

# Negligence: Abolition of the Doctrine of Assumption of Risk in Host-Guest Cases

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### Repository Citation

Jerome E. Gull, *Negligence: Abolition of the Doctrine of Assumption of Risk in Host-Guest Cases*, 46 Marq. L. Rev. 119 (1962).  
Available at: <http://scholarship.law.marquette.edu/mulr/vol46/iss1/9>

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## RECENT DECISIONS

**Negligence—Abolition of the Doctrine of Assumption of Risk in Host-Guest Cases:** Recently the Wisconsin Supreme Court reappraised its position on the application of the doctrine of assumption of risk to automobile host-guest cases and overruled its effect as a complete defense, *per se*, for the defendant host.<sup>1</sup>

The facts of the case at bar were similar to many instances where the doctrine had been previously applied. Plaintiff, guest, received injuries when his host collided with another auto on a town road. The evidence showed that the host and guest had recently left a tavern where they had been for some time and were en route to a party when the accident occurred.

In the trial court, the jury found defendant-host 85% causally negligent as to management and control and position on the highway, while plaintiff-guest was found to be 15% causally negligent in regard to lookout. The driver of the other vehicle was found to be non-negligent; this, coupled with a finding that plaintiff assumed the risk as to defendant's negligence, made recovery impossible. Plaintiff's attorney, in view of language expressed by the court in a recent case,<sup>2</sup> made a motion after verdict for a new trial on the ground that plaintiff's willingness to ride with defendant, host, should have been submitted in terms of negligence and not assumption of risk, thereby permitting partial recovery, under Wisconsin's comparative negligence statute.<sup>3</sup> Upon denial of the motion the plaintiff appealed.

The Wisconsin Supreme Court in modifying the application of the doctrine of assumption of risk, promulgated the following rules of law:

(1) The driver of an automobile owes his guest the same duty of ordinary care that he owes to others; (2) a guest's assumption of risk, heretofore implied from his willingness to proceed in the face of a known hazard is no longer a defense separate from contributory negligence; (3) if a guest's exposure of himself to a particular hazard be unreasonable and a failure to exercise ordinary care for his own safety, such conduct is negligence and is subject to the comparative negligence statute.<sup>4</sup>

By this decision the court overruled much existing case law and reversed its policy in an area that is almost as old as the automobile itself. In light of this, I shall trace the doctrine from its in-

<sup>1</sup> *McConville v. State Farm Mutual Auto Ins. Co.*, 15 Wis. 2d 374, 113 N.W. 2d 14 (1962).

<sup>2</sup> *Baird v. Cornelius*, 12 Wis. 2d 284, 287, 303, 107 N.W. 2d 278 (1961).

<sup>3</sup> WIS. STAT. SEC. 331.045 (1959).

<sup>4</sup> *Supra* note 1, at 378, 113 N.W. 2d 16.

ception to the present to examine the plausibility of the change. The doctrine of assumption of risk originally sprang up as a defense in master-servant and contractual cases. It is characterized by the maxim "volenti non fit injuria" meaning that to which a person assents is not esteemed in law an injury.<sup>5</sup> But as characterized in negligence cases, the maxim does not denote exactly the nature of the defense for in effect when the court states that a plaintiff assumed the risk of injury, it does not infer that he chose voluntarily to incur a known danger but rather to state the position of the plaintiff where the defendant was under no duty to him or if under duty to him, was not violating it.<sup>6</sup>

These ideas are reflected in the policy which was adopted by the Wisconsin courts in holding that an automobile host should not be held to as high a standard of responsibility for injury to his guest as for injury to one not in that relationship;

The principle represents an evaluation of the relationship itself, including a concept that the guest is in the automobile as a matter of grace, not right, that he is free to ride or not to ride, and must protest or else be silent, at his own risk, and that the host as a benefactor of the guest merits protection from liability to one to whom the host has extended a favor.<sup>7</sup>

Working from this basic premise, Wisconsin courts first limited the doctrine to contractual cases<sup>8</sup> but later expanded and modified it to cover certain aspects of automobile negligence where a consensual relationship of host and guest existed. This consensual relationship being similar to that of contract, having only the element of consideration lacking.<sup>9</sup>

The doctrine as applied to automobile cases required the finding of three component elements to bar a guest's recovery against his host: (1) a hazard or danger inconsistent with the safety of the guest; (2) appreciation of the hazard by the guest and (3) acquiescence or willingness to proceed in the face of the danger.<sup>10</sup> If the guest could prove that one of these elements was lacking upon the host's affirmative tender of the defense, the doctrine would fail to operate.

Under the former rule the duty owed a guest by his host was likened to that of a licensor-licensee relationship, the duty of the driver being not to increase the danger or add a new one.<sup>11</sup> Ex-

<sup>5</sup> AM. JUR. *Negligence*, Sec. 171.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Supra* note 1, at 378, 113 N.W. 2d 16.

