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In the so-called gratuitous passenger cases, the defence of voluntary assumption of risk, being a complete defence to negligence, has fallen into some disfavour with the courts in recent years, preference having been given to the more moderate defence of contributory negligence with its consequent apportionment of responsibility.[1] With one exception,[2] this has also proved to be the case in their dealing with a gratuitous passenger's rights against the drunken driver found to be grossly negligent under the motor vehicle legislation.[3]

As a rule, the plea of *volenti* and that of contributory negligence go together, so that the defence of contributory negligence may succeed where *volenti* fails. The defences can cover the same field, so to speak. The essence of *volenti* is that the plaintiff has abrogated his legal rights. The Principle was summarized by Ritchie J. of the Supreme Court of Canada in 1969 in *Eid* v. *Dumas*:[4]

> . . . the rule embodied in the maxim *volenti non fit injuria* was discussed by the present Chief Justice speaking on behalf of the majority of this Court in *Lehnert* v. *Stein*,[5] where he said in reference to the case of *Car & Gen'l Ins. Corp. Ltd.* v. *Seymour & Maloney*:[6]
>
> That decision establishes that where a driver of a motor vehicle invokes the maxim *volenti non fit injuria* as a defence to an action for damages for injuries caused by his negligence to a passenger, the burden lies upon the defendant of proving that the plaintiff, expressly or by necessary implication, agreed to exempt the defendant from liability for any damage suffered by the plaintiff occasioned by that negligence, and that, as stated in Salmond on Torts, 13th ed., p. 44:

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1. *E.g.*, *Eid* v. *Dumas*, [1969] S.C.R. 668; *McDonald* v. *Dalgleish*, [1973] 2 O.R. 826.
2. *I.e.*, where there is a "joint venture in drunknness", *infra*.
3. Motor Vehicle Act R.S.N.S. 1967, c. 191 s. 223.
4. [1969] S.C.R. 668.
5. [1963] S.C.R. 38.
6. [1956] S.C.R. 322.

> "The true question in every case is: *did the plaintiff give a real consent to the assumption of the risk without compensation: did the consent really absolve the defendant from the duty to take care?*"[7]

And of course, absolution from legal liability is predicated upon knowledge on the part of the plaintiff of the nature and extent of the risks involved. Given that knowledge, acceptance of the legal risk of injury can be inferred from the surrounding circumstances.[8] On the other hand, liability for contributory negligence can be imposed upon the plaintiff where he did not know but should have known of the danger which confronted him. Further, the plaintiff may have appreciated the danger ut have been recklessly indifferent to it and so negligent as regards his own safety. Thus it is relatively easy for the courts to move from one defence to the other.

As a matter of social policy, the defence of contributory negligence is preferable to that of *volenti*. It permits a more equitable distribution of loss in a situation where the defendant driver has proved to be the primary instrument in causing the plaintiff's injury. Moreover, it may (very) occasionly act as some deterrent to the irresponsible or drunken driver. In the words of Professor Fleming:

> . . . contributory negligence by merely reducing, instead of extinguishing, recovery serves as a deterrent for both parties, the driver as well as the passenger. By not letting the former escape scot free, the law of torts as thus doing its share to combat drunk-driving by promoting his insurance company to discipline him in exercising its contractual or statutory right of indemnity and increasing his future premiums. Nor is it in any way unjust to permit the passenger some recovery, for his fault is usually much the lesser. . . .[9]

Be that as it may, it is a sad commentary upon human nature that so many of these cases come before the courts with monotonous regularity.

It was observed earlier that, with one exception, the drunken driver will find small comfort in pleading the defence of *volenti*. *Stevens v. Hoeberg*[10] is a typical decision. The plaintiff was injured when a car driven by the defendant and in which she was a passenger left the road at high speed and rolled over. The driver was intoxicated

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7. Emphasis added.
8. *E.g., Deauville* v. *Reid* (1967), 52 M.P.R. 218, 223-4.
9. *The Law of Torts*, (4th ed., Law Book Co., 1971) 244.
10. (1973), 29 D.L.R. (3rd) 673. See also, *Car & General Ins. Corp. Ltd.* v. *Seymour & Maloney*, [1956]S.C.R. 322; *Lehnert* v. *Stein*, [1963]S.C.R. 38; *Roy* v. *McEwan* (1969), 6 D.L.R. (3d) 43; *Halliday* v. *Essex*, [1971]3 O.R. 621; *Lewis* v. *Sayers* (1971), 13 D.L.R. (3d) 543.

