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ASSUMPTION OF RISK IN AUTOMOBILE CASES

RICHARD GLEN GREENWOOD*

The purpose of this article is to reexamine the law of assumption of risk as it is currently applied in automobile negligence cases in Wisconsin. It is my hope that the article may be useful to the readers of the *Review*, at least as a considered compilation of the recent cases. I will not endeavor to trace the historical evolution of the doctrine in any detail,¹ rather I will direct my emphasis to the reaffirmation or the change which the law has lately assimilated.

I

THE LEGAL RELATION BETWEEN HOST AND GUEST

Before beginning an examination of the cases, it seems best to discuss briefly the corresponding right and duty between the guest and the host. In some respects the duty owed by the host-driver to the guest-passenger for the condition of the car and its operation is less than the usual duty of ordinary care. This is commonly referred to as the limited duty rule. In essence the rule states that the duty of the host to his guest is not to increase the danger which the guest assumes as a matter of law upon entering the car, and it is well settled that the guest must accept the honest and conscientious exercise by the host-driver of such skill as he has to the control of the automobile.² The Supreme Court has put it this way per Justice Gehl:

It is the risk incident to the skill of the driver which a guest assumes. The risk which is attendant upon the driver's failure *conscientiously* to exercise his skill and judgment is not assumed.³ (Emphasis supplied)

And in this regard Justice Rosenberry said:

Since *Cleary v. Eckart* . . . it has been the law of this state that a guest in an automobile must accept the honest and conscientious exercise of such skill as the host may have attained in the management of automobiles.⁴

In other words, it is a rule of law in Wisconsin that upon entering a car a guest accepts the skill and judgment possessed by the driver, and

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¹ See generally Kluwin, *The Problems of Host-Guest Cases as They Relate to Contributory Negligence and Assumption of Risk*, 37 MARQ. L. REV. 35 (1953) and Campbell, *Host-Guest Rules in Wisconsin*, 1943 WIS. L. REV. 180.

² *Pierner v. Mann*, 249 Wis. 469, 25 N.W. 2d 83 (1946).

³ *Olson v. Milwaukee Auto Ins. Co.*, 266 Wis. 106, 115, 62 N.W. 2d 549, 554 (1954).

⁴ *Struck v. Vetter*, 233 Wis. 540, 543, 290 N.W. 131, 132 (1940).

that consequently, at least in the area of management and control, the duty owed by the host to the guest, can be denominated as a limited one.

Another example of the limited duty imposed upon a host is where a risk arises from the bad driving habits of the host which are known to the guest when he enters the car. The Supreme Court has held that a guest assumes the risk of such habits of the driver as are known to the guest.⁵ Concerning this type of a fact situation the court said:

The term 'assumption of risk' has caused some difficulty and perhaps a happier phrase might be coined, but it is conveniently used in referring to the duty of the host not to increase the hazard assumed by the guest when entering the car, and the responsibility of the guest to refuse hospitality if he knows of careless habits or fixed defects which make the host an unsafe driver. The guest who voluntarily takes a chance on known dangers in preference to renouncing the benefits of the relationship which he creates by entering the car must himself bear the consequences when he is injured by reason of a known danger.⁶

When the skill and judgment of the driver, that is management and control, are not in issue, and there are no bad driving habits known to the guest when he enters the car, then the duty which the host owes to the guest is no longer limited in any sense. The negligence of the host, other than as to management and control, for example, negligence as to speed, lookout and the law of the road is to be measured by the standard of ordinary care. The duty, therefore, which a host owes to a guest relative to the negligence issues other than the issue of management and control, is a duty to exercise ordinary care, and it is identical to that same duty which the host owes to third persons. The Supreme Court settled this question of substantive law when it held:

While the guest cannot demand of the host a higher degree of skill and experience than he actually possesses, in the management and control of the automobile under special and peculiar circumstances, even though they do not amount to emergencies, nevertheless there are certain duties imposed upon the drivers of automobiles, the abilities to perform which do not depend upon experience or acquired skill. Among these is the duty to maintain a reasonable speed, obey the law of the road, keep a proper lookout, etc. These are duties which are required to be observed for the safety of everyone,—those within as well as those without the automobile,—and failure to perform them may result in liability in the absence of acquiescence or contributory negligence on the part of the guest. The driver of an automobile who maintains an excessive or reckless speed, who fails to maintain a lookout or to observe the laws of the road, plainly increases the dangers which the guest assumed upon entering the

⁵ Harter v. Dickman, 209 Wis. 283, 245 N.W. 157 (1932).

