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THE AUTOMOBILE GUEST AND THE RATIONALE OF ASSUMPTION OF RISK*

By RALPH S. RICE†

VI. THE OPERATION OF THE CONCEPT AND THE AUTOMOBILE GUEST

A. AS TO THE "DUTY" OF THE DEFENDANT

In the automobile cases, as in other fields where the doctrine has been applied, confusion has resulted from the use of the words "assumption of risk" to indicate a limitation on the duty of the host to observe a certain standard of care for the safety of his passenger regardless of the conduct of the guest. Where the liabilities of the parties are determined at common law, the standard of obligation of the host to the guest has arisen from two principal analogies: that of the gratuitous bailee toward the safety of his bailment, and that of the licensor to a gratuitous licensee. The impact of the doctrine on the cases drawing analogies to the bailor-bailee relationship has been slight, but an understanding of the rationale of those cases is imperative in establishing the proper place of the doctrine of assumption of risk in contemporary automobile accident law.

A minority of jurisdictions have sought to measure the responsibility of the host to a guest on the theory that a gratuitous bailee owes only slight care to preserve the subject of the bailment from harm. This doctrine was enunciated in England in 1869 and was affirmed in 1899.[223] The rule was subsequently discarded there.[224] The doctrine that only slight care was owed

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[223]Moffatt v. Bateman, (1869) L. R. 3 P. C. 115, 22 L. T. 140, and Coughlin v. Gillison, [1899] 12 Q. B. 145, 68 L. J. Q. B. 147, 79 L. T. 627, in which the decision in the earlier case was discussed by Smith, L. J.: "What was there laid down was that if you undertake to drive a man in your carriage, you must not be guilty of gross negligence in driving, if you wish to escape liability for an accident to him while being driven." And, as to the Bateman case, Collins, L. J. said: "The plaintiff had intrusted himself to the defendant to be carried, and there was a clear duty on the part of the bailee towards the bailor not to be guilty of gross negligence causing injury to him."

[224]See Harris v. Perry & Co., [1903] 2 K. B. 219, 72 L. J. K. B. 725, 89 L. T. 174, and Dann v. Hamilton, [1939] 1 K. B. 509, 108 L. J. K. B. 255, 55 T. L. R. 297, 160 L. T. 433.

a gratuitous guest was, however, adopted in Georgia in 1871,[225] and the basic decision establishing the doctrine in the automobile cases was enunciated in Massachusetts in 1917.[226] The decision is still followed there,[227] and has been approved in Georgia[228] and Washington.[229] After some wavering, the Virginia court also adopted the concept,[230] and the Pennsylvania court, after seeming to follow the bailment analogy, subsequently rejected it.[231] The doctrine has been the target for sharp attacks by other courts and commentators.[232].

[225]Selp v. Dunn, (1871) 42 Ga. 528.

[226]Massaletti v. Fitzroy, (1917) 228 Mass. 487, 118 N. E. 168. The decision seems indefensible, both from the standpoint of logic and authority, and is replete with desperate refinements. An examination of the cases cited, adopting the licensor-licensee analogy of the real property cases, reveals that the distinctions from such decisions, sought to be made by the Massachusetts court, are so ill-founded as to reflect on the probity of the members of court. The decision was based in part upon the earlier case of West v. Poor, (1907) 196 Mass. 183, 81 N. E. 960.

[227]E. g., Terlizzi v. March, (1927) 258 Mass. 156, 154 N. E. 754; Picarello v. Rodakis, (1937) 299 Mass. 33, 11 N. E. (2d) 470.

[228]Epps v. Parrish, (1921) 26 Ga. App. 399, 106 S. E. 297, and other cases cited and followed in Hopkins v. Sipe, (1938) 58 Ga. A. 511, 199 S. E. 246.

[229]Saxe v. Terry, (1926) 140 Wash. 503, 250 Pac. 27.

[230]In Morris v. Peyton, (1927) 148 Va. 812, 139 S. E. 500, the court apparently adopted the rule that the host owed a duty of reasonable care toward the automobile guest, in a case in which the guest was a child. The case was distinguished in Boggs v. Plybon, (1931) 157 Va. 30, 160 S. E. 66, and Jones v. Massie, (1932) 158 Va. 121, 163 S. E. 63, holding that the host could be liable to the guest only for gross negligence unless the guest were "an infant of tender years" who could not be expected to understand or assume the risk. This distinction was not made in Massachusetts under the gross negligence rule (Balian v. Ogassian, (1931) 277 Mass. 525, 179 N. E. 232) or in Wisconsin under the assumption of risk doctrine (Eisenhut v. Eisenhut, (1933) 212 Wis. 467, 248 N. W. 440).

[231]Cody v. Venzie, (1919) 263 Pa. St. 451, 107 Atl. 383: ". . . when a gratuitous bailment is for the sole benefit of the guest the law requires slight diligence and makes the carrier only responsible for gross neglect, if it is for the sole benefit of the carrier the law requires great diligence and makes the carrier responsible for slight neglect; and where it is for the benefit or pleasure of both parties, as in the instant case, it requires ordinary diligence and makes the carrier responsible for ordinary neglect." But in Curry v. Riggles, (1931) 302 Pa. St. 156, 153 Atl. 325, where the defendant was taking the plaintiff to a nearby city to get the plaintiff's car and an accident happened during the journey, the court said: "The trip was undertaken for plaintiff's accommodation, and he was a gratuitous passenger, toward whom defendant was required to exercise ordinary care . . . but not the high degree required in the case of the carriage of a passenger for hire. . . ."

[232]See comments of the court in Wurtzburger v. Oglesby, (1930) 222 Ala. 151, 131 So. 9; Munson v. Rupker, (1923) 96 Ind. App. 15, 148 N. E. 169, aff'd 151 N. E. 101, (in the first opinion) ". . . it will not do to say that the operator of an automobile owes no more duty to a person riding with him as a guest at sufferance, or as a self-invited guest, than a gratuitous bailee owes to a block of wood," and (in the opinion on rehearing) "But the analogy between gratuitous bailments of personal property and the gratuitous transportation of a human being in an automobile does not

Most courts, however, have sought to determine the liability of the automobile host to his guest upon principles arising from the licensor-licensee relationship. The greater number of these decisions (and others which arbitrarily set the standard of care without reference to analogies in then existing concepts of legal fault) suggest that the host owes a duty to his guest to exercise "ordinary" or "reasonable" care for his safety:[235] a standard which is properly measurable by the conduct of the reasonably prudent man. Normally the term "assumption of risk" is not found in cases referable simply to the duty of ordinary care. In some of the cases involving automobile transportation, the novelty of the problem was such that in establishing the limits of the duty of the host it was suggested that the guest "assumes the risks which would naturally attach to riding,"[236] or "assumes all the ordinary risk of injury from dangers and accidents incident to automobile travel,"[237] as earlier had been said with reference to railway transportation.[238] The use of the term in defining the liability of the host in litigation involving airplane carriage has been general

hold. The degree of protection required to be given property rights is not necessarily the same as that which must be given to human life. . . ." And see, e. g., White, Liability of an Automobile Driver to a Non-Paying Passenger, (1934) 20 Va. L. Rev. 326, 330, ff.

[235]Perkins v. Galloway, (1915) 194 Ala. 265, 69 So. 875; Howe v. Little, (1931) 182 Ark. 1083, 34 S. W. (2d) 218; Spring v. McCabe, (1921) 53 Cal. App. 330, 200 Pac. 41; Boyle v. Dolan (1929) 97 Fla. 249, 120 So. 334; Barnett v. Levy, (1919) 213 Ill. App. 129; Munson v. Rupker, supra, note 232; Mayberry v. Sivey, (1877) 18 Kan. 291; Beard v. Klusmeier, (1914) 158 Ky. 153, 164 S. W. 319; Avery v. Thompson, (1918) 117 Me. 120, 103 Atl. 4; Cohen v. Silverman, (1922) 153 Minn. 492, 190 N. W. 795; Green v. Maddox, (1935) 168 Miss. 171, 151 So. 160; Nicora v. Cerveri, (1926) 49 Nev. 261, 244 Pac. 897; Grimshaw v. Lake Shore & Michigan Southern Ry., (1912) 205 N. Y. 371, 98 N. E. 762, (gratuitous passenger on common carrier, dicta as to other licensees); Amann v. Thurston, (1928) 133 Misc. Rep. 293, 231 N. Y. S. 657; Eddy v. Wells, (1930) 59 N. D. 663, 231 N. W. 785; Bauer v. Griess, (1920) 105 Neb. 381, 181 N. W. 156; Zwick v. Zwick, (1928) 20 Ohio App. 522, 163 N. E. 917 (requirement of ordinary care assumed); Leonard v. Bartle, (1927) 48 R. I. 101, 135 Atl. 853; Morris v. Sanders, (Tex. Civ. App. 1934) 55 S. W. (2d) 594; Moorefield v. Lewis, (1924) 96 W. Va. 112, 123 S. E. 564; Collins v. Anderson, (1927) 37 Wyo. 275, 260 P. 1089; Lygo v. Newbold, (1854) 9 Ex. 302, 23 L. J. Ex. 108, 22 L. T. O. S. 226; Harris v. Perry & Co., (1903) 2 K. B. 219, 72 L. J. K. B. 725, 89 L. T. 174. Cases on the subject are innumerable, but the ones selected above are representative in enunciation and application of the rule.

[236]Roy v. Kirn, (1919) 208 Mich. 571, 175 N. W. 475.

[237]Green v. Maddox, (1935) 168 Miss. 171, 151 So. 160; later approved in Monsour v. Farris, (1938) 181 Miss. 803, 181 So. 326. See also Jacobs v. Jacobs, (1917) 141 La. 272, 74 So. 992, suggesting that a guest must show negligence on the part of the driver, and that he "assumes the risk of the ordinary dangers of which he is aware."

[238]McKinney v. Neil, (C.C. Ohio 1840) 1 McLean 540, Fed. Cas. No. 8865; Chicago B. & Q. R. v. Hazzard, (1861) 26 Ill. 373.

and has in effect followed the above cases in using the term to limit the liability of the host to those cases in which lack of care is shown.[239]

The decisions above set the standard of conduct of the host in automobile guest cases clearly and definitively. Rules adopted in other decisions have been less exact. It has been suggested that by merely accepting a ride, one does not assume the risk of the driver's negligence,[240] and such conclusion is entirely in accord with the decisions indicating that a possessor of real property may not act negligently toward one on his premises after the possessor knows of the presence of the licensee. But the standard of conduct constituting "negligence" is not thus made clear, and courts disagree as to the elements of negligent action in such cases.[241]

Still less definitive of the respective duties of the parties is the suggestion often made that the host must not "increase the danger to the guest or create a new danger."[242] Within the uncertain scope of this definition, it has been held that the guest accepts the host with the skill the host actually possesses, where the guest has knowledge of the driving habits of his host,[243] or, without

[239]Allison v. Standard Air Lines, (D.C. Cal.) U. S. Av. R. (1930) 292, aff'd on appeal, 65 F. (2d) 668, without specific reference to the term; Law v. Transcontinental Air Transport, (D.C. Pa.) U. S. Av. R. (1931) 205; Stoll v. Curtiss Flying Service, (1932) 236 App. Div. 664, 257 N. Y. S. 1010; Conklin v. Canadian Colonial Airways, (1934) 242 App. Div. 625, 271 N. Y. S. 1107, aff'd without reference to this language of the decision in (1935) 266 N. Y. 244, 194 N. E. 692.

[240]See Marks v. Dorkin, (1927) 105 Conn. 521, 136 Atl. 83, holding that one does not assume the risk of negligence of another because the other has been previously negligent. Williamson v. Fitzgerald, (1931) 116 Cal. App. 19, 2 P. (2d) 201: ". . . it may not be said the plaintiff assumed the risks of danger from the negligent conduct in driving merely because she voluntarily became a member of the expedition. One does not ordinarily assume the risk of dangers he has no reason to anticipate."

[241]The duty of the host toward the guest has since been said by the California court to be that of ordinary care. See Spring v. McCabe, (1921) 53 Cal. App. 330, 200 Pac. 41. An instruction of the trial court that the guest did not "assume the risks of any negligence or any failure to exercise ordinary care on the part of [the driver]" was approved in Peay v. Panich, (1935) 191 Ark. 538, 87 S. W. (2d) 23, the instruction also limiting the right to recover where the conduct of the plaintiff in riding with a known incompetent driver indicated an assumption of risk.

