

CHAPTER SEVEN DEFENCES

7.2. ASSUMPTION OF RISK

7.2.3. FRENCH LAW

Introductory Note

a) Not unlike English law, where *consent* is distinguished from *volenti non fit injuria*,¹ French law makes a distinction between the consent of the victim (*le consentement de la victime*) and the assumption of risk (*l'acceptation des risques*). Whereas the former refers to the consent of the victim to an intentional violation (*une atteinte volontaire*) of rights or interests protected by law, the latter refers to the victim accepting the possibility that a third party inflict unintentional and accidental damage inflicted upon him or her.² The effect of a victim's consent as a defence depends on whether the rights or interests (intentionally) violated relate to property or other economic interests, or to physical integrity or privacy. In the former case, the holder of the right is free in principle to exempt the tortfeasor from liability by explicit or implicit consent. In the latter case, he or she is only free to do so if and insofar as the law permits him or her to dispose of his or her right to bodily integrity or privacy.³

The issue of *explicit* consent, as contained in exoneration clauses, will not be dealt with hereafter as it occurs mainly in contractual situations. The discussion will be limited to the issue of assumption of risk which, as will be seen, is sometimes based on *implied* consent.

b) In French law, assumption of risk by a victim does not, in principle, relieve the defendant of liability for wrongful conduct (Article 1382 C.civ.).⁴ In other words, it does not constitute an autonomous ground of justification (*une cause autonome de justification*). However, it may be regarded as an element in the assessment of fault (i) on the side of a plaintiff who knowingly accepted the risk (and has thus been contributorily negligent) but also and particularly so (ii) on the part of the defendant,⁵ since the defendant is less likely to have been at fault where

¹ *Supra*, 7.2.1., Introductory Note.

² Viney and Jourdain, *Conditions* at 156 para. 572.

³ *Ibid.* at 520, para. 574-577.

⁴ Honoré at 116, para. 7-168.

⁵ Viney and Jourdain, *Conditions*, at 517, para. 573.

the victim assumed a *normal* risk under the circumstances.⁶ That is particularly so in competitive sports or dangerous games where it is not unusual for a player to cause damage to a fellow player in the heat of the moment. In such instances only voluntary or serious fault will be held against the defendant since the victim is supposed to have accepted *normal* risks, but is not supposed to have consented to *abnormal* risks (resulting e.g. from intentionally breaking the rules of the game or from aggression or unfairness).⁷ The different treatment of normal and abnormal risks is reflected in the distinction made between a ‘sporting fault’ (*faute de jeu*) and a ‘fault in the course of, or against a, sport’ (*faute commise dans le jeu ou contre le jeu*), of which only the latter leads to liability.⁸

c) In cases of liability for things⁹ (Article 1384 (1) C.civ.) or animals (Article 1385 C.civ.),¹⁰ assumption of risk by the victim can only exceptionally be relied on by the defendant to eliminate his liability as a keeper (*gardien*) of a thing or an animal. Until 1968 that was the case where a motor vehicle passenger for free got injured in a car accident. The passenger’s claim against the driver on the basis of the latter’s liability as a keeper of the car was then dismissed, as the passenger was held to have agreed implicitly, in return for the free lift, to exonerate the driver from liability under 1384(1) C.civ. (note that this implicit release did not extend to fault-based liability under 1382-3 C.civ.).¹¹ In 1968 the Cour de cassation changed its position, however, and decided that the passenger’s claim under 1384(1) C.civ. was no longer thwarted as a result of assumption of risk.¹² Since 1985, the passenger is even better protected, as a result of Article 3 of *Loi Badinter*.¹³ Until then, a person who had accepted a lift from a drunken driver was supposed to have committed a fault which reduced the driver’s liability under 1382 C.civ.¹⁴ That person would now normally receive full compensation, since under Article 3 of *Loi Badinter*, compensation will be excluded only if the victim committed an inexcusable fault, which moreover must be the sole cause of the accident.¹⁵ According to French case law, accepting a free ride from a drunken driver is neither an inexcusable fault, nor can it be the sole cause of the accident.¹⁶

⁶ Ibid. at 517, para. 573-1 who explain that “assumption of risk accordingly raises the threshold of fault by making it more specific”. The standard for the defendant’s conduct to constitute a fault is set higher in that usually grave fault (*faute lourde*) or intentional fault (*faute volontaire*) is required.