⁶ Bourestom v. Bourestom, 231 Wis. 666, 670, 285 N.W. 426, 428 (1939).

automobile and adds new ones, and there manifestly is no difference between the degree of care he is required to use in these respects for the safety of other persons.⁷

However, when the host has been found negligent, the act or acts of negligence must occur often enough or persist long enough after the trip commences to require a protest from the guest; then if no protest is made, the risk arising out of such negligence is assumed by the guest. The host's negligence constitutes a breach of duty, but the guest loses his right to recover, because his acquiescence has the consequence of a consent to the risk.

Perhaps prior to concluding this review of the host-guest relationship, it would be worthwhile to enumerate the requirements necessary to establish assumption of risk. The Supreme Court has held that three elements comprise assumption of risk, namely:

1. A hazard or danger inconsistent with the safety of the guest;
2. Knowledge and appreciation of the hazard by the guest; and
3. Acquiescence or a willingness to proceed in the face of danger.⁸

The language which describes the doctrine is certainly framed in the nature of consent. However, notwithstanding this naked terminology of definition, Professor Campbell was disposed to remark in connection with the real essence of the doctrine in January of 1956 as follows:

The most serious question which still remains unanswered by the cases is whether assumption of risk really depends upon the state of mind of the guest. Of course, in statement it does, but the administration of the rule is not equally clear.⁹

observation, for assumption of risk, like so many other legal tests which have been reduced to a black letter rule, has been defined in general terms and it is necessary to analyze the case law as a condition to arriving at a clear understanding of the rule in its practical application. With this objective in mind I will attempt to digest and comment upon what appear to be the recent significant decisions from the Wisconsin court bearing upon this important affirmative defense¹⁰ in the litigation of automobile negligence cases.

II

THE GUEST'S KNOWLEDGE OR APPRECIATION OF THE RISK AND HIS OPPORTUNITY AND DUTY TO PROTEST

To support a finding of assumption of risk, it is essential that the guest know or appreciate the danger involved. A guest in an automobile usually acquires his knowledge or appreciation of any risks to

⁷ *Poneitowcki v. Harres*, 200 Wis. 504, 511, 228 N.W. 126, 129 (1930); *Ameche v. Ameche*, 271 Wis. 170, 174, 72 N.W. 2d 744, 747 (1955).

⁸ *Knipfer v. Shaw*, 210 Wis. 617, 621, 246 N.W. 328, 330 (1933).

⁹ *Campbell, Law of Negligence in Wisconsin*, 1955 WIS. L. REV. 4.

¹⁰ *Catura v. Romanofsky*, 268 Wis. 11, 66 N.W. 2d 693 (1954).; *Sandley v. Pilsner*, 269 Wis. 90, 68 N.W. 2d 808 (1955).

which he might be exposed by observing a prior pattern or continuous course of conduct exercised by the host in driving his automobile,¹¹ or he has prior knowledge of the hosts inexperience as a driver and his deficient driving habits.¹² An illustration of a guest acquiring knowledge of a hazard by a prior course of conduct is where a guest was precluded from recovering from his host when they had traveled in the center of the road just prior to the collision, but they had also done this while proceeding up three steep hills, each one creating a blind spot at the crest of the hill.¹³ In *London and Lancashire Indemnity Co. v. Phoenix Indemnity Co.*,¹⁴ the court restated the principle that it is the settled rule that a guest who knows of his host's inexperience as a driver assumes the risk of injury to himself that results from such inexperience.

The danger present in the case must understandably be some kind of negligent conduct on the part of the host. A case representative of a situation where no real danger could be found, so that the question of assumption of risk should not have been submitted to the jury was *LeMere v. LeMere*.¹⁵ That was a case where the host was riding with her husband on a rutty road during the April spring breakup. After crossing a railroad track at a speed of 5 or 10 miles per hour, the right front wheel of the car fell into a deep rut or hole which caused the car to come to an abrupt stop, and the guest was injured. The Supreme Court held that assumption of risk was not an issue in the case. The court said:

The road was rough and rutty in spots, but there is no evidence that it was impassable or dangerous to a car properly driven. There was no evidence on which the jury could have concluded that a driver in the exercise of ordinary care would have turned around when he came to the small rutty area instead of trying to negotiate it. Portions of the road in that area were in good enough condition to permit a carefully driven car to pass without harm.¹⁶

The *LeMere* case simply points up the fact that whether or not there is danger in the case it will be determined by the test of ordinary negligence, and it can be inferred parenthetically, that had the road been in an impassable state when the host drove into it, then assumption of risk would have been in the case.