[242]Barger v. Chelpon, (1932) 60 S. D. 66, 243 N. W. 97. See also Ingerick v. Mess, (C.C.A. 2d Cir. 1933) 63 F. (2d) 233; Liggett & Myers Tobacco Co. v. De Parcq, (C.C.A. 8th Cir. 1933) 66 F. (2d) 678; Perkins v. Galloway, (1915) 194 Ala. 265, 69 So. 875; Dickerson v. Connecticut Co., (1922) 98 Conn. 87, 118 Atl. 518; Roy v. Kirn, (1919) 208 Mich. 571, 175 N. W. 475; Higgins v. Mason, (1930) 255 N. Y. 104, 174 N. E. 77; Leonard v. Bartle, (1927) 48 R. I. 101, 135 Atl. 853; Harrison v. Graham, 21 Tenn. App. 189, 107 S. W. (2d) 517; and a line of Wisconsin cases, the most recent of which appears to be Bourestom v. Bourestom, (1939) 231 Wis. 666, 285 N. W. 426.

[243]Liggett & Myers Tobacco Co. v. De Parcq, supra note 242.

qualification, that the guest accepts the host as he is;[244] or that the host owes the guest the duty of ordinary or reasonable care.[245] Here, too, the term has been used to denote that the guest "assumes the risk" of those hazards concerning which the host owes him no duty of protection.[246] And in one of the earlier cases in which analogy was drawn to the licensor-licensee cases involving real property, the court arrived at the conclusion that the guest "as a licensee, assumed all the risks of the carriage, except such as might result from wanton or intentional wrong, or a failure to exercise due care to avert injury after his danger became apparent,"[247] a combination of the wanton or wilful misconduct theory and that of last clear chance.

A principal variation from the more generally accepted requirement that the host must act as a reasonably prudent man is the principle that the automobile guest must not only take the vehicle of the host as he finds it (a clearly proper conclusion from the real property cases holding that the possessor owes no duty to a licensee or trespasser to put the premises in shape for his use) but that he must also take the host as he finds him. This suggestion was first casually made in Connecticut in 1922,[248] where it was said that "The guest on entering the automobile takes it and the driver as they then are, and accepts the dangers incident to that mode of conveyance." The comment was reiterated during the following year by the Indiana court in the case of *Munson v. Rupker*,[249] which also often has been cited as holding that the automobile host owes the same duty to an invitee as to a guest

[244]Ingerick v. Mess, Dickerson v. Connecticut Co., Higgins v. Mason, and Bourestom v. Bourestom, all cited supra note 242.

[245]Perkins v. Galloway, supra note 235; Roy v. Kirn, supra note 236. Leonard v. Bartle, supra note 235; Barger v. Chelpon, supra note 242; Harrison v. Graham, (1937) 21 Tenn. App. 189, 107 S. W. (2d) 517.

[246]The use of the term "assumption of risk" in limiting the duty of the defendant was well considered in Eddy v. Wells, (1930) 59 N. D. 663, 231 N. W. 785, in which it was held that the host must use ordinary care not to increase the hazards of the guest: "It must be recognized, however, that there is a popular sense in which the term 'assumption of risk' is being used, and this is becoming noticeable in current automobile litigation. Some of the courts have used this language in such cases at times in a sense different from that which the term has commonly borne in legal parlance. And latterly many of the 'catch phrase' writers in the various law reports have used the term in this way. An automobile owner who gives his friend a ride is not an insurer of that friend's safety. The relation of host and guest ensues. The friend becomes a guest subject to the hazards reasonably incident to such a use of such a vehicle. The host must use and exercise ordinary care, considering all of the circumstances, so as not to increase such hazards. . . ."

[247]Crider v. Yolande Coal & Coke Co., (1921) 206 Ala. 71, 89 So. 285.

[248]In Dickerson v. Connecticut Co., (1922) 98 Conn. 87, 118 Atl. 518.

[249]Cited supra note 235.

at sufferance. In that case the court, apparently in an unguarded moment, said: "He who enters an automobile to take a ride with the owner also takes the automobile and the driver as he finds them. But, when the owner of the automobile starts it in motion he, as it were, takes the life of his guest into his keeping, and in the operation of such car he must use reasonable care not to injure any one riding therein with his knowledge and consent." The latter part of the quotation clearly sets up the standard of "reasonable care," but the case says nothing concerning how the term "reasonable" is to be interpreted.

If the term is to be interpreted to mean what is "reasonable" for the driver *as he is*, the standard may be quite different from that of the fictitious "reasonably prudent man" of the other fields of negligence. The potentialities of this decision have not been developed in Indiana, but the looseness of the language was noted by the Connecticut court in the case of *Marks v. Dorkin*,[250] in which it was specifically said that the guest not only did not "accept" the risk of the unknown incompetence of the driver, but that he did not assume any risk of known habits of reckless driving. The conclusion that a guest takes the driver as he finds him was adopted by the Arkansas court in two cases,[251] citing *Munson v. Rupker*, but no case has there arisen directly involving the principle that the guest assumes the risk of injuries through the lack of skill of the host. In a more recent case, the court held that the guest assumes the risk of the *known* incompetence of the driver[252] (which of course pertains to the "conduct" of the guest rather than a limitation of the "duty" of the driver) and from the opinion it seems likely that in Arkansas the doctrine will be applied only to the incompetence of the driver which is known to the guest, and not that with which the guest may be unfamiliar. The suggestion of *Munson v. Rupker* has also been quoted with approval by the West Virginia court in a case not involving incompetence of the driver, but there have been no later cases interpretive of the phrase.[253] In still other opinions, judges have indicated a conviction that the guest ought be said to "assume the risks" arising out of the lack of driving skill of

[250]Marks v. Dorkin, (1927) 105 Conn. 521, 136 Atl. 83.

[251]Black v. Goldweber, (1927) 172 Ark. 862, 291 S. W. 760; Howe v. Little, (1931) 182 Ark. 1083, 34 S. W. (2d) 218, each citing (as dicta) the statement in Munson v. Rupker (1926) 96 Ind. App. 15, 151 N. E. 101, that "He who enters an automobile to take a ride with the owner also takes the automobile and the driver as he finds them."

[252]Peay v. Panich, (1935) 191 Ark. 538, 37 S. W. (2d) 23.

[253]Marple v. Haddad, (1927) 103 W. Va. 508, 138 S. E. 113.

the host,[254] whether such lack of skill was known or unknown to the passenger.

The doctrine, if it may be said to be such, that the guest "takes" or "accepts" or "assumes" the risks of travel arising from the personal characteristics of the driver, whether known or unknown to the guest, has been innocuous in the cases heretofore cited, for it does not appear that the courts have in fact limited the rights of the guest by the suggestions made. In two states, however, the doctrine has impinged sharply on the right of litigants. The concept has been extensively applied in Wisconsin, where the court has held that while the host owes a duty to the guest not to increase the hazards known to him when he embarks upon the journey, the guest is charged with knowledge that driving abilities vary and that the host may be less able to protect him than a driver of more skill and experience.[255] It is therefore said that in conscientiously exercising his best skill, the host has violated no duty owed to the guest, though the standard of care which he is able to attain is less than that of the average reasonably prudent man. The social justification for such rule was presented in an exhaustive opinion by the courts:

"When one drives his car to his neighbor's door and invites his neighbor to an automobile ride, does not the neighbor accept the hospitality which the host has to offer? . . . When he accepts

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[254]Harvey, J., in Howse v. Weinrich, (1931) 133 Kan. 132, 298 Pac. 766: "One who invites another to ride in his car does not thereby necessarily guarantee either that he is an expert driver or that his car is in first class condition. The guest ordinarily is bound to know that he is being invited to ride in a used car, the tires, brakes, lights and other working parts of which may not be in first class condition, and that his host may not be an expert driver. In accepting the invitation the guest necessarily assumes risks normally incident to such condition much as a guest invited to a home assumes the risk of the condition of the premises and the characteristics of his host"; (and see majority opinion of Burch, J., in the same case); Brogden, J., in Norfleet v. Hall, (1933) 204 N. C. 573, 169 S. E. 143: (after considering the analogy between defective automobiles and defective premises) ". . . it would seem that the driver is as much a permanent condition of moving premises as bolts and screws, and valves and tubes. If the rider assumes the risk of such bolts and tubes and valves, it is hard to understand why he does not also accept the risk of the driver, who must be a permanent part of the 'premises' of a moving vehicle, for without the driver, the vehicle would not move at all. The analogy [that a duty of ordinary care is owed in automobile cases because the vehicle is inherently dangerous, hence a higher duty of care is owed than to retain premises in a proper condition] strikes me as an effort to put new wine in old bottles, and the fallacy of that experiment was pointed out about two thousand years ago."
It will be noted that not all cases use the term "assume the risk." Some courts speak of "accepting" the risk; others of "taking" the driver as he is found. Whatever terminology is used, the reference to the general principle behind the cases seems clear.

[255]See Sommerfield v. Flury, (1929) 198 Wis. 163, 223 N. W. 408.

the invitation and enters the automobile does he not accept the car in the condition in which it exists and such skill as may be possessed on the part of the driver? That there is a great variation in the degree of skill possessed by those who assume to drive cars is well known. Not all who drive automobiles by any manner of means can be said to be expert drivers. The danger thus assumed is the danger that should not be increased and to which the host should add no new danger. If the host driving the car conscientiously exercised the skill possessed by him in handling the car under emergencies, does the guest have a right to demand any more? Does the guest have a right to demand of the host a degree of skill for the security of the guest which the host is utterly unable to exercise for his own protection? It would seem that the statement of this question carried with it its own answer, and that the same consideration which compels the guest to accept the car in the condition in which he finds it also compels him to be content with the honest and conscientious exercise of such skill as the host or driver may have attained in the management and control of the automobile in emergencies."[256]

It should be noted that the liability of the host is extended, however, in cases in which he does not conscientiously exercise the skill possessed,[257] and that the guest does not assume the risk of an accident caused by inadvertence,[258] as distinguished from lack of skill. Neither does the guest assume the risk of absence of skill of the host, when faulty or hasty judgment of the driver is based on unsound premises proceeding from careless observation.[259]

The doctrine has been adopted with equal rigor in New York, where it has been applied in a case where the host failed, as a reasonably prudent man obviously would not have failed, to realize that a known defective condition in the automobile was dangerous. The court found that the guest assumed the risk of the inability

[256]Cleary v. Eckart, (1926) 191 Wis. 114, 210 N. W. 267. In this case, however, it appeared that the guest had actual knowledge of the lack of skill of the host in operating the automobile involved in the accident. In Poneitowcki v. Harres, (1929) 200 Wis. 504, 228 N. W. 126, it was held that the guest accepted the driver, with his habits of driving, so far as the same were known to her, and with such skill in operating and managing the car as he actually possessed. The limitation on the duty of the host, excluding liability for lack of skill in operating the automobile, was definitely stated and applied, however, in Eisenhut v. Eisenhut, (1933) 212 Wis. 467, 248 N. W. 440, reh. den. 212 Wis. 467, 250 N. W. 441.

[257]Cleary v. Eckart, (1926) 191 Wis. 114, 210 N. W. 267; Hensel v. Hensel Yellow Cab Co., (1932) 209 Wis. 489, 245 N. W. 159; Monsos v. Euler, (1934) 216 Wis. 133, 256 N. W. 630.

[258]Hensel v. Hensel Yellow Cab Co., (1932) 209 Wis. 489, 245 N. W. 159.

[259]Rudolph v. Ketter, (1940) 233 Wis. 329, 289 N. W. 674.

of the host to appreciate the danger, even though such propensity of the host was unknown to him.[260]

The fact that only two states have adopted this extensive limitation on the duty of the host is illustrative of the shortcomings inherent in the rule. The rule has always been well established in tort that one assuming to act must exercise reasonable care in so acting. It is said that the host "must conscientiously exercise the skill possessed"; yet it may be next to impossible to prove objectively that the host failed so to exercise his skill, where the presumption against his willingness to subject himself to a risk of harm obtains. The difficulty in proof is manifest, especially since the Wisconsin court has upon occasion based its decisions on the factor that the host could not be expected to intend to injure himself.[261] Moreover, if, as the maxims repeat, "conjecture and speculation are abhorrent to the law," what shall be said of a petit jury in a personal injury suit struggling to decide whether the accident occurred because the host had only limited skill, or because he did not "conscientiously exercise" the skill he had? The courts themselves can never say. If the driver has gone around corners on two wheels all his life, unknown to his guest, shall the fact that this was the standard of care he normally observed, and that he exercised the quantum of skill he possessed, preclude a recovery by the guest? Shall there be as many standards of legal fault in these cases as there are automobile drivers? What remains of the basis of the salutary doctrine in automobile accident cases that each man may presume that another will act as a reasonably prudent man, or that he will obey the law, until he has actual or constructive knowledge that does or ought lead him to conclude otherwise? Fundamentally, the doctrine is unrealistic. The guest does not in fact, when he accepts the hospitality, accept the risk that the host will act other than as a reasonably prudent man.

