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## Torts - Assumption of Risk and the Obvious Danger Rule - Primary or Secondary Assumption of Risk - Sherman v. Platte County

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Deloris Sherman slipped and fell on ice in the Platte County Courthouse parking lot while engaged in the process of licensing her motor vehicle.<sup>1</sup> She brought suit against Platte County for the personal injuries she sustained. At trial, the jury was instructed that the landowner owes no duty of care for obvious dangers<sup>2</sup> and, predictably, found for the defendant. The Wyoming Supreme Court (Justice Raper writing for the majority, Justice Rooney specially concurring) affirmed the judgment for the defendant. The court rejected plaintiff's claim that because the obvious danger rule is the equivalent of assumption of risk, it is not a complete bar to recovery under Wyoming's comparative negligence statute.<sup>3</sup> The supreme court held that comparative negligence merely allows comparison of fault once both parties are found negligent, but does not create any duty where none existed.<sup>4</sup>

## BACKGROUND

The doctrine of assumption of risk is an affirmative defense the negligent defendant employs to deny liability. The risk the plaintiff assumes is one ordinarily within the scope of defendant's duty. Defendant may have in fact breached that duty, but is relieved from liability because plaintiff assumed responsibility. The doctrine focuses on plaintiff's behavior.

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1. Sherman v. Platte County, 642 P.2d 787, 788 (Wyo. 1982).
2. Jury Instruction 17: "An owner or occupant of land or premises does not have an obligation to protect his invitees against dangers that are known to them or that are so obvious and apparent that they may reasonably be expected to discover such dangers." 642 P.2d at 788.
3. Brief for Appellant at 20-21, Sherman v. Platte County, 642 P.2d 787 (Wyo. 1982).
4. 642 P.2d at 790. The comparative negligence statute, WYO. STAT. § 1-1-109 (a) (1977) provides:

Contributory negligence shall not bar a recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if the contributory negligence was not as great as the negligence of the person against whom recovery is sought. Any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person recovering.

In certain other instances, however, assumption of risk simply means that the defendant owes no duty to plaintiff. Plaintiff assumes a risk always outside the scope of defendant's duty to protect him. The law limits the defendant's duty by declaring some risks to be outside that duty. There is no reference to plaintiff's behavior.

A 1959 New Jersey case, *Meistrich v. Casino Arena Attractions, Inc.*,<sup>5</sup> summarizes scholarly analysis of the two types of assumption of risk.<sup>6</sup> Primary assumption of risk merely negates duty.<sup>7</sup> The defendant owes no duty to plaintiff, regardless of plaintiff's conduct.<sup>8</sup> Defendant is not liable whether or not plaintiff behaved reasonably. The concept of secondary assumption of risk is similar to the defense of contributory negligence because it shares the standard of reasonable care.<sup>9</sup> Plaintiff is held to assume the risk only if he failed to act as a reasonably prudent person would have acted. The *Meistrich* labels will be used in this note.<sup>10</sup>

Many have grappled with the problems created by these two kinds of assumption of risk without resolving the confusion.<sup>11</sup> Neither the courts<sup>12</sup> nor the scholars<sup>13</sup> are in agree-

5. 31 N.J. 44, 155 A.2d 90 (1959), *rev'g*, 148 A.2d 199 (N.J. Super. Ct. App. Div. 1959).

6. Actually, there are three types of assumption of risk. The third type arises in cases of express contract to relieve defendant of liability for his negligence, but this type is of little importance to the present discussion. See generally, Gaetanos, *Assumption of Risk: Casuistry in the Law of Negligence*, 83 W. VA. L. REV. 471, 473 (1981):

Most courts have identified two types of assumption of risk: express and implied. Dean Wade has spotted the same two, as did Dean Keeton. But Professors Harper and James have identified three types, and Professor Salmond a different three. Dean Prosser noted four types, and the Restatement (Second) proclaimed a similar four. Professor Keeton, not to be outdone, found six. Still others, like Professor Mansfield, have eschewed the jargon. . . . (footnotes omitted).

7. *Meistrich v. Casino Arena Attractions, Inc.*, 155 A.2d at 93 (1959).

8. *Id.*

9. Annot., 35 A.L.R.3d 230, 268 (1971).

10. *But see* McGrath v. American Cyanamid Co., 41 N.J. 472, 196 A.2d 238, 239-41 (1963) (New Jersey will not use any assumption of risk terminology, but will use only negligence and contributory negligence); 31 A.T.L.A.J. 287, 292 (1965).

11. 31 A.T.L.A.J. 287, 291-92 (1965).

12. Annot., 35 A.L.R.3d 230, 268 (1971).

13. See DOOLEY, 1 MODERN TORT LAW: LIABILITY AND LITIGATION 155 (1977); Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5, 11-14 (1961); James, *Contributory Negligence*, 62 YALE L.J. 691, 698 (1953); Malone, *Contributory Negligence and the Landowner Cases*, 29 MINN. L. REV. 61, 78 (1945); P. Keeton, *Assumption of Risk and the Land-*

ment on the relation of secondary assumption of risk to other defenses or to primary assumption of risk.