<sup>8</sup> *Knauer v. Joseph Schlitz Brewing Co.*, 159 Wis. 7, 149 N.W. 494 (1914).

<sup>9</sup> *Switzer v. Weiner*, 230 Wis. 599, 284 N.W. 509 (1939).

<sup>10</sup> *Kimball v. Mathey*, 252 Wis. 194, 31 N.W. 2d 184 (1948).

<sup>11</sup> *O'Shea v. Lavoy*, 175 Wis. 456, 462, 185 N.W. 525 (1921).

amples of what this encompassed appear in the now overruled cases: (1) the guest entering an auto took it with the defects not known to the host;<sup>12</sup> (2) the guest assumed the danger incident to the known incompetency, inexperience<sup>13</sup> or habits<sup>14</sup> of the driver; (3) the guest was to exercise due care for his own safety in the matter of maintaining a lookout;<sup>15</sup> (4) the guest assumed the danger incident to the character and purpose of the trip<sup>16</sup> which could be proved by his lack of protest in proceeding in light of the apparent hazard.<sup>17</sup>

Thus, when the plaintiff-guest was confronted with this affirmative defense, he had to make a positive showing that an essential element was lacking or negated in order to recover. The most prominent rebuttal was a showing of adequate protest on the part of the guest which thereby removed the element of acquiescence to the host's negligent driving.<sup>18</sup>

The court also attempted prior to this decision to ameliorate the harshness of the rule by not applying the doctrine in cases where the host's momentary failure or negligence was the cause of the accident. The rationale being, that this type of negligence afforded no time for protest, for a guest in an auto is considered to have acquiesced only where the course of driving has persisted long enough to give him sufficient opportunity to protest.<sup>19</sup> The court has also held that if a host driver was found guilty of several acts of negligence such as improper lookout and excessive speed, and it was found that the guest only assumed the negligence as to speed, such assumption of risk did not preclude the host's liability for the type of negligence not assumed.<sup>20</sup> Furthermore, if another vehicle was involved in the collision the doctrine would not bar recovery from a third person for injuries to which the negligence of the third person proximately contributed.<sup>21</sup>

These cases, although ameliorating somewhat the rule's harshness, proved insufficient to afford the guest adequate protection under present day travel conditions. The court thus formulated a policy change whereby the host or driver of an automobile will owe his guest the same duty of ordinary care that he owes other members of the community.<sup>22</sup>

<sup>12</sup> *Ibid.*

<sup>13</sup> Cleary v. Eckart, 191 Wis. 114, 210 N.W. 267 (1926).

<sup>14</sup> Olson v. Hermansen, 196 Wis. 614, 220 N.W. 203 (1928).

<sup>15</sup> Howe v. Corey, 172 Wis. 537, 179 N.W. 791 (1920).

<sup>16</sup> Sommerfeld v. Flury, 198 Wis. 163, 223 N.W. 408 (1929).

<sup>17</sup> Knipfer v. Shaw, 210 Wis. 617, 246 N.W. 328, 247 N.W. 320 (1933).

<sup>18</sup> Krause v. Hall, 195 Wis. 565, 217 N.W. 290 (1928).

<sup>19</sup> Groh v. W. O. Krahn Inc., 223 Wis. 662, 271 N.W. 374 (1937).

<sup>20</sup> Bronk v. Mijal, 275 Wis. 194, 81 N.W. 2d 481 (1957).

<sup>21</sup> Kauth v. Landsverk, 224 Wis. 554, 271 N.W. 841 (1937).

<sup>22</sup> *Supra* note 1, at 383, 113 N.W. 2d 19.

This policy change as to the driver's duty appears to have its real basis in the court's recognition that the doctrine of assumption of risk, with its premise of implied consent, should no longer operate as a complete defense per se in the area of automobile negligence law. The reasoning was that vast changes have occurred in the automobile and its uses. These changes when coupled with the often unjust results produced by application of the doctrine give rise to an inequitable situation that denies recovery for injuries without a weighing of the comparative fault of the parties.<sup>23</sup>

Under the new rule the guest's act of riding with the host may constitute no defense, a partial defense or a complete defense depending on the circumstances of each particular case. The host will have no defense if the guest's willingness to proceed in the face of a known hazard would not be unreasonable when taken into consideration with the utility of riding with the host and the inadequacy of an alternative course. Here, the acquiescence would not be such lack of ordinary care as to raise the defense of contributory negligence. The defense may be partial where the guest's acquiescence in riding with a particular host with knowledge of the host's deficiencies is determined by the trier of fact to be a failure to exercise ordinary care for his own safety, such guest's negligence will be evaluated in light of all the circumstances,<sup>24</sup> thus possibly permitting partial recovery under the comparative negligence statute. The defense may be complete when the guest's conduct in light of the circumstances displays an utter disregard for his own safety and is such a breach of his duty to exercise ordinary care that even the finding under the comparative negligence statute will not permit recovery.