The result of the doctrine in the Wisconsin court was the adoption of the fiction that lookout, speed, and obedience to the

[260]Higgins v. Mason, (1930) 255 N. Y. 104, 174 N. E. 77, where it was clear that Mason, the driver of the vehicle, knew something was wrong with it: "Mason's failure to realize . . . a dangerous condition . . . was a risk assumed by the guests when they accepted the invitation to take the trip." And see Campbell v. Spaeth, (1934) 213 Wis. 162, 250 N. W. 394.

[261]E.g., Hensel v. Hensel, supra, note 257: (in deciding whether the host could have intended to injure himself, in determining causation for an accident) "There is nothing to indicate that the driver Hensel did not exercise such skill as he possessed in the management of the truck. He had every inducement to do so. His own safety as well as that of his wife and employee were at stake as well as the property of the company. . . ."

law of the road require no experience or acquired skill, and that the driver of an automobile who failed to maintain a lookout, obey the laws of the road, or drive at a proper speed increased the hazard to his guest.[262] Consequently it was said that as to these factors, the guest assumed no risk. Yet, if a driver is unskillful at all, by lack of experience, he is likely to drive either too fast or too slow, and to encounter peril from lack of experience or judgment in making observations or drawing conclusions from them. There seems no logical reason for including these features of the driving abilities of the host among the risks not assumed by the guest if it may be shown that the host was conscientiously exercising such skill as he possessed in keeping watch over the way of travel. The exception seems based rather on considerations of policy than upon logic.

However, other factors equally independent of the driver's background of skill and experience have been considered not to be within the scope of his obligation to the guest.[263] Even conceding the social desirability of this limitation of the duty of the host, it well may be questioned whether the administrative and judicial inconsistencies inseparable from it do not outweigh the social objectives sought to be obtained. If "assumption of risk" of the lack of skill of the host, unknown to the passenger, be considered a definitive doctrine, it would therefore seem that courts which have adopted it as dicta ought carefully to explore the potentialities of the concept before extending the rule to circumstances in which it may be determinative of the rights of the litigants.

Principles heretofore considered in this section relate to the limitations upon the duty of the host in so far as his operation of the automobile is concerned. Where the analogy to the real property cases is drawn, however, it seems clear that it may properly be said that the guest "assumes the risk" of the defects in the vehicle itself, or, to state the rule more exactly, that the automobile host, like the possessor of real property, owes the guest no duty to make the vehicle safe for the reception of guests, but only to warn the guests of dangers in the vehicle with which he

[262]See cases cited at note 289 infra, and text.

[263]E.g., where a driver is unable to keep a car from running off the highway. Eisenhut v. Eisenhut, (1933) 212 Wis. 467, 248 N. W. 440. See comment by Professor Campbell on this subject, suggesting the absence of a guiding principle in such cases. Campbell, Work of the Wisconsin Supreme Court for the August, 1933, and January, 1934, Term, Ch. VIII, Negligence, (1934) 10 Wis. L. Rev. 67, 69, 70.

is familiar. The cases generally so hold,[264] although many of them do not refer to the problem in terms of "assumption of risk" by the guest of the perils arising out of defects in the vehicle unknown to the host. This is the more surprising not only because the corollary to the real property cases is obvious, but because *Priestly v. Fowler,* first establishing a limitation of the duty of the host as to vehicular defects, dealt specifically, albeit confusedly, with the doctrine.[265] The phrase has, however, been used in suggesting that the host owed the guest a duty to inform him of a defective tire,[266] or accelerator,[267] as well as where the "guest" was in custody of the law.[268]

It must be apparent from the above that in so far as the term "assumption of risk" relates to the duty of the host toward the guest, in any field, the phrase is descriptive rather than definitive. If the words "assumption of risk" were dropped from the vocabu-

[264]The early English case of Moffatt v. Bateman, (1869) L. R. 3 P. C. 115, 22 L. T. 140, based on the bailor-bailee theory of responsibility in vehicular host-guest relationships, so held. Most courts require that actual knowledge of the host be shown: Howe v. Little, (1932) 182 Ark. 1083, 34 S. W. (2d) 218; Shrigley v. Pierson, (1934) 189 Ark. 386, 72 S. W. (2d) 541; Peay v. Panich, (1935) 191 Ark. 538, 37 S. W. (2d) 23; Dickerson v. Connecticut Co., (1922) 98 Conn. 87, 118 Atl. 518; Coffey v. Ouchita River Lbr. Co., (La. App. 1941) 191 So. 561; Monsour v. Farris, (1938) 181 Miss. 803, 181 So. 326; Dickason v. Dickason, (1929) 84 Mont. 52, 274 Pac. 145; Patnode v. Foote, (1912) 153 App. Div. 494, 138 N. Y. S. 221, (horses ran away, injuring plaintiff); Carroll v. Yonkers, (1920) 193 App. Div. 655, 184 N. Y. S. 847; Joyce v. Brockett, (1923) 205 App. Div. 770, 200 N. Y. S. 394; Higgins v. Mason, (1930) 255 N. Y. 104, 174 N. E. 77; Pettys v. Leith, (1933) 63 S. D. 149, 252 N. W. 18; Marple v. Haddad, (1927) 103 W. Va. 508, 138 S. E. 113; O'Shea v. Lavoy, (1921) 175 Wis. 456, 185 N. W. 525; Poneitowcki v. Harres, (1929) 200 Wis. 504, 228 N. W. 126; Waters v. Markham, (1931) 204 Wis. 332, 235 N. W. 797; Sweet v. Underwriters' Casualty Company, (1932) 206 Wis. 447, 240 N. W. 199; Campbell v. Spaeth, (1934) 213 Wis. 162, 250 N. W. 394.

A few courts have held that the host will be liable if he should have known, or by exercise of reasonable care could have discovered, the defective condition of the automobile: Dostie v. Lewiston Crushed Stone Co., (1941) 136 Me. 284, 8 Atl. (2d) 393; Banta v. Moresi, (1928) 9 La. App. 636, 119 So. 900; but cf. Coffey v. Ouchita Lbr. Co., (La. App. 1941) 191 So. 561; Romansky v. Cestaro, (1929) 109 Conn. 654, 145 Atl. 156. Of course, where the defective condition is known to the guest, the host need take no steps to advise of it. Pettys v. Leith, (1933) 63 S. D. 149, 252 N. W. 18; Llewellyn v. Schott, (1930) 109 W. Va. 379, 155 S. W. 115.

The Wisconsin court has also held that mere knowledge of a defect is not sufficient; that realization that the defective condition involves danger to the guest must also be shown: Waters v. Markham, (1931) 204 Wis. 332, 235 N. W. 797; Campbell v. Spaeth, (1934) 213 Wis. 162, 250 N. W. 394.

[265]Priestly v. Fowler, (1837) 3 M. & W. 1, Murp. & H. 305, 7 L. J. Ex. 42. See Professor Bohlen's analysis of the case in Voluntary Assumption of Risk, (1906) 20 Harv. L. Rev. 14, 27, 28.

[266]Knutson v. Dilger, (1934) 62 S. D. 474, 253 N. W. 459.

[267]Hennig v. Booth, (1926) 4 N. J. Supp. 150, 132 Atl. 294.

[268]Russo v. State, (1938) 166 Misc. Rep. 316, 2 N. Y. S. (2d) 350.

lary of the courts, it is doubtful that there would be any change in established legal principles governing the relationship of host and guest, whether in the real property or the automobile cases.

B. Assumption of Risk as a Bar to Recovery Because of the "Conduct" of the Automobile Guest

The decisions immediately preceding were adopted in the absence of a showing of legal fault in the conduct of the plaintiff, and established the limitations of the obligation of the defendant to take care for those who concededly were guilty of no omissions in caring for themselves. The conclusions of the courts hereafter discussed were adopted in circumstances showing a violation of duty owing by the host to the guest, where the defense was urged that the guest by his conduct, as evidencing consent or acquiescence in the negligent conduct of the host, impliedly agreed to release the host from the consequences of his otherwise actionable conduct.

Perhaps the best illustration of the twofold nature of the doctrine arises in the cases relating to mechanical defects in the conveyance operated by the host when transporting the guest. So far as the duty of the host to the guest is concerned, it is generally said that he has a duty to apprise the guest of known defects, but no duty to investigate to ascertain whether defects exist. As to defects unknown to the host, it is sometimes said that the guest "assumes the risk" of such defects. But it is also said that the guest "assumes the risk" of deficiencies in the mechanical condition of the automobile of which he has knowledge,[269] although he does not "assume the risk" of latent defects.[270] If, however, the defects are discoverable he may become a "coadventurer in the risk."[271]

[269]Zimmer v. Little, (1940) 138 Pa. Super. 374, 10 A. (2d) 911 (question as to whether plaintiff had "voluntarily exposed himself" to the danger from a defective door resolved for the plaintiff under Restatement definition of assumption of risk); Smith v. Pacific Trunk Express, (1941) 164 Ore. 318, 100 P. (2d) 474, semble; Hall v. Hall, (1935) 63 S. D. 343, 258 N. W. 491, dicta; Cleary v. Eckart, (1926) 191 Wis. 114, 210 N. W. 267, dicta.

[270]State, use of Beall v. McLeod, (Md. Surr. Ct.) U. S. Av. R. (1932) 94. Other cases thus restricting the defenses available to the guest, without referring to the assumption of risk terminology, include Puckett v. Pailthorpe, (1929) 207 Ia. 613, 223 N. W. 254, and Stanbery v. Johnson, (1934) 218 Ia. 160, 254 N. W. 303.

[271]It was so held in Clise v. Prunty, (1930) 108 W. Va. 635, 153 S. E. 201, where an accident occurred because of the absence of chains which guest should have known were not on the car: "Where possible danger is reasonably manifest to an invited guest, and she sits by without warning or protest to the driver and permits herself to be driven carelessly to her

It was an obvious corollary of this application of the doctrine that it should be extended to include at least the physical disabilities of the host. The analogy has been drawn[272] and applied[273] in such cases in terms of assumption of risk.

It has been suggested (1) that the guest takes the host with his known habits and eccentricities of driving, and (2) that even where the guest enters the vehicle in ignorance of the lack of skill of the driver, he will be considered to acquiesce in any course of driving that has persisted long enough to give him an opportunity to protest and thus indicate dissent or disapproval of the manner of driving.[274] As to the first, the conclusion may be generally stated to be that one "assumes the risk" of perils arising from the incompetency of the driver, known before the journey is undertaken. The Connecticut court[275] has refused to make application of this aspect of the doctrine, and it has been disapproved in England.[276] Even where it has been adopted, as in Wisconsin, it has been held that evidence showing that the guest was familiar with the conduct of the host in operating an automobile on previous occasions would not justify a finding that he had assumed the risk unless a further showing was made that the guest had knowledge of some particular habit of the host which resulted in the subsequent accident.[277] However, the majority of the states considering this phase of the doctrine have approved it.[278] One important distinction arises between the application of

own injury, she becomes a coadventurer in the risk, and is thereby barred of recovery . . . the evidence indicates her assent to the condition of the car." See, also, In re O'Byrne's Estate, (1938) 133 Neb. 750, 277 N. W. 74, and Yates v. Brazelton, (1930) 108 Cal. App. 533, 291 Pac. 695, contra, expressing the principle without reference to assumption of risk.

[272]Brogden, J., dissent in Norfleet v. Hall, (1933) 204 N. C. 573, 169 S. E. 143; Cleary v. Eckart, (1926) 191 Wis. 114, 210 N. W. 267.

[273]Doggett v. Lacey, (1932) 121 Cal. App. 395, 9 P. (2d) 257.

[274]Young v. Nunn, Bush & Weldon Shoe Co., (1933) 212 Wis. 403, 249 N. W. 278, cited with approval in Groh v. W. O. Krahn, Inc., (1937) 223 Wis. 662, 271 N. W. 374.

[275]Marks v. Dorkin, (1927) 105 Conn. 521, 136 Atl. 83.

[276]Dann v. Hamilton, [1939] 1 K. B. 509, 108 L. J. K. B. 255, 160 L. T. 433, per Asquith J.

[277]Forecki v. Kohlberg, (1941) 237 Wis. 67, 295 N. W. 7. Contra: Kelley v. Gagnon, (1931) 121 Neb. 113, 236 N. W. 160.