⁷ See *infra*, 7.F.25.

⁸ Viney and Jourdain, *Conditions* at 518, para. 573-1.

⁹ Discussed in greater detail *supra*, Chapter VI, 6.1.2.

¹⁰ See *supra*, Chapter VI, 6.2.2.

¹¹ Honoré at 116, para. 7-168. See also Cass.civ. 27 March 1928, S 1928.1.353, D 1928.1.145.

¹² Cass. ch. mixte, 20 December 1968, D 1969.Jur.37.

¹³ See *supra*, Chapter VI, 6.2.1.B. and 6.F.16.

¹⁴ Cass. ch. mixte, 28 January 1972, JCP 1972.II.17050, with the conclusions of AG Lindon.

¹⁵ See *supra*, 7.F.4, Note (3). The concept of inexcusable fault under *Loi Badinter* is discussed *supra*, Chapter VI, 6.F.20.

¹⁶ Cass. civ. 2e, 19 February 1986, Bull.civ. 1989.II.20.

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Assumption of risk is still held to eliminate the liability of the keeper (*gardien*) in competitive sports and dangerous games, more particularly in situations where both the victim and the defendant are deemed to be the keepers of the object causing the damage (e.g. a football).¹⁷

d) In so-called rescue cases, assumption of risk will hardly be accepted as a defence to relieve the defendant from liability, whether totally or partially.¹⁸

*Cass. crim., 25 June 1969*¹⁹
Saint-Jean

7.F.22.

RESCUER NOT COMMITTING FAULT

Unfortunate rescuer

Save where the rescuer was at fault in creating the dangerous situation, assumption of risk cannot be argued against the rescuer.

Facts: The defendant was working for an agricultural machine manufacturer. He was on a promotional tour for that manufacturer. Being busy, he left his assistant in charge of putting up metal masts (for a stand) in the vicinity to two power lines. The plaintiff, a passer-by, warned the assistant of the ensuing danger. The plaintiff nonetheless went on to help the assistant place the masts, and was electrocuted in doing so.

Held: The court of appeal ascribed full responsibility for the accident to the defendant. The Cour de cassation upheld the judgment of the court of appeal.

Judgment: “The decision under appeal finds that [the plaintiff] intervened spontaneously and generously to help the [assistant] in difficulty and danger, ... and that in intervening immediately, although ineffectively, [he] acted as a rescuer, and did not commit any fault. On the other hand, [the defendant] had, by his own fault, created a dangerous situation which provoked the intervention of [the plaintiff]. Setting aside any superfluous ground, the court of appeal has thus responded to [the defendant’s] submissions, and given a legal basis for its decision. In effect, it has established... that [the plaintiff] did not commit any fault in creating the accident, which he attempted to avoid by his intervention, and that his awareness of the danger to which he exposed himself in a spirit of duty, cannot have as consequence a discharge, even partial, of the liability of [the defendant]. It follows that the appeal must be rejected.”

Notes

(1) Assumption of risk by a rescuer can be looked at from the point of view of fault²⁰ or causation.²¹ As Honoré puts it: “The first raises the problem whether the

¹⁷ See *infra*, 7.F.24 and Notes (1) and (2) thereafter.

¹⁸ See *infra*, 7.F.22.

¹⁹ D 1969.Jur.688. Translation by A. Dumas-Eymard.

fact that it is morally praiseworthy, or even heroic, to act in this way counterbalances the fact that the injured party has knowingly exposed himself to danger".²² As to the second, the question is whether there exists a causal connection between the tortfeasor's conduct, and the danger it creates for a third person, *and* the attempt of the rescuer to avert the danger.²³ All in all French case law is quite sympathetic to the rescuer (as regards both fault and causation), in that it accepts that a mere mistake (*erreur de conduite*) does not constitute fault,²⁴ and that only a grave or characterized fault (*une faute qualifiée, une faute lourde*)²⁵ can lead to partial exoneration of the defendant; even then, such fault will break the link of causation only where the rescue was totally foolhardy.²⁶ In the annotated judgment, the Cour de cassation approves the court of appeal in finding that the rescuer had not committed "any fault in creating the accident". Assumption of risk on the part of a rescuer does not therefore normally eliminate the defendant's liability for own fault (nor does it eliminate liability as a keeper of things or animals).²⁷