and had been engaged in heavy drinking with other passengers in the car. The plaintiff had probably had at least some drinks. The original purpose of the journey had been to buy a wedding ring for the plaintiff at a town some distance from where the driver and his passengers were living. The ring was purchased, along with a considerable amount of beer, and the accident took place on the return journey. It was clear that when the original journey began there was no intention on the part of the defendant or his passengers to purchase beer. It was also found that the plaintiff did not participate in the arrangements to buy the beer. Lerner J. held that the defence of voluntary assumption of risk failed. The mere joining in the consumption of *some* beer by the plaintiff was not sufficient to make her *volens*. She was, however, assessed with 25% contributory negligence as she had the opportunity to leave the car on a number of occasions, the conduct of the other occupants having made it apparent to her that the journey was fraught with danger.

The position is, however, different where there is a "joint venture in drunkenness". The leading case is the Supreme Court of Canada decision of *Miller* v. *Decker*.[11] A number of young men of which the plaintiff was one formed a common purpose "to get feeling good and then go to the dance hall". They achieved their ambition, arrived at the dance hall but later predictably crashed their car. It was held that the defendant driver had been grossly negligent, but the plaintiff failed to recover, on the ground of *volenti*. The defendant when at the beer parlour must have required the plaintiff to have assumed all the risks that the exciting evening of imbibing might entail and the plaintiff must have been taken to have accepted that requirement. The difficulty, of course, is in establishing the relevant time at which this common purpose is formed, but Rand J. of the Supreme Court in *Miller* v. *Decker*[12] had no trouble in fixing it at the beginning of the evening, the time when the drinking plans were made.

The case has since been followed many times.[13] A recent case is *Priestly* v. *Gilbert*.[14] The defendant, whilst driving on the wrong side

11. [1957] S.C.R. 624.
12. *Ibid.*
13. *Tobin* v. *Fennell* (1962), 35 D.L.R. (2d) 513; *Deauville* v. *Reid* (1967), 52 M.P.R. 218; *Boulay* v. *Wild* (1972), 25 D.L.R. (3d) 249; *Tallow* v. *Tailfeathers*, [1973] 6.W.W.R. 732. See also, *CONRAD* v. *Crawford* (1972), 22 D.L.R. (3d) 386; *Tomlinson* v. *Harrison* (1972), 24 D.L.R. (3d) 26; *Allen* v. *Lucas* (1972), 25 D.L.R. (3d) 218.
14. [1974] 1 O.R. (2d) 365.

of the road, collided with an oncoming car. The occupants of the other car were both killed and the plaintiff, a passenger in the defendant's car, was severely injured. Both the defendant and the plaintiff were drunk at the time, and had been drinking together throughout the day. The trial judge found that the plaintiff and the defendant had embarked upon a joint venture which the plaintiff knew or should have known would be dangerous, and that he voluntarily accepted the risk of personal injury. The action was dismissed. The plaintiff appealed to the Ontario Court of Appeal, where the defence of *volenti* was sustained. In dismissing the appeal, reference was made with approval to the reason for judgment given by Rand J. in *Miller* v. *Decker*.[15] Rand J. had said in part:

> As between themselves there is no doubt of what would have been required by Decker in the inter-change that is to be constructed between these young men as they sat down at the beer table to begin "to make an evening of it". That he would have required the other two to assume the risks all were able to foresee and would have participated in creating, to take the same risks that he was taking, is inevitable development, and the obvious hazards were theirs equally and jointly; and one can imagine the reasonable response of Decker, had his mind still been clear enough, if either of them had let fall a suggestion that he would be responsible for their safety: they would have been told to get into another car.
>
> It is equally clear that Miller is to be taken to have accepted that requirement. This would have been obvious if he had remained sober and in command of his faculties; and having, by his voluntary acts, co-operated in creating and placing himself in the midst of the mounting dangers, his intoxication does not quality his acceptance.

