full knowledge and voluntarily accepted the risks of harm which caused the accident, assumption of risk may apply.\textsuperscript{139} The \textit{Landrum} court concluded, however, that "generally the question of whether or not the conduct of the guest while riding in the car of his host would preclude him from recovering damage if his host is guilty of gross negligence and causing the same is one of contributory negligence."\textsuperscript{140} The narrow holding of \textit{Landrum}, thus, is that in the factual situation of an automobile guest riding with an intoxicated driver, whether or not the conduct of a guest in assuming the risk of riding with the intoxicated driver will preclude him from recovering any damages from the driver is a question of contributory negligence.\textsuperscript{141}

Unless it is accepted that the defense of assumption of risk in Nebraska is confined to those situations where contributory negligence is not present under the facts of the particular case, then clearly the facts of \textit{Landrum} presented an issue of assumption of risk.\textsuperscript{142} The court's discussion of how to treat assumption of risk generally as a defense in Nebraska negligence actions may seem

\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id. at 948, 12 N.W.2d at 90.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id. at 948-49, 12 N.W.2d at 90.
\textsuperscript{142} See id. at 947-48, 12 N.W.2d 89-90. Before addressing the issue of whether the facts presented a question of assumption of risk, contributory negligence or both, the court restated the facts as follows. The plaintiff knew from past experiences that the defendant drove fast and customarily drank intoxicating liquors while driving; in fact, the plaintiff had even drank with the defendant on such trips. Fully aware of this information the plaintiff voluntarily consented to ride in defendant's car on the fateful ride from which the cause of action arose. She fully realized the danger for she warned the defendant without success that her fast driving made her nervous. She also had at least one opportunity to make use of other transportation, yet she chose otherwise. \textit{Id.} These facts clearly present the essential elements of assumption of risk even as described by the \textit{Landrum} court: knowledge of the risk, realization or appreciation of the danger and voluntary exposure or assent thereto. \textit{Id.} at 944, 12 N.W.2d at 88. However, the court in \textit{Landrum} did not allow an instruction on assumption of risk to be given as defendant had requested. \textit{Id.} at 948-49, 12 N.W.2d at 90. \textit{See also Nebraska Negligence Actions, supra} note 109, at 623.
unclear. But, on precisely the question of whether the conduct of a guest while riding in the car of his host constitutes assumption of risk, contributory negligence, or both, the court clearly held that it was generally an issue of contributory negligence, and on the facts before it, the court refused to give an instruction on assumption of risk.

Landrum has accordingly been read as standing for the proposition that under the Nebraska comparative negligence statute "damages are to be apportioned where there is negligent assumption of risk, as in other cases of negligence of the plaintiff." The Restatement (Second) of Torts cites Landrum as the source of its illustration involving a jurisdiction which has a comparative negligence statute that is silent concerning the vitality of assumption of risk. According to the illustration, if the plaintiff can be found to have unreasonably assumed the risk, then the comparative negligence statute should be construed to encompass the plaintiff's conduct and to reduce the damages recoverable by him. In effect, this proposition states that assumption of risk should not completely bar recovery in a comparative negligence action.

143. While certain portions of the Landrum decision apparently warrant the use of assumption of risk as a separate and complete defense in Nebraska, 143 Neb. 934, 944-46, 12 N.W.2d 82, 88-89, this runs contrary to the actual holding as discussed above. See note 142 and accompanying text infra. This anomaly remains inexplicable. A possible explanation may arise in the fact that prior to the discussion of assumption of risk the court overruled an earlier case, Sheehy v. Aboud, 126 Neb. 554, 253 N.W. 683 (1934), which did not permit the comparative negligence statute to apply to actions arising under the motorist guest statute. 143 Neb. 934, 943, 12 N.W.2d 82, 88. Perhaps without expressly stating so, the court recognized the apparent conflict between the purpose of a comparative negligence statute and the effect of permitting assumption of risk to exist as a complete and independent defense. See Merger, supra note 39, at 71, where the author suggests that in Landrum "[t]he Nebraska court, at least by implication, has discussed the effect its comparative negligence statute should have on assumption of risk." Id.

144. 143 Neb. at 948-49, 12 N.W.2d at 90.
145. W. Prosser, supra note 24, § 68 at 457 & n.71.
146. Restatement (Second) of Torts § 496A, Comment d, Illustration 3 (1965).
147. Restatement (Second) of Torts Appendix § 496A, Comment d, Illustration 3 (1966).
148. Restatement (Second) of Torts § 496A, Comment d, Illustration 3 (1965). Another writer believes that assumption of risk exists as a defense in Nebraska, "but it has vitality only as one type of contributory negligence." Nebraska Negligence Actions, supra note 109, at 628. In an article discussing the suitability of assumption of risk in automobile guest cases where the driver is intoxicated, one author includes Landrum among those cases which are not sympathetic to the doctrine of assumption of risk, and instead elect to "assimilate" the entire conduct of the plaintiff "to the defense of contributory negligence." Pedrick, supra note 67, at 95 & n.18; cf. Merger, supra note 39, at 71 (result in Landrum suggests a merger of the two defenses although the court noted distinctions). Contra, V. Schwartz, supra note 24, § 9.3, at 161-62.
jurisdiction where the same conduct of the plaintiff could be described as either assumption of risk or contributory negligence.