Once there is a danger or hazard inconsistent with the safety of the guest, there is a duty imposed upon the guest to protest such conduct if the guest is to avoid assuming the risk of that particular danger.

¹¹ See *Modl v. National Farmers Union Prop. and Cas. Co.*, 272 Wis. 650, 76 N.W. 2d 599 (1956).

¹² See *Braatz v. Continental Casualty Co.*, 272 Wis. 479, 76 N.W. 2d 303 (1956).

¹³ *Gimbel v. Goldman*, 256 Wis. 28, 39 N.W. 2d 768 (1949).

¹⁴ 263 Wis. 171, 56 N.W. 2d 777 (1953).

¹⁵ 6 Wis. 2d 58, 94 N.W. 2d 166 (1959).

¹⁶ *Id.* at 62, 94 N.W. 2d at 168.

The case of *Spang v. Schroeder*¹⁷ effectively demonstrates this duty to protest. That case arose out of the wrongful death of a high school boy who fell from the running board of a car driven by the defendant, also a high school student. The host-defendant had asked the guest to stand on his running board and promised to take him to his home two blocks away. The host, instead of stopping to discharge his running board-guest, accelerated his speed and continued on. However, when they had reached the corner where the guest was to be discharged, the guest had told his host to turn the corner as he had to go to work. This request was disregarded by the host as of his own admission at the trial. The trial court changed the jury's findings and held that the negligence of the host did operate to increase the risk assumed by the guest. On appeal the question was raised whether or not the protest made by the guest was sufficient. The Supreme Court affirmed the trial court and held that at the corner the guest said he had to go to work and he wanted to get off, and, that under all the circumstances and upon the host's admission, there was a sufficient protest unheeded by the host, and, because of that admission, no question inquiring as to protest had to be submitted to the jury.

The case is unique in this respect. The trial court felt that the guest had been willing to assume the risk of riding as he did for the short distance he had to go, and at the low rate of speed maintained up to the corner where he was to have been discharged. However, beyond that point the guest assumed no risk because the host's acceleration of speed, at and beyond the corner, increased the guest's danger and added a new one.

A case which offers an excellent comparison of where a proper protest was made and where the protest was not properly made is *Olson v. Williams*.¹⁸ The case involved two guests in the company of a host. One guest had thought the host too drunk to drive and asked that he be allowed to drive but the host refused and then proceeded to drive weaving the car from the left to the right lane. The guest protested to this weaving but the second guest had fallen asleep. When he awakened he hollered, "Look out we are off the road" and the accident followed. The jury found that the protesting guest had not acquiesced in the danger whereas the sleeping guest had so acquiesced and in so doing assumed the risk. The case was upheld on appeal.

Scory v. LaFave,¹⁹ a classic Wisconsin case in this area, was reaffirmed in *Muehlenbeck v. Fitchett*.²⁰ The *Scory* case was held to be controlling in a situation where a wife-passenger remained in a car

¹⁷ 275 Wis. 92, 80 N.W. 2d 768 (1957).

¹⁸ 270 Wis. 57, 70 N.W. 2d 10 (1955); *But. Cf. Holtz v. Fogarty*, 270 Wis. 647, 72 N.W. 2d 411 (1955).

¹⁹ 215 Wis. 21, 254 N.W. 643 (1934).

²⁰ 270 Wis. 373, 71 N.W. 2d 293 (1955).

parked on a highway at night, while her husband-driver repaired a flat tire. The Supreme Court held that the trial court should have submitted the question of the wife's assumption of risk to the jury. This seems sound in that remaining in such a vehicle is clearly hazardous and apparently the wife had acquiesced in such danger and chose to remain in the area of risk. She made no protest.

