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# Torts: Distinction Between Assumption of Risk and Contributory Negligence: Host and Guest Relationship (Page 182 Includes Editorial Board).

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## NOTES

TORTS—DISTINCTION BETWEEN ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE — HOST AND GUEST RELATIONSHIP. — The two important doctrines of tort law, contributory negligence and assumption of risk, are of especial significance in two major fields today. One of these is the relationship of employer and employee under Employers' Liability Acts, and the other is the host-guest relationship in automobile negligence cases. The present discussion will be confined to the latter relationship.

As early as 1799, the doctrine of contributory negligence was expressed.[1] A plaintiff whose own misconduct had contributed to his injury was barred from recovery, provided such misconduct was a proximate cause of the injury.[2] The doctrine of assumption of risk was a further limitation of the harsh liability placed on negligent actors. One who, with full knowledge of the dangers of a situation and of his

[1] *Cruden* v. *Fentham*, 2 Esp. 685; *Butterfield* v. *Forrester*, 11 East 60 (1809), in which the doctrine was truly established.

[2] *Randall* v. *Northwestern Tel. Co.*, 54 Wis. 140, 11 N.W. 419, 41 Am. Rep. 17 (1882); *Buchinon* v. *Jeffery*, 135 Wis. 448, 115 N.W. 372 (1908).

rights to protection, voluntarily subjected himself to the danger, was barred from recovery for a subsequent injury.[3]

Although the effect of both doctrines is the same, since either serves to bar plaintiff's recovery, there is a distinct difference in the theory which underlies each.[4] One who assumes a known risk is barred because of his own voluntary action. Once the defendant has warned the plaintiff of dangers not apparent, the defendant's duty is performed, and there remains no further obligation.[5] However, the assumption of risk, to be truly voluntary, must include an opportunity open to the plaintiff to refuse to accept the danger. There must have been no force, either actual or implied from the absence of any other course of action. The plaintiff must have deliberately chosen to act.[6] Assumption of risk does not admit any idea of misconduct on the part of the plaintiff, whose acts are not negligent merely because of their voluntariness, except, of course, where the risk was so great, and the reason for taking it so unwarranted, that the assumption of it would be an unreasonable act, judged by the actions of a reasonable, intelligent, and prudent man under the same or similar circumstances.[7] Neither does the doctrine mean that the plaintiff consents to be harmed by the danger. He rather hopes to escape the danger, if possible, in each case.[8]

Contributory negligence, unlike assumption of risk, presumes a prima-facie liability on defendant. The defendant can overcome this liability by showing that the plaintiff has acted or failed to act in such a way as to violate his self-protective duty, a duty placed upon him because of the complex civilization in which he finds himself, where dangers are always present.[9] The doctrine of contributory negligence throws on the individual the primary burden of protecting his own interest. The law will not protect a man when common prudence and caution would be sufficient to guard him. Thus the misconduct of the plaintiff is the basis of contributory negligence as a bar.[10]

Before the passage of legislation affecting the two doctrines, the difficulty of distinguishing between them in the circumstances of each case was avoided, because either doctrine served to prevent a recovery by a plaintiff whose own misconduct or assumption of dangers was a

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[3] *Butterfield* v. *Forrester,* supra, note 1.
[4] *Thomas* v. *Quartermaine,* L.R. 18 Q.B.D. 685 (1887).
[5] *Burr* v. *Adelphi Theater Co.,* [1907] 1 K.B. 544.
[6] *Mason* v. *Yockey,* 103 Fed. 265 (C.C.A., 7th, 1900); *LeDuc* v. *Northern Pac. R. R.,* 92 Minn. 287, 100 N.W. 108 (1904); *Knipfer* v. *Shaw,* 210 Wis. 617, 246 N.W. 328 (1933).
[7] *Kavanaugh* v. *City of Janesville,* 24 Wis. 618 (1869).
[8] Bohlen, F., "Contributory Negligence," 21 *Harv. Law Rev.,* 233 (1908). The article explains the basis of assumption of risk as a bar thus: "One cannot be forced to accept risks, but one may place his private rights in what peril he please, subject them to what risk he chooses, and he who gives him the opportunity to do so is no more guilty of a wrong toward him then he, who, with the consent of the owner, takes his property."
[9] Note 8, supra, in which, on the question of deliberation involved in each doctrine, the author says, "One guilty of contributory negligence acts unintentionally, while he who accepts a risk does so voluntarily."
[10] *Muller* v. *McKesson,* 73 N.Y. 195 (1878); *Thomas* v. *Quartermaine,* supra, note 4.

