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The Problems of Host-Guest Cases as They Relate to Contributory Negligence and Assumption of Risk

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THE PROBLEMS OF HOST-GUEST CASES AS THEY RELATE TO CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK*

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The evolution of the legal relationship in automobile host and guest cases has been gradual. Whether it, like matrimony, has been for better or for worse I shal not attempt to answer, but I will feel that my efforts have been well rewarded if my remarks are provocative and serve to stimulate some thought on the subject.

In my approach to the problem, I hope my criticisms will be constructive, bearing in mind that the men who have made up our Supreme Court for the past forty-five years have had to struggle with the problem from its inception just as the manufacturers of the automobile itself which gave rise to the problem had to labor in improving the product.

The reported cases evidence the struggle within the Court itself in an attempt to arrive at a sound public policy in respect to the determination of this particular class of litigation.

The first reported case by our Supreme Court involving an action by a guest against a third person was *Lauson v. Fond du Lac*[1] decided forty-three years ago. It held that an occupant of a private automobile cannot recover for an injury caused by a defect in the highway if the negligence of the host-driver was imputed to the guest. For reasons unexplained by the decision, counsel for the plaintiff did not bring an action by the guest against the host. At least that issue is not raised by the decision.

In the case of *Steinkrause v. Eckstein*[2] the rule laid down in the *Lauson* case was followed, and I quote:

> "It is the accepted law in this jurisdiction that any occupant of a private vehicle such as the automobile in this case is barred from recovering from a third person for injuries caused by such person's negligence if the driver of such vehicle is also properly chargeable with negligence proximately contributing to the accident."[3]

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* Adapted from an address given before the Board of Circuit Judges of Wisconsin.

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[1] Lauson v. Fond du Lac, 141 Wis. 57, 123 N.W. 629 (1909).

[2] Steinkrause v. Eckstein, 170 Wis. 487, 175 N.W. 488 (1920).

[3] *Ibid.*, 175 N.W. at p. 989.

It appears that this is the first case involving alleged intoxication on the part of one of the drivers, and the Court, speaking through Justice Eschweiler, makes this interesting comment:

> "* * * no precise definition of what is intoxication is made by the statute, nor will we undertake in that behalf to do more than say that it is evidently intended that the fact must appear that the driver's indulgence in the use of intoxicating liquors was such as to result in an appreciable interference with the exercise by him of ordinary care in the management of such vehicle.
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> "In *Briffitt v. State,* 58 Wis. 39, 43, 16 N.W. 39, this court declared that judicial knowledge would be taken of such a matter of common knowledge as that beer and other alcoholic liquors are intoxicating.
>
> "It also follows as a corollary that the consumption of sufficient quantities thereof will produce intoxication. But in the quantitative analysis that must be made in cases like the present there are always two elements: the constant or intoxicant and the ever-variable, that is, the capacity and resisting power of the indiviual who imbibes. Of the constant we are bound to know, but of the variable, judicial knowledge, which at the best must be assumed to be purely academic on such a subject, cannot be charged upon the court as a matter of law."[4]

The foregoing quotation is worthy of note in connection with the application which has been made by some judges in connection with the urinalysis test. The common sense rule announced by the Court over thirty years ago is still applicable today.

In *Howe v. Corey*[5] a guest riding in an automobile which was equipped with poor lights and a frosted windshield was injured when the car collided with a train. The question of the liability of a gratuitous carrier to his invited guest in the absence of contributory negligence on the part of the guest was not determined. In denying recovery to the plaintiff because of his contributory negligence, the Court stated:

> "It is the general rule that a passenger in an automobile is required to use the same care for his safety that a reasonably careful person exercises under the same or similar circumstances. The fact that he has not charge of the automobile as driver does not absolve him from exercising care for his safety, though he is not required to exercise the same care that is required of the driver. The extent to which a guest may rely on the driver for his protection against danger must in a measure depend upon the circumstances of the particular case.
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> " 'In general, the primary duty of caring for the safety of the vehicle and its passengers rests upon the driver, and a mere gratuitous passenger should not be found guilty of contributory

[4] *Ibid.,* 175 N.W. at p. 990.
[5] Howe v. Corey, 172 Wis. 537, 179 N.W. 791 (1920).

negligence as a matter of law, unless he in some way actively participates in the negligence of the driver, or is aware either that the driver is incompetent or careless, or unmindful of some danger known to or apparent to the passenger, or that the driver is not taking proper precautions in approaching a place of danger, and, being so aware, fails to warn or admonish the driver or to take proper steps to preserve his own safety.' *Carnegie v. G. N. R. Co.* 128 Minn. 14, 150 N.W. 164.