In summary, the cases reiterate well established principles of the doctrine of assumption of risk. First, to find an assumption of risk there must be some real hazard or danger present, inconsistent with the guest's safety. Secondly, once the danger is present the guest must know or appreciate its presence, and then, in order for the guest to avoid assuming this risk or hazard, he has a duty imposed upon him to protest such negligence on the part of his host. Depending upon the facts, the question of the sufficiency of this protest will be either answered by the court or made a specific question to the jury.

III

THE PROBLEM OF OVERPOWERING SPEED

An examination of a line of cases which find their source in *Young v. Nunn, Bush and Weldon Shoe Co.*²¹ generates a provocative question concerning the application of the doctrine of assumption of risk where the negligent overpowering speed of the host is involved. At the beginning, let it be said that if a host is negligent as to speed, management and control and lookout, and the guest has not assumed the risk, at least as to one of these elements of his host's negligence, then the guest is not barred from recovering from his host.²² In that regard it is important to appreciate what the Supreme Court has said relating to the assumption of the risk as to management and control and lookout. The court has held that both negligent management and control and negligent lookout are usually of such a momentary nature that the guest does not have the opportunity to appreciate the risk and the corresponding opportunity to protest.²³ It follows that it might be extremely difficult to prove that a guest has assumed such a momentary risk, unless of course it can be shown that the guest was previously appraised of his host's negligent management and control or lookout through a prior negligent course of conduct on the part of the host. Yet a real controversy bearing on this precise point can grow out of the line of cases referred to at the outset of this paragraph.

Pertinent language from the *Young*²⁴ case *supra* is quoted as follows:

²¹ 212 Wis. 403, 249 N.W. 278 (1933).

²² *Jewell v. Schmidt*, 1 Wis. 2d 241, 83 N.W. 2d 487 (1957).

²³ *Tietz v. Blaier*, 250 Wis. 214, 218, 26 N.W. 2d 551, 553 (1947) on management and control; *Whirry v. Rural Mut. Casualty Ins. Co.*, 267 Wis. 302, 308, 64 N.W. 2d 841, 845 (1954) on lookout.

²⁴ Note 21 *supra*.

If a host is proceeding at a negligent rate of speed which the guest assumes, and by reason of this speed finds himself in a situation requiring instant decision and giving him opportunity for further negligence with respect to control, *it is impossible to isolate the subsequent negligence from the prior negligence* and to hold in spite of the fact that the guest has acquiesced in the former, that the momentary character of the latter makes acquiescence impossible. In such a situation where the emergency itself is produced by negligence of the host, the guest who has assumed the risk of such negligence must be held to assume the risk involved in the emergency produced by it. (Emphasis supplied)²⁵

In other words the *Young* case holds that it is possible for a guest to assume the risk of negligent management and control even though the same is momentary, under circumstances where it is impossible to separate negligent speed from any subsequent negligence of the host. The *Young* case was decided in 1933, but in 1956 it reappears, bearing on the assumption of risk question, being cited as authority in *Peterson v. Magnus*.²⁶ From this point, I will develop the line of cases referred to *supra*, chronologically.

In *Peterson*²⁷ the facts presented a host-guest (co-worker) relationship, in which they were proceeding to work in the host's car, in an attempt to cover 60 miles in an hour's time, under unfavorable weather conditions. The guest was injured in an accident, and on trial testified that his host drove a little too fast for the road, and that he had been travelling a little too close to a car ahead of them. The guest never protested. The jury found the host negligent as to speed and management and control, and that the host assumed the risk of both these items of negligence. On appeal the question was raised as to whether the guest could assume this momentary negligent management and control of the host. The Supreme Court affirmed the trial court and said:

We may not treat the two findings, those respecting speed and control, independently of each other. As we have stated, the negligent speed at which Magnus drove might well be found to have been the sole cause of the collision. It was his *speed*, his anxiety to cover a distance of 60 miles in an hour's time under favorable road and weather conditions which *placed him in a position where the proper control of his car was almost impossible.* (Emphasis supplied)²⁸

The court relied on the language of the *Young* case which is set out above as authority for the *Peterson* decision. The court seems to feel that there are some fact situations in which negligent speed overrides

²⁵ *Id.* at 410, 249 N.W. at 281.

²⁶ 272 Wis. 461, 76 N.W. 2d 289 (1956).