Although the holding of Landrum seems clear, subsequent Nebraska cases have consistently determined that an instruction on assumption of risk as well as contributory negligence is proper under circumstances indistinguishable from Landrum.\(^{149}\) What is even more perplexing is that nearly all of these cases cite Landrum as authority for holding that an instruction on assumption of risk is appropriate under such circumstances.\(^{150}\)

The cases subsequent to Landrum can be separated into three categories according to how the issues were framed before the court. One category consists of those cases in which the defendant driver lost at the trial level and then on appeal alleged that as a matter of law the plaintiff had assumed the risk.\(^{151}\) A second category involves a case in which the plaintiff passenger lost at the trial level and on appeal the plaintiff argued that it was error for the trial court to give an instruction on assumption of risk.\(^{152}\) A third category includes cases in both of the above categories, but in which the court seems to apply the same test for both assumption of risk and contributory negligence, ultimately deriving its authority for so doing from Landrum.\(^{153}\)

The first automobile guest case following Landrum is representative of the cases in the first category. In Hess v. Holdsworth,\(^ {154}\) the plaintiff-passenger accompanied the defendant-driver in the latter's car into a nearby town where they stopped for


\(^{154}\) 176 Neb. 774, 127 N.W.2d 487 (1964).
a drink, purchased some liquor, and then traveled to another tavern.\textsuperscript{155} Although much of the evidence was disputed by both sides, both parties agreed that the defendant was not, or at least did not appear intoxicated.\textsuperscript{156} When the plaintiff decided to leave, he asked someone other than the defendant to drive him home.\textsuperscript{157} The defendant insisted that the plaintiff ride home with him, however, and the plaintiff complied.\textsuperscript{158} After leaving, en route home, the defendant missed a turn at a T-intersection and ran into a ditch alongside the road injuring the plaintiff.\textsuperscript{159} The plaintiff asserted that he warned the defendant—though the defendant disputed this\textsuperscript{160}—that he was driving too fast and instructed him to slow down.\textsuperscript{161} At trial the plaintiff-guest sought to establish that the defendant-driver was grossly negligent.\textsuperscript{162} The defendant, on the other hand, affirmatively alleged that the plaintiff was guilty of contributory negligence and assumption of risk in, \textit{inter alia}, riding with a driver who, in the presence of the plaintiff, had consumed intoxicating liquors which impaired the defendant’s driving reactions and responses.\textsuperscript{163} The jury found for the plaintiff-guest and judgment was accordingly entered against the defendant.\textsuperscript{164} On appeal, the driver argued that the trial court should have ruled as a matter of law that the guest was more than slightly contributorily negligent and had also assumed the risk of riding with the driver.\textsuperscript{165} The supreme court did not agree. The court acknowledged that there was evidence which could establish that the plaintiff was either contributorily negligent or had assumed the risk involved in riding with the defendant.\textsuperscript{166} It also noted that there was evidence to the contrary, and held that it was for the jury to decide which side to believe.\textsuperscript{167}

On the surface of the opinion, then, it appears as though \textit{Hess} expressly warrants the application of assumption of risk in drinking party cases. Yet, the defendant’s version of the facts parallels

\textsuperscript{155} Id. at 780, 127 N.W.2d at 491.
\textsuperscript{156} Id. at 781, 783, 127 N.W.2d at 492-93.
\textsuperscript{157} Id. at 780, 127 N.W.2d at 491-92.
\textsuperscript{158} Id.
\textsuperscript{159} Id. at 776, 781, 127 N.W.2d at 490, 492.
\textsuperscript{160} Id. at 776, 127 N.W.2d at 489.
\textsuperscript{161} Id. at 781, 127 N.W.2d at 492.
\textsuperscript{162} Id. at 775, 127 N.W.2d at 489.
\textsuperscript{163} Id. at 776, 127 N.W.2d at 493. The defendant also alleged that the plaintiff was familiar with defendant's driving habits, had not left the defendant's vehicle when he had the opportunity to do so, and had failed to maintain a proper look out or to warn of upcoming dangers and the speed of the auto. \textit{Id.}
\textsuperscript{164} Id. at 776, 127 N.W.2d at 489.
\textsuperscript{165} Id. at 784, 127 N.W.2d at 493.
\textsuperscript{166} Id. at 786-87, 127 N.W.2d at 494-95.
\textsuperscript{167} Id.
the facts of Landrum,\textsuperscript{168} and clearly under such facts Landrum allowed only an instruction on contributory negligence.\textsuperscript{169} Had the jury rendered a verdict for the defendant in Hess, the plaintiff would have undoubtedly appealed any instruction on the defense of assumption of risk, since Landrum under similar circumstances had allowed only an instruction on contributory negligence.\textsuperscript{170} Since the jury returned a verdict for the plaintiff in Hess, the court may have deemed it unnecessary to address the narrow holding of Landrum. Limiting the case only to the issues before it, Hess could be read to hold only that the evidence did not establish that as a matter of law the plaintiff had assumed the risk of riding with the defendant.\textsuperscript{171}

Another case in the first category is Kaufman v. Tripple.\textsuperscript{172} The defendant-driver, having lost in the trial court, appealed arguing that his motion for directed verdict should have been upheld by the trial court because as a matter of law the contributory negligence of the plaintiff was more than slight and assumption of risk by the plaintiff-passenger should have been found as a matter of law.\textsuperscript{173}

The court addressed the contributory negligence issue first, finding it appropriate that it was left to the jury in this case.\textsuperscript{174} It stated that a guest who knows, or ought to have known, that the host driver was under the influence of intoxicating liquor to the extent it was dangerous to ride with him, yet who voluntarily exposed himself to this danger, is guilty of contributory negligence.\textsuperscript{175}