(2) Except for a few specific legal provisions,²⁸ French law does not generally award rescuers compensation for injury sustained outside the situation where the defendant is held liable for fault (Art. 1382-3 C.civ.) or for being the keeper of a thing or an animal (Art. 1384(1) or 1385 C.civ.). To remedy this situation, some case law has applied the provisions of the *Code civil* on *negotiorum gestio* (*gestion d'affaires*),²⁹ or has acknowledged the existence of an agreement to help (*convention d'assistance*).³⁰ The Cour de cassation went even so far as to presume the existence

²⁰ C. Roy-Loustaunau, *Du dommage éprouvé en prêtant assistance bénévole à autrui* (Marseille: Presses Universitaires d'Aix-Marseille, 1980) at 31-49.

²¹ Ibid. at 17-31.

²² Honoré at 103, para. 7-154.

²³ The issue of causation in rescue cases is discussed *supra*, Chapter IV, 4.3.3.

²⁴ C. Roy-Loustaunau, *Du dommage éprouvé en prêtant assistance bénévole à autrui* (Marseille: Presses Universitaires d'Aix-Marseille, 1980) at 40-41.

²⁵ Metz, 14 April 1975, JCP 1977.II.18624, annotated by N. Dejean de la Bâtie.

²⁶ Honoré at 104, para. 7-154. Grave fault (*faute lourde*) on the part of the rescuer does not necessarily constitute a foolhardy attempt at rescue. See N. Dejean de la Bâtie, *ibid.*, who explains: "While it is true that a completely unsolicited course of conduct from the victim, in a situation which did not require it, might be such as to break the chain of causation, the same cannot be said of a grave fault by a rescuer, in particular of his or her 'major mistakes' (*maladresses graves*)."

²⁷ See Cass.civ., 11 July 1962, D. 1963.Jur.40, with annotation by P. Azard.

²⁸ Rescue at sea (*l'assistance en mer*): Act 67-545 of 7 July 1967, JO, 9 July 1967, D 1967.Lég.258 and Decree 68-65 of 19 January 1968, JO, 25 January 1968, D 1968.Lég.91; also mutual help amongst farmers (*l'entraide agricole*): Art. 20 of the Act of 8 August 1962, JO, 10 August 1962, D 1962.Lég.274, now art. L. 325-1 to 325-3 of the Code rural.

²⁹ Le Tourneau and Cadet at para. 1039; C. Roy-Loustaunau, *Du dommage éprouvé en prêtant assistance bénévole à autrui* (Marseille: Presses Universitaires d'Aix-Marseille, 1980) at 50-75. See Cass.civ. 1re, 16 November 1955, JCP 1956.Jur.9087, with annotation by P. Esmein.

³⁰ Le Tourneau and Cadet at para. 1036; Roy-Loustaunau, *ibid.* at 109-144. Cass.civ. 1re, 27 May 1959, D 1959.Jur.524, with annotation by R. Savatier, JCP 1959.II.11187, with annotation by P. Esmein. Among many other cases see Paris, 25 January 1995, D. 1997.Somm.191, with an interesting

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of such a contract where the rescued person did not accept the help offered to him by the rescuer (e.g. because he was not in a position to do so); that line of case law has been very much criticised.³¹ However that be, such a contract cannot be invoked against the defendant where the rescuer himself or herself committed a fault: according to the Cour de cassation *any* fault, regardless of its gravity (*toute faute, quelle que soit sa gravité*), on the part of the rescuer leads to the reduction of the defendant's contractual liability.³²

*Cass. civ. 2e, 28 January 1987*³³
Malherbe v. Amar

7.F.23.

DEFENDANT NOT LIABLE FOR NORMAL RISK

A game of squash

Injury suffered in the course of a sport game will not be recoverable if the other player(s) did not commit grave or intentional fault and if no abnormal risk was present.

Facts : In the course of a game of squash, which took place as part of a tournament, M was hit in the face and injured by the racket of his partner A, as the latter was playing a backhand shot. M claimed compensation for his injury from A.

Held: The court of appeal rejected the claim. The Cour de cassation upheld the decision of the court of appeal.

