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Negligence--Assumption of Risk and Contributory Negligence--Abolition of Assumption of Risk as a Defense Separate From a Contributory Negligence in Autobmobile Guest-Host Situations NEGLIGENCE IN AUTOMOBILE GUEST-HOST SITUATION

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NEGLIGENCE—ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE—ABOLITION OF ASSUMPTION OF RISK AS A DEFENSE SEPARATE FROM CONTRIBUTORY NEGLIGENCE IN AUTOMOBILE GUEST-HOST SITUATIONS—Plaintiff, a guest in an automobile driven by defendant, was injured when defendant's vehicle collided with another car. In plaintiff's suit against defendant and her insurer the jury found that defendant was causally negligent as to management and control and position on the highway, and that plaintiff was causally negligent as to lookout. After apportioning 85 percent of the negligence to defendant and 15 percent to plaintiff, the jury found that plaintiff had assumed the risk with respect to defendant's management and control and position on the highway, and the trial court therefore entered judgment dismissing the complaint. On appeal, *held*, reversed. In Wisconsin, hereafter, an automobile driver owes to his guest the same duty of ordinary care that he owes to others; a guest's assumption of risk, previously implied from his willingness to proceed in the face of a known hazard, is no longer a defense apart from contributory negligence; and if a guest's exposure of himself to a particular hazard is unreasonable and a failure to exercise ordinary care for his own safety, such conduct constitutes negligence, and is subject to the provisions of the state's comparative negligence statute. *McConville v. State Farm Mut. Auto. Ins. Co.*, 113 N.W.2d 14 (Wis. 1962).

Although assumption of risk and contributory negligence are entirely separate legal doctrines, they sometimes become difficult to distinguish

when applied to the conduct of an automobile guest. The distinction is not particularly important in a jurisdiction recognizing both doctrines as complete defenses in an action by the guest against the host, since a court's mistake in characterizing the facts is harmless error as long as either of the two doctrines is applicable. But in a jurisdiction where contributory negligence has been modified to a partial defense under a comparative negligence statute, a practicable distinction is essential in determining the respective rights of the host and guest.

Until 1931 Wisconsin courts employed the common-law rule totally barring plaintiff's recovery for injuries resulting from defendant's negligence where plaintiff was contributorily negligent. At that time Wisconsin adopted a comparative negligence statute[1] enabling a negligent plaintiff to recover that portion of his damages attributable to defendant's negligence. Plaintiff was completely barred only if the quantum of his negligence exceeded that of the defendant's. Nevertheless, Wisconsin courts continued to recognize the defense of assumption of risk as a complete bar to plaintiff's recovery.[2]

In Wisconsin the term "assumption of risk" was used to describe two somewhat separate concepts. One of these ideas limited the host's duty to his guest to that of a licensor to a licensee.[3] The guest accepted as a matter of law the condition of the automobile as he found it, subject only to the limitation that the host could not set a trap or be guilty of active negligence contributing to the injury of the guest.[4] The guest also accepted the driver with such skill and experience as he possessed.[5] Thus, the duty of the host was limited to the exercise of reasonable care to avoid increasing the danger to the guest or creating a new danger.[6] This idea was based neither on fault nor consent, but rather on the proposition that the guest had no right to security greater than that enjoyed by his host.[7]

Another concept, also labeled "assumption of risk," operated to avert any legal liability on the part of the host where the guest was deemed

1 WIS. STAT. ANN. § 331.045 (1958). "Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering."

2 For an extensive analysis of the assumption of risk doctrine in Wisconsin, see Campbell, *Host-Guest Rules in Wisconsin*, 1943 WIS. L. REV. 180.

3 O'Shea v. Lavoy, 175 Wis. 456, 462, 185 N.W. 525, 528 (1921).

4 *Id.* at 462-63, 185 N.W. at 528.

5 Cleary v. Eckart, 191 Wis. 114, 120, 210 N.W. 267, 269 (1926). But as a practical matter this limited duty theory was available to the host only when he could present affirmative evidence that he was a bad driver. Campbell, *Wisconsin's Law Governing Automobile Accidents*, 1962 WIS. L. REV. 240, 246.

6 Cleary v. Eckart, *supra* note 5, at 117-18, 210 N.W. at 268.

7 O'Shea v. Lavoy, 175 Wis. 456, 463, 185 N.W. 525, 528 (1921).

to have consented to the risk resulting in his injury. Consent was implied from the existence of a hazard or danger inconsistent with the safety of the guest, knowledge and appreciation of the hazard by the guest, and acquiescence or willingness to proceed in the face of that hazard.[8] The element of fault was irrelevant, and the guest was barred from recovery against his host even where the assumption of risk could be characterized, under the circumstances, as being reasonable.