cause of his injury.[11] Courts could refuse to grant a recovery on either theory, and, as long as the evidence justified the finding of one or the other, there was little danger of a reversal. The early Wisconsin cases treated a voluntary subjection to known danger as a problem of contributory negligence, attempting only to determine whether the assuming of a great risk was so unreasonable as to be negligence as a matter of law.[12] Later cases adopted this line of reasoning without hesitation.[13] But in those cases where the doctrine of assumption of risk was apparently applicable, the courts have spoken of plaintiff's acts as merely a form of contributory negligence.[14] Very often the two doctrines have been applied interchangeably, with the obvious practical predetermination that the results achieved would be the same with the use of one or the other.[15]

But with the enactment of the Employers' Liability Acts, doing away with the defenses of contributory negligence and assumption of risk in certain cases,[16] and later with the passage of the Comparative Negligence Law, [17] it became highly important to determine whether the plaintiff's actions were to be deemed contributory negligence or as-

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[11] *Upthegrove* v. *Jones and Adams Coal Co.*, 118 Wis. 673, 96 N.W. 385 (1903); *Horn* v. *La Crosse Box Co.*, 131 Wis. 384, 11 N.W. 522 (1907); *Fandek* v. *Barnett and Record Co.*, 161 Wis. 55, 150 N.W. 537 (1915).

[12] *Kavanaugh* v. *City of Janesville*, supra, note 7; *Kenworthy* v. *Town of Ironton*, 41 Wis. 647 (1877); *McKeegue, Adm'x.* v. *City of Janesville*, 68 Wis. 50, 31 N.W. 298 (1887).

[13] *Ottman* v. *Wis. Mich. Power Co.*, 199 Wis. 4, 225 N.W. 179 (1929), where a painter was held guilty of contributory negligence when he proceeded to work near wires which he knew were highly charged. See also *Reiland and Wife* v. *Wis. Valley Elec. Co.*, 202 Wis. 499, 233 N.W. 91 (1930).

[14] See *Douglas* v. *Chi. Milw., and St. P. Ry. Co.*, 100 Wis. 405, 409, 76 N.W. 356 (1898), where it was held: "If a person enters a railway track after receiving warning that it is about to be used for the passage of trains, he does so at his own peril, and if personal injury results, such is attributable to his contributory negligence." See also *Keller* v. *Port Washington*, 200 Wis. 87, 227 N.W. 284 (1929).

[15] In *Haselmeier* v. *The M. E. R. and L. Co.*, 185 Wis. 210, 213, 201 N.W. 257 (1924), the courts says: "One who voluntarily subjects himself to a danger or hazard, appreciating the consequences thereof, is held either to have assumed the risk or be guilty of contributory negligence, as the case may be. And it is not necessary in order to assume a risk or be guilty of contributory negligence that he should fully appreciate the precise nature of the danger or anticipate the precise result that actually follows. It is sufficient if he knows that he will be likely to be seriously injured if he does the act in question." In *Keller* v. *Port Washington*, supra, note 14, the plaintiff voluntarily drove up an icy hill, knowing its condition. It was held that in driving up the hill he assumed the risk of slipping, and that assumption of risk was a form of contributory negligence. See also *Culbertson, Adm'x.* v. *Milw. and Northern R. R. Co.*, 88 Wis. 567, 60 N.W. 998 (1894); *Salzer* v. *City of Milwaukee*, 97 Wis. 471, 73 N.W. 20 (1897). The court expressly notes this failure to distinguish the doctrines, saying in *Fandek* v. *Barnett and Record Co.*, 161 Wis. 55, 67, 150 N.W. 537 (1915): "In Wisconsin, assumption of risk has been spoken of as a species of contributory negligence. As long as both were complete defenses, no occasion arose for a sharp distinction between them. In most cases it was a question for the jury to say in what field the questioned conduct lies, in that of a mere assumption of risk, or in that of negligence, bearing in mind, however, that it may enter the latter field through the former as well as otherwise."