Assumption of risk as a protection for the defendant was in keeping with nineteenth century ideas of individual responsibility,<sup>14</sup> but today assumption of risk is in disfavor as a defense.<sup>15</sup> The anomaly is that as a duty limitation it persists. The elimination of assumption of risk as a duty limitation has probably been delayed in part because under traditional negligence theory, it makes little practical difference how assumption of risk is classified or how it is dealt with procedurally. The result is always the same: the plaintiff will not recover. Either assumption of risk or contributory negligence will bar completely his recovery from a negligent defendant, and he cannot recover from a non-negligent defendant who owes him no duty. Under any system of comparative negligence, however, how assumption of risk is stated may determine whether or not the plaintiff can recover. If the secondary assumption of risk doctrine is applied, then defendant has a duty of reasonable care. If defendant has breached this duty, plaintiff's behavior is evaluated to determine if he contributed to the accident and to what degree he should recover. If primary assumption of risk is used, then, as no duty is owed, finding the defendant negligent is foreclosed, and plaintiff is precluded from recovering.

The simple analysis above is not universally applied. There is, in fact, disagreement as to the effect comparative negligence has on secondary assumption of risk.<sup>16</sup> Assumption of risk remains a complete defense under comparative negligence in a few jurisdictions.<sup>17</sup> In some, assumption of

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owner, 20 TEX. L. REV. 562, 574 (1942); Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233, 245-52 (1908). *But see* HARPER AND JAMES, 2 THE LAW OF TORTS 107 (Supp. 1968); Pedrick, *Taken for a Ride: The Automobile Guest and Assumption of Risk*, 22 LA. L. REV. 90, 92-93 (1961); Green, *Assumed Risk as a Defense*, 22 LA. L. REV. 77, 85 (1961).

14. Bohlen, *supra* note 13, at 254: "The duty of care for others manifestly should be no higher than the duty of self-protection." *See also id.* at 254-55 (which sets out background and rationale for the self-protection rule).

15. 31 A.T.L.A.J. 287, 291 (1965).

16. Green, *The Negligence Action*, ARIZ. ST. L.J. 369, 384 (1974).

17. WOODS, THE NEGLIGENCE CASE: COMPARATIVE FAULT 155 (1968).

risk is abolished as a separate defense and the term means only that the plaintiff was contributorily negligent.<sup>18</sup> In yet others, assumption of risk is retained as a separate defense, but the result is the same as if it were considered to be a form of contributory negligence.<sup>19</sup>

Comparative negligence theory is aimed toward the abolition of absolute defenses. It succeeds in all but two situations. It fails in the few jurisdictions where secondary assumption of risk remains a complete defense. It also fails where primary assumption of risk operates to limit duty.

The obvious danger rule is a theory that limits defendant's liability for injuries caused by dangers that are obvious to the plaintiff. Some jurisdictions treat the obvious danger rule as secondary assumption of risk—the plaintiff assumes the risks of obvious dangers. Others interpret the obvious danger rule to be primary assumption of risk—the defendant owes no duty to protect against obvious dangers. As with assumption of risk, the form of the obvious danger rule under traditional negligence makes little practical difference, because the plaintiff will never recover. Under the doctrine of comparative negligence, if the obvious danger rule is treated as primary assumption of risk, plaintiff cannot recover; if secondary, the plaintiff has a chance to recover.

Wyoming was the seventeenth state to adopt a comparative negligence scheme.<sup>20</sup> The statute took effect in 1973.<sup>21</sup> Long before, the Wyoming court ruled that assumption of risk would not be a defense separate from contributory negligence.<sup>22</sup> Thus, plaintiff's behavior in assuming a risk was to be compared with defendant's negligence under the comparative negligence statute. The early merger apparently did not anticipate the impact of comparative negligence on no-duty assumption of risk.

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18. *Id.* at 129-55.

19. *Id.* at 128.

20. Comment, *Comparative Negligence in Wyoming*, 8 LAND & WATER L. REV. 597, 597. (1973).

WYOMING CASES

Treatment of the obvious danger rule varies with the context in which it is employed and frequently the issues are confused. In Wyoming, the obvious danger rule has been applied in cases involving collateral issues of master and servant law,<sup>23</sup> plaintiff's status as trespasser, licensee, or invitee,<sup>24</sup> governmental liability,<sup>25</sup> and ice and snow as natural conditions in Wyoming.<sup>26</sup> Even apart from the constraint placed on its uniform development by the presence of these issues, the role of the obvious danger rule in Wyoming is unclear. The confusion began early as the court shifted from one theory to another and back again.

Four early cases illustrate the court's vacillation. A 1914 case, *Carney Coal Co. v. Benedict*,<sup>27</sup> concerned an employee who returned to work in a pit after debris had fallen from the sides of the excavation.<sup>28</sup> Although the court noted that the danger of a cave-in was obvious,<sup>29</sup> it held that the plaintiff's return to work was enough to show his assumption of that risk.<sup>30</sup> The obviousness of the condition was a factor in plaintiff's secondary assumption of risk. The court found no negation of defendant's duty of reasonable care.