\begin{itemize}
  \item \textsuperscript{168} The facts considered by the court in Landrum are set forth at note 142 supra.
  \item \textsuperscript{169} Landrum v. Roddy, 143 Neb. 934, 948-49, 12 N.W.2d 82, 89-90 (1943).
  \item \textsuperscript{170} Id. See notes 137-144 and accompanying text supra.
  \item \textsuperscript{171} 176 Neb. at 788-89, 127 N.W.2d at 495-96. It is interesting to note that assumption of risk and contributory negligence were both made subject to the instruction on comparative negligence. Id. at 789, 127 N.W.2d at 496. These instructions were specifically agreed upon and stipulated to by the parties. Id. Nevertheless, it does suggest that assumption of risk in this case was not an absolute defense.
  \item \textsuperscript{172} 180 Neb. 593, 144 N.W.2d 201 (1966). Plaintiff accompanied defendant, a wholesale beer distributor, on a business trip designed to promote the latter's business. Over a span of about 12 hours, they visited several taverns. The plaintiff testified that at the last tavern visited the defendant consumed eight to nine bottles of beer. Id. at 595, 144 N.W.2d at 204. While driving home, the defendant fell asleep and wrecked the car, injuring the plaintiff. Id. The plaintiff also testified that before getting into the car for the return trip home, he inquired whether defendant was in a condition to drive. Upon defendant's assurances, plaintiff entered the vehicle. Id. The defendant disputed much of the above testimony. Id. at 595-96, 144 N.W.2d at 204.
  \item \textsuperscript{173} Id. at 598-99, 144 N.W.2d at 205-06.
  \item \textsuperscript{174} Id. at 599, 144 N.W.2d at 206.
\end{itemize}
gence.\textsuperscript{175} It is evident that this rule also includes the elements of assumption of risk.\textsuperscript{176} By implication the \textit{Kaufman} court suggests that a plaintiff who knows of the driver's intoxication and the corresponding danger of riding with him yet voluntarily chooses to ride with him, has unreasonably assumed the risk and is therefore guilty of contributory negligence.

The court also found that the motion for directed verdict based on the ground that assumption of risk should be found in this case as a matter of law could not be sustained.\textsuperscript{177} Generally, the court stated, the question is one for the jury and such is the case here as presented by the facts.\textsuperscript{178} It appears from the court's discussion that the issue of assumption of risk was submitted to the jury.\textsuperscript{179} It is not known whether it was submitted as a complete and independent defense. In dictum the \textit{Kaufman} court recognized that assumption of risk is not inconsistent with contributory negligence.\textsuperscript{180} The court distinguished the two doctrines by noting that contributory negligence requires the plaintiff's negligence to be a proximate cause or a proximately contributory cause of the injury while assumption of risk may not have a role in causing plaintiff's injury.\textsuperscript{181} By its extensive discussion of assumption of risk, the \textit{Kaufman} court seemed to indicate even more so than \textit{Hess} that assumption of risk may be applied in automobile guest-intoxicated driver cases. Yet, like \textit{Hess},\textsuperscript{182} \textit{Kaufman} could be read as holding merely that the evidence before the court could not support a finding that the plaintiff had as a matter of law assumed the risk.\textsuperscript{183}

\begin{itemize}
\item \textsuperscript{175} \textit{Id.}
\item \textsuperscript{176} As stated above, the two elements of the defense of assumption of risk are knowledge and appreciation of the danger, and voluntary exposure to that danger. See notes 17-18 and accompanying text \textit{supra.}
\item \textsuperscript{177} 180 Neb. at 600, 144 N.W.2d at 206.
\item \textsuperscript{178} \textit{Id.} The court cited \textit{Landrum} for this proposition: "Whether or not the knowledge of a guest, that the host driver of an automobile has been drinking, will operate to prevent a recovery of damages in a particular case depends upon all the facts and circumstances of the case, and is usually a question for the jury." \textit{Id.}
\item \textsuperscript{179} \textit{See generally} 180 Neb. at 599-600, 144 N.W.2d at 206.
\item \textsuperscript{180} \textit{Id.} at 599, 144 N.W.2d at 206.
\item \textsuperscript{181} \textit{Id.} This distinction is the same as the one suggested that assumption of risk is based on consent while contributory negligence is based on conduct. See Comment, \textit{Distinction Between Assumption of Risk and Contributory Negligence in Wisconsin}, 1960 Wis. L. Rev. 460, 467. It is suggested that the word consent is a shorthand way of saying that assumption of risk requires the plaintiff either to acquiesce or to willingly accept the danger created by the defendant. \textit{Id.} On the other hand, conduct implies that the plaintiff has actively participated in causing his injuries either by doing an unreasonable act or failing to do something which he reasonably should have done. \textit{Id.} For a discussion of the distinction of consent versus conduct, see notes 46-52 and accompanying text \textit{supra.}
\item \textsuperscript{182} \textit{See} note 171 and accompanying text \textit{supra.}
\item \textsuperscript{183} 180 Neb. at 600, 144 N.W.2d at 206.
\end{itemize}
Nonetheless, Hess and Kaufman appear to be irreconcilable with Landrum, since under similar facts as Landrum they purport to allow an instruction on assumption of risk as a defense.\textsuperscript{184}

Representative of the second category is O'Brien v. Anderson.\textsuperscript{185} In that case, the plaintiff testified that she was escorted by the defendant to a New Year's Eve party.\textsuperscript{186} Both the plaintiff and the defendant confessed to drinking while at the party, though neither knew how much the other had been drinking since they were separated much of the evening.\textsuperscript{187} The plaintiff stated that the defendant was intoxicated when he picked her up and remained so throughout the night.\textsuperscript{188} After leaving the party and accepting a ride home with the defendant, the plaintiff was injured in a two-car traffic accident involving the car driven by the defendant.\textsuperscript{189} The plaintiff pled that the defendant was grossly negligent.\textsuperscript{190} The defendant alleged two affirmative defenses: that plaintiff assumed the risk of defendant's driving while under the influence, and that plaintiff was contributorily negligent in riding with the defendant.\textsuperscript{191} The jury found for the defendant.\textsuperscript{192} One of the grounds plaintiff cited as error on appeal was the allowance of an instruction on assumption of risk "when the instruction did not include that assumption of risk does not apply to unknown or hidden dangers."\textsuperscript{193} The supreme court held that under the facts of