" 'Ordinarily it is not the province or even proper for a guest to attempt to direct the movements of the driver. The situation may be different when he knows that the driver is operating the machine in a careless manner, or if he has knowledge of some danger which is not known or obvious to the driver.' See cases in Huddy, Automobiles (5th ed.) sec. 690.

"Negligence of a guest may be inferred from action or omission to act, speaking or omitting to speak, respecting the duty under all the circumstances. Accepting the hospitality of his friend does not excuse him from the duty of acting for his own safety as a reasonably prudent person would under like circumstances."

The Court further states:

"The facts, circumstances, and conditions thus disclosed and the other evidence in the case show without dispute that the plaintiff, to all intents and purposes, acquiesced in the manner the car was being driven by Corey and that he did nothing to protect himself from the imminent dangers in approaching the Soo tracks crossing in the manner they did, and of which he was as fully apprised as Corey, nor did he do anything to ascertain whether or not Corey was keeping a lookout for these dangers. To permit Corey to proceed in this reckless manner without remonstrance, in the light of plaintiff's knowledge of the probable dangers at the Soo crossing, amounts to acquiescence in Corey's conduct and an assumption of the hazards and dangers incident thereto. It is wholly inconsistent with the idea that he exercised such reasonable care as the ordinarily prudent person exercises under like or similar circumstances. There is but one inference permissible to be drawn from the facts shown by the evidence, namely, that plaintiff was guilty of a want of ordinary care on the occasion in question and that such want of care contributed to produce the injury complained of."[6]

The Court continued to struggle with contributory negligence and assumption of risk. Prior to the passage of our Comparative Negligence Statute, the distinction was of little consequence, but with the passage of that Act the matter of comparison became of vital importance, and the distinction between the two likewise became extremely important as shall be pointed out later in this discussion.

[6] *Ibid.*, 179 N.W. at p. 792.

Reiter v. Grober,[7] is a landmark case because it overruled *Prideaux v. Mineral Point,*[8] in so far as it imputed the negligence of the driver of a private vehicle to an occupant therein. The doctrine previously followed was artificial and unfair, and in the *Reiter* case, counsel for the plaintiff were obviously overreaching when they attempted to extend the doctrine so as to make a guest occupant liable to third persons for the negligence of the driver. The Court, in refusing to accept plaintiff's theory, stated:

> "To extend the doctrine to that degree would make a guest in a private conveyance an insurer of third persons against the negligence of the driver. Instead of being invested with the liabilities of a guest he would shoulder those of a master. We not only decline to so extend the rule of *Prideaux v. Mineral Point,* 43, Wis. 513, in so far as it imputes the negligence of the driver of a private vehicle to an occupant therein, but we take this occasion to expressly overrule it. We do so now the more readily because no litigant before the court suffers by reason of the repudiation of the doctrine."[9]

In *Brubaker v. Iowa County,*[10] the Court extends the rule laid down in the *Reiter* case and sets forth that from the mere marital relationship existing between husband and wife, the contributory negligence of the husband cannot be imputed to the wife. Thus, where a wife was traveling with her husband and they were not engaged in a joint enterprise and she had no direction or control over his movements, she was not chargeable with his negligence acts. However, the Court does go on to make this interesting comment:

> "If the occupant sees the driver is driving at a dangerous rate of speed or in violation of the law, reasonable care would require that the passengers protest."[11]

In *Oshea v. Lavoy,*[12] a guest was denied any recovery when the accident resulted due to the upsetting of the automobile because of a defective spring even though it was a secondhand automobile and the springs were repaired with old parts.