[278]White v. McVicker, (1933) 216 Ia. 90, 246 N. W. 385, dicta; Peay v. Panich, (1935) 191 Ark. 538, 37 S. W. (2d) 23; Jacobs v. Jacobs, (1917) 141 La. 72, 74 So. 992; Kelley v. Gagnon, (1931) 121 Neb. 113, 236 N. W. 160; Hall v. Hall, (1935) 63 S. D. 343, 258 N. W. 491, dicta; Maybee v. Maybee, (1932) 79 Utah 585, 11 P. (2d) 973; and see cases cited at notes 274 and 277 supra. See also Olson v. Hermanson, (1928) 196 Wis. 614, 220 N. W. 203; Thomas v. Steppert, (1930) 200 Wis. 388, 228 N. W. 513; Fontaine v. Fontaine, (1931) 205 Wis. 570, 238 N. W. 410; and Ganzer v. Great American Indemnity Co., (1932) 209 Wis. 135, 244 N. W. 588, among other Wisconsin cases making application of the doctrine.

the doctrine in cases where knowledge of the habits of the host existed prior to the journey, and cases where the knowledge was acquired during the journey. It has been held that where the guest was familiar with the driving habits of the host before commencing the journey, no amount of protest against his activities during the journey is availing to prevent the operation of the rule.[279]

Where the guest, after accepting the hospitality of the host, discovers thereafter certain perilous driving habits endangering the safety of both, it is said that the guest "assumes the risk" if he acquiesces in the conduct of the driver.

Numerous problems arise in determining whether the guest has in fact acquiesced in the conduct of the host. In a recent Wisconsin decision,[280] inferentially supported by an earlier case,[281] it was held that the guest was under a duty to leave the vehicle if his protests went unheeded, but it has been held otherwise in Michigan,[282] and a still earlier case in Wisconsin suggested that after protests had been made as to the manner of operation of the car, failure to leave the car was not contributory negligence.[283] At least until the contrary is shown by the conduct of the host, it seems that after protest the guest may assume that the driver will not again engage in the conduct concerning which the protest has been made.[284] The celerity with which a protest

[279]Markovich v. Schlafke, (1939) 230 Wis. 639, 284 N. W. 516; Bourestom v. Bourestom, (1939) 231 Wis. 666, 285 N. W. 426: (where suit was brought by a wife against her husband) "She testified that her husband was a fast driver and that she had cautioned him many times about driving too fast. She voluntarily entered into the host-guest relationship and accepted the benefits to be derived therefrom, knowing of that danger, and she had, therefore, consented to assume the risk of her husband's known habits. Her protests on the evening of the accident were unavailing to relieve her from her assumption of the risk of her husband's known habit."

[280]Markovich v. Schlafke, (1939) 230 Wis. 639, 284 N. W. 516.

[281]Biersach v. Wechselberg, (1931) 206 Wis. 113, 238 N. W. 905.

[282]Hemington v. Hemington, (1922) 221 Mich. 206, 190 N. W. 203.

[283]Krause v. Hall, (1928) 195 Wis. 565, 217 N. W. 290.

[284]Ragland v. Snotzmeier, (1933) 186 Ark. 778, 55 S. W. (2d) 932; Pecor v. Home Indemnity Co. of New York, (1941) 234 Wis. 407, 291 N. W. 313; and see Wright v. Sellers, (1938) 25 Cal. App. (2d) 603, 78 P. (2d) 209, holding that a very mild protest and rejoinder was sufficient to bar the application of the doctrine, especially where the speed at the time the protest was made was more dangerous at the point where the accident happened because of perilous road conditions. Of course the doctrine does not apply where protest is made and the guest is unable to leave the automobile. Blanchard v. Ogletree, (1929) 41 Ga. App. 4, 152 S. E. 116.

It ought be noted also that acquiescence in an occasional burst of excessive speed is not acquiescence in subsequent conduct of a motorist in so driving through a deep drain. McKinley v. Dalton, (1932) 128 Cal. App. 298, 17 P. (2d) 160.

must be made is to be determined by the jury. The courts, however, have established general limitations concerning the time within which protest must be made. Where the conduct of the host is sudden and unexpected, obviously the rule cannot apply,[285] unless the emergency has arisen because of previous negligence of the host in which the guest has acquiesced;[286] and where protest would clearly be unavailing, acquiescence in his negligence will not be presumed.[287]

C. Application of the Concept to Specific Factual Situations

No well defined principle determining when the doctrine shall be applied runs through the decisions. Because of the specific requirement of unspecific qualities—knowledge, appreciation, and acquiescence—in the doctrine, courts have been tempted to declare more explicitly the circumstances upon which it must be said that the guest has assumed the risk, leading to an illusory kind of certainty in decisions in which multiple factors are never the same. Thus, a factual classification of materials relating to the subject is of limited value. Perhaps the chief value of such a classification in this field is to illustrate the pitfalls awaiting the jurist who seeks to create a definitive standard of conduct for daily affairs which inherently include a plethora of variously

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[285] In reversing the findings below, the Massachusetts court held that the doctrine could not be predicated on acquiescence where there was nothing to show that the guest knew that the host would step on the gas pedal while the guest attempted to apply the emergency brake. Holland v. Pitochelli, (1938) 299 Mass. 554, 13 N. E. (2d) 390. The general rule is well set out in Raddant v. Labutzke, (1940) 233 Wis. 381, 289 N. W. 659, that the guest does not assume the risk of the conduct of the motorist at the immediate time of the occurrence, where there is neither time nor occasion to object to or protest against conduct.

[286] Walker v. Kroger Grocery & Baking Company, (1934) 214 Wis. 519, 252 N. W. 721; Schwab v. Martin, (1938) 228 Wis. 45, 279 N. W. 699; Raddant v. Labutske, supra note 285.

[287] Edward v. Kirk, (1940) 227 Iowa 684, 288 N. W. 875, (a comparatively few seconds); Kovar v. Beckius, (1937) 133 Neb. 487, 275 N. W. 670, (five seconds); Schwab v. Martin, (1938) 228 Wis. 45, 279 N. W. 699, (one hundred feet); Webster v. Krembs, (1939) 230 Wis. 252, 282 N. W. 564 (three or four seconds); Rudolph v. Ketter, (1940) 233 Wis. 329, 289 N. W. 674, (twenty seconds); Helgestad v. North, (1940) 233 Wis. 349, 289 N. W. 822, (time indeterminate; excellent discussion of previously decided Wisconsin cases; host attempting to pass another car).

In other cases it has been held that, within the discretion of the jury, it might be said that the protest should have been made at an earlier time: Kauth v. Landsverk, (1937) 224 Wis. 554, 271 N. W. 841, (increase in speed for five hundred feet); and that protest ought to have been made as a matter of law: Miller v. Stephens, (1934) 63 S. D. 10, 256 N. W. 152, (guest rode for one hour without objecting to excessive speed).

weighted factors incapable of accurate measurement in advance. Subject to these limitations, it is proposed in the paragraphs following to consider the standard of conduct suggested by the courts as constituting such knowledge, appreciation and acquiescence that a jury may or must say that assumption of risk was present or absent. Consideration will be made of instances both where the term is used to indicate a limitation of the "duty" of the host where no claim of legal fault of the guest is presented, and those cases in which it is said that the guest assumes the risk of injury by reason of his "conduct" in acquiescing in negligent operation of the vehicle by the host.

1. *Lookout.* In cases involving the lookout of the host, an exception is found to the rule that the guest when accepting the hospitality of the driver assumes the risk of his lack of skill in operating the automobile,[288] on the theory that keeping a proper lookout requires no experience or acquired skill.[289] If, however, the guest knows and acquiesces in the faulty lookout of the host, his "conduct" is such as to permit the application of the doctrine,[290] although here assumption of risk by conduct is difficult to establish, since lookout is a momentary matter.[291] Whether the defective lookout of the host was a causative factor in resultant damage is normally for the jury to decide,[292] unless the evidence is so clear that the court as a matter of law declares the cause of the accident to be defective observation.[293] Failure of the guest to keep a proper lookout for his own safety seems to have been considered as evidence of assumption of risk, but it has been suggested that the guest owes no duty to the host to make suggestions with reference to the management of the car.[294]

2. *Speed.* Among other risks which the guest does not automatically assume, even though strictly speaking they may often arise from the lack of skill and experience of the host, is the possibility that the driver will conduct the operation of the automo-

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[288]Weis v. Davis, (1938) 28 Cal. App. (2d) 240, 82 P. (2d) 487; Hall v. Hall, (1935) 63 S. D. 343, 258 N. W. 491. See also Wisconsin cases cited infra notes 289 to 293. And see Knutson v. Dilger, (1934) 62 S. D. 474, 253 N. W. 459.

[289]Poneitowcki v. Harres, (1929) 200 Wis. 504, 228 N. W. 126. Approved in Neuser v. Thelen, (1932) 209 Wis. 262, 244 N. W. 801.

[290]Cummings v. Nelson, (1933) 213 Wis. 121, 250 N. W. 759; Elkey v. Elkey, (1940) 234 Wis. 149, 290 N. W. 627.

[291]Maltby v. Thiel, (1937) 224 Wis. 648, 272 N. W. 848.

[292]Madden v. Peart, (1930) 201 Wis. 259, 229 N. W. 57.

[293]Maltby v. Thiel, supra, note 291; Cummings v. Nelson, supra note 290.

[294]Haines v. Duffy, (1931) 206 Wis. 193, 240 N. W. 152.

bile at an excessive speed.[295] It is, however, obvious that the guest may so conduct himself after learning of the predilection of the driver to proceed at an excessive speed as to indicate his acquiescence in it, and in such cases the guest is barred from recovery under the rule,[296] as well as in cases designating such conduct of the guest as contributory negligence. It has been affirmed,[297] and denied,[298] that where the doctrine is invoked, knowledge of the general conduct of the host in driving at an excessive speed precludes a recovery of damages by the guest.

3. *The "radius of vision" rule.* The standard of conduct set up in the contributory negligence cases, that the driver of an automobile must be able to stop within the radius of his vision ahead, combines the two elements of speed and lookout, and in consideration of the doctrine of assumption of risk, principles governing those factors are reiterated. Where the inability of the driver to stop within the range of the assured clear distance ahead is not known to the guest until five seconds or so before the accident, the doctrine may not be invoked to bar recovery.[299] While courts

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[295]Here also the rationale of the cases is not convincing. In Poneitowcki v. Harres, (1929) 200 Wis. 504, 228 N. W. 126, it was suggested that it required no experience or acquired skill to avoid driving at an excessive speed, while the reason behind the rule was stated in Haines v. Duffy, (1931) 206 Wis. 193, 240 N. W. 152, to be that "Where the invitation is to take an auto ride, the guest is warranted in assuming that the host will not drive at a reckless or unlawful rate of speed." The rationale in the first case is discussed, supra, note 262 and text. As to the second case, if the guest is warranted in assuming (as a matter of realistic interpretation of the automobile guest relationship) that the host will not drive at an unlawful or reckless rate of speed, it is hard to see why the more general rule ought not be adopted that the guest may assume, in the absence of knowledge to the contrary, that the host will conduct himself according to the standard of the reasonably prudent man.

[296]Valencia v. San Jose Scavenger Co., (1937) 21 Cal. App. (2d) 469, 69 P. (2d) 480; Winston's Admx. v. City of Henderson, (1918) 179 Ky. 220, 200 S. W. 330; Hemington v. Hemington, (1922) 221 Mich. 206, 190 N. W. 203, (but guest need not leave the car if she protests); Nardone v. Milton Fire Dist., (1941) 261 App. Div. 717, 27 N. Y. S. (2d) 489; Miller v. Stevens, (1934) 63 S. D. 10, 256 N. W. 152; Hall v. Hall, (1935) 63 S. D. 343, 258 N. W. 491. The Wisconsin cases have also uniformly so held. See Olson v. Hermanson, (1928) 196 Wis. 614, 220 N. W. 203; Waters v. Markham, (1931) 204 Wis. 332, 235 N. W. 797; Hotz v. Ingels, (1934) 214 Wis. 356, 253 N. W. 177; Groh v. W. O. Krahn, Inc., (1937) 223 Wis. 662, 271 N. W. 374; Kauth v. Landsverk, (1937) 224 Wis. 554, 271 N. W. 841; Elkey v. Elkey, (1940) 234 Wis. 149, 290 N. W. 627; Raddant v. Labutske, (1940) 233 Wis. 381, 289 N. W. 659. An early Wisconsin case discussed such conduct as contributory negligence as a matter of law: Harding v. Jesse, (1926) 189 Wis. 652, 207 N. W. 706; but it was later explained that only the doctrine of assumption of risk could properly be applied. Haines v. Duffey, (1931) 206 Wis. 193, 240 N. W. 152.

[297]Bourestom v. Bourestom, (1939) 231 Wis. 666, 285 N. W. 426.

[298]Marks v. Dorkin, (1927) 105 Conn. 521, 136 Atl. 83.

