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Assumption of Risk: Contribution: Imputed Negligence: Joint Tortfeasors: Comparative Negligence

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RECENT DECISIONS

ASSUMPTION OF RISK—CONTRIBUTION—IMPUTED NEGLIGENCE—JOINT TORT-FEASORS—COMPARATIVE NEGLIGENCE.—Plaintiffs Walker, Iselin, and Bashaw were injured in a collision which took place when the automobile driven by Walker collided with a disabled truck standing on the highway, owned by the defendant Kroger Grocery and Baking Company and driven by the defendant Hegley. In the action the jury found defendants guilty of negligence in allowing the truck to remain on the highway, in not providing clearance lights, and in failing to give adequate warning. The jury found Walker guilty in maintaining excessive speed, and in failing to properly manage and control his car. The jury found each of the guests guilty of failing to keep a proper lookout and failing to warn or protest to the driver. Each of the plaintiffs recovered judgment, diminished by his proportion of negligence, and the defendant was awarded contribution from the plaintiff, Walker, on the cross-complaint. The defendants appeal from the judgment against them, and plaintiff Walker from the judgment for contribution. *Held,* verdict of jury stands except as to finding that the failure to provide clearance lights was a proximate cause of the accident. Judgment for contribution reversed on the ground that the guests assumed the risk, and that therefore there was no common liability between Walker and the defendant; that the method of comparing the negligence of the guests on the one hand with the combined negligence of Walker and the defendants on the other was correct; that the negligence of Walker could not be imputed to the guests; that the comparative negligence statute does not change the law as regards the liability of joint-tort feasors. *Walker* v. *Kroger Grocery & Baking Co.,* (Wis. 1934) 252 N.W. 721.

In holding that plaintiffs, Iselin and Bashow, the guests, had assumed the risk, the court follows the rule laid down in *Knipfer* v. *Shaw,* 210 Wis 617, 246 N.W. 328, 247 N.W. 320 (1933) followed in the later case of *Young* v. *Nunn, Bush & Weldon Shoe Co.,* (Wis. 1933) 249 N.W. 278, that there must be a hazard or danger inconsistent with the safety of the guest, that the guest must know or appreciate the hazard, and that there must be on his part a willingness to proceed in the face of this danger. The assumption of risk herein does not constitute imputed negligence as it did in the case of *Knipfer* v. *Shaw,* supra. Here there is nothing more than the mere relationship of host and guest, as pointed out by the court. In the *Knipfer* case, there was an actual delegation of the duty of maintaining a lookout by the guest which created the other relationship.

Therefore the court denied the addition of the percentage of negligence found in the case of Walker to either of the guests. The language of *Cameron* v. *Union Automobile Ins. Co.,* 210 Wis. 659, 246 N.W. 420 (1933), and as explained in *Wiese* v. *Polzer,* (Wis. 1933) 248 N.W. 113, would seem to indicate that if the acts of the driver in which the guest acquiesced operated as a cause of the collision, then the guests would likewise assume the risk of the negligence of other users of the road. Very evidently such was not the intent of the court as expressed in that language, for in no later case has the statement been literally followed.

Before the enactment of section 331.045, Wis. Stats., the comparative negligence statute, it made a great difference whether the guest was held to have assumed the risk, or whether he was held guilty of contributory neglignce. Where he assumed the risk, the would have an action against the negligent third party; where he was guilty of contributory negligence his action would be barred as to such third persons. *Knauer* v. *Joseph Schlitz Brewing Co.,* 159 Wis. 7, 149 N.W.

494 (1914). In the case of *Scory* v. *La Fave,* Case No. 57, Jour. State Gov't. Service, Apr. 7, 1934, this difference is pointed out, following the language of *Fandek* v. *Barnett and Record Co.,* 161 Wis. 55, 130 N.W. 537 (1915), that if the injury is caused by acquiescence in a hazard no greater than that an ordinarily careful and prudent man would accept, it is assumption of risk; but if the hazard is not one such as a man of ordinary care and prudence would accept, it is contributory negligence. Under the comparative negligence statute neither is now a bar to an action against a third party.

The rule of contribution is founded on the principles of equity—where one of several common obligors has discharged more than his equitable share of the common liability. *Wait* v. *Pierce,* 191 Wis. 202, 225, 209 N.W. 475, 210 N.W. 822 (1926); *Grant* v. *Asmuth,* 195 Wis. 458, 218 N.W. 834 (1928); *Michel* v. *McKenna,* 199 Wis. 608, 227 N.W. 396 (1929); *Buggs* v. *Wolff,* 201 Wis. 533, 230 N.W. 621 (1930). Here there is no common liability as between the plaintiff Walker and the defendants, and therefore there can be no contribution. *Standard Accident Ins. Co.* v. *Runquist,* 209 Wis. 97, 244 N.W. 759 (1932); *Zutter* v. *O'Connell,* 200 Wis. 601, 229 N.W. 74 (1930).

Because the case does not fall within the rule of *Knipfer* v. *Shaw,* supra, the court refused to combine the negligence of Walker with that of either of the guests, Iselin or Bashaw. Sec. 331.045, Wis. Stats., provides that "any damages allowed shall be diminished by the jury in proportion to the amount of negligence attributable to the person recovering." The court holds that the recovery by the plaintiff guest may be diminished only by the amount of his own negligence. Therefore the other term must include the causal negligence of all the other parties. This follows the rule of liability among joint tort-feasors at common law. *Kingston* v. *C. & N. W. Ry. Co.,* 191 Wis. 610, 211 N.W. 613 (1927).

Between each of the guests, Iselin and Bashaw, and the defendants, the negligence of each toward himself must be compared with the negligence of all the others whose negligence concurred in causing his injury. The doctrine of assumption of risk has no place in a suit against a negligent third party. While assuming the risk toward their host herein, plaintiff guests were found to have neglected the duty which they owed to themselves, and such neglect was found by the jury to have contributed to their injury. To hold that in assuming the entire risk of the negligence of plaintiff Walker the guests assumed Walker's negligence would amount to imputing his negligence to them. This cannot be done since the relationship is no more than that of host and guest. *Knipfer* v. *Shaw,* supra; *Young* v. *Nunn, Bush & Weldon Shoe Co.,* supra.

The court in refusing to allow contribution against Walker was not forced to decide whether the comparative negligence statute abrogated the rule of contribution between joint tort-feasors. It may be that under this section the burden of sharing the liability for damage caused by joint tort-feasors may be equitably prorated among them according to the proportion of negligence each contributed.

RICHARD A. MCDERMOTT.

AUTOMOBILES—"GUEST STATUTES"—GROSS NEGLIGENCE AS CONTEMPLATED BY THE "STATUTES."—The plaintiff was a gratuitous guest in a car owned and operated by the defendant in North Dakota. The defendant who was feeling drowsy fell asleep while driving and the car plunged into the ditch injuring the plaintiff. The North Dakota statute provides that a gratuitous guest in an automobile cannot recover for injuries unless the same resulted proximately from the "intoxication, wilful misconduct, or gross negligence of the owner, operator,