In *Boatman v. Miles*,<sup>31</sup> a 1921 case, the court declared that to say the servant assumed the risk was another way to say no duty existed.<sup>32</sup> Thus the court embraced the primary

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21. WYO. STAT. § 1-1-109 (1977) (originally enacted as 1973 WYO. SESS. LAWS ch. 28, § 1, WYO. STAT. § 1-7.2(a) (Supp. 1973)).  
 22. *Ford Motor Co. v. Arguello*, 382 P.2d 886, 891 (Wyo. 1963); *Rocky Mountain Trucking Co. v. Taylor*, 79 Wyo. 461, 335 P.2d 448, 451 (1959).  
 23. See *infra* text accompanying notes 27, 31, 35, 43, and 52 for a discussion of some master/servant cases.  
 24. *Yalowizer v. Husky Oil Co.*, 629 P.2d 465 (Wyo. 1981); See also *infra* cases cited note 26, which also involve status of plaintiff.  
 25. *Oroz v. Carbon County Comm'rs*, 575 P.2d 1155 (Wyo. 1978), *remanded jury verdict aff'd*, 598 P.2d 432 (Wyo. 1979); *Town of Cody v. Soth*, 36 Wyo. 66, 252 P. 1021 (1927).  
 26. *Johnson v. Hawkins*, 622 P.2d 941 (Wyo. 1981); *LeGrande v. Misner*, 490 P.2d 1252 (Wyo. 1971).  
 27. 22 Wyo. 362, 140 P. 1013 (1914), *rev'g on rehearing*, 21 Wyo. 163, 129 P. 1024 (1913), *reh'g denied*, 144 P. 19 (1914).  
 28. 140 P.2d at 1015.  
 29. *Id.* at 1014.  
 30. *Id.* at 1015.  
 31. 27 Wyo. 481, 199 P. 933 (1921).  
 32. 199 P. at 935.

assumption of risk formulation. But in 1925, in *Chicago and Northwestern Ry. v. Ott*,<sup>33</sup> the court said that the servant assumed the risk of open and obvious dangers associated with his employment,<sup>34</sup> and that defendant's negligence was a question for the jury.<sup>35</sup> The obviousness of the danger did not limit defendant's duty as primary assumption of risk would require, but was an indication that plaintiff assumed the risk in the secondary sense.

In *Loney v. Laramie Auto Co.*,<sup>36</sup> in 1927, the court apparently rejected the no-duty formulation of the obvious danger rule. The court favored a consideration of contributory negligence.<sup>37</sup> The defendant owed plaintiff-invitee the duty of reasonable care and an obvious danger did not make the plaintiff contributorily negligent as a matter of law.<sup>38</sup> In *Loney*, the court evidently considered the danger's obviousness as an indication the plaintiff was contributorily negligent. The differing treatment of obvious dangers in these cases demonstrates the court's failure to determine whether the obvious danger rule involves primary or secondary assumption of risk.

The inconsistency evident in the earlier cases is also present in more recent cases. In the 1966 case *McKee v. Pacific Power and Light Co.*,<sup>39</sup> the plaintiff was injured when a tie wire supporting the television cable on which he was working broke, came in contact with defendant's high-voltage power line, and shocked him. The court proposed three bases for upholding a directed verdict for defendant. The first involved an application of the obvious danger rule to limit defendant's duty.<sup>40</sup> The other two involved plaintiff's own negligence as a bar to his recovery.<sup>41</sup> The court did not indicate on which basis it was deciding the case. It

33. 33 Wyo. 200, 237 P. 238 (1925), *reh'g denied*, 238 P. 287 (Wyo. 1925), *cert. denied*, 296 U.S. 585 (1926).

34. 237 P. at 241.

35. *Id.* at 242.

36. 36 Wyo. 339, 255 P. 350 (1927).

37. 255 P. at 353.

38. *Id.* at 351.

39. 417 P.2d 426 (Wyo. 1966).

40. *Id.* at 427.

41. *Id.* at 428.

merely concluded by noting that in the absence of evidence showing defendant could have foreseen and prevented the accident better than plaintiff, the directed verdict would stand.<sup>42</sup> Although the court cited the obvious danger rule, it seems as likely that the decision was based on plaintiff's secondary assumption of risk or contributory negligence—theories incompatible with the concept of primary assumption of risk.

In *Berry v. Iowa Mid-West Land and Livestock Co.*,<sup>43</sup> a 1967 case, a servant proceeded with an electrical wiring project, knowing he had inadequate equipment.<sup>44</sup> The court said the servant assumed obvious risks of employment, but noted that if defendant had been negligent, then plaintiff was contributorily negligent as a matter of law.<sup>45</sup> This is consistent with the merger<sup>46</sup> of assumption of risk and contributory negligence, and inconsistent with a no-duty formulation of the obvious danger rule.

