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Assumption Of Risk As A Limitation Of Liability In Guest-Host Relationships

Excluding statutory duties which cut across this entire field,[37] a legal duty to act may be imposed because of a family relationship or because of contract or assumption of a duty. Otherwise there is no general duty for one to act in behalf of his fellow man, no matter how slight the inconvenience or how shocking the results.

ROBERT G. FRANK

ASSUMPTION OF RISK AS A LIMITATION OF LIABILITY IN GUEST-HOST RELATIONSHIPS

Two recent cases from adjoining jurisdictions[1] deal with the liability of automobile drivers to guests when the defendant-host and the plaintiff-guest had been drinking together earlier in the evening. Both cases held the plaintiff was barred from recovery. However, different legal approaches were used to reach the ultimate conclusions.

The Supreme Court of Wisconsin in *Severson v. Hauck*[2] held that evidence concerning assumption of the risk was properly submitted to the jury. A group of young people had spent the evening drinking beer. On the way home the sixteen-year-old plaintiff, Elaine Severson, was in the back seat "laughing and fooling around,"[3] when she somehow received a severe cut on her head. One of the passengers yelled to the defendant to turn around and look, which he did. When he looked forward again, he could not avoid hitting a bridge. The car overturned and the plaintiff was seriously injured. The defendant was adjudged guilty of negligence, and the jury found that the plaintiff assumed the risk and was contributorily negligent. The plaintiff appealed, claiming the defendant's negligent speed, management and control were such momentary acts that as a matter of law they could not be assumed by a failure to protest. The Wisconsin Supreme Court held that even if the defendant's acts of negligence were momentary, the rule that a guest does not assume the momentary acts of the host's negligence does not apply where the host has been drinking alcoholic beverages and the plaintiff knows that fact.[4] Although

[37]Some states have passed statutes imposing a duty to act in specific instances. E.g., Maryland as in the principal case, and New York as in Hodson v. Stapleton, 248 App. Div. 524, 290 N.Y. Supp. 570 (Sup. Ct. 1936).

[1]Waltanen v. Wiitala, 361 Mich. 504, 105 N.W.2d 400 (1960); Severson v. Hauck, 11 Wis. 2d 192, 105 N.W.2d 369 (1960).

[2]11 Wis. 2d 192, 105 N.W.2d 369 (1960).

[3]Id. at 371.

[4]Ibid.

Wisconsin has a comparative negligence statute,[5] it has no guest statute. A guest is treated as a licensee to whom the host owes the common law duty of reasonable care. Under Wisconsin law assumption of the risk, as distinguished from contributory negligence, completely bars recovery regardless of the comparative negligence of the parties.[6]

In *Waltanen v. Wiitala*,[7] a Michigan decision, it was held that the plaintiff had assumed the risk of the defendant's misconduct and was barred from recovery. The lower court reached this result without submitting the issue to the jury. The supreme court, in affirming the decision, stated that it was simply a question on which reasonable men would not differ. The plaintiff and the defendant were comrades who, over the course of several months, "frequented bars and taverns."[8] On the evening in question they had been drinking for a period of five hours. The defendant was driving between 95 and 100 miles per hour when he ran off the road and as a consequence the plaintiff was seriously injured. The court indicated that even if the facts were so analyzed as to constitute contributory negligence, the plaintiff would still have been barred as a matter of law. Normally, ordinary contributory negligence on the part of the plaintiff would not be a defense to an action based on the gross negligence required under the Michigan guest statute for liability,[9] but here the court stated: "[T]he same knowledge of past and present excesses [of drinking] that justified holding plaintiff to have assumed the risk, justify holding him to be in reckless disregard of his own safety, all as a matter of law."[10]

The dissenting justice in *Waltanen* argued that the plaintiff's actions constituted contributory negligence and not assumption of risk.

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[5]"Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering." Wis. Stat. § 331.045 (Supp. 1959).

[6]Scory v. La Fave, 215 Wis. 21, 254 N.W. 643 (1934).

[7]361 Mich. 504, 105 N.W.2d 400 (1960).

[8]Id. at 401.