[16] Chap. 331.37, Wis. Stats.; Title 45 U.S.C.A. 53-59 (c. 149, sec. 3-9, 35 Stat. 66); Chap. 192.50, Wis. Stats.

[17] Chap. 331.045, Wis. Stats.

sumption of risk. The distinction is recognized in the *Fandek* case, where it is pointed out that the plaintiff's assuming a great danger, which assumption would be unreasonable to the mind of an ordinary, prudent man, would be held to be contributory negligence.[18] However, the *Keller* case reasserted the earlier holdings that the doctrines are interchangeable.[19]

It is interesting to note that, with the beginnings of automobile law in Wisconsin, the two doctrines were applied in much the same manner as they had been developed in the English cases regarding land owners and licensees.[20] In those cases, the English courts had approached the problem of a landowner's liability to a person coming on the land from the view point of the particular duty which the owner owed to the licensee, invitee, or trespasser.[21] The suggestion of an absolute duty was soon done away with by an investigation into what position the plaintiff occupied with respect to the owner. As to licensees, the rule was early adopted that an owner owes no duty to a bare licensee other than to warn of hidden dangers.[22] But the owner did owe a duty not to increase the danger or add a new one.[23] The owner's duties were thus firmly established, and as a result of their limitations, the licensee was obliged to take the premises as he found them, apart from any hidden defects.[24] The English courts viewed a

[18] Note 11, supra. Here the action was brought for the death of an employee, under the Employers' Liability Act. The jury found that the deceased, working in removing plates from spouts placed one above the other, without having first observed the dangerous position in which the top one stood, was guilty of contributory negligence causing the injury which resulted when the top spout fell, and not of assumption of risk. The court said (at p. 64): "The assuming of such risks as ordinary careful and prudent men similarly situated usually assume is within the field of assumption of risk, whether assumed knowingly or ignorantly. But the assuming of such risks as are more hazardous than those constitutes contributory negligence, and it is immaterial whether the risk is assumed knowingly or ignorantly through want of ordinary care."

[19] Note 14, supra.

[20] *O'Shea* v. *Lavoy,* 175 Wis. 456, 185 N.W. 525 (1921).

[21] In *Lowery* v. *Walker,* L.R. [1910] 1 K.B. 173, 183, Williams, L. J., indicates this approach: "There cannot be negligence in the legal sense unless there is some duty which the defendant has failed to observe, and the existence of a duty of the defendant to such or such a thing."

[22] *Southcote* v. *Stanley,* 1 H. & N. 247, 250 (1856). In that case, the plaintiff, a social guest of the defendant hotel owner, was injured when, upon his leaving, the glass in the door fell upon him. The defendant, though found negligent, was not held liable. Pollock, C. B., after stating that an employer need not take more care of an employee than he can reasonably be expected to take of himself, continues: "The same principle applies to the case of a visitor at a house; whilst he remains there he is in the same position as any other member of the establishment, so far as regards the negligence of the master or his servants, and he must take his chance with the rest." *Hounsell* v. *Smyth,* 7 C.B. 732 (1860); *Bolch* v. *Smith,* 7 H. & N. 736 (1862); *Gallagher* v. *Humphrey,* 6 L.T. 684 (1862); *Ivay* v. *Hedges,* L.R. 9 Q.B.D. 80 (1882); *Indermaur* v. *Dames,* L.R. 1 C.P. 274 (1866); *Batchelor* v. *Forstecue,* L.R. 11 Q.B.D. 474 (1883); *Kimber* v. *Gas Light and Coke Co.,* 87 L.J. 651, 118 L.T. 562 (K.B., 1918). As to duty to warn of hidden danger, see *Corby* v. *Hill,* 4 C.B. (N.S.) 556 (1858); *Robbins* v. *Jones,* 16 C.B. (N.S.) 221 (1864); *Gantret* v. *Egerton,* L.R. 2 C.P. 371 (1867). As to duty to trespassers, see *Lowery* v. *Walker,* supra, note 21; and to licensees with an interest, see *Indermaur* v. *Dames,* supra.

[23] *Gallagher* v. *Humphrey, supra,* note 22; *Lowery* v. *Walker,* supra, note 21.