The court also recognized the problem that develops when framing a verdict where the guest was also guilty of active negligence as was true in the case at bar, where the guest's failure to maintain a lookout was deemed to be contributory negligence and a cause of the accident. This type of negligence is to be differentiated from that which only pertains to the guest's unreasonable conduct in riding with the deficient host, for this hazard, though not being a cause of the accident, is a cause of the guest's injuries. Under such circumstances in a suit against the host the two phases of the guest's negligence, that percentage causal to the accident and that percentage causal to his injury, would be coupled and compared against the failure of the host to determine if there is actual liability.<sup>25</sup>

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<sup>23</sup> *Ibid.*

<sup>24</sup> *Supra* note 1, at 379, 113 N.W. 2d 17.

<sup>25</sup> *Id.* at 385, 113 N.W. 2d 20.

An even more complicated problem arises in situations where another vehicle is involved in the collision and there are conflicting claims as to the negligence of the parties involved. Thus, in a single suit there could be various questions including: (1) whether the guest has a right of recovery against his host, or the other driver or both of them; (2) the issue of negligence as between the two drivers if either claims damages against the other. This is best illustrated in a case in which both the guest and third party driver seek recovery for damages incurred. In our hypothetical example if the jury found the following on the guest's claim, what would result?

	Guest	Host	Third Party Driver
Active Negligence (cause of the accident)	10% (lookout)	45%	25%
Negligence Arising From Riding With Deficient Host (cause of guest's injury)	20%	—	—
Total	30%	45%	25%

Here, the guest could recover 70% of his damages from his host. The finding that the third party driver was only 25% negligent in this question would be immaterial as to his claim against the host and a separate comparison question determining their respective rights as between themselves would be required.<sup>26</sup>

In appraising the decision, it appears that the policy adopted will produce more equitable results, though for the time being the procedural aspects in reaching the verdict may be a source of difficulty, even with proper instructions the jury may be confused as to what is actually expected of them.

It is interesting to note that in a companion case, *Colson v. Rule*, 15 Wis. 2d 387, 113 N.W. 2d 21 (1962), the court also abrogated the doctrine in farm labor cases. Section 331.37(3) which abolished assumption of risk as a defense in employer-employee controversies, had expressly excluded farm laborers from its protection. However the court held that in the future this type of case would be decided on a contributory negligence basis and subjected to Wisconsin's comparative negligence statute thereby permitting partial recovery.

<sup>26</sup> *Ibid.*

By these two decisions, Wisconsin has placed strict limitations on the application of assumption of risk. It appears that this was necessitated by the nature of the particular areas involved, where past experience had shown resulting injustice to an injured party whose fault was based on a theory of implied consent. It remains questionable whether these decisions will open the door to future amelioration of the doctrine in other areas. One of these areas that is especially noteworthy relates to the plight of a spectator who sustains injury upon attendance at a sporting event. The language of a recent case<sup>27</sup> appears to make the doctrine applicable in barring recovery if the injury is caused by a known hazard that is incident or natural to the sport.

—JEROME E. GULL

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**Evidence: Inference Remaining after Presumption Rebutted—**

The plaintiff, Herman Schlichting, was an eighty-four year old widower who lived on his homestead farm with four of his sons; John, Christian, Carl and Ulrich. John took care of much of the business affairs of both his aged father and his brother Christian, handling the money and supplying the information for income tax returns. On November 24, 1958, Herman had a married son, August, appointed as his conservator.

On December 1, 1958, Herman conveyed his homestead to Christian without any consideration. Thereafter, a family dispute arose over the conveyance, and on December 15, 1958, Christian conveyed the tract to John, again without consideration.

The Supreme Court affirmed the trial court's finding that John, in handling Herman's business affairs, stood in a relationship of trust and confidence, dominating both Herman and Christian. Under these circumstances, the Court felt that the intermediate transfer to Christian was of no consequence, and a presumption that John exercised undue influence over Herman arose out of the transaction.<sup>1</sup>

The Court discussed rebuttable presumptions, dividing them into two basic categories. The first type includes those presumptions which are "invoked by the law for reasons of public policy without regard to whether the presumption thus invoked is likely to bear any reasonable relationship to the actual fact presumed." The second classification includes those presumptions "in which the facts upon which [they are] based reasonably give rise to an inference of the ultimate conclusion embodied in the presumption."

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<sup>27</sup> *Lee v. National League Baseball Club*, 4 Wis. 2d 168, 176-78, 89 N.W. 2d 811 (1958).

<sup>1</sup> *Schlichting v. Schlichting*, 15 Wis. 2d 147, 112 N.W. 2d 149 (1961).