[9]"Provided, however, That no person, transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been caused by the gross negligence or wilful and wanton misconduct of the owner or operator of such motor vehicle and unless such gross negligence or wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought." Mich. Comp. Laws § 256.29 (1948). The term gross negligence as used in Michigan guest statute is synonymous with wilful and wanton misconduct. Thayer v. Thayer, 286 Mich. 273, 282 N.W. 145, 147 (1938).

[10]105 N.W.2d at 403.

He thought the trial court should not have directed a verdict. Instead, he advocated the doctrine of comparative misconduct[11] (contributory fault of equal degree), and emphasized that "the question of presence or absence of such contributory fault is, from its very specifications, a natural one for jury determination."[12]

Under the majority rule at common law a host owes a gratuitous guest the duty of exercising reasonable care to prevent injury.[13] A minority of jurisdictions at common law held the defendant liable only for harm resulting from wilful or wanton misconduct.[14] Wisconsin follows the majority rule while Michigan and some other states have incorporated the minority rule into guest statutes. The minority common law rule and its statutory enactment into so-called guest statutes have the effect of limiting the liability of a host to his gratuitous passenger. This view shows an aversion to the idea that a non-paying guest is entitled to compensation from his host for the ordinary mishaps of modern day traffic.[15]

Prior to Wisconsin's enactment of a comparative negligence statute in 1931, the defense of contributory negligence would have been a complete bar to the plaintiff's recovery in a case like *Severson*. Although Wisconsin adhered to the common law rule of due care in guest-host relations, the defense of contributory negligence provided a means to limit the liability of a host.

Since the enactment of the comparative negligence statute, however, contributory negligence is no longer a complete bar to a defendant's misconduct. Instead the plaintiff's misconduct is apportioned with that of the defendant and a recovery allowed unless the plaintiff's misconduct equals that of the defendant. The comparative negligence statute in effect increases the area of liability in guest-host relations. Prior to 1931 assumption of risk was frequently referred to in Wisconsin as a form of contributory negligence.[16] There was no

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[11]Where the misconduct of the plaintiff has been of such a character as to contribute to the cause of the accident or is of a substantially equal degree as the fault of the defendant, then the plaintiff is precluded from recovering. Annot., 15 A.L.R.2d 1165, 1177 (1951) and cases cited therein. This doctrine is considered in Restatement, Torts § 503(2), comment a (1934).

[12]105 N.W.2d at 406.

[13]Annot., 20 A.L.R. 1014 (1922).

[14]Id. at 1018-19.

[15]Richards, The Washington Guest Statute, 15 Wash. L. Rev. 87 (1940).

[16]Biersach v. Wechselberg, 206 Wis. 113, 238 N.W. 905 (1931). "In driving up the hill he assumed the risk of slipping, and assumption of risk is a form of contributory negligence." Keller v. City of Port Washington, 200 Wis. 87, 227 N.W. 284, 285 (1929). See also Tosty v. Morgan Co., 151 Wis. 601, 139 N.W. 402 (1913); Johnson v. St. Paul & W. Coal Co., 126 Wis. 492, 105 N.W. 1048 (1906); Dugal v. Chippewa Falls, 101 Wis. 533, 77 N.W. 878 (1899).

real need to distinguish between the two defenses as contributory negligence was a sufficient bar. Shortly after the enactment of the comparative negligence statute the Wisconsin Supreme Court declared that comparative negligence was inapplicable to the defense of assumption of risk.[17] In the case of *Scory v. La Fave*,[18] the court made clear the distinction of the two defenses and stated that assumption of the risk acts as a complete bar to recovery.

> "It follows that, as to Mrs. La Fave, plaintiff's right to recover from her is defeated by her assumption of the risk, regardless of whether plaintiff was or was not also guilty of contributory negligence. . . ."[19]

In this interpretation of the common law the court found another method of limiting the liability of a host to a guest.

Since the courts of Wisconsin and other states distinguished between assumption of risk and contributory negligence,[20] it is worthwhile to consider the nature of the two defenses in some detail. In contributory negligence the bar to recovery is based on the plaintiff's own fault.[21] The defense evolved from the general law of negligence and looks to the independent acts of the plaintiff and the defendant, which together have created a danger. Contributory negligence is conduct of the plaintiff that falls below a reasonable standard and is a legally contributing cause of the injury.[22] The doctrine of assumption of risk arose out of the law of contracts[23] while contributory negligence grew out of the law of torts.[24] Therefore, the defense to an action in the guest-host case under the former has consent as its basis, while a defense under the latter involves the idea of the plaintiff's misconduct or fault. The doctrine of assumption of risk applies when there are three elements present: (a) a hazard or danger inconsistent with the safety of the guest,[25] (b) knowledge (actual or constructive)

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[17]Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934).