[24] *Southcote* v. *Stanley,* supra, note 22; *Latham* v. *Johnson,* L.R. [1913] 1 K.B. 406. See also *Greenfield* v. *Miller,* 173 Wis. 184, 180 N.W. 834 (1921).

man's home and its premises in the traditional light, as a man's "castle," built especially to protect his family. A guest could invariably expect a great degree of security upon entering the household, being assured of the same protection as his host had designed for its members.

In Wisconsin, the early automobile cases upon which our present rules are based accepted the licensor-licensee relationship as the one most closely approximating that of driver and occupant of a private vehicle, and consequently held the occupant to have accepted the car as he found it, except for unknown defects.[25] The fallacy of such an analogy between host and guest on the land of the host, and host and guest in an automobile driven by the host, lay chiefly in the great difference in the degree of security to be found in each. A man's automobile, though in a condition beyond reproach, and though being driven carefully and at a reasonable rate of speed, is by no means a man's "castle." The protection assured to a guest in a home cannot possibly be extended to one traveling in an automobile upon a busy highway.

Apparently the Wisconsin court realized this difference when deciding *Mitchell* v. *Raymond,*[26] in which the duty of using ordinary care to avoid injury to the guest was placed upon the automobile host. But soon thereafter this duty was greatly modified, so that once more the host owed only a slight duty to the guest, namely that of refraining from increasing the danger to the guest, or adding a new danger.[27] The latter rule has been adhered to in all succeeding cases down to the present.[28]

Consistent with the duty of self-protection which falls upon every person, the court placed upon the automobile guest the duty of using reasonable care for his own safety, such duty being specifically to keep a lookout, warning the driver of approaching danger, and to protest against excessive speed and dangerous driving practices.[29] Failure of

[25] *O'Shea* v. *Lavoy,* supra, note 20.

[26] 181 Wis. 591, 195 N.W. 855 (1923). The rule was affirmed in *Vogel* v. *Otto,* 182 Wis. 1, 195 N.W. 859 (1923); *Glick* v. *Baer,* 186 Wis. 268, 201 N.W. 752 (1925); *Harding* v. *Jesse,* 189 Wis. 652, 207 N.W. 706 (1926); and *Bryden* v. *Priem,* 190 Wis. 483, 209 N.W. 703 (1926).

[27] *Cleary* v. *Eckart,* 191 Wis. 114, 210 N.W. 267, 51 A.L.R. 576 (1926). The court adopts the reasoning of the property cases as expressed in *Greenfield* v. *Miller,* supra, note 24, when it asks: "Should a guest be able to demand of his host a degree of skill for the guest's security, which the host is unable to exercise for his own protection?"

[28] *Summerfield* v. *Flury,* 198 Wis. 163, 223 N.W. 408 (1929); *Grandhagen* v. *Grandhagen,* 199 Wis. 315, 225 N.W. 925 (1929); *Hamus* v. *Weber,* 199 Wis. 320, 226 N.W. 392 (1929); *Schmidt* v. *Leuthener,* 199 Wis. 567, 227 N.W. 17 (1929); *Heim* v. *Bluhm,* 200 Wis. 321, 228 N.W. 599 (1930); *Poneitowcki* v. *Harres,* 200 Wis. 504, 228 N.W. 126 (1930), in which the hosts' duties were expressed, namely: to maintain a reasonable speed, to obey the laws of the road, and to keep a proper lookout; *Brockhaus* v. *Newmann,* 201 Wis. 57, 228 N.W. 477 (1930); *Sweet* v. *Underwriters' Casualty Co.,* 206 Wis. 447, 240 N.W. 199 (1932); *Harter* v. *Dickman,* 209 Wis. 289, 245 N.W. 157 (1932); *Krantz* v. *Krantz,* 211 Wis. 249, 248 N.W. 156 (1933); *Cummings* v. *Nelson,* (Wis. 1933) 250 N.W. 759.

[29] *Howe* v. *Corey,* 172 Wis. 537, 179 N.W. 791 (1920); *Wappler* v. *Schenck,* 178 Wis. 632, 190 N.W. 555 (1922); *Harding* v. *Jesse,* 189 Wis. 652, 207 N.W. 706 (1926); *Krause* v. *Hall,* 195 Wis. 565, 570, 217 N.W. 290 (1928), in which, in regard to protest by the guest, the court says: "No case has yet defined the amount of protest necessary to relieve the guest of contributory negligence as a matter of law;" *Goehmann* v. *National Biscuit Co.,* 204 Wis. 427, 235 N.W.

the guest to perform these duties made him guilty of contributory negligence.