In a 1971 case, *Continental Motors Corp. v. Joly*,<sup>47</sup> a pilot, injured in an airplane crash caused by engine failure, brought suit for personal injuries against the manufacturer.<sup>48</sup> The court held there was no proof that negligence on the part of the manufacturer was a proximate cause of the injuries sustained. Therefore it did not need to decide if the pilot was contributorily negligent as a matter of law. Nonetheless, the court did note that even if the manufacturer had been negligent, the pilot would be barred from recovery by his contributory negligence. The court said that the jury found that the pilot was not contributorily negligent. However, the court noted that the pilot landed because of engine roughness and resumed flight only after the plane was serviced. Thus, the danger was obvious to the pilot.<sup>49</sup> The court cited the *McKee* obvious danger rule and explained that

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42. *Id.* at 429.

43. 424 P.2d 409 (Wyo. 1967).

44. *Id.* at 410.

45. *Id.* at 411.

46. See *supra* text accompanying note 22.

47. 483 P.2d 244 (Wyo. 1971), *reh'g denied mem.*, (1971).

48. *Id.* at 245.

49. *Id.* at 246.



unless it was assumed the mechanic had more expertise than the highly qualified, experienced pilot, the court would have to adhere to the rule in *McKee* and hold that the pilot failed to exercise due care for his own safety.<sup>50</sup> Although it did not apply the rule, the *Joly* court indicated that the *McKee* formulation of the obvious danger rule reflects secondary, rather than primary, assumption of risk. The court in *Sherman* interpreted *McKee* differently.

Even after the comparative negligence statute was adopted, the inconsistent application of the obvious danger rule continued. A comparison of the 1976 case, *Bluejacket v. Carney*,<sup>51</sup> with the 1979 case, *Brittain v. Booth*,<sup>52</sup> illustrates the disparity.

In *Bluejacket*, plaintiff was an outfitter who had been a guest<sup>53</sup> at defendant's remote mountain resort for two weeks prior to his accident. Plaintiff knew that the path to his cabin was icy, unlit, and rough, but used it anyway, and fell down.<sup>54</sup> Plaintiff brought suit for damages for his injuries against the owner. Summary judgment for defendant was affirmed because 1) plaintiff never stated what caused him to fall,<sup>55</sup> and 2) there was no showing that defendant was negligent.<sup>56</sup> The court found that the obvious danger rule relieved defendant of a duty to remove the ice and snow from the path, and plaintiff did not propose any other duty or standard of care by which defendant might have been found negligent.<sup>57</sup> Justice Rose concurred with the majority only because no causal connection was shown between the icy path and the fall. Noting that bad appeals make bad law, he warned that *Bluejacket* might be a classic example of the maxim.<sup>58</sup> Justice Rose did not agree that no standard of care was established. He would have reserved the question

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50. *Id.*

51. 550 P.2d 494 (Wyo. 1976).

52. 601 P.2d 532 (Wyo. 1979).

53. For various ways plaintiff might be classified, see 550 P.2d 494, 499 (Rose, J., specially concurring).

54. *Id.* at 496.

55. *Id.*

56. *Id.* at 498.

57. *Id.* at 497.

58. *Id.* at 498 (Rose, J., specially concurring).

of negligence for the factfinder.<sup>59</sup> He urged the use of the standard of reasonable care for business invitees and noted that the obvious danger rule is not always an absolute bar to a plaintiff's recovery.<sup>60</sup> Justice Rose cited *Hape v. Rath*<sup>61</sup> for the proposition that the plaintiff is not necessarily contributorily negligent if he knows of a danger and carefully attempts to deal with it. Justice Rose articulated the obvious danger rule as involving secondary assumption of risk, while the majority cast the obvious danger rule in the primary assumption of risk mold.

In *Brittain*, plaintiff was injured when the sides of an excavation in which he was working fell on him.<sup>62</sup> The majority held that plaintiff assumed the risk of such accidents,<sup>63</sup> and reasoned that since under comparative negligence, plaintiff's assumption of risk is to be compared to defendant's negligence, the jury verdict finding plaintiff contributorily negligent must stand.<sup>64</sup> The court acknowledged that the pit was obviously dangerous, because the sides were neither shored nor sloped and thus likely to cave in.<sup>65</sup> But the obvious danger rule was not invoked to remove defendant's duty. Rather, the obviousness went to the question of plaintiff's secondary assumption of risk. Justice Rose dissented because the danger was not obvious.<sup>66</sup> He, too, would have evaluated plaintiff's behavior in light of the nature of the condition. The whole court thus treated the obvious danger rule as an expression of secondary, rather than primary, assumption of risk.

Whether *Brittain* overrules *Bluejacket* or not, the tension manifest in these cases between the treatment of the obvious danger rule as secondary assumption of risk or contributory negligence on the one hand and no-duty primary assumption of risk on the other hand indicates that in Wyo-

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59. *Id.* at 499 (Rose, J., specially concurring).

60. *Id.* at 500 (Rose, J., specially concurring).

61. 492 P.2d 974 (Wyo. 1972).