Judgment: “The court of appeal’s judgment found that squash is a rapid and ‘intense’ game, not devoid of certain risks. Having analysed the submissions of two witnesses, it held that, even assuming that the act of A was technically inept, proof had not been produced that he had acted with blatant incapacity, intentional brutality or in a disloyal fashion. Nor had he played in conditions creating, for his partner, an abnormal risk. Having regard to those statements and findings, the court of appeal was entitled, without incurring criticism on appeal, to hold that A was not liable [for the injury to his partner].”

Notes

(1) As explained in the introductory note the most important application of the doctrine of assumption of risk is found in competitive sports cases. In those cases the

note by F. Lagarde, “Obligation de secours mutuel et convention d’assistance formées entre les membres d’une palanquée de plongeurs.”

³¹ Cass. civ. Ire, 1 December 1969, D 1970.Jur.422, with annotation by M. Puech; JCP 1970.II.16445, with annotation by J.-L. Aubert.

³² Cass. civ. 2e, 30 April 1970, Bull.civ. 1970.II.149; (1971) 71 RTDciv. 135, with annotation by G. Durry. For a recent case see Cass. civ. Ire, 13 January 1998, D 1998.IR.44.

³³ Bull.civ. 1987.II.32.

victim's acceptance of *normal* risks prevents the defendant's conduct from constituting a fault.³⁴ Only faults of a certain gravity (*fautes d'une certaine gravité*),³⁵ such as serious faults or voluntary faults, are retained against the defendant since they are seen as abnormal risks which the victim is not deemed to have accepted. In that respect French case law makes a distinction between, on the one hand, a "sporting fault" (*faute de jeu*) – which refers to a breach of the technical rules of the game, and does not lead to liability³⁶ – and, on the other hand, a "fault in the course of, or against a, sport" (*faute commise dans le jeu ou contre le jeu*) – such as intentionally breaking the rules of the game, voluntary brutality, aggression or unfair behaviour,³⁷ which constitutes an *abnormal* risk not assumed by the victim,³⁸ and for which the defendant remains liable.

(2) In combat sports, like boxing, where physical violence is part of the game, it is accepted that the victim's prior consent will lead to exemption from liability on the basis of an implied "legal permission". That permission does not, however, relieve the players from observing the rules of the game.³⁹

*Cass. civ. 2e, 8 March 1995*⁴⁰ **7.F.24.**
Bizouard v. Assurances générales de France (AGF)

KEEPER LIABLE FOR ABNORMAL RISK

Capsized yacht

The keeper of a thing which was instrumental in sport injury will be liable if the injury resulted from the realization of an abnormal risk.

³⁴ Viney and Jourdain, *Conditions* at 517, para. 573-1. But see *Cass. civ. 2e, 19 March 1997, D 1999.Somm.88*, with annotation by J. Mouly; see also P. Jourdain, "Vers un recul de l'acceptation des risques en matière sportive?" (1997) 97 *RTDciv.* 666.

³⁵ Except when safety regulations have been infringed in which case each fault of the defendant entails liability: see *Pau, 18 November 1993, D 1996.Somm.29*, with annotation by A. Lacabarats.

³⁶ See *Cass. civ. 2e, 20 November 1968, Bull.civ. 1968.II.277*: fault in the service of a game of tennis not leading to liability. See also *Cass. civ. 2e, 21 June 1979, D 1979.IR.543*, with annotation by C. Larroumet: fault in a game of football sanctioned by a penalty not leading to liability.

³⁷ See e.g. *Aix, 28 November 1978, D 1980.IR.492*, with annotation by C. Larroumet; *Cass. civ. 2e, 5 December 1990, Bull.civ. 1990.II.258*.

³⁸ For a case in which the victim of a skiing accident was held liable for one third, however on the basis of *contributory fault*, as she had knowingly accepted the dangers of the expedition under the prevailing weather conditions, and therefore was regarded to have assumed the abnormal risk, see *Chambéry, 6 June 1978, JCP 1980.II.19286*.

³⁹ Viney and Jourdain, *Conditions* at 522, para. 576, with reference to cases concerning boxing.

⁴⁰ *Bull.civ. 1995.II.83*.