In addition to these duties, and correlated with them, the burden upon the guest to take proper measures for his own safety was increased by the extension of the doctrine of assumption of risk to the skill and driving habits of the host. The guest assumes the risk of injury due to the host's lack of skill or incompetence, whether such is known to the guest or not, and to the usual driving habits and practices of the host, known to the guest.[30] The necessary elements of a complete assumption of risk by the guest have been clearly defined in *Knipfer* v. *Shaw*.[31] First, there must be a hazard or danger inconsistent with the safety of the guest. Second, the guest must have a knowledge and appreciation of the hazard. And third, there must be acquiescence or willingness on the part of the guest to proceed in the face of danger.

In reviewing the application of the doctrines of assumption of risk and contributory negligence, it is found that even before the advent of the automobile, the guest in a private vehicle assumed the risk of skill and care of the person guiding it.[32] The *O'Shea* case established the rule for automobiles, holding the guest to have assumed the risk of injury due to the condition of the car, except for unknown defects.[33] The

792 (1931), making an exception to the rule in the case of emergencies or momentary management of the car; *Biersach* v. *Wechselberg,* 206 Wis. 113, 238 N.W. 905 (1931); *Rock* v. *Sarazen,* 209 Wis. 126, 244 N.W. 577 (1932); *Kull* v. *Adv. Rumley Threshing Co.,* 209 Wis. 565, 245 N.W. 589 (1932); *Crane* v. *Weber,* 211 Wis. 294, 247 N.W. 882 (1933).

[30] *Olson* v. *Hermansen,* 196 Wis. 614, 220 N.W. 203, 61 A.L.R. 243 (1928); *Krueger* v. *Kreuger,* 197 Wis. 588, 222 N.W. 784 (1929); *Summerfield* v. *Flury,* supra, note 28; *Grandhagen* v. *Grandhagen,* supra, note 28; *Page* v. *Page,* 199 Wis. 641, 227 N.W. 233 (1929); *Heim* v. *Bluhm,* supra, note 28, *Brockhaus* v. *Neumann,* supra, note 28, in which assumption of risk was also extended, as in the *Summerfield* case, supra, to the dangers necessarily incident to the character of the trip; *Royer* v. *Saecker,* 204 Wis. 265, 234 N.W. 742 (1931); *Fontaine* v. *Fontaine,* 205 Wis. 570, 238 N.W. 410 (1931); *Biersach* v. *Wechselberg,* supra, note 29, which case expressly repudiated the rule of *Knauer* v. *Schlitz,* 159 Wis. 7, 149 N.W. 494 (1914), limiting the application of assumption of risk to contract only, and also held that acquiescence in unlawful speed or reckless driving includes an assumption of the risk of resulting injuries; *Ganzer* v. *Weed,* 209 Wis. 135, 244 N.W. 588 (1932); *Harter* v. *Dickman,* supra, note 28, which states that there is no assumption of the risk of injury resulting from the host's failure to keep a careful lookout.

[31] 210 Wis. 617, 246 N.W. 328 (1933). Here the plaintiff guest was driving in an extremely dense fog with her husband. She was watching the right side of the road, while he watched the front and left side. It was impossible to see more than thirty feet ahead. The plaintiff was injured in a collision with a car approaching from the opposite direction. The court held that, as a matter of law, the plaintiff had fully assumed the risk by continuing to ride under such conditions.

[32] *Prideaux* v. *City of Mineral Point,* 43 Wis. 513 (1878).

[33] *O'Shea* v. *Lavoy,* supra, note 20, at p. 462. The injury resulted from a defective spring which had been repaired. Court found that this was not a "trap," and that guest could not recover, saying that there was no difference between "an invitation extended to a person to dine with him and an invitation extended to ride with him." In *Waters* v. *Markham,* 204 Wis. 332, 235 N.W. 797 (1931), injury resulted from a defective tire. The court said the host was liable if he knew of a defective condition existing, and realized, or should have realized, that it involved an unreasonable risk to his guest, to whom the defect was not known or apparent. See also *Rawlowski* v. *Eskofski,* 209 Wis. 189, 244 N.W. 611 (1932), and *Campbell* v. *Spaeth,* (Wis. 1933) 250 N.W. 393.