In the case just mentioned, Justice Owen comments on the relationship of host and guest, and his remarks are worthy of our consideration. He commented:

> "The automobile is an instrumentality of recent creation which has rapidly established itself in the desires of the people. No other agency has so effectively appealed to their favor. Nothing contributes so much to the comfort and pleasure, the welfare

[7] Reiter v. Grober, 173 Wis. 493. 181 N.W. 739 (1921).
[8] Prideaux v. Mineral Point, 43 Wis. 513 (1877).
[9] *Sppra,* note 7, 181 N.W. at p. 740.
[10] Brubaker v. Iowa County, 174 Wis. 574, 183 N.W. 690 (1921).
[11] *Ibid.,* 183 N.W. at p. 693.
[12] O'Shea v. Lavoy, 175 Wis. 456, 185 N.W. 525 (1921).

and happiness of the family. It has given a new idea to distances and materially enlarged the orbit of individual existence. It affords recreation which appeals to every member of the family and pleasures which may be indulged by the family unit. It is a minister of health as well as pleasure. It makes the fresh air of the country available to the citizens of the congested city and brings the pleasures of the city within the reach of the rural inhabitant. There are many who cannot afford to own an automobile. There are few who do not covet the comfort, pleasure, recreation afforded thereby. It is an act of kindness and consideration for the owner of a car to lend its comfort and pleasure through an invitation extended to his less fortunate neighbor for a ride in the country, to join a picnic party, or to enjoy an evening at the theater in the near-by city. This is a species of hospitality which should be encouraged rather than discouraged, and the law should not couple with this friendly act a duty which makes its exercise an unreasonable hazard. On the other hand, he who takes his friends and neighbors into his automobile places them in a high-powered, swiftly-moving vehicle attended with great danger unless handled and operated with a requisite degree of care. He must realize that he has voluntarily received into his keeping the lives and safety of his passengers, and he should not be permitted to trifle therewith or to renounce all responsibility in such respect."[13]

The Court struggled with the question of the legal relationship existing in host and guest cases and comments upon whether it should adopt the rule existing in some jurisdiction of finding a host liable only for gross negligence, or whether the relationship of licensor and licensee exists so that the host is liable only for active negligence which increases the hazard or creates a new one. The Court, after discussing the matter at length, finally concluded that because the question of liability of the host-driver to his invited guest for negligent management of the vehicle was not before it, it would render no decision on that point. However, before concluding the Court makes this interesting comment:

"We can see no difference between an invitation extended by a person to dine with him and an invitation extended to ride with him. It has been held by this court that in the former case the legal relation arising was that of licensor and lisensee. *Greenfield v. Miller,* 173 Wis. 184, 180 N.W. 834. It follows that the same relation arises in the latter case, which conclusion is supported by authorities already cited. Whether or not the established rules of liability existing between licensor and licensee are applicable in the matter of the *management* of the automobile, they plainly are applicable so far as the *condition* of the automobile is concerned. According to those rules the guest accepts the premises of his host as he finds them, subject only to the limitation that

[13] *Ibid.*, 185 N.W. at p. 526.

> the licensor must not set a trap or be guilty of active negligence which contributed to the injury."[14]

The foregoing covers the historical background giving rise to the questions of contributory negligence and assumption of risk in host and guest cases, but in subsequent decisions the Court continued to struggle with the problem of whether assumption of risk and contributory negligence were one and the same or whether they were separate and distinct. In our consideration of the problem, it is well to consider the elements which go toward establishing what constitutes assumption of risk and contributory negligence.

In order to establish assumption of risk, three elements must be present:

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.[15]

In *Osborne v. Montgomery* the Court said:

> "Negligence in law is not mere carelessness, but is careless conduct under such circumstances that an ordinarily prudent person would anticipate some injury to another as a reasonable probable result thereof."[16]

One would think that the foregoing definition would apply in its entirety to contributory negligence. However, our Court in *Scory v. LaFave*,[17] modified the definition by stating:

> "It must be borne in mind that contribution to the injury to the plaintiff, not contribution to the accident that caused his injury, is the only contribution that is essential to contributory negligence. Thus one who carelessly takes a position of danger is guilty of contributory negligence, although his conduct has nothing to do with the accident caused by the negligence of another in which he sustains his injuries."[18]

The problem which seems to have caused the greatest trouble has been the application of these rules to the particular case and the question as to what distinction, if any, should be made between the two. The best discussion will be found in the *Scory* case, supra. In the concurring opinion of Justice Fowler, the Court refers to an opinion by Mr. Justice Holmes in *Schlemmer v. Buffalo, R. & P. Co.*[19]

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[14] *Ibid.*, 185 N.W. at p. 528.
[15] Krueger v. Krueger, 197 Wis. 588, 222 N.W. 784 (1929); Sommerfield v. Flory, 198 Wis. 163, 223 N.W. 408 (1929); Page v. Page, 199 Wis. 641, 227 N.W. 233 (1929); Brockhaus v. Neuman, 201 Wis. 57, 228 N.W. 477 (1930); Knipfer v. Shaw, 210 Wis. 617, 246 N.W. 328 (1933).
[16] Osborne v. Montgomery, 203 Wis. 223, 234 N.W. 372 (1931).
[17] Scory v. La Fave, 215 Wis. 21, 254 N.W. 643 (1934).
[18] *Ibid.*, 254 N.W. at p. 650.
[19] Schlemmer v. Buffalo, R. & P. Co., 205 U.S. 1 (1906).