[18]215 Wis. 211, 254 N.W. 643 (1934).

[19]Id. at 646.

[20]The distinction between the two defenses, assumption of risk and contributory negligence has been reiterated in a recent federal court case. The court states that there has been a good deal of confusion on this issue, but quotes various legal scholars to show that there is a basic distinction. "It would be hard to find any point on which scholarly discussion is so completely unanimous." Potter v. Brittan, 286 F.2d 521, 523 (3d Cir. 1961).

[21]Bohlen, Voluntary Assumption of Risk, 20 Harv. L. Rev. 14, 91 (1906).

[22]Restatement, Torts § 463 (1934).

[23]65 C.J.S. Negligence § 117 (1950).

[24]Ibid.

[25]Stotzheim v. Djos, 256 Minn. 316, 98 N.W.2d 129 (1959).

and appreciation of the hazard by the guest,[26] and (c) acquiescence or a willingness on the part of the guest to proceed in the face of danger.[27] Although apparently precisely defined, the term "assumption of risk" is used with at least four different meanings. (1) It is used when the plaintiff has given his express consent so as to relieve the defendant of any obligation for his safety, *i.e.*, the plaintiff takes his chances from a known risk.[28] (2) The term is used where one, though not expressly agreeing to assume a risk, enters voluntarily into a relationship with the defendant that involves some risk and, therefore, impliedly agrees to relieve the defendant of any obligation toward him.[29] (3) It is used where a plaintiff who is aware of a particular risk created by the defendant proceeds voluntarily to encounter it.[30] (4) Finally, it is used when the plaintiff is unreasonable in voluntarily entering into a relationship with the defendant.[31] Here he may be barred from recovery by his venturesome conduct as well as being contributorily negligent by his unreasonableness or recklessness.

Since it does not necessarily follow that the plaintiff is contributorily negligent because he acts voluntarily, the two defenses are quite distinct.[32] The fourth sense in which assumption of risk is used is the one that causes a great deal of confusion with the concept of contributory negligence.[33] In the two cases under consideration the facts could be analyzed so as to constitute either defense.

Both assumption of risk and contributory negligence are equally effective to bar recovery when they overlap in guest-host actions under the majority common law rule. As indicated by the majority opinion in the Michigan case of *Waltanen,* the doctrine of contributory negligence could have been utilized and the plaintiff would still have

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[26]Elie v. C. Cowles & Co., 82 Conn. 236, 73 Atl. 258 (1909).

[27]See note 25 supra.

[28]Atlantic Greyhound Lines v. Skinner, 172 Va. 428, 2 S.E.2d 441 (1939); Quimby v. Boston & M. Ry., 150 Mass. 365, 23 N.E. 205 (1890).

[29]Brisson v. Minneapolis Baseball & Athletic Ass'n, 185 Minn. 507, 240 N.W. 903 (1932); Murphy v. Steeplechase Amusement Co., 250 N.Y. 479, 166 N.E. 173 (1929).

[30]Hunn v. Windsor Hotel Co., 119 W. Va. 215 S.E. 57 (1937).

[31]Adair v. Valley Flying Service, 196 Ore. 479, 250 P.2d 104 (1952); Sutherland v. Davis, 286 Ky. 743, 151 S.W.2d 1021 (1941); Clise v. Prunty, 108 W. Va. 635, 152 S.E. 201 (1930).

[32]Bohlen, supra note 21 at 17.

[33]If the plaintiff is put in a position of potential peril by the acts of the defendant and then acts unreasonably in attempting to extricate himself from this peril, he will be barred by his own negligence. Although often called "voluntary assumption of risk" such usage of terminology is technically incorrect, since the plaintiff's action is not completely voluntary. The defendant has made a choice of alternative necessary. Restatement, Torts § 893, comment c (1939).