skill and competence of the driver, whether know or unknown, as well as the known driving habits and practices of the driver, were later held to be assumed by the guest.[34] But these were not the only risks assumed by the guest. Where the guest acquiesced in the host's excessive speed, the guest has been held to have assumed the risk of injuries resulting from such speed.[35] Also, where the guest acquiesced in a course of reckless driving that persisted long enough for the guest to protest, he assumed the risk of resulting injury; and such acquiescence cannot be separated from the guest's inability to protest after a subsequent emergency has arisen.[36] If the character of the trip was such as to involve obvious risks to the guest, he has been held to have assumed those risks by making the journey.[37] The guest assumed the risk of injury by riding with a tired host, when the guest knew that the host had had little sleep, and had driven for hours without resting.[38] But it has been held that under ordinary circumstances, the guest does not assume the risk of injury caused by the host's failure to keep a lookout.[39] The con-

[34] *Olson* v. *Hermansen,* supra, note 30, in this case the guest was killed when the car overturned when the host made an effort to swerve sharply to avoid striking dogs which had suddenly darted onto the road. It was held that the guest had assumed the risk of the injury, since it was due to the host's lack of skill and driving proficiency.

[35] *Harding* v. *Jesse,* supra, note 26, the plaintiff and his wife, guests in the car, knew that the brakes had become loosened. Plaintiff's wife asked the host to hurry back to town. The host did, and a collision resulted. The court held the guests' failure to protest the excessive speed to be contributory negligence as a matter of law, and barred recovery. Any risk of injury which might result was assumed. The court says, (p. 658): "A gratuitous guest cannot sit idly by, observe clear violations of the law, in fact acquiesce in them, and then, in the event of an accident, hold his host liable in damages."

[36] *Young* v. *Nunn-Bush Weldon Co.,* (Wis. 1933) 249 N.W. 278. The guest had known the host's driving habits. Just before the accident, the host had been speeding. In passing a truck on the right, the host was forced to veer sharply into a post in order to avoid hitting the truck, which had suddenly turned in to the right. It was held that assuming the risk of the speeding and passing on the right side barred the guest's recovery, since the guest must also have assumed the risk of the emergency created by those acts. See also *Biersach* v. *Wechselberg,* supra, note 30, where it was said that acquiescence in excessive speed or unlawful driving was assumption of risk.

[37] *Summerfield* v. *Flury,* supra, note 28, in which several guests had accompanied the driver on his way to assist in fighting a fire. The court held here that the question of whether the guests should have reasonably anticipated some injury should have been put to the jury. In *Knipfer* v. *Shaw,* supra, note 31, the assumption was based on continuing a journey under dangerous conditions, but the same question might logically have governed. In *Brockhaus* v. *Neumann,* supra, note 28, the assumption was held to have been of the manner in which the trip was made, where, in making a sharp turn at an unexpected curve in the road, the car overturned. The guest was one of a party traveling to a football game. It must be said, however, that the court emphasized the fact that this holding was limited to the particular circumstances of the case. See also *Walker V. Kroger Grocery and Baking Co., et al.,* (Wis. 1934) 252 N.W. 721, in which, as against the host, the guest was held to have assumed the risk of injury in riding, on a foggy night, where it was impossible to keep a careful lookout at the rate of thirty-five to forty miles an hour.

[38] *Krueger* v. *Krueger,* supra, note 30; but see *Krantz* v. *Krantz,* supra, note 28, where the guest was not barred when he did not know, and had no reason to believe that his host was tired, and injury resulted when host fell asleep at the wheel.

[39] *Harter* v. *Dickman,* note 30, supra; and *Cummings* v. *Nelson,* supra, note 28, where the guest was injured when the host's car struck a barrier, at night, at a

tributory negligence of the guest, on the other hand, lay chiefly in his failure to protest against excessive speed or unlawful driving practices, and in failure to keep a proper lookout and warn of approaching dangers.[40]

There has been some slight confusion as to whether a guest's acquiescence in excessive speed and unlawful driving practices should be termed assumption of risk or contributory negligence.[41] But the application of either doctrine served to bar the plaintiff, and the intermingling of the two was, from a practical viewpoint, immaterial. However, with the passing of the Comparative Negligence Law in Wisconsin, a confusion of the two doctrines should no longer be so considered, since contributory negligence, where it is less than the negligence of the party against whom recovery is sought, namely, the host, is no longer a bar, while assumption of risk, in strict legal theory, remains to prevent a recovery.[42]