" '* * * the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligent. But the difference between the two is one of degree rather than of kind.' "[20]

In concluding his opinion, Justice Fowler continues, and it must be assumed that his language is the language of the entire Court except where it may have been subsequently modified, and I quote:

"It is to be borne in mind that the thing assumed in assumption of risk by a plaintiff is risk of injury to himself, and that a plaintiff's subjecting himself unreasonably to a risk of injury has always been, and I submit always will be, contributory negligence if injury results from the act from which risk of injury has been unreasonably assumed. To my mind attempt to apply the assumption of risk doctrine in host and guest cases was entirely unnecessary. The same result follows from applying the doctrine of contributory negligence irrespective of that of assumption of risk. We say a guest assumes the risk of injury from negligent conduct of his host to which he knowingly and voluntarily subjects himself. The host in such case is negligent because he has done something that an ordinarily careful and prudent driver would not do. If the host is negligent under a given state of facts, the guest is negligent under the same state of facts for voluntarily and knowingly subjecting himself to the dangers incident to the host's conduct, and the guest is precisely as negligent as is the host. The guest subjects himself to precisely the same danger to which the host subjects himself. It follows our comparative negligence statute that the guest's negligence is not less than that of the host and he cannot recover from the host."[21]

So that there will be no misunderstanding as to the foregoing, I want to bring to your attention the fact that our Court distinctly recognizes that assumption of risk and contributory negligence are separate legal concepts.

In *Storlie v. Hartford Accident & Indemnity Co.,* [22] in which decision the *Scory* case is referred to, Justice Fairchild, writing the opinion for the Court, states:

"Their assumption of these risks would completely bar the guests from recovering from the host, and it would be unnecessary to consider whether or not the evidence sustained a finding of contributory negligence on the part of the guests. However, it may be well to point out, in view of the thought expressed by the trial court in its memorandum decision, that assumption of risk

[20] *Supra,* note 17, 254 N.W. at p. 649.
[21] *Supra,* note 17, 254 N.W. at p. 650.
[22] Storlie v. Hartford Accident & Indemnity Company, 251 Wis. 340, 28 N.W. 2d 920 (1947).

> and contributory negligence are distinct legal concepts. Assumption of risk is based on a consent to the prevailing and casual circumstances. Such consent may or may not evince a failure to exercise ordinary care. Contributory negligence, of course, always involves a failure to exercise ordinary care under the circumstances, including the duty owed by the actor to others. Since assumption of risk is not necessarily negligence, it is misleading to speak of adding it to contributory negligence, as the trial court did here, to determine that the negligence of the guests was at least equal to the negligence of the driver and therefore precluded recovery by the guests. The action fails because the cause alleged is not proved."[23]

The picture became more confused following the decisions handed down in *Koepke v. Miller,* [24] and *State ex rel. Litzen v. Dillett.*[25] In the former case a plaintiff was permitted a full recovery where the host was negligent as to lookout, although it was conceded that the guest assumed the risk incident to the icy condition of the street, the frosted condition of the windshield and side windows, the host-driver's intoxication, if any, and the lateness of the hour as affecting loss of sleep.

In the latter case the plainstiff-guest was permitted to recover, although the jury found that he had assumed the risk of his host's negligent lookout but not as to the host's causal negligence as to the position of the car on the road and as to control.

By the rulings in these two cases, the host is penalized without any relief despite the finding of assumption of risk on the part of the guest. For all practical purposes, these cases eliminated the defense of assumption of risk. If we were to stop there, we would need to consider the question of assumption of risk only in such cases in which the guest assumed the risk as to all items of negligence. It is my judgment that the Court has veered away from the doctrine laid down in the foregoing cases, and I shall discuss at this time the cases modifying the rule.