62. 601 P.2d at 533.

63. *Id.* at 536.

64. *Id.* at 534.

65. *Id.* at 535.

66. *Id.* at 540 (Rose, J., dissenting).

ming the obvious danger rule is not firmly grounded in duty limitation.

### ANALYSIS OF THE COURT'S DECISION

The Wyoming Supreme Court in *Sherman v. Platte County* rejected Deloris Sherman's contention that comparative negligence abrogates the obvious danger rule.<sup>67</sup> The basis for her contention was that the obvious danger rule is "but a refined statement of the more colloquial phrase 'assumption of risk'."<sup>68</sup> Since in Wyoming assumption of risk is but a class of contributory negligence, and since comparative negligence removed contributory negligence as a complete bar to plaintiff's recovery, plaintiff argued that she should not be barred from recovery just because assumption of risk is "paraphrased" in terms of the no-duty obvious danger rule.<sup>69</sup> Plaintiff's objection centered around Jury Instruction 17: "An owner or occupant of land or premises does not have an obligation to protect his invitees against dangers that are known to them or that are so obvious and apparent that they may reasonably be expected to discover such dangers."<sup>70</sup>

It was not disputed that plaintiff knew of the icy condition of the parking lot where she fell.<sup>71</sup> Plaintiff urged that the jury should have been instructed that plaintiff's knowledge of the dangerous condition was merely a factor to be considered when apportioning fault, but that obviousness did not remove the duty to exercise reasonable care to keep the premises safe.<sup>72</sup>

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67. 642 P.2d at 790. The court apparently also rejected Sherman's contentions that 1) an exception to the obvious danger rule applies where defendant should anticipate harm despite the obviousness (Brief for Appellant, *supra* note 3, at 10); 2) a public utility owes a higher duty of care to entrants as of right—that of reasonable care under all the circumstances (*Id.* at 15); 3) the ice on the courthouse parking lot was an artificial, rather than a natural, accumulation and that the jury should have been allowed to decide that question. (*Id.* at 19).

68. Brief for Appellant, *supra* note 3, at 21.

69. *Id.*

70. 642 P.2d at 788.

71. *Id.*

72. Brief for Appellant, *supra* note 3, at 26.

The court presented "numerous Wyoming cases right on point," and cited *McKee* as the source for Jury Instruction 17.<sup>73</sup> The court found that Jury Instruction 17 was not in error and said it was clear the jury found the danger to be obvious.<sup>74</sup> The *Sherman* court cited *Bluejacket* as rejecting the notion that comparative negligence abrogated the obvious danger rule.<sup>75</sup>

The court announced that two rules were involved: 1) the obvious danger rule and 2) the rule that no duty exists to remove natural accumulations of snow and ice; and declared that the second rule broadened the protection afforded the possessor under the obvious danger rule.<sup>76</sup> The court explained: "Comparative negligence only abrogated absolute defenses involving the plaintiff's own negligence in bringing about his or her injuries. However it did not impose any new duties of care on prospective defendants."<sup>77</sup> Justice Rooney reiterated: "The adoption of the comparative negligence statute did not 'abrogate' any duty or standard of care. It simply directed a consideration of 'comparative fault'."<sup>78</sup> Both statements seem to assume that the obvious danger rule has always been interpreted as primary assumption of risk in Wyoming. A critical review of the court's analysis reveals several problem areas.

### 1. *Assumption of Risk*

Plaintiff contended the duty limitation contained in the obvious danger rule was but a paraphrase of the notion that the plaintiff assumes the risks of obvious dangers.<sup>79</sup> Justice Rooney, specially concurring, responded most directly to that contention: "The fallacy in appellant's argument is in reading into the instruction a direction to the jury for an assumption of risk by *appellant* rather than reading therein a definition of the duty owed by *appellee*."<sup>80</sup>

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73. 642 P.2d at 789.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 790 (citation omitted).

78. *Id.* at 791 (Rooney, J., specially concurring).

79. Brief for Appellant, *supra* note 3, at 21.

80. 642 P.2d at 790 (Rooney, J., specially concurring) (emphasis in original).

The judge's belief is not commonly shared by those who have studied the question. The consensus is that the obvious danger rule is a species of assumption of risk,<sup>81</sup> and there is strong criticism of the primary, or no-duty, formulation.<sup>82</sup> One notable response to the no-duty formulation is that "[W]e might as readily say that the defendant has no duty to one who is contributorily negligent."<sup>83</sup> We are asked to consider what, if not assumption of risk, negates a duty which otherwise exists, simply because the danger is obvious.<sup>84</sup> The duty limitation has been called "incompatible with good theory" since the victim's conduct simply contributes to his injury.<sup>85</sup> It has also been urged that whatever validity the duty limitation might have had, it should be reevaluated in light of modern notions of social responsibility and in light of comparative negligence.<sup>86</sup>