\textsuperscript{184} A later case very similar to Kaufman is Circo v. Sisson, 193 Neb. 704, 229 N.W.2d 50 (1975). In Circo, the plaintiff attended a football game in Lincoln with some friends where they met the defendant. The group spent much of the day drinking together. During the game the driver, who the plaintiff had ridden with, became intoxicated and was taken to the police station. When the rest of the party arrived to pick up this person, the police suggested that the defendant drive the group's vehicle home, which she did, but only after going to a bar. While the defendant was driving home a head-on collision with another vehicle took place, injuring the plaintiff. At trial the defendant alleged both contributory negligence and assumption of risk on the part of the plaintiff. \textit{Id.} at 708, 229 N.W.2d at 32. The jury returned a verdict for the plaintiff. \textit{Id.} On appeal, the supreme court found that the issues of contributory negligence and assumption of risk were both properly submitted to the jury (quoting extensively from Kaufman) and affirmed the judgment of the trial court. \textit{Id.} at 709-13, 229 N.W.2d at 52-55. The Circo court also cited Landrum's discussion on assumption of risk, \textit{id.} at 711, 229 N.W.2d at 54, and, like other cases before it, failed to reconcile its conclusion that an instruction on assumption of risk was proper with Landrum's conclusion that in such instances a question of contributory negligence was generally presented. For a discussion of Landrum's holding, see notes 139-146 and accompanying text supra.

\textsuperscript{185} 177 Neb. 635, 130 N.W.2d 560 (1964).
\textsuperscript{186} \textit{Id.} at 641, 130 N.W.2d 564.
\textsuperscript{187} \textit{Id.} at 642-43, 130 N.W.2d at 565.
\textsuperscript{188} \textit{Id.} at 642, 130 N.W.2d at 565.
\textsuperscript{189} \textit{Id.} at 638, 641-43, 130 N.W.2d at 564-65.
\textsuperscript{190} \textit{Id.} at 637, 130 N.W.2d at 563.
\textsuperscript{191} \textit{Id.} at 637-38, 130 N.W.2d at 563.
\textsuperscript{192} \textit{Id.} at 637, 130 N.W.2d at 562.
\textsuperscript{193} \textit{Id.} at 646-47, 130 N.W.2d at 567.
the case the trial court did not commit prejudicial error in giving the instruction on assumption of risk.\textsuperscript{194} It noted that \textit{Landrum} made applicable the defense of assumption of risk in negligence actions in Nebraska,\textsuperscript{195} and apparently on the basis of this authority concluded that the defense of assumption of risk is applicable in drinking party cases. \textit{O'Brien} was handed down in the same year that \textit{Hess} was decided.\textsuperscript{196} Like \textit{Hess},\textsuperscript{197} \textit{O'Brien} failed to recognize that under similar facts, \textit{Landrum} held that only an instruction on contributory negligence should be given.\textsuperscript{198} In reading \textit{O'Brien}, in fact, one is given the impression that \textit{Landrum} had expressly allowed an instruction on assumption of risk under these circumstances.\textsuperscript{199} \textit{O'Brien}, therefore, would seem to be another case that is irreconcilable with \textit{Landrum}.

\textit{Schaffer v. Bolz},\textsuperscript{200} the first case in the third category, applied the same test for contributory negligence as for assumption of risk and relied on \textit{Landrum} for its authority to do so.\textsuperscript{201} The rule \textit{Kaufman} applied to contributory negligence\textsuperscript{202} was apparently expanded by the Nebraska Supreme Court in \textit{Schaffer} to encompass also assumption of risk.\textsuperscript{203} On appeal defendant Bolz unsuccess-

\begin{footnotesize}
\textsuperscript{194} Id. at 647, 130 N.W.2d at 567-68.
\textsuperscript{195} Id. at 647, 130 N.W.2d at 567. But see note 146 and accompanying text \textit{supra}.
\textsuperscript{196} Both cases were decided in 1964. O'Brien v. Anderson, 177 Neb. 635, 130 N.W.2d 560 (1964); Hess v. Holdsworth, 176 Neb. 774, 127 N.W.2d 487 (1964).
\textsuperscript{197} See notes 167-169 and accompanying text \textit{supra}.
\textsuperscript{198} See notes 137-144 and accompanying text \textit{supra}.
\textsuperscript{199} See 177 Neb. at 647, 130 N.W.2d at 567 (citing Landrum v. Roddy, 143 Neb. 934, 944-46, 12 N.W.2d 82, 88-89 (1943)).
\textsuperscript{200} 181 Neb. 509, 149 N.W.2d 334 (1967). The plaintiff rode with defendant from Norfolk, Nebraska to Yankton, South Dakota and back. \textit{Id.} at 510, 149 N.W.2d at 336. Both consumed alcohol while riding and each had a couple more drinks while in Yankton. \textit{Id.} at 512, 149 N.W.2d at 337. On the trip back, while defendant was driving, the car struck a guardrail and plaintiff sustained serious injuries. \textit{Id.} at 513, 149 N.W.2d at 338.
\textsuperscript{201} 181 Neb. at 513, 149 N.W.2d at 338 (citing Landrum v. Roddy, 143 Neb. 934, 12 N.W.2d 82 (1943)).
\textsuperscript{202} For the rule \textit{Kaufman} applied to contributory negligence, see notes 175 & 176 and accompanying text \textit{supra}.
\textsuperscript{203} 181 Neb. at 513, 149 N.W.2d at 338. This result seemed at least implicit in \textit{Kaufman}. See note 176 and accompanying text \textit{supra}.
\textsuperscript{204} 181 Neb. at 513, 149 N.W.2d at 338.
\end{footnotesize}
he is unable to operate the vehicle with proper prudence or skill.  