²⁷ *Ibid.*

²⁸ *Id.* at 465, 76 N.W. 2d at 291.

other incidental negligence, and might be looked upon as the sole cause of the accident; therefore, if a guest assumes the risk as to speed, he will be held to have assumed the risk of incidental negligent management and control notwithstanding that such is merely momentary.

*Bronk v. Mijal*²⁹ is the next case in the evolution of this problem of overpowering speed. The *Bronk* case involved a fact situation of negligent speed and lookout, rather than negligent speed and management and control as was present in the *Peterson* case. In discussing the momentary character of negligent lookout, and the fact that generally a guest cannot be found to assume such risk, the court noted two exceptions to this legal principle, namely:

- (1) Where a guest acquiesces in a host-driver operating his car for a considerable distance with a windshield clouded with frost or moisture, the guest may be found to have assumed the risk of the host's negligent lookout; and,
- (2) where there is evidence that the host to the knowledge of the guest has consumed intoxicating liquor in a quantity which might appreciably interfere with the exercise by the host of ordinary care in the operation of his vehicle, a jury is permitted to find assumption of risk as to lookout.³⁰

However, the court went further and pointed out that:

It is possible to assume a hypothetical state of facts where the speed of an automobile might be so great that the driver could not read the highway safety signs, such as the curve warning sign in the instant case. In such a situation a guest who assumed the negligent speed ought to be held to have assumed the negligence of his host in not seeing such a highway safety sign.³¹

This legal principle was applied to the facts of *Tomchek v. Mutual Automobile Ins. Co.*³² In that case, the host and guest were minors "cruising around" in a convertible, on an unfamiliar road, seventeen feet wide, at 70 to 75 miles per hour. The guest felt this was "good driving". At an intersection they failed to stop for a stop sign, and crashed into the side of another car. The host had failed to see the stop sign after having seen an earlier junction sign as he was passing a preceding automobile. The jury found the host negligent in five respects including negligent speed and lookout. They found that the guest assumed the risk in all five respects, but the trial court changed their findings, and held that the guest had not assumed the risk of the

²⁹ 275 Wis. 194, 81 N.W. 2d 481 (1957).

³⁰ *Id.* at 201, 202, 81 N.W. 2d at 485; *Ven Rooy v. Farmers Mutual Auto Ins. Co.*, 5 Wis. 2d 374, 92 N.W. 2d 771 (1958).

³¹ Note 29 *supra* at 202, 81 N.W. 2d at 485.

³² 6 Wis. 2d 577, 95 N.W. 2d 220 (1959).

negligent lookout, failure to stop for an arterial and failure to yield the right of way. On appeal the Supreme Court reversed and said:

It is true that negligent lookout is ordinarily a momentary failure which the guest does not assume. Negligence as to management and control, likewise, is usually of a momentary character, as in *Peterson v. Magnus* (1956), 272 Wis. 461, 76 N.W. 2d 289. In that case this court held that where there is such excessive speed as might well be the sole cause of the accident, a finding of assumption of risk incident to momentary negligence as to management and control cannot be considered independently of the finding as to speed. The court observed that it was the defendant's speed which placed him in a position where proper control of his car was impossible. *We consider that the reasoning of that case is just as applicable to the matter of assumption of risk as to lookout under circumstances where speed is so great as to have an overpowering effect on the driver's ability to exercise ordinary care.* In that instant case, the jury could well believe that it was Balkansky's [host's] speed which made it almost impossible for him to maintain a proper lookout. (Emphasis supplied)³³

Thus in the *Tomchek* case there is a culmination in the application of a principle which sprang from the *Young* case in 1933. The problem in the application of this line of cases in actual practice would seem to be, under what fact situations can it be predicted, that the court will consider negligent speed to be "overpowering", so that other incidental items of negligence may be treated as inextricable from the overpowering speed. It should be patently clear that the answer to such a question could be crucial in determining the outcome of a host-guest litigation when assumption of risk is at issue. It is submitted that because the doctrine of assumption of risk itself is such an immanent concept, it will be necessary to weigh all the peculiar facts of the case before any valued prediction can be made. It would appear that such things as the exact rate of speed driven, type of road and the host's familiarity with it to the knowledge of the guest, weather conditions prevailing, purpose of the trip and the host's driving experience to the knowledge of the guest, just to suggest a few, would certainly be relevant considerations in making a determination of the question. I would conclude that after weighing the peculiar facts, the attorney must decide whether or not his case is one where it may be said that the speed is so overpowering that it might be considered by a jury as truly the sole cause of the accident.