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Facts: In the course of a regatta, a yacht having on board S, the yacht's owner, and six crew, foundered with no survivors. The heirs and beneficiaries of the lost crew demanded compensation for their loss from the heirs of S on the basis of Art. 1384(1) C.civ.

Held: The court of appeal allowed the claim. The Cour de cassation upheld the decision of the court of appeal.

Judgment: "The decision of the court of appeal is criticised on the ground that it held S liable on the basis of Art. 1384(1) C.civ. However the court held, on the one hand, that it is certain that the yacht went down with all hands. For this reason, the yacht played a part in the death by drowning of those who were on board and is thus presumed to be the actual cause (*cause génératrice*) of these deaths, proof to the contrary not having been produced. The court also held, on the other hand, that the usage and rules applicable to regattas give the skipper alone the command of the yacht, which he directs and controls in its manoeuvres, while each crew member fulfils his task at the post to which he has been assigned, under the control and supervision of the skipper. The skipper alone therefore exercises the powers of control and supervision which are characterize the keeper (*gardien*) [within the meaning of Article 1384(1) C.civ.]. Having regard to those statements and findings, the court of appeal was entitled to infer that S was *the sole keeper of the yacht* [emphasis added], which was the instrument of the damage. [The court of appeal] stated correctly that *assumption of risk* [emphasis added] means assumption of those risks that are normally foreseeable. It then found... that the race took place over 24 hours upon a course limited to 80 nautical miles and in the proximity of coasts or in protected waters; that the start, which had been delayed because of poor weather conditions, was given by the organisers to numerous contestants; and that the only yacht that went down with all hands and with no proven or determined cause was that of S, an experienced skipper, assisted by one of the best crews in the Nautical Society. Having regard to those statements and findings, the court of appeal was entitled to infer... that even though the members of the crew had accepted the ordinary and foreseeable risks of a highly competitive yacht race, they had not however accepted the risk of death which, in the circumstances of case, constituted an *abnormal risk* [emphasis added]. It follows that the appeal is not founded."

Notes

(1) Assumption of risk by a victim constitutes by no means a *general* defence which would operate as a full release of *liability for a thing* (Article 1384 (1) C.civ.) or *an animal* (Article 1385 C. civ.),⁴¹ like it does not operate as a full release of liability for one's own fault (Article 1382 C. civ.).⁴² It can however exonerate the keeper of the thing or of the animal under certain circumstances, but nowadays⁴³

⁴¹ Viney and Jourdain, *Conditions* at 619, para. 641. See also Cass. civ. 2e, 5 July 1989, Bull.civ., 1989.II.146 and Cass. civ. 2e, 17 May 1995, Bull.civ. 1995.II.142.

⁴² *Supra*, Introductory Note under c), with reference to Viney and Jourdain, *Conditions* at 516, para. 573.

⁴³ As explained in the introductory note, assumption of risk is no longer applied in cases of transport of passengers for free.

only in cases of competitive sports and dangerous games.⁴⁴ The annotated judgment is a good example of how, even then, French courts may very well refuse to eliminate the liability of the keeper of a thing on the basis of assumption of risk, as well as, in the present case, on the basis that the participants were collective keepers (*garde en commun*).⁴⁵

(2) First, a few words about the latter doctrine, which is used also to solve causation problems in multiple defendant cases.⁴⁶ In derogation of the principle that only one person can be the keeper of a thing or animal at the one time,⁴⁷ it is sometimes possible to have multiple keepers, i.e. that more than one person is deemed to exert the *garde* over the thing.⁴⁸ Where the victim himself or herself is amongst these keepers, he or she cannot then found a claim on Article 1384 (1) C. civ. or Article 1385 C. civ. as against the fellow keepers. The notion of “collective keepers” (*garde en commun*) has been adopted in sports cases in which the players compete with each other for the same object (e.g. a ball),⁴⁹ sometimes also in cases in which they use the same equipment (e.g. a yacht).⁵⁰ However, in the annotated judgment, the Cour de cassation does not apply that doctrine,⁵¹ since it approves the opinion of the court of appeal, according to which the skipper of the yacht, who as such has full command of the ship and its crew, was the sole keeper of the ship within the meaning of Article 1384 (1) C.civ.