The obvious danger rule is not properly classified as primary assumption of risk because it describes dangers ordinarily within the scope of defendant's duty, removed only because they are obvious. A duty limitation is proper for those dangers which are always outside the defendant's scope of duty,<sup>87</sup> but obvious dangers are not always found there. The argument that the obviousness always takes the danger beyond the scope of defendant's duty does not address the simple fact that the same hole in the ground, perfectly obvious by day, is not obvious under cover of total darkness. Protection from the dangers of the hole is within the land-

81. 57 AM.JUR.2d *Negligence* § 277 (1971); Annot. 35 A.L.R.3d 230, 268 (1971); Mansfield, *Informed Choice in the Law of Torts*, 22 LA. L. REV. 17, 69 (1961); Wade, *supra* note 13, at 9; Green, *supra* note 13; P. Keeton, *Assumption of Risk and the Landowner*, 22 LA. L. REV. 108, 110 (1961); HARPER AND JAMES, *supra* note 13, at 1471; P. Keeton, *supra* note 13, at 562-63.

82. Green, *supra* note 13; Pedrick, *supra* note 13, at 100; P. Keeton, *Assumption of Risk and the Landowner*, 22 LA. L. REV. 108, 120 (1961); HARPER AND JAMES, *supra* note 13, at 487; James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605, 623 (1954); P. Keeton, *supra* note 13, at 562-63.

83. R. Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 160 (1961).

84. PROSSER, *TORTS* § 68 (4th ed. 1971).

85. Green, *supra* note 13.

86. Pedrick, *supra* note 13, at 100 (the doctrine of comparative negligence changes the relevance of no-duty assumption of risk); P. Keeton, *supra* note 13, at 563 (if assumption of risk sprang from rugged individualism it should be re-evaluated in light of modern thought).

87. The risk that one's neighbor may be struck by lightning while he is fishing is always outside one's scope of duty.

owner's duty by night. To warn of the danger of the hole is beyond the scope of the landowner's duty only when the danger is obvious. The obviousness merely relieves defendant of any further duty to protect the plaintiff, but the underlying duty is always there. Some say the obviousness limits defendant's duty, but in reality the obviousness relieves defendant from his breach of duty in maintaining the unsafe condition.

The *Sherman* court's formulation of the obvious danger rule seems a classic example of what the *Meistrich* opinion described as primary assumption of risk. It thus appears that the Wyoming court adopted by implication the *Meistrich* categories and classified the obvious danger rule as no-duty assumption of risk. Even so, the court was not at liberty to treat the rule as the *Meistrich* court might, because the Wyoming court must operate under the constraints of the comparative negligence statute. The *Meistrich* analysis and the comparative negligence statute conflict. The *Meistrich* court's primary assumption of risk formula demands that the plaintiff assume the risk, whether or not he was at fault, and declares that the defendant cannot be at fault, whether he otherwise would be or not. Comparative negligence requires the fault of both parties be compared. The explicit legislative determination should control.

## 2. *The Implications of Wyoming's Comparative Negligence Statute*

The face of Wyoming's comparative negligence statute manifests no intention to create additional duties. However, the policies behind the statute—to compare fault of the parties and to ameliorate the harsh consequences of traditional negligence theory—compel that conclusion.

In Wyoming, comparative negligence has changed the rule that contributory negligence is a complete bar to plaintiff's recovery. Comparative negligence has not changed pre-existing substantive law if 1) defendant is not negligent,<sup>88</sup>

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88. Comment, *supra* note 20, at 601.

2) there is no contributory negligence, or 3) if the contributory negligence was as great as defendant's negligence.<sup>89</sup>

The Wyoming court has stated that the concept of comparative negligence has also abrogated the doctrine of last clear chance.<sup>90</sup> The doctrine of last clear chance ameliorated the harsh rule of the common law that plaintiff's contributory negligence automatically barred his recovery. Even though the plaintiff was contributorily negligent, he could recover if the defendant, aware of the plaintiff's predicament, had the last chance to avoid an accident. There is no practical reason to retain the doctrine under a statutory scheme comparing fault,<sup>91</sup> because the relative fault of each party will be considered.<sup>92</sup>

The Wyoming court also has announced that the term "gross negligence" has no place in comparative negligence theory. Under traditional negligence theory, the plaintiff, in certain circumstances, could recover only if defendant acted with a conscious disregard for the consequences of his actions that amounted to a major departure from the standard of reasonable care. Under the comparative negligence statute a major departure from the standard is reflected in the percentage of negligence assigned to defendant, so the court declared the elimination of gross negligence to be "no great loss toward the attainment of equity."<sup>93</sup> The court indicated that public policy, as established by the comparative negligence statute, has abolished gross negligence.<sup>94</sup>

Thus the court has acknowledged that the statute operates not only directly, by expressly removing contributory

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89. *Danculovich v. Brown*, 593 P.2d 187, 192 (Wyo. 1979).

90. *Id.* at 195.