Referring to contributory negligence and assumption of risk in the same proposition, Schaffer appears to hold that the test for assumption of risk is the same as that for contributory negligence. Yet, Landrum distinguished the two defenses.  It therefore appears that a plaintiff may be guilty of contributory negligence or assumption of risk if (1) he has knowledge of a driver's intoxication and attendant inability to properly operate the vehicle or that he should have known this; and (2) he rides or continues to ride with the driver.

Examining the Schaffer rule one can interpret this as proposing that a guest is contributorily negligent "by riding or continuing to ride with a driver who he knows, or in the exercise of ordinary care and diligence should know, is so intoxicated that he is unable to operate the vehicle with proper prudence or skill." A guest may be guilty of assumption of risk "by riding or continuing to ride with the driver who he knows . . . is so intoxicated that he is unable to operate the vehicle with proper prudence or skill." The only difference then between the two applications would be that actual knowledge is required by assumption of risk. However, Schaffer appears to say that "where the driver is really and perceptibly under the influence of liquor" to such an extent it can be actually ascertained he is intoxicated, the guest will be charged with knowledge, apparently regardless of whether he personally had such knowledge. Schaffer seems to be imposing constructive knowledge upon the guest where intoxication of a driver is so apparent that any normal prudent person would know of the driver's intoxication. Assumption of risk requires that the guest subjectively know of the danger and voluntarily encounter it. Applied to the rule in Schaffer the danger is riding with a driver so intoxicated that he cannot capably and skillfully drive the vehicle. Simply knowing the driver has been drinking does not necessarily suffice to prevent recovery by the guest, however. According to the Schaffer court, the driver must be "really and perceptibly under the influence of liquor and actual ascertainable intoxication exists to such an extent that the guest is charged with knowledge.

205. Id. at 513, 149 N.W.2d at 338.
206. Landrum v. Roddy, 143 Neb. 934, 947, 12 N.W.2d 82, 89 (1943). See also notes 135 & 136 and accompanying text supra.
207. 181 Neb. at 513, 149 N.W.2d at 338 (emphasis added).
208. Id.
209. Id.
210. See notes 17-18 and accompanying text supra.
211. 181 Neb. at 513, 149 N.W.2d at 338.
of it."\textsuperscript{212} This would seem to be a statement of the objective standard of knowledge required for contributory negligence.\textsuperscript{213} However, \textit{Schaffer} does not expressly restrict this language to contributory negligence alone.\textsuperscript{214} By referring to the defenses together, \textit{Schaffer} suggests that the knowledge requirements of the defenses are the same. Accordingly, if it is accepted that the measurement of knowledge to invoke the application of assumption of risk is objective, the same standard used for contributory negligence, then the rule for practical purposes becomes identical for either defense.

\textit{Schaffer}’s treatment of contributory negligence and assumption of risk as the same rule of law gives one the impression that the same factual circumstances of an automobile guest riding with an intoxicated driver establish contributory negligence as well as assumption of risk. Like many of the other cases discussed, the \textit{Schaffer} court cited \textit{Landrum} as the principal authority for this rule.\textsuperscript{215} If \textit{Schaffer} stands for the proposition that in automobile guest-intoxicated driver cases assumption of risk and contributory negligence may arise under the same set of facts and that either defense may be submitted to the jury, then \textit{Schaffer}, like the cases before it,\textsuperscript{216} cannot be reconciled with \textit{Landrum}.\textsuperscript{217} The \textit{Schaffer} court’s identical treatment of knowledge under either contributory negligence or assumption of risk only makes it more difficult to determine the place for assumption of risk in automobile guest-intoxicated driver actions.\textsuperscript{218} 

\begin{enumerate}
\item \textit{Id.}
\item See notes 40-41 and accompanying text \textit{supra}.
\item 181 Neb. at 513, 149 N.W.2d at 338.
\item \textit{Id.}
\item \textit{Id.} at 609, 177 N.W.2d at 746. The weather became snowy and icy and, as a result, a head-on accident occurred with plaintiff sustaining personal injuries because of the accident. \textit{Id.} at 610, 177 N.W.2d at 746. However, contrary to \textit{Schaffer}, judgment was entered against the plaintiff. \textit{Id.} at 609, 177 N.W.2d at 746. Plaintiff contended that the trial court erred in submitting the issues of contributory negligence and assumption of risk to the jury. \textit{Id.} at 610, 177 N.W.2d at 746. The supreme court cited the \textit{Schaffer} rule and held that the evidence introduced at trial was clearly sufficient to warrant the submission of the issues of assumption of risk and contributory negligence to the jury. \textit{Id.} at 611, 177 N.W.2d at 747.
\item By treating the defenses identically in this situation, \textit{Schaffer} apparently did not regard as significant the choice of which defense to apply. However, contributory negligence is not a complete defense, but is subject to Nebraska’s compar-
Citing Schaffer, the court in Sandberg v. Hoogensen\(^{219}\) also concluded that an automobile guest can be guilty of contributory negligence or assumption of risk when he rides with a driver who he knows, or in the exercise of ordinary care and diligence should know, is intoxicated to the extent that he is unable to operate the vehicle with proper prudence and care.\(^{220}\) In Sandberg, the plaintiff's decedent, Sandberg, and the defendant's decedent, Hoogensen, drank together at a couple of taverns for several hours.\(^{221}\) Witnesses at trial testified that each man had consumed a total of nineteen to twenty-four drinks in a seven and one-half hour period.\(^{222}\) When the tavern they visited last closed for the evening, the two men left in Hoogensen's vehicle.\(^{223}\) Sometime thereafter both men were fatally injured when Hoogensen's vehicle went off a county road at a high rate of speed.\(^{224}\)