Since the defense of assumption of risk was available in Wisconsin only when plaintiff and defendant stood in a consensual relationship to each other,[9] its applicability was limited almost entirely to actions by the guest against his host.[10] Since the guest had no relationship with the driver of another automobile on which to base any finding of consent, the doctrine of assumption of risk did not operate to bar the guest's recovery against a negligent third party.[11] Even if the guest's assumption of risk was unreasonable and therefore constituted a failure to exercise reasonable care for his own safety,[12] such acquiescence in the negligence of his host was simply contributory negligence with respect to the negligent third party. Therefore the guest still had a chance to recover part of his damages against the third party under the comparative negligence statute.

In the principal case the court based its objections to the assumption of risk doctrine on the arguments that (1) a guest is entitled to more protection than that received by a licensee,[13] (2) the social value in protecting drivers who have extended their hospitality to guests no longer outweighs the consequences of implying consent by the guest to the serious injuries commonly arising out of today's automobile accidents,[14] and (3) a literal application of the doctrine in cases where the guest, as a practical matter, has little choice but to consent, works a harsh result.[15] The doc-

8 Scory v. LaFave, 215 Wis. 21, 26, 254 N.W. 643, 645 (1934); Knipfer v. Shaw, 210 Wis. 617, 621, 246 N.W. 328, 330 (1933).

9 Schiro v. Oriental Realty Co., 272 Wis. 537, 548, 76 N.W.2d 355, 360 (1956). See Comment, 1960 WIS. L. REV. 460, 468-73.

10 Although master and servant stand in a consensual relationship to each other, the Wisconsin legislature has abolished assumption of risk as a defense in an action by an employee against an employer of four or more. WIS. STAT. ANN. § 331.37 (1958). Although the statute expressly excludes farm labor from its coverage, the Wisconsin Supreme Court has decided "that any conduct of a farm laborer, which evinces want of ordinary care for his own safety, constitutes contributory negligence and is subject to comparison under [the comparative negligence statute]. This will have the effect of largely, if not entirely, abrogating in farm labor cases the defense of assumption of risk as an absolute bar to recovery where the conduct alleged falls short of express consent." Colson v. Rule, 113 N.W.2d 21, 25 (Wis. 1962).

11 See Walker v. Kroger Grocery and Baking Co., 214 Wis. 519, 532, 252 N.W. 721, 726 (1934); 1961 WIS. L. REV. 677, 678.

12 Howe v. Corey, 172 Wis. 537, 540, 179 N.W. 791, 792 (1920).

13 Principal case at 19.

14 *Ibid.*

15 Baird v. Cornelius, 12 Wis. 2d 284, 299-300, 107 N.W.2d 278, 286 (1961) (concurring

trine also prejudiced the position of a negligent third-party driver[16] where the host was also negligent and the guest was held to have assumed the risk. Since the absence of any common liability between the host and the third party barred the latter from any right of contribution against the host, the third party alone was liable for any amount recoverable by the guest[17] even though most of the negligence which caused the accident might actually have been attributable to the host. With assumption of risk abolished as a defense separate from contributory negligence, contribution should now be more readily available to the negligent third party whenever the negligence of the host has contributed to the guest's injuries.

Under facts where the assumption of risk formerly operated as an affirmative defense based on consent, the host may now invoke the comparative negligence statute whenever the guest's consent to his negligence is unreasonable. On the other hand, if the guest's consent is reasonable, the guest will be allowed full recovery. Under facts where the assumption of risk formerly operated as a limitation on the duty of the host, and the question of negligence and contributory negligence was therefore never reached, the host may now be held liable for injuries caused by his own disabilities or by mechanical defects of which he was aware or should have been aware. And if such is the case, the jury may also have to decide at what point such disability or mechanical defect, of which the guest was aware or should have been aware, becomes so serious that the guest's decision to ride with the host constitutes a lack of reasonable care for his own safety.

Some of the other possible effects of this decision on the determination of liability in future cases are difficult to predict. From the abolition of assumption of risk, it does not necessarily follow that all conduct previously treated as involving an assumption of risk rather than contributory negligence will now be ignored. Since the jury will be given contributory negligence instructions in cases where such instructions were previously refused, it is conceivable that the assumption of risk previously considered reasonable will in some cases be now considered unreasonable conduct. And in cases where assumption of risk limited the duty of the host and therefore eliminated the necessity of examining the reasonableness of the guest's conduct, the application of the doctrine of contributory negligence will involve the use of objective standards of reasonableness yet to be formulated. While this decision obviously effectively expands the scope of contributory negligence in Wisconsin jurisprudence, the exact line between

opinion). As early as 1934 it was suggested that the assumption of risk doctrine was unnecessary in Wisconsin automobile host-guest cases. Scory v. LaFave, 215 Wis. 21, 35, 38, 254 N.W. 643, 649, 650 (1934).

16 See Campbell, *Host-Guest Rules in Wisconsin*, 1943 WIS. L. REV. 180, 203-04.

17 Shrofe v. Rural Mut. Cas. Ins. Co., 258 Wis. 128, 132, 45 N.W.2d 76, 78 (1950).

negligent and non-negligent conduct in areas formerly covered by the assumption of risk doctrine remains to be determined in later decisions.

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