[299]Kovar v. Beckius, (1937) 133 Neb. 487, 275 N. W. 670.

considering this factual situation have often applied the doctrine, the difficulty of making application of the rule to concrete factual situations is great, and the rationalization of the cases has not been entirely convincing.[300]

4. *Application of brakes.* In the earlier cases on the question of the liability of the host for improper application of brakes it was clearly thought that this was a risk which was assumed by the guest, even if he had no knowledge of the driving habits of the host,[301] though it is doubtful that the doctrine will be applied as rigorously in the future as it has been in the past.[302] Where knowledge of the driving habits of the host was possessed before the journey began, it was held that the guest assumed the risk of this type of misconduct of the host.[303]

5. *Misjudgment of the course of another vehicle.* While it would seem logical that continued observation of the failure of the host to judge properly the distance from and course of another vehicle would constitute an assumption of the risk by the guest, no cases on this matter have been determined by the courts, nor have they generally discussed, as was done in *Kelley v. Gagnon*[304] whether a general knowledge of the driving characteristics of the host would suffice to justify the application of the doctrine in such cases. The doctrine was vigorously applied in 1934 to prevent a recovery by the guest in the absence of any conduct on his part indicating legal fault, in a case where the driver failed to calculate

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[300]The rule was applied with especial harshness in Washington, where it was held that a physician who was injured when his host ran off the highway was precluded by his acquiescence from recovering damages sustained while hurrying to attend the mother of the host. Pinckard v. Pease, (1921) 115 Wash. 282, 197 Pac. 49. Compare Knipfer v. Shaw, (1933) 210 Wis. 617, 246 N. W. 328, with Monsos v. Euler, (1934) 216 Wis. 133, 256 N. W. 630. And see Walker v. Kroger Grocery & Baking Co., (1934) 214 Wis. 519, 252 N. W. 721, and Helgestad v. North, (1940) 233 Wis. 349, 289 N. W. 822, the latter of which discusses previous cases dealing at length with the proof necessary to support the knowledge of danger and acquiescence requirements of the doctrine in such cases.

[301]It was so held in the first clearly definitive case limiting the liability of the host where the accident arose from his lack of skill. Cleary v. Eckart, (1926) 191 Wis. 114, 210 N. W. 267, and the decision was later approved in Ganzer v. Great American Indemnity Co., (1932) 209 Wis. 135, 244 N. W. 548.

[302]The conduct of a host in running into a car entering an intersection and turning to go in the same direction as the host was held actionable negligence because of the deficiencies of the host in steering and applying the brakes on the automobile, although the jury specifically found that the host kept a proper lookout. Webster v. Krembs, (1939) 230 Wis. 252, 282 N. W. 564. It would seem that under the earlier cases such conduct would relate directly to the skill actually possessed by the host.

[303]Kelley v. Gagnon, (1931) 121 Neb. 113, 236 N. W. 160.

[304]Ibid.

properly the course of an automobile making a turn into the highway ahead.[305] Yet in a case where the driver was blinded by the lights of an approaching truck and turned off the concrete slab of the roadway to his right, whereupon, in returning to the pavement, the rear end of his car sideswiped the passing truck, the court peremptorily held the driver liable to the passengers even though the truck was over the center of the road.[306] Here, also, reconciliation of the cases is difficult, and it seems clear that the Wisconsin court is progressing toward a relaxation of the doctrine in so far as it limits the "duty" of the driver to the passenger.

6. *Intoxication of the driver.* The cases in which the doctrine has been applied where the guest accepts the hospitality of an intoxicated driver have already been noted.[307] The question appears to be normally one of fact to be decided by the jury,[308] unless from the circumstances the condition of the driver must have been manifest to the guest.[309] In an English case, the court refused to apply the doctrine even where the guest knew when he elected to become a passenger that "the driver was under the influence of drink to such an extent as substantially to increase the chance of a collision," specifically reserving the question of whether the doctrine might apply where the drunkenness of the driver was so extreme that accepting his hospitality was "like engaging in an intrinsically and obviously dangerous occupation."[310]

7. *Others.* It has been held that where one knows of the lack of sleep of a driver, he assumes the risk of such sleepiness;[311] that a mother knowing of the tendency of her daughter to turn corners at a dangerous speed assumes the risk of such conduct in a journey;[312] and that a guest who acquiesces in the action of

[305]Grover v. Sherman, (1934) 214 Wis. 152, 252 N. W. 680.

[306]Schwartz v. Schwartz, (1936) 222 Wis. 401, 267 N. W. 276. The factual situation in Rudolph v. Ketter, (1940) 233 Wis. 329, 289 N. W. 674, seems to make that case also essentially inconsistent with Grover v. Sherman, supra note 305.

[307]In the first section of this article, at notes 103-107, and text.

[308]Mahin's Adm'r v. McClellan, (1940) 279 Ky. 595, 131 S. W. (2d) 478.

[309]Nardone v. Milton Fire Dist., (1941) 261 App. Div. 717, 27 N. Y. S. (2d) 489.

[310]Dann v. Hamilton, [1939] 1 K. B. 509, 108 L. J. K. B. 255, 160 L. T. 433.

[311]Krueger v. Krueger, (1929) 197 Wis. 588, 222 N. W. 784; Markovich v. Schlafke, (1939) 230 Wis. 639, 284 N. W. 516. Contra: Freedman v. Hurwitz, (1933) 116 Conn. 283, 164 Atl. 647; Gower v. Strain, (1933) 169 Miss. 344, 145 So. 244.

[312]Page v. Page, (1929) 199 Wis. 641, 227 N. W. 233.

the host in parking on the wrong side of the road, with lights on, assumes the risk of injuries arising from such conduct.[313] At the same time, a guest does not assume the risk of the failure of the host to come to a complete stop at an arterial highway;[314] or the conduct of the driver in backing a parked car into traffic.[315]

8. *Conduct of the guest increasing the risk.* Where the conduct of the guest increases the risk to himself, as when he is riding in an overcrowded vehicle,[316] or in a dangerous and exposed position on an automobile,[317] it well may be said that he "assumes the risk" of dangers arising from such conduct. But all the jurisdictions dealing with the subject are unanimous in their conclusion that the guest does not thereby assume the added risk of the negligence of the host in operating the automobile.[318] It would seem that the duty of care on the host ought to increase with his knowledge that the guest is in a position of danger. While this question has not received extended consideration by the courts, California has contrary decisions on the subject, holding latterly that the host might operate the vehicle without regard for the position of danger in which the guest has placed himself.[319]

D. Application of the Doctrine to Third Parties

If, as has been suggested, the doctrine is based upon and justified by "relational interests" between the plaintiff and the defendant, it follows as a matter of course that where a guest has assumed the risk of riding with a host known to be incompetent, this defense is not available to a third party whose negligence concurs with that of the host to cause injury to the guest. The defense that the guest did not take precaution for his own safety, and that he is himself guilty of contributory negligence in his

[313]Scory v. LaFave, (1934) 215 Wis. 21, 254 N. W. 643.

[314]Milwaukee Automobile Ins. Co. v. Felten, (1939) 229 Wis. 29, 281 N. W. 637.

[315]Fischer v. London Guarantee and Accident Co., (1939) 230 Wis. 47, 283 N. W. 295.

[316]Hawthorne v. Gunn, (1932) 123 Cal. App. 452, 11 P. (2d) 411; Kalamian v. Kalamian, (1927) 107 Conn. 86, 139 Atl. 635.

[317]McGeever v. O'Byrne, (1919) 203 Ala. 266, 82 So. 508; Gornstein v. Priver, (1923) 64 Cal. App. 249, 221 Pac. 396; Strong v. Olsen, (1925) 74 Cal. App. 518, 241 Pac. 107; Stout v. Lewis, (1929) 11 La. App. 503, 123 So. 346; Cosse v. Ballay, (La. App. 1933) 149 So. 285, and cases cited; Wiese v. Polzer, (1933) 212 Wis. 337, 248 N. W. 113.

[318]Ibid.

[319]Compare Graff v. United Railroads of San Francisco, (1918) 178 Cal. 171, 172 Pac. 603, with Grassie v. American La France Engine Co., (1928) 95 Cal. App. 384, 272 Pac. 1073.

conduct toward the third party defendant, may, of course, be alleged and proved by the third party as in other cases. In states which have applied the doctrine in a clearly definitive form, it has accordingly been held that assumption of risk as to the host is no defense to a third party,[320] but in states which have failed to draw a clear line between contributory negligence and assumption of risk, or have held that assumption of risk arises when contributory negligence is shown as a matter of law, it has been held that assumption of risk as to the host provides a defense also to the third party defendant.[321]

E. Causation

It seems well established that the assumption of one risk by the guest does not bar his recovery under the doctrine if his damage is caused by a risk which was unassumed. Such a conclusion is in fact the leading principle of most of the cases relating to situations in which the guest has assumed a dangerous position on the vehicle.[322] But where one of the items of negligence found by the jury to have been a cause of the accident, and of which the plaintiff assumed the risk, cannot be isolated or separated from another item also found by the jury to have been a cause, it has been said that the assumption of risk of the

[320]National Motor Vehicle Co. v. Kellum, (1915) 184 Ind. 457, 109 N. E. 196; Edwards v. Kirk, (1940) 227 Iowa 684, 288 N. W. 875; Elliott v. Coreil, (La. App. 1935) 158 So. 698, and cases cited. But cf. Sloan v. Gulf Rfg. Co. of La., (La. App. 1932) 139 So. 26, in which it is not clear whether the court holds the plaintiff assumed the risk as to the third party or was contributorily negligent as a matter of law; Sommerfield v. Flury, (1929) 198 Wis. 163, 223 N. W. 408; Walker v. Kroger Grocery & Baking Co., (1934) 214 Wis. 519, 252 N. W. 721; Scory v. LaFave, (1934) 215 Wis. 21, 254 N. W. 643; Bruins v. Brandon Canning Co., (1934) 216 Wis. 387, 257 N. W. 35; Kauth v. Landsverk, (1937) 224 Wis. 554, 271 N. W. 841; Canzeroni v. Heckert, (1936) 223 Wis. 25, 269 N. W. 716; Schubring v. Weggen, (1940) 234 Wis. 517, 291 N. W. 788. Cf. Wiese v. Polzer, (1933) 212 Wis. 337, 248 N. W. 113.

[321]Wiley v. Young, (1918) 178 Cal. 681, 174 Pac. 316; Valencia v. San Jose Scavenger Co., (1937) 21 Cal. App. (2d) 469, 69 P. (2d) 480; White v. Cochrane, (1933) 189 Minn. 300, 249 N. W. 328; Winston v. Henderson, (1918) 179 Ky. 220, 200 S. W. 330, (although perhaps the court here is talking about imputed negligence); Guile v. Greenberg, (1934) 192 Minn. 548, 257 N. W. 649, (rule apparently recognized as available to the third party, but not applied); Robinson v. American Ice Co., (1928) 292 Pa. St. 366, 141 Atl. 244; Coca-Cola Bottling Co. v. Brown, (1918) 139 Tenn. 640, 202 S. W. 926; Rebillard v. Mil. St. P. & S. S. M. Ry. Co., (C.C.A. 8th Cir. 1914) 216 Fed. 503.

[322]Supra notes 316-319 and text. And see Krause v. Hall, (1928) 195 Wis. 565, 217 N. W. 290. Cf. Buckingham v. Eagle Warehouse & Storage Co., (1919) 189 App. Div. 760, 179 N. Y. S. 218.

one causal factor will bar all recovery,[323] and it appears that the effective force first in time and motivating the connected whole of the damage will be held to constitute the proximate cause of the accident.[324] As a practical matter, this doctrine may mean as much or as little as the court and jury desire in limiting the liability of the defendant, for to the always elastic requirement of proximate causation there is added the further somewhat confusing qualification that if the jury could reasonably separate the two concurrent causes, the doctrine of assumption of risk might not be applied. So far as the writer has been able to discover, this addition to the rule of proximate causation has been applied in only two cases.[325] If relaxation of the rigor of the doctrine is desired, a less involved procedure would seem to be simply to hold as a matter of law that between two factors contributing to the accident, the guest assuming the risk of one and not the other, the jury must find on the evidence that one factor was in fact the substantial cause of the damage and the other was not.[326] In California, it has been held that assumption of risk of the excessive speed at which the host was driving did not bar recovery of damages by the guest when the accident happened through a combination of excessive speed and defective lookout.[327] and the rule adopted with reference to master and servant cases imposed the doctrine only when the risk assumed was the sole cause of plaintiff's injury.[328]

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[323]Young v. Nunn, Bush & Weldon Shoe Co., (1933) 212 Wis. 403, 249 N. W. 278; Walker v. Kroger Grocery & Baking Co., (1934) 214 Wis. 519, 252 N. W. 721; Scory v. LaFave, (1934) 215 Wis. 21, 254 N. W. 643; Monsos v. Euler, (1934) 216 Wis. 133, 256 N. W. 630. See also Campbell, Work of the Wisconsin Supreme Court for the August, 1933, and January, 1934, Terms, (1934) 10 Wis. L. Rev. 69, 70.