(3) In the annotated case, the Cour de cassation also approved the court of appeal’s refusal to regard assumption of risk by the plaintiffs as a defence under Article 1384 (1) C.civ.⁵² As we have seen,⁵³ in sports cases French case law has relied on the doctrine of assumption of risk to exonerate the defendant from liability for personal fault where normal sports risks are involved. In the same way the liability of a keeper under Art. 1384 (1) or 1385 C.civ. may be excluded in situations

⁴⁴ See Note (3). Moreover, the number of such situations would seem to diminish even further: see J. Gardach in a note under Cass. civ. 2e, 8 March 1995, JCP 1995.II.22499 and J. Mouly in a note under Cass. civ. 2e, 22 March 1995 and Cass. civ. 2e, 8 March 1995, D 1998.Somm.44.

⁴⁵ In the annotated case the plaintiffs were the heirs and successors of the six teammates of the skipper, who in relation to the heirs of the skipper were put on the same footing as primary victims (cf. *supra*, Chapter II, 2.F.19, Note (2) and ff.).

⁴⁶ See *supra*, Chapter IV, 4.F.42., Note (2).

⁴⁷ See *supra*, Chapter VI, 6.F.8., Note (6).

⁴⁸ *Garde* is defined as the power “to use, direct and control” a thing or an animal: see *supra*, Chapter VI, 6.F.8.

⁴⁹ Cass. civ. 2e, 20 November 1968, Bull.civ. 1968.II.277.

⁵⁰ Cass. civ. 2e, 15 June 1983, Bull.civ. 1983.II.127.

⁵¹ For a second time: the Cour de cassation had already rejected the doctrine of *garde en commun* in the same case on 9 May 1990, Bull. civ. 1990.II.93. For a comparison between the two judgments, see J. Gardach in a note under the annotated judgment, JCP 1995.II.22.499.

⁵² For a case in which the Cour d’appel de Rouen rejected the doctrine of *garde en commun* but applied the doctrine of assumption of risk to exclude the liability of the keeper of a toboggan: see Rouen, 17 May 1995, D 1997.Somm.189, with annotation by A. Lacabarats.

⁵³ See *supra*, 7.F.23, Note (1).

of normal sports risks which the victim is assumed to have accepted.⁵⁴ However, even then, as is illustrated by the annotated judgment, that defence will not be successful, where the situation, although one of normal risk in itself, results in death, which was not seen as a normal risk in the circumstances of the case.⁵⁵ Moreover some case law refused to accept assumption of risk as a defence at all in sports, such as skiing or hunting,⁵⁶ where there is no direct competitive relationship between the participants, and where it is therefore inappropriate to regard anyone of them as having assumed any risk of harm whatsoever as against the others. Furthermore, there is a tendency to exclude the defence of assumption of risk also for injury sustained while training, even for competitive sports.⁵⁷ In the face of so much uncertainty, it has been suggested that, instead of distinguishing between competitive and non-competitive sports or games, the courts should rather make a distinction with regard to the players, between professionals and amateurs.⁵⁸

⁵⁴ For a broad interpretation of “competition”, see Cass. civ. 2e, 5 June 1985, Bull.civ. 1985.II.114 to include the preliminary phase of a concours hippique, namely when three of the horses, and their riders, were waiting to be called to participate. In this case the victim’s assumption of risk was deemed to exonerate the defendant of his liability based on Article 1385 C. civ. (liability for animals).

⁵⁵ See J. Gardach, note under the annotated judgment, JCP 1995.II.22499 and J. Mouly, note under the annotated judgment, D 1998.Somm.44, both criticizing the Cour de cassation for not taking into account the abnormality of the situation itself rather than the gravity of the harm inflicted.

⁵⁶ For a skiing case: Cass. civ. 2e, 1 June 1972, Gaz.Pal. 1973.I.76, with annotation by W. Rabinovitch; for a hunting case: Cass. civ. 2e, 21 December 1962, Bull.civ. 1962.II.832.

⁵⁷ For a case of cyclists enjoying a Sunday outing for the sole purpose of training, see Cass. civ. 2e, 22 March 1995, Bull.civ. 1995.II.99. But see Limoges, 25 November 1993, D 1995.Somm.62.

⁵⁸ J. Mouly, note under Limoges, 25 November 1993, *ibid.* and under Cass.civ. 2e, 22 March 1995, D. 1998.Somm.43.