In *Gilbertson v. Gmeinder*[26] the Court said:

> "* * * if Gmeinder was drunk, then as a matter of law Gilbertson, having been with him all during the time he was drinking, would assume the risk flowing therefrom."[27]

Likewise, in the very recent case of *Watland v. Farmers Mutual Automobile Insurance Co.,*[28] it was held that a drinking-partner guest assumes the risk of injury incidental to the host's drunken driving, and where such guest voluntarily rides with the host, regardless of the host's

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[23] *Ibid.,* 28 N.W. 2d at p. 922.
[24] Koepke v. Miller, 241 Wis. 501, 6 N.W.(2d) 670 (1942).
[25] State ex. rel. Litzen v. Dillett, 242 Wis. 107, 7 N.W.(2d) 599 (1943).
[26] Gilbertson v. Gmeinder, 252 Wis. 210, 31 N.W. 2d 599 (1943).
[27] *Ibid.,* 31 N.W. 2d at p. 161.
[28] Watland v. Farmers Mutual Automobile Insurance Company, 261 Wis. 477, 53 N.W. 2d 193 (1952).

intoxicating condition, the guest assumes the risk of injury caused by the host's negligence in operating the host's automobile whether such negligence is in respect to control or lookout or being on the wrong side of the highway, and whether such negligence is temporary or is part of a course of driving conduct which would have warned the guest that the host was in no condition to drive.

In *Wheeler v. Rural Mutual Casualty Insurance Co.*,[29] decided at the same term as the *Watland* case, the Court reviewed the law of as- a course of driving conduct which would have warned the guest that the that:

> "A host driving a car in which his guest is riding is, in law, required to exercise such skill and judgment as he possesses in the management of the car with relation to the laws of the road and the exercise of ordinary care for the safety of his guest. 'A guest takes the host as he finds him, so far as skill and judgment are concerned, but he is entitled to assume upon entering the car that the host will obey the laws of the road.' *Olson v. State Farm Mut. Automobile Ins. Co.* (1947), 252 Wis. 37, 40, 30 N.W. (2d) 196. See *Poneitowcki v. Harres* (1930), 200 Wis. 504, 509, 228 N.W. 126. It has been held that the established rule as to assumption of risk by a guest ' "should not be extended to situations where a host is inattentive and careless in making observations, to situations where his faulty judgment is based upon faulty premises proceeding from careless observation, or to hasty judgments resulting from careless observations." ' *Rudolph v. Ketter* (1940), 223 Wis. 329, 333, 289 N.W. 674. See *Harter v. Dickman* (1932), 209 Wis. 283, 288, 245 N.W. 157; *Goehmann v. National Biscuit Co.* (1931), 204 Wis. 427, 430, 235 N.W. 792. In the case last referred to, it is said, 'The momentary management of the car should be left to the driver.' In *Poneitowcki v. Harres, supra,* it is said that it is also the duty of the host 'to exercise ordinary care not to increase the danger or add a new one to those which she (the guest) assumed when she entered the car.' "[30]

In *Johnsen v. Pierce*,[31] decided November 5, 1952, you will find a situation that presents practically all of the problems which can arise in a two car collision involving joint venture, comparative negligence, and assumption of risk. In this case the plaintiff and her son were making a trip in their jointly-owned automobile to bring a second son from his army base to his home. As a result of a collision with the defendant Pierce, the mother was injured. She sued Pierce who in turn impleaded her son. The trial court found as a matter of law that at the time of the collision the plaintiff and her son were engaged in a joint enterprise. The jury found that both Pierce and the impleaded defendant Johnsen

[29] Wheeler v. Rural Mutual Casualty Company, 261 Wis. 528, 53 N.W. 2d (1952).
[30] *Ibid.*, 53 N.W. 2d at p. 191.
[31] Johnson v. Peirce, 262 Wis. 367, 55 N.W. 2d 394 (1952).

were causally negligent in equal degree and that the plaintiff had assumed the risk of her son's failure to exercise due care. Under the circumstances, the plaintiff was denied recovery from both defendants because the negligence of the son was imputed to her, and such negligence, not being of a lesser degree than that of the defendant Pierce, she could not recover against him.

As between joint adventurers, the negligence of the one joint adventurer is not imputed to the other except in actions against third persons, but as between joint adventurers, the doctrine of assumption of risk applies upon the same basis that it does in host-guest cases, and the jury having found that the plaintiff had assumed the risk, she was denied any recovery against her son.