At the trial plaintiff, administratrix of the estate of Sandberg, sought to recover damages against defendant, the executrix of the estate of Hoogensen, for the wrongful death of her decedent on the grounds that Hoogensen was grossly negligent in driving the vehicle.\(^{225}\) The defendant argued that Sandberg was guilty of contributory negligence and assumption of risk.\(^{226}\) The jury returned a verdict in favor of the defendant, and the plaintiff appealed to the Nebraska Supreme Court, alleging, among other things, error in the submission of an instruction on assumption of risk.\(^{227}\)

Quoting extensively from Landrum,\(^{228}\) the Sandberg court acknowledged that Landrum held that whether the conduct of a guest precluded him from recovering for his injuries was a question of contributory negligence, and conceded that Landrum did

\(^{219}\) 201 Neb. 190, 266 N.W.2d 745 (1978).
\(^{220}\) Id. at 192, 266 N.W.2d at 747.
\(^{221}\) Id. at 192-93, 266 N.W.2d at 747.
\(^{222}\) Id. at 193, 266 N.W.2d at 747-48.
\(^{223}\) Id. at 191, 266 N.W.2d at 746-47.
\(^{224}\) Id. at 193, 266 N.W.2d at 748. The trial court ruled that as a matter of law plaintiff's decedent was grossly negligent. Id.
\(^{225}\) See id. at 193-94, 266 N.W.2d at 748.
\(^{226}\) 201 Neb. at 190-91, 266 N.W.2d at 746.
\(^{227}\) Id. at 196-98, 266 N.W.2d at 749-50 (quoting Landrum v. Roddy, 143 Neb. 934, 943-46, 12 N.W.2d 82, 88-90 (1943)).
not hold that an instruction on assumption of risk should be
given.\textsuperscript{229} The court simply responded that "in subsequent cases
involving similar factual situations, this court has repeatedly held
it is proper to instruct on both contributory negligence and as-
sumption of risk, often citing Landrum . . . for this proposition"\textsuperscript{230}
without any further attempt to reconcile Landrum with the subse-
quent cases. Sandberg concluded there was no error in submitting
the question of assumption of risk to the jury.\textsuperscript{231} It held that under
the facts of the case, the jury could find that the guest, Sandberg,
knew or should have known that the driver's state of intoxication
was such that it would be dangerous to ride with him.\textsuperscript{232} Although
Sandberg attempted to clarify the use of assumption of risk in Ne-
braska, it did not add much to what Landrum had already said.
On the authority of Landrum, a long line of cases had held that the
defense of assumption of risk was applicable under the circum-
stances;\textsuperscript{233} yet, as discussed above, Landrum had held that only
contributory negligence was applicable.\textsuperscript{234} The court in Sandberg
seemed to be presented with a good opportunity to reevaluate
those later cases, particularly in light of the trend towards abrogat-
ing assumption of risk.\textsuperscript{235} The court, however, did not attempt to
reconcile Landrum with the cases subsequent to it, nor did it con-
sider the policy reasons for abrogating the defense of assumption
of risk.\textsuperscript{236} A discussion of the policy reasons for abrogating the de-
fense of assumption of risk which the Sandberg court might have
considered follows.

POLICY REASONS FOR ABROGATING
ASSUMPTION OF RISK

The first policy consideration for abrogating assumption of risk
as a complete and independent defense arises in those states
which have comparative negligence statutes. Under non-compara-
tive negligence statutes, where contributory negligence exists as a
complete defense and a plaintiff's negligence contributes to the oc-
currence of an accident, a plaintiff is totally barred from any recov-
ery even though the defendant's negligence was the proximate

\textsuperscript{229} Id. at 198, 266 N.W.2d at 750.
\textsuperscript{230} Id.
\textsuperscript{231} Id. at 199, 266 N.W.2d at 750.
\textsuperscript{232} Id.
\textsuperscript{233} See note 149 and accompanying text supra.
\textsuperscript{234} See notes 137-144 and accompanying text supra.
\textsuperscript{235} See notes 63-64 and accompanying text supra.
\textsuperscript{236} See 201 Neb. at 196, 266 N.W.2d at 749.
cause of the accident.\textsuperscript{237} Comparative negligence systems were adopted to ameliorate the harshness of contributory negligence by apportioning damages according to the fault of the plaintiff and the defendant.\textsuperscript{238} However, by asserting the defense of assumption of risk in comparative negligence jurisdictions, a defendant may be able to circumvent the statute and prevent the plaintiff from recovering anything.\textsuperscript{239} Such a result may contravene the intent of a legislature to apportion damages according to the fault of the parties.\textsuperscript{240} As a result, a number of states with comparative negligence statutes have merged the doctrine of assumption of risk with that of contributory negligence.\textsuperscript{241}

It has been argued that “at the time Nebraska enacted its comparative negligence statute, assumption of risk was but one aspect of contributory negligence.”\textsuperscript{242} If this is true, then assumption of risk was not an absolute defense to negligence. If the plaintiff was found to have assumed the risk, the defendant would still be partially liable. The hardship of the doctrine of contributory negligence upon the plaintiff is readily apparent. It places upon one party the entire burden of a loss for which two are, by hypothesis, responsible. The negligence of the defendant has played no less a part in causing the damage; the plaintiff's deviation from the community standard of conduct may even be relatively slight, and the defendant's more extreme; the injured man is in all probability, for the very reason of his injury, the less able of the two to bear the financial burden of his loss; and the answer of the law to all this is that the defendant goes scot free of all liability, and the plaintiff bears it all.

\textsuperscript{237} V. Schwartz, supra note 24, § 2.3 at 36. Cf. W. Prosser, supra note 24, § 67 at 433.

\textsuperscript{238} See W. Prosser, supra note 24, § 68 at 433-34; V. Schwartz, supra note 24, § 2.3 at 31. See generally Prosser, Comparative Negligence, 51 Mich. L. Rev. 464 (1953).