IV

CASES INVOLVING INTOXICATION

(A) *Drinking Companion Fact Situations*

When the intoxication of the host or the intoxication of the host

³³ *Id.* at 583, 95 N.W. 2d 223.

and the guest is present in a case, special rules of decisional law come into play. The cases which spell out the rule hold that if the plaintiff-guest knew or ought to have known that by reason of the intoxication of the defendant-host, that he was unfit to drive, then the guest has assumed the risk of the results of that intoxication.³⁴ Expanding on this, it has been held that "the assumption of risk results from the guest's knowledge of the host's intoxication, whether obtained from participation or observation, and not from the guest's own condition."³⁵ Of course it is fundamental that the jury must also find that if the host is intoxicated, such intoxication substantially affected and impaired his ability to operate and control the automobile properly.

The principal question which runs through the cases involving intoxication seems to be, when or under what circumstances should a guest be barred from recovery from his host because the guest knew or ought to have known of the intoxication of his host. Yet in this regard one thing is clear. While it has been held that a passenger who involuntarily falls asleep has been excused from voicing a protest of his host's negligent speed, this rule will not be extended to a guest who has been prevented from the ability to protest by voluntary intoxication.³⁶ It is significant that in a case involving a host and guest as drinking companions, the court seems reluctant to hold that the guest assumed the risk of the host's negligence as a matter of law. On the contrary, assumption of risk being an affirmative defense,³⁷ the defendant-host has the burden to show the plaintiff-guest was intoxicated and that such intoxication caused the guest to fall asleep and be rendered incapable of a protest.³⁸ A study of the following two cases illustrates the point.

*Topel v. Correz*³⁹ is a case where the trial court directed a verdict for the defendant-host. The Supreme Court reversed on the grounds that there was no evidence to show that the host drank in the presence of his guest and no evidence concerning the behavior of the host at the tavern inconsistent with complete sobriety. This was *not* a drinking-companion case. The court held that at least the plaintiff had a right to have the question of whether the guest knew or ought to have known of the host's intoxication submitted to the jury.

In *Diedrich v. Lukasovitz*⁴⁰ the host and guest were at the same New Year's Eve party, and both drank and danced together from 2:30

³⁴ *Schubring v. Weggen*, 234 Wis. 517, 291 N.W. 788 (1940); *Watland v. Farmer's Mutual Auto Ins. Co.*, 261 Wis. 477, 53 N.W. 2d 193 (1952).

³⁵ *Sanderson v. Frawley*, 273 Wis. 459, 78 N.W. 2d 740 (1956).

³⁶ *Sprague v. Hauck*, 3 Wis. 2d 616, 89 N.W. 2d 226 (1958).

³⁷ Note 10 *supra*.

³⁸ *Haag v. General Accident Fire and Life Assur. Corp.*, 6 Wis. 2d 432, 95 N.W. 2d 245 (1959).

³⁹ 273 Wis. 611, 79 N.W. 2d 253 (1956).

⁴⁰ 6 Wis. 2d 466, 95 N.W. 2d 267 (1959).

a.m. to 5:30 a.m. They left in a car, and crashed into a tree when the host fell asleep. The jury found that the host was under the influence of intoxicating liquor, nevertheless, that at the time his companion-guest entered the car, she did not know nor should she have known that her companion-host was intoxicated. The Supreme Court reversed and ordered a new trial in the interest of justice, however, it is interesting to note that three justices dissented. The dissent felt that the case was one where a reasonable person, in command of her mental faculties, cannot associate with a person as intoxicated as the defendant without knowing that he was intoxicated, and the jury should so have found.

Now compare two sleeping-guest cases involving intoxication. In *Sprague v. Hauck*,⁴¹ one Miss Frederick was in the company of her host, one Sprague, for a three hour period, during which time they drank heavily. Two witnesses testified that both were under the influence of intoxicating liquor when they left the tavern which they frequented. Miss Frederick fell asleep in the car, and she was injured in an ensuing accident. The jury found that she had assumed the risk of her host's negligent lookout and speed, because she had put it without her power to voice a protest by reason of her intoxication, and this was affirmed on appeal.