As between host and guest, the problem of applying the two doctrines is relatively simple, but when the suit is by the guest against the host and a third party whose actions have, together with the negligence of the host, caused the injury, several difficulties arise under the Comparative Negligence Law. Before the act was passed, the negligence of

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point where the highway was under construction. The host was found negligent as to his lookout ,but the guest was found to have kept a careful lookout. The court reasserted the rule that a host owes the guest the duty of maintaining a proper lookout, and said: "That duty is unaffected by the rule as to the qualified care which a host owes to a guest" citing *Poneitowcki* v. *Harris,* supra, note 28.

[40] See note 29.

[41] *Harding* v. *Jesse,* supra, note 29, termed such action by the guest contributory negligence as a matter of law. The court in *Biersach* v. *Wechselberg,* supra, note 29, held the acquiescence to be an assumption of risk, saying (at p. 118): "We see no reason why the term 'assumption of risk' should not be used in instructing a jury with respect to the duty of a guest to exercise due care for his own safety. The circumstances which attend the ordinary host and guest relationship are such as to suggest use of the term 'assumption of risk' as opposed to 'contributory negligence,' whatever the differences and likenesses of the two terms may be when subjected to a critical legal analysis. When the evidence presents an issue of assumption of risk, it should be presented to the jury." But the later case of *Haines* v. *Duffy,* 206 Wis. 193, 196, 240 N.W. 152 (1931), held the acquiescence to bar recovery "not, strictly speaking, because of contributory negligence, but since it would be against reason and justice to permit a recovery against a host under such circumstances. The guest has a duty to protest against excessive speed. Failure to do so is termed contributory negligence. It is not, strictly speaking, contributory negligence. The duty grows out of the host and guest relationship and is an essential factor in whether the guest can recover from the host." That concept was further developed in *Eisenhut* v. *Eisenhut,* (Wis. 1933) 250 N.W. 441, where an infant guest was barred from recovery, even though he was, as a matter of law, unable to assume a risk, on the ground that the host owed no duty to a guest in the way of exercising a greater protection for the guest than he could exercise for his own protection. "While it is stated in several opinions of this court that the guest assumes the risk incident to the degree of skill possessed by the host, this is not the fundamental ground upon which the exception of a host from liability to a guest for injury sustained through lack of experience of the host is based. The fundamental basis of the exemption is that the host has not violated any duty owed to the guest."

[42] Campbell, Richard V., "Wisconsin's Comparative Negligence Law," 7 *Wis. Law Rev.* 222. After stating that the act is intended to include contributory negligence, Prof. Campbell continues, (at p. 241): "On the other hand, the act

the host was held not to be imputed to the guest.[43] A guest free of contributory negligence or assumption of risk could recover from a third party, even though his host concurred in causing the injury.[44] The third party could then recover contribution from the host on the ground that both had been subjected to a common liability.[45] But where the guest had assumed the risks of the acts of the host, which acts operated as a cause of the injury, the guest could not recover from the third person.[46] The guest was also barred where his own contributory negligence operated as a cause of the injury.[47] The first application under the statute was made in *Cameron* v. *Union Automobile Insurance Co.*,[48] in which the court held that the guest assumed the risk of the injury, by riding with the host, when the injury was sustained through the host's customary method of driving, but that the guest did not, by so riding, assume the risk of injury caused by the negligence of other users of the highway than the host, unless the acts of the host in which the guest acquiesced operated as a cause of the collision. The latest available case of an injury to a guest caused by the negligence of the host and a third party holds that an assumption of risk of the host's acts will bar a recovery as against him, but that as against the third party, the negligence of the guest must be considered separately in relation to the total negligence involved, and damages merely diminished accordingly. The third person cannot recover contribution from the host unless there is a common liability existing between the third person and the host. Thus, where a host is freed of liability toward the guest by the latter's assumption of risk, the third person can recover no contribution from the host.[49]