91. *Id.*

92. Note the obvious danger rule is the converse of last clear chance: because the danger is obvious to the plaintiff, he, not the defendant, has the last chance to avoid the accident. For two cases emphasizing that defendant did not have superior knowledge, so could not have prevented the accident, see: *Bluejacket v. Carney*, 550 P.2d 494, 497 (Wyo. 1976); *LeGrande v. Misner*, 490 P.2d 1252, 1255 (Wyo. 1971). *But cf.* *Buttrey Food Stores v. Coulson*, 620 P.2d 549, 552 (Wyo. 1980) (plaintiff recovered because owner-defendant had constructive knowledge of the dangerous condition).

93. *Tate v. Mountain States Tel. & Tel. Co.*, 647 P.2d 58, 60 (Wyo. 1982) (citing *Danculovich v. Brown*, 593 P.2d 187, 192-93 (Wyo. 1979)).

94. *Tate v. Mountain States Tel. & Tel. Co.*, 647 P.2d at 61 (Wyo. 1982).

negligence as a complete bar to recovery, but also indirectly, by eliminating, through underlying public policy, certain well-established formulations which are no longer convenient or necessary under comparative negligence. The no-duty formulation of the obvious danger rule is inconsistent with the policy to abolish absolute defenses and compare fault. On the one hand, the court declares the public policy behind the comparative negligence statute to be controlling in the elimination of inconvenient terms and impractical doctrines. On the other hand, the court neglects public policy when the obvious danger rule is involved, and looks only to the express language of the statute itself.

### 3. *Landowner Protections*

The landowner has traditionally enjoyed immunity from liability for injuries caused by the condition of his property. In addition to the usual defenses enjoyed by all defendants, the landowner was protected by special duty limitations and, in varying degrees, by his victim's status as trespasser, licensee or invitee.<sup>95</sup> This favored status in law may have resulted from the small number of landowners and their disproportionate power, the laissez-faire attitude of the common law, and the rugged individualism that marked earlier days.

The special status of the landowner among defendants may have been justified in the nineteenth century, but today it is criticized as an archaic remnant of the distant past.<sup>96</sup> The laissez-faire attitude of that period has given way to policies reflecting broader social responsibilities.<sup>97</sup> Landowners are no longer the few and favored. As their status declines, so do the very reasons for the original protections. Therefore many jurisdictions have abolished those protections.<sup>98</sup>

Landowner protections in Wyoming were reduced somewhat by the comparative negligence statute. Under compara-

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95. DOOLEY, *supra* note 13, at 433.

96. *Id.* at 435.

97. P. Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. PA. L. REV. 629, 641 (1952).

98. Mansfield, *supra* note 81, at 71.



tive negligence, a negligent landowner may have to pay damages to a partially negligent plaintiff to whom recovery would have been denied under traditional negligence. There is no exemption in the statute for the landowner, no indication the landowner is to be treated any differently from other defendants.

Despite the trend away from landowner immunities elsewhere, and despite the legislative determination to compare landowner's fault, the Wyoming court continues to protect the landowner in two ways. The no-duty formulation of the obvious danger rule keeps many landowner cases from the purview of the comparative negligence statute. And the obvious danger rule not only includes obvious dangers, but has been expanded by the *Sherman* court to bring within its sway even concealed dangers resulting from natural accumulations of ice and snow.<sup>99</sup>

The court appears reluctant to subject landowners, particularly governmental entities, to liability for obvious dangers, especially if the danger is ice or snow. The vision of landowners bankrupted by enormous sums paid as damages to great multitudes of people who have accidents on the frequently-icy streets, sidewalks and parking lots of Wyoming is a formidable one. However, acknowledging the obvious danger rule as a form of assumption of risk subject to comparison conjures up no such vision.

Plaintiff did not urge strict liability, only that obviousness become one factor<sup>100</sup> rather than the decisive factor in determining defendant's liability. This is the consensus of those who would abolish the no-duty obvious danger rule.<sup>101</sup>

99. 642 P.2d at 789. Although the court did not explain just what a concealed danger of ice and snow might be, it seems clear that the court's intent is to remove all duty regarding natural accumulations.

100. Brief for Appellant, *supra* note 3, at 24.

101. Green, *supra* note 13 (plaintiff's behavior is simply contributing when the danger is obvious); Pedrick, *supra* note 13, at 99 (comparative negligence requires no-duty be abolished so fault can be compared); P. Keeton, *Assumption of Risk and the Landowner*, 22 LA. L. REV. 108, 120 (1961) (general no-duty doctrine denying plaintiff's recovery is unwarranted); HARPER AND JAMES, *supra* note 13, at 1487 (blanket relief to defendant doubtful on principle and authority; obviousness might satisfy duty of due care in a given case, but not always); James, *supra* note 82 (the requirement to make premises safe might be satisfied by obviousness, but not invariably); P. Keeton, *supra* note 13, at 562-63 (plaintiff's knowledge is an important factor, but shouldn't, as a matter of law, decide all cases).

The obviousness of the danger would properly be considered in an evaluation of plaintiff's contributing behavior.