The *Sprague* case was distinguished recently in *Haag v. General Accident Fire and Life Assur. Corp.*⁴² In that case the defendant-host relied on *Sprague* as primary authority for his position on the question of assumption of risk, however the court distinguished the two cases on their facts. In the *Haag* case the host had consumed 6 to 10 glasses of beer from 11:30 p.m. to 3:30 a.m. The guest consumed approximately 20 glasses of beer between 7 p.m. and 3:30 a.m. The guest admitted he drank his beer in the same three taverns. The accident occurred at about 3:30 a.m. The plaintiff-guest had been half asleep at the time of the accident, and the defendant contended that under those facts the guest assumed the risk of the host's negligence as a matter of law, notwithstanding that the jury found that the plaintiff did not assume the risk of the defendant's negligence. The Supreme Court observed that no witnesses testified that the plaintiff was intoxicated and that the plaintiff testified that he was not intoxicated; moreover, no witnesses testified to any conduct, action, or speech on his part which would indicate intoxication. In other words, the defendant failed to meet his burden of proof as to the intoxication of the plaintiff. These collected cases are digested in detail to emphasize the importance of the evidentiary fact situation which will be depicted to the court and the jury. Perhaps the chief factors in an intoxication case will be whether or not the parties drank in each others' company or

⁴¹ Note 36 *supra*.

⁴² Note 38 *supra*.

whether or not the guest had an opportunity to observe the imbibing host.

The argument has been made that when a drinking-companion falls asleep, in a case where his host later crashed as a result of drowsiness induced by protracted drinking, that there was no present danger for the guest to assume but only a possibility of future danger.⁴³ It was argued that the narrow risk present was that of a drowsy driver. In dismissing this argument the Supreme Court said that the risk is broader than the risk of a drowsy driver, because the guest knew that his host was equally as long on drink and short on sleep as the host was himself. The court said:

Very likely, an underlining cause of Tollison's [host's] negligent driving was in falling asleep, but the immediate cause of the wreck was Tollison's failure in his lookout and speed when he approached the curve, which is thoroughly established in evidence. We have concluded that Christensen [guest] assumed the risk arising from Tollison's prior conduct in which Christensen participated. That will include the resulting drowsiness *and* the more immediate causal negligence of unsafe speed and deficient lookout.⁴⁴

Here the court expressly holds that in drinking-companion cases, the guest assumes the risk of the future potential dangers as well as the present existent dangers which consequently flow from the host's intoxication which is known or ought to be known to the guest.

(B) *Form of Verdict and Instructions*

No review of the cases involving intoxication would be complete without commenting upon *Erickson v. Pugh*.⁴⁵ That case appears to have been treated as one involving special circumstances in which both the host and the guest consumed large quantities of alcoholic beverages in one another's company, and where the evidence of the intoxication of the host was so strong that the Supreme Court fully expected a jury to find that the host had operated his vehicle while under the influence of intoxicating liquor.⁴⁶ With such an affirmative finding it would follow as a matter of law that the guest had assumed all the risks incident to such intoxication. But the method of submitting the case to the jury set out in the *Erickson* case has been questioned by two later cases.⁴⁷ If a jury finds that the host was not intoxicated, but that the guest assumed the risk of the host's negligence, the court is faced with a resultant inconsistent verdict when there is evidence of the host and guest drinking intoxicants in the case.⁴⁸ The Supreme

⁴³ Christensen v. Tollison, 7 Wis. 2d 216, 96 N.W. 2d 330 (1959).

⁴⁴ *Id.* at 221, 96 N.W. 2d at 333.

⁴⁵ 268 Wis. 53, 66 N.W. 2d 691 (1954).

⁴⁶ Frey v. Dick, 273 Wis. 1, 9a, 76 N.W. 2d 716, 721 (1956).

⁴⁷ *Ibid.*; Toppel v. Correz, 3 Wis. 2d 495, 499, 89 N.W. 2d 295, 298 (1958).

⁴⁸ *Id.* at 8, 76 N.W. 2d at 720.