\textsuperscript{239} See W. Prosser, supra note 24, § 68 at 456-57; V. Schwartz, supra note 24, § 9.3 at 161-62; Merger, supra note 39, at 64-65.

\textsuperscript{240} See Restatement (Second) of Torts § 496A, Comment d (1965); W. Prosser, supra note 24, § 68 at 456-57; Merger, supra note 39, at 64-65; Nebraska Negligence Actions, supra note 109, at 620-21. Cf. V. Schwartz, supra note 24, § 9.5 at 173-75. Prof. Schwartz notes that a strong reason for retaining assumption of risk as a complete defense is based on the generic difference between assumption of risk and contributory negligence. Unlike contributory negligence, assumption of risk is based not on the plaintiff's fault but on his agreement by his conduct to encounter the risk of the danger which actually injures him. This suggests a close similarity with the consent defense to intentional torts. It is argued that since consent would remain an absolute defense to intentional torts under a comparative negligence system, assumption of risk should maintain its place as a bar to negligence. There is one major difference, however, between assumption of risk and consent. In consenting to an intentional tort, plaintiff manifests his agreement to an actual injury, whereas in assuming the risk, plaintiff voluntarily agrees to be subject to a possible injury. Id.

\textsuperscript{241} See notes 83-84 and accompanying text supra.

\textsuperscript{242} Nebraska Negligence Actions, supra note 111, at 620. The author of this note observed that at the time of passage of the Nebraska comparative negligence statute the leading case on assumption of risk was Wilkins v. Water & Light Co., 92 Neb. 513, 138 N.W.754 (1912). Nebraska Negligence Actions, supra note 109, at 619. In the syllabus to Wilkins, the court stated that “the doctrine of assumption of risk arises from the relation of master and servant, and does not constitute a defense
risk was under the control of the comparative negligence statute and existed as a defense pursuant only to the terms of that statute.\textsuperscript{243} If the legislature made this assumption, the comparative negligence statute should be so read, notwithstanding any common law rule to the contrary.\textsuperscript{244}

A related reason why assumption of risk has been abandoned, even in states without comparative negligence statutes, is due to its similarity to contributory negligence. This arises in situations where the reasonableness of a plaintiff's conduct in assuming the risk is examined, and assumption of risk is asserted as an affirmative defense.\textsuperscript{245} It is here that assumption of risk coincides or overlaps with contributory negligence.\textsuperscript{246} Where the issue is whether the plaintiff was negligent or not, it is argued that to recognize assumption of risk as an affirmative and distinct defense, "create[s] the potential of a verdict for defendant even though the jury might logically find on the issue of contributory negligence that plaintiff exercised the care of a reasonably prudent man under all the circumstances."\textsuperscript{247} Moreover, an instruction to the jury on assumption of risk as a complete defense, along with others on contributory negligence, results in redundant instructions, tending to unduly emphasize a defendant's claim of contributory negligence.\textsuperscript{248}

More specifically, as mentioned earlier,\textsuperscript{249} there are separate considerations for not allowing assumption of risk to exist as a separate and complete defense in automobile accidents where the guest is injured while riding with a driver under the influence of alcohol.\textsuperscript{250} Barring the plaintiff's recovery through the defense of assumption of risk will not teach him to refuse rides with intoxicated drivers.\textsuperscript{251} Even when he accepts a ride from an obviously
intoxicated driver, the passenger probably does not anticipate becoming involved in an accident. Nor does he climb into any car with the thought that if he is injured in an accident, he can always sue and recover for his injuries. A guest is concerned about his own safety and well being and it is rather doubtful that the elimination of assumption of risk as a complete defense would encourage anyone to ride with intoxicated drivers. Instead what should be reflected in these cases is the feeling of society as to what conduct should be required of a driver, intoxicated or sober, and a passenger who is either intoxicated or sober.

Perhaps all the participants should feel responsible for the adverse consequences of their common course of conduct. Yet if one person should be solely responsible for such conduct, it is suggested the driver ought to be the one. The law has recognized the importance of safe driving and prescribes many laws to enforce this. While a passenger generally is not held criminally culpable for riding in an intoxicated state, it is everywhere held illegal to drive while intoxicated. It would certainly follow, therefore, that the availability of assumption of risk should not be allowed to diminish the legislative fiat that no one is to drive a motor vehicle while under the influence of alcohol. Furthermore, the abatement of assumption of risk as a complete defense may lead to more plaintiffs recovering as least part of their losses, and perhaps, in turn, the insurance companies who must compensate the injured parties would transmit the message handed down by the jury rather effectively in the drinking driver's next premium payment. This message, in the form of higher premiums, would tell those persons who choose to drink and drive that they will pay for

252. See id. at 101-03.
253. Id. at 104.
254. Pedrick, supra note 67 at 104.
255. Id. Professor Pedrick notes that there is something to be said for the view that the driver is in a special position. It is his conduct that creates the risk for himself, for his passengers, and for the traveling public. Any rule that relieves from responsibility for damage inflicted as a result of his irresponsible driving should be suspect.