[324]Elkey v. Elkey, (1940) 234 Wis. 149, 290 N. W. 627.

[325]Young v. Nunn, Bush & Weldon Shoe Co., (1933) 212 Wis. 403, 249 N. W. 278; Scory v. LaFave, (1934) 215 Wis. 21, 254 N. W. 643. It is quite possible that there may be others; the subject is completely without index, and the principles here involved are rather implicit than explicit in the cases.

[326]This is the usual way of handling the problem, and has been utilized even in cases acknowledging the general rule as to causation. See Walker v. Kroger Grocery & Baking Co., (1934) 214 Wis. 519, 252 N. W. 721; Monsos v. Euler, (1934) 216 Wis. 133, 256 N. W. 630; Elkey v. Elkey, (1940) 234 Wis. 149, 290 N. W. 627. See also, for general examples of the usual procedure, Thomas v. Steppert, (1930) 200 Wis. 388, 228 N. W. 513, and Koscuik v. Sherf, (1937) 224 Wis. 217, 272 N. W. 8.

[327]Weis v. Davis, (1938) 28 Cal. App. (2d) 240, 82 P. (2d) 487. Semble: Knutson v. Dilger, (1934) 62 S. D. 474, 253 N. W. 459.

[328]Shearman and Redfield, The Law of Negligence, (1913) 293, 294: "If two or more causes contribute to produce the injury, the plaintiff's assumption of risk as to one will not preclude his recovery for injury produced by any other cause. . . ."

VII. Effect of Other Rules of Conduct Upon the Doctrine

A. "Guest Statutes" and Gross Negligence Requirements

It has been noted that some courts drawing an analogy between the bailor-bailee relationship and that of the automobile guest, require that the guest show gross negligence of the host in establishing a cause of action. This requirement of a showing of gross negligence has been imposed in other jurisdictions by so-called "guest statutes" which may also bespeak the bases of the liability of the host in terms of reckless, wilful, or wanton misconduct, or their equivalent.

Where the term "assumption of risk" is conceived as a limitation on the duty of the host, regardless of the conduct of the guest, limitation of liability by "guest statutes" is relatively unimportant. The standard of care thereunder is obviously less for the host than when "assumption of risk" is invoked, for under the statutes, a host failing to exercise the skill which he possesses is nevertheless not responsible to the guest in damages unless he has operated the vehicle recklessly, wilfully, or wantonly. The doctrine, however, becomes important when considered as a matter involving the conduct of the guest.

It is impossible here to deal with the various standards of care required under the "guest statutes," and their relationship to contributory negligence, except to say that in almost all cases it is recognized that contributory negligence is no defense to wanton and wilful misconduct because the nature of the action in each case is dissimilar, an implied intent to injure being present in reckless, wanton, or wilful operation of the vehicle by the host.[329] Not infrequently it has been said that contributory negligence is no defense to an action in which it is shown that gross negligence existed.[330] The social problems presented by the passage of the guest statutes were not simple. As legislatures of about half the states passed such laws,[331] interpretation of the rights of the parties grew increasingly complex. Under existing law, the remarkable result was reached that a guest permitting his host to engage in ordinarily negligent conduct was precluded from recovery from the host if the court found that in failing to protest or ask to leave

[329] See cases cited in annotation, What Amounts to Gross or Wanton Negligence in Driving an Automobile Precluding the Defense of Contributory Negligence, 38 A. L. R. 1424, and annotations supplementary thereto; Prosser, Torts, (1941) 402.

[330] Ibid.

[331] Weber, Guest Statutes, (1937) 11 U. of Cinn. L. Rev. 24.

the car he did not act as a reasonably prudent man would do. On the other hand, the guest who accompanied the host on a journey where the misconduct of the host exceeded that of mere negligence, without protest on the part of the guest, could recover on the ground that his contributory negligence was no defense to the "intentional" tort of the host.

Some courts adopted techniques to establish a more realistic distribution of loss between the parties in such cases, among them the technique that where the host engaged in reckless, wilful, or wanton misconduct, the guest was subject to the doctrine of assumption of risk if he knew of the danger, appreciated the risk, and voluntarily submitted himself to it. If the proof of the elements of knowledge, appreciation and acquiescence in potential danger are the same under either doctrine, courts might prevent a recovery by the guest exposing himself to the more perilous potentialities in accompanying a wilful or wanton driver, by applying the rule of contributory negligence under the name of assumption of risk. In referring to the adoption of the doctrine of assumption of risk in Iowa, the court quite frankly said:

"In states which have so-called 'Guest Statutes,' such as ours . . . the courts are of necessity driven to the adoption of some such rule as that announced in the *McVicker Case* in order to find any basis upon which the guest might be barred from recovery. The cause of action, under our guest statute, is not based on negligence, but upon recklessness, and, since we have held that 'recklessness is more than negligence,' it follows that contributory negligence, is not an element to be considered or dealt with, either by pleading, proof, or instruction of the court, in cases brought under this statute."[332]

The doctrine has been applied in both Iowa and Wisconsin to prevent recovery.[333] The Michigan court refused to recognize the concept,[334] and other jurisdictions, while apparently recognizing the applicability of the doctrine, have refused to apply it to specific circumstances presented.[335]

Consideration of the guest statutes raises an interesting question concerning the applicability of the doctrine where the guest

[332]Edwards v. Kirk, (1940) 227 Iowa 684, 288 N. W. 875.

[333]White v. McVicker, (1933) 216 Iowa 90, 246 N. W. 385; Walker v. Kroger Grocery & Baking Co., (1934) 214 Wis. 519, 252 N. W. 721; and Patterly, J., in Schubring v. Weggen, (1940) 234 Wis. 517, 291 N. W. 788.

[334]Schneider v. Draper, (1936) 276 Mich. 259, 267 N. W. 831.

[335]Freedman v. Hurwitz, (1933) 116 Conn. 283, 164 Atl. 647; Wright v. Sellers, (1938) 25 Cal. App. (2d) 603, 78 P. (2d) 209; Kovar v. Beckius, (1937) 133 Neb. 487, 275 N. W. 670; Carpenter v. Thomas, (1931) 164 Wash. 583, 3 P. (2d) 1001.

is a paying rather than a non-paying passenger, for normally the statutes are limited in their operation to cases where no consideration is received for the transportation. Where the doctrine is applied to limit the liability of the host in the first instance, regardless of the conduct of the plaintiff, the fact that consideration passed between the passenger and the driver may be important, and in some decisions using the term in this sense emphasis is put on the fact that the guest was gratuitous.[336] Where the doctrine arises from the conduct of the guest in voluntarily submitting to a known peril, the courts have made no distinction between cases where the passengers paid compensation and those where there was none.[337]

B. Last Clear Chance

The doctrines of assumption of risk and last clear chance are antithetical in so far as the interpretation of the theory of assumption of risk is based on the conclusion that the defendant is relieved of a duty by the conduct of the plaintiff, for the rule of last clear chance in effect establishes a new duty on the defendant after he has seen and realized the peril of the plaintiff. The doctrines are similar in the difficulty encountered in each of establishing actual knowledge of peril on the part of the party against whom the rule is sought to be applied. It is significant that in treatment of the doctrine of last clear chance by the editors of the Restatement the rule was declared to be, consonant with that adopted in the doctrine of assumption of risk, that actual knowledge and realization of peril need not be shown.[338] Courts loosely using the term "assumption of risk," or its equivalent, in cases not involving relational interests have held that the doctrine of last clear chance applied even where the plaintiff had assumed the risk of injury,[339] and that there could be no assumption of risk

[336]Hall v. Hall, (1935) 63 S. D. 343, 258 N. W. 491, (assumption of risk of known proficiency of driver) ; Marple v. Haddad, (1927) 103 W. Va. 508, 138 S. E. 113, (duty of host to examine automobile for defects) ; Cleary v. Eckart, (1926) 191 Wis. 114, 210 N. W. 267, (skill in driving possessed by driver). It was held that the relationship was gratuitous, however, under the doctrine of assumption of risk, where the parties agreed to share the cost of the gasoline in defraying transportation costs to a football game. Brockhaus v. Neuman, (1930) 201 Wis. 57, 228 N. W. 477.

[337]Cases particularly illustrative of the attitude of the courts on this problem are cited supra, in the first section of this article at notes 168 to 174 and text, where the doctrine was applied to passengers upon street railways. See also, as to automobiles, Weis v. Davis, (1938) 28 Cal. App. (2d) 240, 82 P. (2d) 487.

[338]3 Restatement of Torts, (1934) Sec. 479, 480.

[339]Bradley v. Wood, (1922) 207 Ala. 602, 93 So. 534; Lee v. Baltimore & O. R. Co., (1914) 246 Pa. St. 566, 92 Atl. 719.

where the defendant had the last clear chance to avoid injury while the plaintiff was effecting the rescue of his property.[340] The doctrine has not been considered in relation to the automobile guest, but a consideration of the two doctrines is implicit in a concurring opinion by Justice Harvey in a case decided by the Kansas court, where the host urged that the guest was guilty of legal fault in sleeping during a journey in which the host also went to sleep, thus causing a collision. Judge Harvey said:

> "But if defendant invited plaintiff to go to sleep in his car, or, knowing that plaintiff had gone to sleep, acquiesced in his sleeping while a guest, he is not in very good position to complain of the fact that plaintiff was asleep, for he would then know plaintiff's senses of observation were dormant and not functioning. Due care on defendant's part would require him to take that matter into consideration, perhaps as much so as if defendant had invited a blind deaf mute to ride with him, or an infant, or one decrepit with age or incapacitated by disease. Naturally in any of those situations the ability of the guest to care for himself *should be taken into consideration in determining whether or not the host used due care.*"[341] (Italics supplied.)

In essence, this question is posed: If it may be said that the guest by acquiescing in negligent conduct of the host, with actual or constructive knowledge of potential peril, assumes the risk of that misconduct, might it not also be said that the host, knowing of the want of due care on the part of the guest (either in sleeping or not protesting against the misconduct of the driver) acquiesced in such conduct of the guest and hence cannot avail himself of it? Ought not the host to accept the known or unknown riding characteristics of the guest as much as the guest assumes the driving characteristics of the host? And if the guest is unfamiliar with motor vehicles or has a predilection for riding fast, ought not the host to accept the guest as he is? Are not the social necessities, which require one having the person of another at his mercy to protect him properly, sufficient to impose this duty on the host? The answer is, of course, that in a realistic way each takes the other as he finds him, and ought to exercise the care of a reasonably prudent man in like circumstances, and none other. Judge Harvey's position, that one ought not to try to take advantage of conduct of another which he has countenanced and which puts that other in a position of greater danger, and that such conduct should be considered in determining whether

[341]Gover v. Central Vermont Ry. Co., (1922) 96 Vt. 208, 118 Atl. 874.
[341]Howse v. Weinrich, (1931) 133 Kan. 132, 298 Pac. 766.

the actor has exercised care, is eminently appropriate, and the determination of the question is quite properly left where he inferentially places it—with the jury. But whether such conduct be denominated in terms of contributory negligence, assumption of risk, or a violation of the last clear chance rule, it seems apparent that in all cases the effect of failure to discharge the duty ought to be the same—a result not now obtained by reason of judicial reliance on the doctrine of assumption of risk, which restricts the rights of the guest more rigidly than that of contributory negligence.

C. Suit by Guest Against a Third Party

Where the risk of the conduct of the driver which contributes to the damage has been assumed by the guest, it obviously makes no difference in the liability of the host that the accident occurred because of the concurrence of the risk assumed with the negligence of a third party. In either case the defense of assumption of risk is available to the host. It equally seems clear, as heretofore suggested, that assumption of risk as to the conduct of the host does not extend to the third party. But if the guest is contributorily negligent with respect to the third party (in failing to protest against excessive speed, improper lookout or other conduct of the host), his recovery against the third party may be denied altogether if he has failed to exercise the care of a reasonably prudent man. Normally, of course, this is designated as contributory negligence and not as assumption of risk. But the question arises: Is not the conduct of the guest in assuming the risk as to the host such as to constitute contributory negligence to the third party as a matter of law? The answer seems clear where the doctrine of assumption of risk is used to denote a limitation of the duty of the host, without respect to the conduct of the guest. To make application of the doctrine in establishing contributory negligence as a matter of law to the third party where the limitation is established as to the "duty" of the host, without reference to legally unjustifiable "conduct" on the part of the guest would be manifestly inequitable, for no legal fault exists as to the guest.