In *Lepak v. Farmers Mutual Automobile Insurance Co.*,[32] the trial court held as a matter of law, which ruling was affirmed by the Supreme Court, that the causal negligence of the plaintiff was as a matter of law at least equal to the causal negligence, if any, of the defendant. The facts disclose that the plaintiff who was seated in a loaded dump truck with the defendant's driver and who knew that the defendant was operating the hoist and would start the truck forward with a jerk had reason to apprehend that he would subject himself to danger if he left the truck under the circumstances and without telling the defendant who was engaged in the operation of the truck and its unloading but who nevertheless started to leave the truck and was thrown to the ground and injured.

I have discussed the legal principles and their application to particular facts, but the problem which judges face in the presentation of the particular cases to the jury has not been considered. I shall do so at this time.

In *Harter v. Dickman*,[33] the trial judge submitted the following question:

> " 'Q: 1. Was the defendant, Russell Dickman, negligent in the operation of his automobile at and just previous to the time of the accident in respect to—
>
> " '(A) As to control?
>
> " '(B) In respect to the control at which he drove so as to increase the danger to the plaintiff beyond which the plaintiff ought to have reasonably expected in riding with the defendant?' "[34]

The question was severely criticized by the Supreme Court, and the Court then suggested that the matter be submitted as follows:

[32] Lepak v. Farmers Mutual Automobile Insurance Company, 262 Wis. 1, 53 N.W. 2d 710 (1952).
[33] Harter v. Dickman, 209 Wis. 283, 245 N.W. 157 (1932).
[34] *Ibid.*, 245 N.W. at p. 157.

" 'Did the defendant, just prior to the accident, fail to exercise ordinary care not to increase the danger assumed by the plaintiff upon entering defendant's automobile—

" '(a) in respect to the control of his automobile?' "[35]

In the recent case of *Johnsen v. Pierce*,[36] the question of assumption of risk was submitted as follows, and it was not criticized by the Supreme Court:

" 'Question 5: Was the defendant Robert Johnsen negligent so as to increase the danger which the plaintiff Tressie Johnsen assumed when she entered the car, or so as to create a new danger, as to: . . .

" '(b) With respect to Robert Johnsen's management and control of his car just prior to the first collision?

" 'Answer: Yes.

" 'Qestion 6: If you answer any of the subdivisions of Question 5 "yes," then answer the corresponding subdivision of this question: Did defendant Robert Johnsen fail to exercise the skill and judgment he possessed just prior to the first collision? . . .

" '(b) With respect to the management and control of his car?

" 'Answer: Yes.'

"By its answer to Question 8 the jury found such negligences were causal. Question 9 dealt with 5 (b) and 6 (a) concerning speed, not material here. Then the verdict asked:

" 'Question 10: If you answer Questions 5 (b) and 6 (b) and 8 "Yes," then answer this question: Did plaintiff Tressie Johnsen assume the risk of this negligence by defendant Robert Johnsen?

" 'Answer: Yes.' "[37]

I personally feel that both forms just referred to are cumbersome and can be simplified, and for your consideration I submit that the question be set forth in a special verdict substantially as follows:

Did the defendant, just prior to the accident, increase the danger assumed by the plaintiff upon entering defendant's automobile—

A. As to speed?

B. As to lookout?

C. As to management and control?—or

D. Such other items as the evidence submitted raises jury issues in respect to the defendant-driver's negligence.

The contributory negligence of the guest may also be in issue and, if it is, I suggest that it be submitted substantially as follows:

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[35] *Ibid.*, 245 N.W. at p. 159.

[36] *Supra*, note 31.

[37] *Sppra*, note 31, 55 N.W. 2d at p. 398.

Was the plaintiff negligent at or just previous to the time of the accident in respect to—

A. Failing to warn the driver?

B. The position he or she took in or on the automobile?

C. Keeping a proper lookout?

D. Such other item or items as the evidence submitted raises jury issues in respect to the guest's negligence.

In conclusion, I wish to point out that in my judgment, from a study of the cases in Wisconsin, we can proceed upon the legal theory that it is well engrafted in our common law that:

1. Assumption of risk is a complete defense wherever the negligence of the host-driver, which negligence is assumed by the guest, causally contributes to the accident.

2. That contributory negligence is separate and distinct from assumption of risk and that negligence on the part of a guest is subject to the limitations of the Wisconsin Comparative Negligence Law.

3. That the principles laid down by our Supreme Court in host and guest cases are sound and are not in need of change, and that the only problem which exists is the matter of interpretation as it applies to the facts in each particular case. That is a problem which will continue to be presented as long as we have automobiles.

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