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does not alter the rule that a person coming in contact with a dangerous condition in the exercise of a privilege derived from the consent of the one responsible for the condition is unable to recover where he is fully aware of the danger and risk involved. It was only intended to change the defense of contributory negligence or fault." In *Pryor* v. *Williams*, 254 U.S. 43, 41 Sup. Ct. 36, 65 L.Ed. 121 (1920), the court held a charge by the lower court that assumption of risk should be treated as contributory negligence in mitigating damages under the comparative negligence section of the Employers' Liability Act, supra, note 16, was error, stating that assumption of risk is still a bar, not being affected by a comparative negligence statute. See also *Cameron* v. *Union Automobile Insurance Co.*, 210 Wis. 659, 246 N.W. 420 (1932), where assumption of risk barred a recovery against the host for an injury occurring after the passage of the Comparative Negligence Law.

[43] *Reiter* v. *Grober*, 173 Wis. 493, 181 N.W. 739 (1921), overruling the doctrine of *Prideaux* v. *City of Mineral Point*, 43 Wis. 513 (1878); *Brubacher* v. *Iowa County*, 174 Wis. 574, 183 N.W. 690 (1921).

[44] *Wiese* v. *Polzer*, (Wis. 1933) 248 N.W. 113. Here the guest, riding on the fender of host's truck, was barred from a recovery against either the host or the third party on the ground of contributory negligence.

[45] *Standard Accident Insurance Co.* v. *Runquist*, 209 Wis. 97, 244 N.W. 757 (1932).

[46] *Wiese* v. *Polzer*, supra, note 44.

[47] *Waitkus* v. *Chicago and N. W. R. Co.*, 204 Wis. 566, 236 N.W. 531 (1931).

[48] 210 Wis. 659, 246 N.W. 420 (1933).

[49] *Walker* v. *Kroger Grocery and Baking Co.*, supra, note 37. Had *Weise* v. *Polzer*, supra, note 44, fallen under the statute, the actions of the plaintiff in that case would probably have been held to constitute a greater amount of negligence than that of the defendant host and the third party combined, so that plaintiff would still be barred. But, assuming that such negligence was less, the court might yet bar a recovery on the ground that the plaintiff, even as

The suggestion has been made that Wisconsin adopt a "reckless operation statute" such as obtains in several of our states.[50] Such a statute would hold the host liable only for gross negligence. Undoubtedly, such a law would simplify the host and guest duty problem, but it is submitted that with a careful distinction made between the doctrines of assumption of risk and contributory negligence in their application to the circumstances of the individual case, the automobile host is not without sufficient defenses under the present status of our law. However, the Comparative Negligence Law demands a more careful submission of the distinction between the two doctrines when the facts of each case are presented to the jury for decision.[51] If the two doctrines are to remain, it is important that the courts enforce assumption of risk as a bar, under the statute, and restrict the application of the statute to contributory negligence alone.

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against the third party, has assumed the risk of injury, by taking the position he did.

[50] Meissner, H. V., "Liability of Automobile Drivers to Gratuitous Passengers under the Wisconsin Law," 18 *Marq. Law Rev.* 3, 16, note 55.

[51] *Seaboard Air Line Ry.* v. *Horton,* 233 U.S. 492, 58 L.Ed. 1063, 1067 (1914). This was an action by a railroad engineer against his employer. The employee was injured when a defective water gauge exploded. The employee, knowing of the defect, had requested a new glass for the gauge, but none was available. The plaintiff continued to operate the train with the defect not repaired. The lower court submitted three questions to the jury: "(1) Was the plaintiff injured by defendant's negligence? (Yes.) (2) If so, did plaintiff assume the risk of injury? (No.) (3) Did plaintiff by his own negligence contribute to the injury? (Yes.)" The defendant had requested an instruction that "If you find by a preponderance of the evidence that the gauge was not provided with a guard glass, was open and obvious and was fully known to plaintiff, and he continued to use such gauge with such knowledge and without objection, and that he knew the risk incident thereto, then the court charges you that the plaintiff assumed the risk incident to such use, and you will answer the second question "Yes." The Supreme Court found the submission of the instruction asked in regard to contributory negligence only to be error, and that defendant was entitled to the instruction as requested. The Employers' Liability Act, under which this action was brought, provided for diminution of damages under comparative negligence, where the employee was contributorily negligent. Thus it was important to determine whether the employee assumed the risk, since assumption of risk would still serve as a bar, while contributory negligence as found merely served to mitigate the damages.