Where the behavior of the guest prohibits recovery from the host because of acquiescence in a known and appreciated danger, however, it would seem equitable to hold that such "conduct" ought to be a bar to a recovery against a third party as contribu-

tory negligence. If, as has been suggested, the content of the terms "acquiescence," "knowledge," and "appreciation" is established in fact by reference to the conduct of the reasonably prudent man, such a conclusion seems inevitable.[342] Yet it was held by the Wisconsin court in *Scory v. LaFave* that assumption of risk as to the host is not, as a matter of law, contributory negligence to a third party, and that if the hazards assumed "were no greater than ordinarily careful and prudent persons usually assume under similar circumstances, then plaintiff's conduct was merely within the field of assumption of risk and did not constitute contributory negligence."[343] But this conclusion ought not to be accepted without reservations. It is difficult to conceive how one with actual or constructive knowledge of peril, exposing himself to it for no socially justifiable purpose, can be considered to be acting as a reasonably prudent man would have acted, unless the peril is so remote as to be inconsequential.[344] And if the peril is (as suggested by the court) not imminent or grave in its nature, how may it be said that the guest shall be charged with actual or even constructive knowledge and appreciation of its existence? Moreover, it must be said not only that there is constructive knowledge and appreciation of the peril, but also, at the root of the doctrine, that the plaintiff consented to be harmed by it—a requirement far from realistic in the automobile guest cases where the possibility of peril is remote, and one not required even in the Wisconsin cases.[345] The dissent of Judge Fowler, reaching to the

[342]Note, however, that such a conclusion conflicts with the theory that the relational interests between host and guest prompt the application of the doctrine; in such case the standard of care of the guest would be the same toward those with whom relational interests obtained and those with whom he had no relational interests.

[343]Scory v. LaFave, (1934) 215 Wis. 21, 254 N. W. 653. Contra: Sloan v. Gulf Rfg. Co. of Louisiana, (La. App. 1932), 139 So. 26.

[344]See Comment by Clark M. Byse, (1937) 12 Wis. L. Rev. 376, 380, which suggests that the court in reality bases the application of the doctrine on whether the host as a reasonably prudent man would be justified in believing that the guest was aware of and assented to the risk, and not an actual acquiescence in a known and appreciated danger. Except for the very doubtful case of Scory v. LaFave, which is apparently still followed, there is nothing in the Wisconsin cases to indicate the exact basis upon which the doctrine is applied. But in application the doctrine seems to the writer to be indistinguishable from that of contributory negligence, and the requirements for application of the doctrine in practice to be substantially the same in each case. See also, discussion of the case of Scory v. LaFave in Gregory, Legislative Loss Distribution in Negligence Actions, (1936) 137, 138.

[345]E.g., it is quite within the realm of possibility that damage may occur to the guest in the area of sudden speed in passing cars, lookout, or disobedience to the law of the road, but damage so remote was said by the Wisconsin court not to come within the doctrine. Poneitowcki v. Harres, (1929) 200 Wis. 504, 228 N. W. 126.

entire foundation of the doctrine in its application to automobile accident cases, seems the better view. Other states have not considered the question.

In states where, as in Wisconsin, a comparative negligence statute has been adopted, the application of the doctrine of assumption of risk raises problems still more complex. As to the host, it is clear from the case of *Scory v. LaFave,* and others preceding it, that assumption of risk is a complete bar to recovery from the host, and not a partial bar, as where the doctrine of contributory negligence is applicable. In all cases, the contributory negligence of the guest is to be measured against that of the third party. Yet he has "assumed the risk" of the negligence of the host. If the jury concludes that the guest is ten per cent negligent, the host ten per cent negligent, and the third party eighty per cent negligent, must the third party pay eighty per cent of the damage or ninety per cent of the damage? In short, who is chargeable with the ten per cent negligence of the host? Or supposing that under the rule in *Scory v. LaFave,* the guest assumed the risk as to the host, but was not at all contributorily negligent as to the third party, and the host and the third party are each fifty per cent negligent in causing the accident. Would the guest be able to recover all of his loss from the third party, or only fifty per cent of such damages? Under the Wisconsin comparative negligence statute, it has been held that the guest can recover for all damages except the percentage found by the jury to constitute his share of the burden by reason of his contributory negligence, and that this does not include his bearing the burden of the negligence of the host, even though he "assumed the risk" of such negligence.[346] Logically, the effect of the comparative negligence statute seems justified under the wording of the Wisconsin statute. However, legislative amendment of the rule announced has been urged.[347]

D. CONTRIBUTION

Still more complexity attends the operation of the doctrine where the state in which the doctrine is applied permits suit

[346]Walker v. Kroger Grocery & Baking, Co., (1934) 214 Wis. 519, 252 N. W. 721, approved in Canzeroni v. Heckert, (1936) 223 Wis. 25, 269 N. W. 716.

[347]Gregory, Legislative Loss Distribution in Negligence Actions, (1936) 138. Professor Gregory urges that the guest be allowed in all cases to recover against the third party on the ground that his assumption of risk was contributory negligence only, such contributory negligence to be balanced with the negligence of the third party.

by one of two or more joint tort feasors to apportion damages between them. Suppose the guest sues the third party for damages; that under the contribution statute the third party interpleads the host; and that it is found that the guest assumed the risk of accident as to the host, but that the negligence of the host and that of the third party each contributed to the accident. The third party thereupon must pay the damages to the guest. Thereafter he sues the host for contribution for the damages. Difficulties arise for the court in whatever decision might be made. To require the host to contribute to the damages would be in effect to nullify the doctrine of assumption of risk in cases where the negligence of another concurred with that of the host in causing damage to the guest. To hold that the guest ought to bear the burden of the negligence of the host (since he had "assumed the risk" of the negligence as to him) would be in effect to say that he "assumed the risk" as to the third party as well as the host. To hold that the third party must pay all the damage to the guest, without recourse to the host, would be to impose a burden on him that the rule was clearly designed to alleviate. The Wisconsin court adopted the third of these alternatives, holding that where the accident resulted from a risk assumed by the guest the third party must bear the burden of the loss alone,[348] but that the burden of showing that the guest assumed the risk as to him rested on the host.[349] A further refinement of the rule was necessitated by the earlier conclusion of the court that contribution might be had between the host and the third party only where each had been subjected to a common liability. A finely drawn distinction was adopted under this rule in determining whether the respective duties of the host and third party toward the guest were the same. Cases had repeatedly held that the duty of the host to the passenger was not to increase the danger to him; but the duty of the host to the third party was to use ordinary care for the safety of other persons on the highway. Hence the court adopted the theory that where the failure of the host to protect his guest arose from conduct concerning which the duty owed was

[348]Roeber v. Pandl, (1930) 200 Wis. 420, 228 N. W. 512; Standard Accident Ins. Co. v. Runquist, (1932) 209 Wis. 97, 244 N. W. 757; Neuser v. Thelen, (1932) 209 Wis. 262, 244 N. W. 801; Walker v. Kroger Grocery and Baking Co., (1934) 214 Wis. 519, 252 N. W. 721; Milwaukee Automobile Insurance Co. v. Felten, (1939) 229 Wis. 29, 281 N. W. 637; Webster v. Krembs, (1939) 230 Wis. 252, 282 N. W. 564; Forecki v. Kohlberg, (1941) 237 Wis. 67, 295 N. W. 7.

[349]Standard Accident Ins. Co. v. Runquist, (1932) 209 Wis. 97, 244 N. W. 757.

the same toward the guest as to others on the highway (such as failure to keep a proper lookout or drive at a proper speed) contribution would lie.[350]

E. Imputed Negligence

It has been suggested that normally the assumption of risk of the guest is no defense to the third party in an action brought against him by the guest. However, the same circumstances which justify an application of the doctrine of assumption of risk as between host and guest may justify imputing the negligence of the driver to the passenger, thus precluding a suit by the guest against a third party where the negligence of the host is such as to bar the host from suit against such third party.[351] In some of the cases, it is difficult to determine from the language of the decision whether it is held that the guest has "assumed the risk" as to the third party, or whether the negligence of the host is imputed to the guest under the theory that negligence may be imputed from a driver to a passenger who unreservedly places himself in the hands of his host. Whatever theory may be implicit in the decisions, it is certain that courts have on occasion denied recovery to the guest under such circumstances.[352] If the essence of the doctrine in each case is the acquiescence in the negligent conduct of another, the possibility is present that the doctrine of assumption of risk may be extended under the name of imputed negligence to include third parties.

F. Violation of Statute

Violation of a statute relating to the operation of a motor vehicle on the highway is generally considered to be evidence of negligence.[353] Does the guest accompanying the driver guilty of

[350]Neuser v. Thelen, (1932) 209 Wis. 262, 244 N. W. 801.

[351]Knipfer v. Shaw, (1933) 210 Wis. 617, 246 N. W. 328. Here it was held that a wife had not only assumed the risk of injury by her husband-host, but also that his negligence was imputed to her because she had completely entrusted her safety to her husband. Under the Wisconsin rule, however, the doctrine of imputed negligence was limited to cases involving such relations as principal and agent, master and servant, or some family relationship.

[352]Valencia v. San Jose Scavenger Co., (1937) 21 Cal. App. (2d) 469, 69 P. (2d) 480; Chapman v. Powers, (1928) 150 Miss. 687, 116 So. 609; Winston v. Henderson, (1918) 179 Ky. 220, 200 S. W. 330; LeDoux v. Alert Transfer & Storage Co., (1927) 145 Wash. 115, 259 Pac. 24; Ingerick v. Mess, (C.C.A. 2d. Cir. 1933) 63 F. (2d) 233. But see Wiley v. Young, (1918) 178 Cal. 681, 174 Pac. 316.

[353]The rule seems well settled. See 2 Blashfield, Cyclopedia of Automobile Law (1926) 1157.

such conduct assume the risk of injury thereby? It is clear that in Wisconsin the guest, while taking the driver as he is found, subject to the host's limitations of skill in the operation of his automobile, does not assume the risk of his violation of the law of the road simply by accompanying him on the journey.[354] However, where the violation of a law of the road occurs over an extended period of time with acquiescence of the guest, the doctrine of assumption of risk through the conduct of the guest has been applied.[355]

VIII. Critique of the Doctrine

A. Logical Difficulties in the Doctrine

A primary difficulty with the logic of the doctrine is encountered in attempting to rationalize the widespread use of the terminology in unconnected cases relating to the "duty" of the defendant. It is used interchangeably to convey a specialized concept and no doctrine at all. "Assumption of risk" in common usage means simply that there are certain risks to which an individual is subject, for which he has no cause of action against the individual who set the injuring force in motion. So used, the doctrine of assumption of risk is essentially nothing more nor less than the doctrine that no man shall recover from another unless that other violates a legal duty towards him—which is, in turn, only a broad general statement of a universal principle underlying all law.

In the earlier cases, the influence of the maxim, *"volenti non fit injuria,"* somewhat limited the breadth of the general use of the term "assumption of risk" from that described above. Where consent, whether actual (as in the seduction cases), or constructive through contract (as in the master-servant cases) or by conduct (as in the licensor-licensee cases where the parties knew of the existence of a hazard) was given by the plaintiff that the defendant should not be held liable, no recovery might be had. This aspect of the doctrine is hardly more susceptible to classification than the other. In the first place, confusion has been and still is the inevitable result of the dual meanings of the term. Second, the

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[354]Knipfer v. Shaw, (1933) 210 Wis. 617, 246 N. W. 328.

[355]Ibid. See also White v. Cochrane, (1933) 189 Minn. 300, 249 N. W. 328, in which it was assumed without discussion that one riding in a car without headlights might be guilty of negligence or assumption of risk as to a third party as well as the host. The statement is dictum. See also Rebillard v. Minneapolis St. P. & S. S. M. R. Co., (C.C.A. 8th Cir. 1914) 216 Fed. 503, to the same effect.

social disciplines sought to be effected by the courts in implying a consent to injury have been so divergent that the courts have been hard put to promulgate a rational basis for distinction between the cases in which the term ought or ought not to be applied to limit the liability of the defendant. Is not the "consent" the same when Lord Mellish's street sweeper continues sweeping with knowledge of the reckless nature of the passing cabman, as that of a pedestrian passing over a way made dangerous by neglect of public officials, or a workman in the mine knowing that trains pass behind his position daily in a dangerous condition? Yet the application of the doctrine, conditioned by contemporary ethical and social considerations, has varied in each case. In due course, it was concluded that the doctrine (that consent to injury ought be inferred) ought to apply only in cases where the plaintiff knew, appreciated, and voluntarily encountered the danger. Even this broke down in the automobile guest cases, in which courts substituted the term "acquiescence" for the *volens* of the older rule.

Efforts by commentators and some courts to limit the application of the doctrine to cases involving a relational interest between the parties have not been universally successful, for the doctrine continues to be applied occasionally in cases between litigants not standing in such relationship.