Id.
256. Id. If assumption of risk is applied in this situation, Professor Pedrick questions whether the civil side of the court adequately supports the legislative policy behind the criminal offense of drunk driving, and concludes that it does not since an intoxicated driver would be relieved from civil liability simply because his guest-passenger assumed the risk. Id.
257. Id.
258. Id. at 103. While, in theory, assumption of risk may discourage automobile guest passengers from accepting rides with intoxicated drivers, it has been said that assumption of risk does not deter drunken drivers from driving while intoxicated, conduct generally deemed unlawful. Id. at 102, J. Flemming, An Introduction to the
any injuries that result from such conduct.\textsuperscript{259} This may prove to be an effective deterrent since the drinking driver “is likely to be quite sober and reflective at the time he pays his liability insurance premium.”\textsuperscript{260} Finally, distributing the loss over all the drivers who drink appears fairer than leaving the complete loss to be absorbed by a guest not totally responsible for his injuries.\textsuperscript{261}

CONCLUSION

Recently, the Nebraska Supreme Court, in \textit{Sandberg v. Hoogensen},\textsuperscript{262} clearly indicated that assumption of risk exists as a defense in automobile guest cases in which the parties have been intoxicated.\textsuperscript{263} In that case, the court quoted extensively from what appears to be the leading Nebraska case on that subject,\textsuperscript{264} \textit{Landrum v. Roddy}.\textsuperscript{265} \textit{Landrum} held that in the factual situation of drinking party cases whether or not the conduct of a guest in assuming the risk of riding with an intoxicated driver would preclude him from recovery is a question of contributory negligence.\textsuperscript{266} \textit{Landrum} could be read to permit the application of assumption of risk only in those instances where contributory negligence would not be present.\textsuperscript{267}

In automobile guest-intoxicated driver cases following \textit{Landrum}, the Nebraska Supreme Court, however, has cited \textit{Landrum} for the proposition that assumption of risk exists as a defense in

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\textsuperscript{259} \textit{See} Pedrick, \textit{supra} note 67, at 103.

\textsuperscript{260} \textit{Id.} Professor Pedrick suggests that these premium rates could be higher for drivers who admit to indulging in alcoholic beverages. \textit{Id.} The potential problem of applicants falsely deny ing on policy applications that they do drink could be remedied “by a provision subjecting the insured in case of dishonest response to a heavy penalty, perhaps even an obligation to indemnify the insurer for any liability causally connected with the misrepresentation.” \textit{Id.}

\textsuperscript{261} \textit{Id.} at 103-04. \textit{Cf.} McConville v. State Farm Mut. Auto. Ins. Co., 15 Wis. 2d 374, ---, 112 N.W.2d 14, 19 (1962). The court stated: Liability insurance is widely prevalent today. In few cases will the new rule shift the burden of loss from the injured guest to the negligent host personally. In the great majority of cases it will shift part or all the burden of loss from the injured individual to the motoring public. The policy concept that it is unfair to shift the burden from the injured person to his host where the injured person knowingly and voluntarily exposed himself to dangers created by the host is no longer applicable.

\textit{Id.}

\textsuperscript{262} 201 Neb. 190, 266 N.W.2d 745 (1978).

\textsuperscript{263} \textit{Id.} at 198, 266 N.W.2d at 750.

\textsuperscript{264} \textit{Id.} at 196-98, 266 N.W.2d at 749-50.

\textsuperscript{265} 143 Neb. 934, 12 N.W.2d 82 (1943).

\textsuperscript{266} \textit{See} notes 137-144 and accompanying text \textit{supra}.

\textsuperscript{267} \textit{See} notes 133-136 and accompanying text \textit{supra}.
automobile guest-intoxicated driver cases. In Sandberg, the court recognized the inconsistency between Landrum and later cases in handling the same factual situations. The Sandberg court, however, did not reconcile or fully explain this anomaly. Throughout the cases subsequent to Landrum there is language of the supreme court which appears to follow Landrum and yet, under similar factual situations, contrary results have been reached. To aid in resolving this inconsistency concerning assumption of risk in Nebraska, the Nebraska Supreme Court should consider fully the policy reasons behind abrogating assumption of risk.

Where assumption of risk and contributory negligence arise under the same set of facts, many courts, like the court in Landrum, have decided that the better result is to treat the issue as merely one of contributory negligence. In a comparative negligence jurisdiction, like Nebraska, the defense of assumption of risk may defeat the intent of the statute since the purpose of the statute would seem to be to reduce the damages in the case of all such negligent conduct, no matter what the defense is called. Furthermore, it has been argued that when Nebraska adopted its comparative negligence statute assumption of risk was but one aspect of contributory negligence, adding further support to the contention that the legislature intended to include assumption of risk within the terms of the statute. To allow assumption of risk status as a complete defense would seem to override the apparent intent of the legislature without justification.

Additionally, the holding in Landrum is supported by policy considerations particular to automobile guest cases involving intoxicated drivers. By not allowing assumption of risk to exist as a complete defense in these actions, civil courts will be supporting the legislative policy of deterrence inherent in the criminal offense of drunk driving. Moreover, the driver may be persuaded to use greater care in driving or in deciding whether to drive after he has been drinking if he realizes that carelessness on his part may result in his paying higher premiums for automobile liability insur-

268. See note 150 and accompanying text supra.
269. 201 Neb. at 198, 266 N.W.2d at 750; see note 231 and accompanying text supra.
270. See note 70 and accompanying text supra.
272. See notes 237-240 and accompanying text supra.
273. See notes 242-244 and accompanying text supra.
274. See notes 249-261 and accompanying text supra.
275. See note 256 and accompanying text supra.
Finally, distributing the loss over all drinking drivers seems to be a fairer result than compelling an individual guest to bear the burden of the loss himself.\textsuperscript{277}

The foregoing considerations support the conclusion that in automobile guest cases involving intoxicated parties, the approach taken by the Nebraska Supreme Court in \textit{Landrum} is more desirable than that adopted by the Nebraska cases subsequent to \textit{Landrum}. In light of the trend towards abrogating the defense of assumption of risk and the convincing reasons for doing so, the Nebraska Supreme Court ought to recognize the fundamental soundness of the \textit{Landrum} court's approach and reevaluate those cases which have since departed from it.

\textit{Richard A. Stefani—'80}

\textsuperscript{276} See notes 258-260 and accompanying text \textit{supra}.  
\textsuperscript{277} See note 261 and accompanying text \textit{supra}.  