Court said that the preferable way to avoid an inconsistent verdict would be to omit any question of intoxication of the host-driver from the verdict, and, in lieu thereof, covering the subjects of intoxication by the instructions.⁴⁹ In that respect, the jury should be instructed that they must first determine that the driver's consumption of liquor appreciably interfered with his care and management of the vehicle before they could properly consider the evidence as to the driver's drinking, in answering the questions of the verdict dealing with his negligence and the alleged assumption of risk by the plaintiff-guest. Commenting on this instruction the court said:

As a general rule in an automobile accident case it is not necessary to give any instruction on the subject of driving while under the influence of liquor because it is immaterial what caused the particular alleged failure of the driver to use ordinary care. However, in a host-guest case where assumption of risk is in issue such an instruction is proper when there is evidence of the driver having consumed intoxicating liquor to the knowledge of the guest.⁵⁰

The court concluded the opinion by stating that its further experience with appeals in which the trial court employed the form of verdict recommended in the *Erickson* case had caused it to doubt the wisdom of trying to employ a short cut in disposing of the intoxication issue in host-guest cases.⁵¹

V

CONCLUSION

In my judgment there has been no change in the elementary tests which have been set out to establish the legal relationship between the host and his guest in an automobile. The limited duty role and the standard of ordinary care remain the accepted norms for determining responsibility in host-guest litigation in Wisconsin.

Similarly, the legal principles propounded by the Supreme Court which relate to the guest's knowledge of the risk and his duty to protest have remained unchanged. Here it might be appropriate to state that, generally speaking, the question of assumption of risk is ordinarily a question for the jury.⁵² In that light it would seem that on most occasions the question of knowledge of the risk and sufficiency of the protest will be deemed to be typical jury questions. Then too, the concept of assumption of risk is one which is bottomed on a consensual relationship.⁵³ Because its very definition comprises *scienter* or appre-

⁴⁹ *Id.* at 9, 76 N.W. 2d at 720.

⁵⁰ *Ibid.*

⁵¹ *Id.* at 9 a, 76 N.W. 2d at 721.

⁵² See generally *Forecki v. Kohlberg*, 237 Wis. 67, 295 N.W. 7 (1941); *Helgestad v. North*, 233 Wis. 349, 289 N.W. 822 (1940).

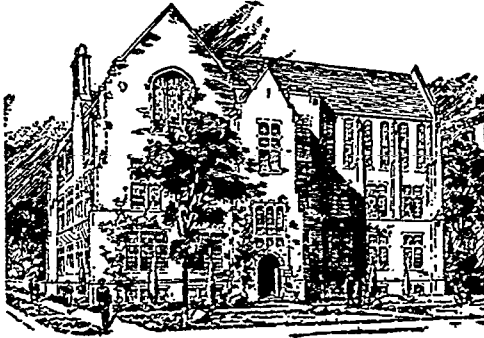
⁵³ *Whirry v. Rural Mut. Casualty Ins. Co.*, 267 Wis. 302, 305, 64 N.W. 2d 841, 843 (1954); *Schiro v. Oriental Realty Co.*, 7 Wis. 2d 556, 563, 97 N.W. 2d 385, 388 (1959).

ciation of the risk, and this element in many cases entails subjective evidence, I have concluded that the final determination in an assumption of risk case is dependent upon the state of mind of the guest.

The line of cases which culminate in the *Tomchek* case, to which I have alluded when discussing the problem of overpowering speed, could raise a perplexing problem for an attorney in his attempt to arrive at some legal prediction under a given set of facts. Evidently there are some fact situations where an overpowering speed will be found to be the principal cause of the accident, and all other incidental negligence will be held to have merged under the umbrella of negligent overpowering speed; and consequently, if the guest assumes the risk of the overpowering speed, a jury will also be upheld if they find the guest has assumed the risk of management and control or lookout, even though they be of a momentary character.

A review of the cases discloses that many of the contemporaneous appeals pertain to drinking-companion fact situations. If the facts incontrovertibly establish that the parties have participated in a drinking bout or have engaged in protracted drinking and dancing, it seems logical to conclude that assumption of risk will be present as a matter of law. However, if the host and guest have done no drinking in one another's company; or if the evidence is cloudy on whether or not the guest observed his host drinking, or as a reasonable person he should have known his host was intoxicated, then the question of assumption of risk must be submitted to the jury with the approved instructions on intoxication. I would broadly conclude that the trend in the stream of cases reaching the appellate level has been to strengthen the defense of assumption of risk, especially in the cases involving intoxication, and furthermore, the defense of assumption of risk has stiffened and become more favorable to the defending-host in some cases where the automobile is driven at overwhelming speeds under the conditions then and there existing.

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