While all this development of the doctrine of assumption of risk was taking place the courts were also applying the doctrine of contributory negligence with increasing frequency to cases where knowledge, appreciation and voluntary assumption of, or acquiescence in, peril were evident. Attempts made to distinguish the two doctrines failed, principally because the interpretation of the terms "knowledge," "appreciation," and *"volens,"* being words of indefinite content, was in each case fundamentally measurable only by the same standard of conduct: whether the actor had performed with reason and prudence as other men would or ought to have done. Moreover, it was impossible for the courts to expound a rational distinction between assumption of risk and the less penalistic doctrine of contributory negligence in such fashion as to make controlling the obvious social, ethical, and economic factors which have in fact been determinative of the result.

B. Difficulties in Application of the Doctrine

Not only do the two doctrines of assumption of risk and contributory negligence seem inseparable in theory, but they are in

fact interchangeably used. Part of this is due to the fact that the phrase "assumes the risk" fits so aptly into discussions of the subject of contributory negligence; without apparently intending to refer to a specialized doctrine the courts have said that when one assumes a risk of injury under certain circumstances he is guilty of contributory negligence as a matter of law. To attempt to determine what constitutes contributory negligence as a matter of law, even for the automobile guest, is to find one's self plunged in a welter of conflicting precedents in which varying equities of the parties often lead the judiciary into making distinctions without difference.[356] Since the doctrine of assumption of risk has been applied most generally in Wisconsin, the treatment of the cases under the doctrine in that state, under an unusually competent court, ought to be fairly representative of difficulties arising in the application of the doctrine. Difficulties of the Wisconsin court in the application of the rule have already been noted, both with respect to the concept of the doctrine as a matter of the duty of the defendant, and as limiting recovery because of the conduct of the plaintiff,[357] and the decisions reveal that application of the doctrine of assumption of risk in these cases is no less hazardous to the symmetry of the law than that of contributory negligence.

[356]It is notorious that the verdicts of juries often require revision by appellate tribunals, and where the contributory negligence of the plaintiff is the principal matter at issue, it is inevitable that in making such corrections the courts should set up a standard of conduct from which analogies may be drawn in other cases. In seeking to secure an equitable result in the weighing of factors which are sometimes intangible, it is also inevitable that courts should modify and distinguish precedents upon apparently insubstantial grounds. Occasionally, also, technological changes make modification of existing standards of conduct imperative, as in the so-called "radius of vision" and "stop, look, and listen" rules. The criticisms hereafter made of the decisions in the field of assumption of risk, therefore, may be made of most courts also in the field of contributory negligence.

[357]See notes 295, 300-302, 305, 306 supra, and text. As to when one assumes the risk of improper lookout of another as a matter of law, compare Knipfer v. Shaw, (1933) 210 Wis. 617, 246 N. W. 328, with Duss v. Friess, (1937) 225 Wis. 406, 275 N. W. 547; with reference to assumption of risk and contributory negligence as a matter of law relating to third parties compare Wiese v. Polzer, (1933) 212 Wis. 337, 248 N. W. 113, with Scory v. LaFave, (1934) 215 Wis. 21, 254 N. W. 643. The court has also experienced difficulty in applying the rule that the guest "assumes the risk" of the lack of skill of the host: Cf., e.g., Eisenhut v. Eisenhut, (1933) 212 Wis. 467, 248 N. W. 440, with Fischer v. London Guarantee & Accident Co., (1939) 230 Wis. 47, 283 N. W. 295. The difficulties encountered in establishing conduct as legal fault as a matter of law in these cases is emphasized in the factual distinctions sought to be made in Helgestad v. North, (1940) 233 Wis. 349, 289 N. W. 822. In order to mitigate the harshness of the rule, the courts have sometimes appeared to be making an obvious effort to avoid application of the doctrine. See, e.g., Hensel v. Hensel Yellow Cab Co., (1932) 209 Wis. 489, 245 N. W. 159.

C. Social Considerations and the Desirability of the Doctrine

1. *As related to the "duty" of the defendant.* Since repeated use of the term with reference to the "duty" of the defendant in the different fields represents a conclusion of the court on a substantially different classification of factual situations, it seems impossible to weigh social considerations in this use of the term. To attempt to analyze adequately the social justification of the doctrine in each case would require examination of the social backgrounds for the entire law of the subject in which the term is used. In so far as the term has come to be used, particularly in Wisconsin, as descriptive of the limitation of the liability of the automobile host for accidents arising because he fails conscientiously to exercise the skill which he possesses, the social inequalities of the rule appear manifest. While the rule has a note of equity in the conclusion that the host ought not to be required to exercise greater care for the guest than he can exercise for himself, application of the rule in practice has resulted in confusion and appears in fact to have been relaxed by the Wisconsin court in late years. From an equitable standpoint, the rule that a man must exercise the degree of skill which he represents himself to have, suggested in Judge Campbell's concurrence in *Hall v. Hall*,[358] appears more sound, although it seems to the writer that any rule of law which depends in application on the distinction between whether an actor was conscientiously using the skill he possessed, or was possessed of a lesser degree of skill than the average man, is calculated to introduce an excess of confusion into an already ill-defined field.

Essentially, however, where the term has been used to designate a limitation of the duty of the defendant, it seems descriptive rather than doctrinal, and as Lewis Carroll wrote many years ago:

" 'If there's no meaning in it,' said the King, 'that saves a world of trouble, you know, as we needn't try to find any.' "

2. *As to the "conduct of the plaintiff.* If it be conceded that the knowledge, appreciation, and acquiescence of the plaintiff in a known risk must be measured by ascertaining whether the plaintiff had the quantum of knowledge and appreciation of peril that a reasonably prudent man ought to have had, there seems no question that the doctrine would be at least as socially justifiable

[358](1935) 63 S. D. 343, 258 N. W. 491.

as those standards of conduct judicially approved within the field of contributory negligence, except for the variation in the effect of each doctrine upon the litigant.

It is no secret that in practice the primary aim of the plaintiff in a personal injury case is to get his case before a jury, while the defendant attempts to secure a determination of the cause, if possible, from the court. In view of the very general prejudice of juries against defendants in such cases, it seems important in any social approach to the problem of equitable distribution of the burden of bearing loss, to ascertain whether one doctrine is more likely to be considered as a matter for decision by the court than the other. There seems little question that the determination of loss distribution problems in such cases is more likely to be considered as a matter for the court where the doctrine of assumption of risk is adopted. This has been the experience in cases involving master and servant, and generally speaking it seems also to be true in the treatment of the doctrine by the Wisconsin court. This is particularly true in view of the general conclusion of the courts that the doctrine of assumption of risk involves the "duty" of the defendant, even though that "duty" may shift because of conduct of the plaintiff involving legal fault, for a determination of a question of "duty" has been traditionally within the jurisdiction of the court, rather than the jury. Courts are normally reluctant to reverse the verdict of a jury below where no pattern exists against which the findings of the jury may be measured; but where it is possible to seek for evidences of conduct which according to a recognized and traditional pattern bars recovery, the rationale of a court setting aside a verdict below is rendered considerably more convincing, even though at bottom the question in each case is the same.

In short, where the court examines a record and finds knowledge, appreciation, and acquiescence in or voluntary assumption of a perilous condition, it then seems more clear that they are applying and not creating a standard of conduct for the servant or guest, notwithstanding that in fact the quantum of plaintiff's knowledge, appreciation, and acquiescence in the risk is measured by the standard of what the reasonably prudent man would or ought to have done. Concomitant with such review, whether in the field of assumption of risk or contributory negligence, arise standards of care in which courts will say what the conduct of the reasonably prudent man ought to have been, rather than what it is.

In most cases involving personal injuries, in which the defense

of assumption of risk may be raised, the courts perforce delicately endeavor to balance a distribution of the burden of loss upon those who best can bear it, against the modern conception of the old *volenti* maxim: that one who invites or consents to an injury cannot recover damages where loss results from the risk to which consent was given. Because juries are most inclined to err, distributing the burden of loss without regard to the relative fault of the parties, revision of verdicts in the appellate court has not been unusual, and the doctrine of assumption of risk has seemed to some courts an attractive technique in regulating the conduct of juries by setting up a more explicit standard of care to which a plaintiff must conform to justify his recovery of damages. While close (perhaps even closer) analysis of jury verdicts by the appellate court in such cases seems imperative, it is submitted that the end ought not to be sought through reliance on the rationale of assumption of risk. There is no requirement of conduct under the doctrine which may not equally well be founded on standards implicit in the decided cases holding stated combinations of factors indicating legal fault to be contributory negligence as a matter of law.

In so far as the standard of conduct of the guest, under the doctrine of assumption of risk, may be higher than that of the reasonably prudent man (as in Wisconsin under the rule of *Scory v. LaFave*)[359] there seems no social justification for a distinction between the requirement of care owed to the host by a guest, and that owed by the guest to the third party whose negligence concurs with that of the host to cause an accident. If the guest knows of circumstances such that as a reasonably prudent man he ought to protest or leave the car, he ought to have no cause of action in any event; if he has no such knowledge he ought not to be precluded from recovery as to anyone. The social justification of the doctrine, also, is conditioned by the factor that thus far, at least, it has been impossible to tell what the standard of care of the guest ought to be, if it ought to be other than that of a reasonably prudent man.

The effect of the doctrine on the fair and intelligent analysis of the issues by the jury is, of course, of paramount social importance. The standard method of procedure in presenting the defenses in the field of master and servant has been to present instructions to the jury on both assumption of risk and con-

[359](1934) 215 Wis. 21, 254 N. W. 643.

tributory negligence,[360] and the same rule has been followed in the cases relating to the automobile guest.[361] Two issues bottomed upon substantially the same standard of care are thus presented to the jury. As a practical factor in making a general determination of social responsibility it may clearly be academic to make a distinction between the use of the phrase "assumption of risk" and "contributory negligence" in the verbiage handed to jurors (and all too often disregarded, as every practitioner knows) for the purpose of assisting them to come to an intelligent conclusion as to liability in any case. The niceties of legal terminology too complicated to be understood by the courts can hardly be significant to the average jury, especially since, as Labatt has suggested, "An act which changes its quality completely, according as the servant [plaintiff in other cases involving the doctrine] is or is not aware of the physical consequences which it may entail, is, we think, a conception altogether too subtle and refined to be comprehended by the average juror."[362] To instruct that recovery is precluded where plaintiff is guilty of "negligence contributing to the injury" will be equally meaningful to the jurors, whether they be also instructed that recovery may be denied because the plaintiff "knowingly assumed the risk."

The conception of the doctrine as a limitation on the right to recovery, based on the conduct of the plaintiff, presents complex problems. Present application of the *volenti* concept finds no basis in the older cases, especially those in England, in which it is suggested that the rule was not intended to apply where negligence of the defendant was conceded, when litigants sought to apply the doctrine as a defense based upon the conduct of the plaintiff.[363] Use of the term in this frame of reference has been rejected also in a few jurisdictions here.[364]

But the concept has been generally recognized in American jurisdictions as a doctrine separate and independent from contributory negligence. Generally it has been conceived as a distinct

[360]Labatt, Assumption of Risk and Contributory Negligence, (1897) 31 Am. L. Rev. 667, 683.

[361]Hall v. Hall, (1935) 63 S. D. 343, 258 N. W. 491.

[362]3 Labatt, Master and Servant, (1913) 3624.

[363]See 1 Bevan, Negligence (1928) 796; Pollock, The Law of Torts (1923) 169, 170. Bramwell, J., in Smith v. Baker and Sons [1891] A. C. 325, 60 L. J. Q. B. 683, 65 L. T. 467, 55 J. P. 660, 7 T. L. R. 679; Dulieu v. White and Sons, [1901] 2 K. B. 669, 70 L. J. K. B. 837, 85 L. T. 126, 17 T. L. R. 555; Dann v. Hamilton, [1939] 1 K. B. 509, 108 L. J. K. B. 225, 160 L. T. 433, 55 T. L. R. 297.

[364]Cf., e.g., Woodman v. Peck, (1939) 9 N. H. 292, 7 A. (2d) 251; Reed v. Zellers (1933) 273 Ill. App. 18.

limitation on the duty of the defendant, based on plaintiff's voluntary assumption of a known and appreciated danger. Logically, it seems clearly unjustifiable, not only because it is impossible to make any conceptual distinction between this rule and that of contributory negligence, but because the standard of conduct under each doctrine seems essentially to have been the same, and the variance in the effect of such conduct when conditioned by other legal principles impinging upon one doctrine or the other has on the whole been unfortunate. With a more complete understanding of the implications of the doctrine, it seems probable that courts will cease attempting to separate the inseparable and where circumstances require, classify indisputable legal fault on the part of a plaintiff, arising from whatever cause and in whatever field, as contributory negligence as a matter of law.

(Concluded)