In addition, a normal standard of reasonable care would adequately protect the landowner's interests.<sup>102</sup> In Wyoming, for example, sudden temperature fluctuations, uninterrupted cold, incessant snow, and the difficulty, cost and futility of snow removal, would all be among the circumstances to be considered in determining whether the landowner exercised reasonable care. Acknowledging the obvious danger rule as a form of assumption of risk subject to comparison does not create a duty of care impossible for Wyoming landowners to meet, only a duty of reasonable care considering all the circumstances.

#### 4. *Prior Case Analysis*

Justice Thomas has suggested that among the responsibilities of an appellate court is an obligation to lend some modicum of rationality to the law whenever possible.<sup>103</sup> That would seem to require a more complete analysis of the issues before the court than took place in *Sherman*.

In *Sherman*, the court told us that it had already decided, in *Bluejacket*, that the obvious danger rule is still good law under comparative negligence.<sup>104</sup> However, there is no indication that the impact of comparative negligence on the no-duty obvious danger rule was raised or addressed there. Thus, neither opinion gives any insight into the decision to retain the obvious danger rule as a duty limitation.

The *Sherman* court did not reconsider its holding in *Brittain*, which is inconsistent with *Sherman*. In *Brittain*, the danger was obvious, but rather than limit defendant's duty according to the "rule" of *Bluejacket*, the court affirmed a finding that plaintiff was contributorily negligent for assuming the risk.<sup>105</sup> The *Sherman* court did not avail itself

102. Green, *The Duty Problem in Negligence Cases: II*, 29 COLUM. L. REV. 255, 275 (1929).

103. *Tate v. Mountain States Tel. & Tel. Co.*, 647 P.2d 58, 63 (Wyo. 1982). (Thomas, J., specially concurring).

104. 642 P.2d at 789.

105. 601 P.2d at 536.

of the opportunity 1) to overrule *Brittain*, or 2) to reconcile *Brittain* and *Bluejacket*, or 3) to distinguish them.<sup>106</sup>

*McKee* is cited as the source for the jury instruction disputed in *Sherman*. However, there is no indication in *McKee* that the court applied the obvious danger rule. Rather, the court appears to provide three bases for its decision, without distinguishing them.<sup>107</sup> Furthermore, the Wyoming source cited in *McKee* for the obvious danger rule is *Watts v. Holmes*, which merely stated that the cases seem generally to hold that there is no liability where the danger is obvious.<sup>108</sup> In fact, prior Wyoming cases seem generally to hold that the obviousness of the danger means plaintiff was contributorily negligent or assumed the risk. Defendants had not been liable in the prior Wyoming cases because both assumption of risk and contributory negligence barred the plaintiff's recovery under traditional negligence theory. In addition, *Joly* may have modified *McKee* since it indicated that the *McKee* obvious danger rule addresses plaintiff's behavior rather than limits defendant's duty.<sup>109</sup>

### 5. A Rational Model

Texas recently abolished the no-duty obvious danger rule.<sup>110</sup> Three of the reasons the Texas Supreme Court gave are especially relevant. First, the rationale for primary assumption of risk had already been partially eroded, because secondary assumption of risk had been abolished by the adoption of comparative negligence.<sup>111</sup> Second, that erosion included an abolition of elements essential to primary assumption of risk, because secondary assumption of risk in-

106. A rough calculation suggests a possible basis for distinguishing *Brittain* and *Bluejacket*. Wyoming has one obvious danger rule for landowners (no duty is owed) and a second for master/servant and all other cases (the obviousness will be a factor in determining plaintiff's contribution to the accident).

107. See *supra* text accompanying notes 24-42.

108. 386 P.2d 718, 719 (Wyo. 1963).

109. 483 P.2d 244, 246. See *supra* text accompanying note 50.

110. *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978), *rev'g*, 545 S.W.2d 275 (Tex. Civ. App. 1976). See generally Note, "No-Duty" Doctrine Abolished in Negligence Actions in Texas, 10 TEX. TECH. L. REV. 278 (1978).

111. 565 S.W.2d 512, 517 (Tex. 1978).

cludes and is inseparable from primary assumption of risk.<sup>112</sup> Third, the purpose of comparative negligence—to apportion fault—was incompatible with primary assumption of risk which is an absolute bar.<sup>113</sup>

These three factors also exist in Wyoming. The court in *Sherman* refused the opportunity to give real effect to the notion that comparative negligence abolishes absolute defenses. The Wyoming court declined the invitation to set clear guidelines, to rectify discrepancies in previous law, and to give supporting reasons for its retention of the archaic no-duty formulation of the obvious danger rule.

### CONCLUSION

In *Sherman v. Platte County*, the Wyoming Supreme Court clings to the antiquated notion that the landowner owes no duty for obvious dangers, thus keeping such negligence cases out of the purview of the comparative negligence statute—a legislative determination to compare fault in *all* negligence cases. The legislative mandate seems to require 1) an acknowledgment of the usual duty of reasonable care, 2) an examination of defendant's breach of that duty, and 3) contributing behavior by the plaintiff, to balance the equities. The no-duty formulation of the obvious danger rule strictly predetermines the equities and precludes a comparison of fault.

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112. *Id.*

113. *Id.*