Similar conclusions were reached in two other recent "joint-drinking" cases, *Tomlinson* v. *Harrison*,[16] and *Tallow* v. *Tailfeathers*.[17] Both cases have the additional feature that they involved stolen cars and in the former the police were actually giving chase when the accident occurred. The plaintiff had acquiesced in the escape attempt. *Volenti* operated as a complete defence in both. In the former case the plaintiff's claim was also defeated by the public policy defence of *ex turpi causa non oritur actio, i.e.*, the plaintiff, being a party to the criminal offence, could not treat his co-offender's conduct in the performance of their joint criminal ventures as a tort against himself.[18]

15. [1957] S.C.R. 624, 630.
16. (1972), 24 D.L.R. (3d) 26.
17. [1973] 6 W.W.R. 732.
18. C.f. the judgment of Clement J. A. in *Tallow* v. *Tailfeathers, supra.*

But in *Halliday* v. *Essex,*[19] the Ontario High Court refused to regard a "joint venture in drinking" as giving rise to the defence of *volenti*. The case concerned a "drinking weekend" at a summer cottage. Late in the evening, after all the participants had become drunk, they went for a drive. The car left the road and struck a tree, injuring the plaintiff. The learned trial judge found that the plaintiff, although a willing participant in the weekend junketing, had not voluntarily assumed the legal risk of injury. He had, however, failed to take reasonable care of himself and had contributed by this want of care to his own injury. His blame was assessed at 40%. It is submitted, with respect, that this decision is out of the mainstream of authority in such cases. It would seem quite clear that the defendant and his cronies, including the plaintiff, had formed their common purpose in drinking at the outset of the weekend (indeed, before) with all that that would entail. The facts would therefore seem to fall squarely within the *Miller* v. *Decker* principle. *Miller* v. *Decker,* however, was not considered.

Finally, reference should be made to two cases where a joint venture in drunkenness was not involved. Both these cases came before the Ontario High Court in 1973. They both concerned drag-racing. In both the plaintiff was an injured passenger who sued the defendant driver. In the first case, *McDonald* v. *Dalgleish,*[20] it was held that *volenti* could not succeed; there was, however, contributory negligence on the part of the plaintiff. But in the second of the two cases, *Deskau et al.* v. *Dziama,*[21] it was held that the plaintiff was *volens* and the action was dismissed. The cases (differ) on the facts in one important respect: the former case involved a more or less spontaneous drag-race between two cars on the highway. Drag-racing was not the original purpose of the journey. In *Deskau et al.* v. *Dziama,*[22] on the other hand, the object of the drive was to take the defendant's car at high speed over a number of sharp hills with a view to achieving the maximum thrill by launching the car into the air at each crest. It was, accordingly, a joint venture in drag-racing and akin to a common enterprise in drinking.[23] Keith J. said in part:

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19. [1971] 3 O.R. 621.
10. [1973] 2 O.R. 826.
21. (1973), 36 D.L.R. (3d) 36.
22. *Ibid.*
23. *C.f. Schwindt* v. *Giesbrecht* (1958), 13 D.L.R. (2d) 770, where the plaintiff, a gratuitous passenger, in urging his driver to outrace a police car had agreed to contribute to the fine if they were caught.

> Counsel for the plaintiffs submits that while Miss Deskau and Arthur Brooks undoubtedly freely and voluntarily joined in a venture that was fraught with danger, it was only on the basis that the brakes on the defendant's car were in good working order and that they never accepted the additional risk involved in riding in a car whose brakes failed.
> In my view, *and having regard only to the whole foolhardy frolic that these young people were jointly engaged in*[24] . . . The nature of the risk that these plaintiffs voluntarily assumed was unlimited in the circumstances. Any one of many things could and was likely to bring about disaster.[25]

To conclude: voluntary assumption of risk as a defence in gratuitous passenger cases has met with little success in recent years, apart from those cases where a drinking enterprise common to both parties has been established by the defendant so that it can be said that the plaintiff must have consented to the legal risk of injury. The notion of a common enterprise in drinking can be extended by analogy to other situations where a common purpose has been agreed upon in advance by the active encouragement of the plaintiff, or where there has been passive compliance on his part without domination by the defendant.[26] Whether such a development is desirable is another matter.

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24. Emphasis added.
25. (1973), 36 D.L.R. (3d) 36, 40.
26. See also *Car and General Ins. Corp. Ltd.* v. *Seymour and Maloney*, [1956] S.C.R. 322.