Comment

DISTINCTION BETWEEN ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE IN WISCONSIN

INTRODUCTION

At common law an injured plaintiff was barred from recovering damages against a negligent defendant when plaintiff was either contributorily negligent or could be found to have assumed the risk.[1] It was therefore usually unnecessary to distinguish clearly between the two doctrines. However, in Wisconsin, legislation such as the comparative negligence statute and safe-place statute has either eliminated or limited the scope of one of these defenses while leaving the other in full operation. The result is that substantial interests are often dependent upon making a valid distinction between the two doctrines.

In many cases the distinction between contributory negligence and assumption of risk is clear. However, in cases where plaintiff knew of defendant's negligence and yet conducted himself in such a manner as to precipitate his injuries there is a danger of confusion. The Wisconsin court has analyzed this type of case either from the point of view of assumption of risk or contributory negligence. When the analysis of assumption of risk has been used, the court has required a "consensual relationship" and a voluntary acquiescence by plaintiff to defendant's negligence.[2] The analysis of contributory negligence applies the test of whether a reasonable man, having knowledge of the danger created by the defendant would, under the circumstances, encounter the danger.[3]

The tests are manifestly similar. However, since important rights depend upon distinguishing between the two, it is imperative that there be clear and meaningful distinctions. This Comment shall discuss the importance of distinguishing between assumption of risk and contributory negligence; the differences suggested by the tests and the importance and meaning of "consensual relationship"; and finally, the policy considerations underlying the distinction.

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[1] Schiro v. Oriental Realty Co., 272 Wis. 537, 76 N.W.2d 355 (1956).

[2] Switzer v. Weiner, 230 Wis. 599, 284 N.W. 509 (1939).

[3] Paepcke v. Sears Roebuck & Co., 263 Wis. 290, 57 N.W.2d 352 (1953).

THE IMPORTANCE OF THE DISTINCTION BETWEEN ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE

Comparative Negligence Statute

The comparative negligence statute[4] provides that contributory negligence is not a complete bar to a plaintiff's recovery; rather, the negligence of the plaintiff and defendant are judged on a scale of 100 percent. So long as plaintiff's negligence neither equals nor exceeds that of the defendant, he may recover to the extent of the defendant's negligence. For instance, if defendant were 70 percent negligent and plaintiff 30 percent negligent, plaintiff would be able to recover 70 percent of the total damages. If plaintiff assumes the risk, however, the comparative negligence statute does not apply and plaintiff is completely barred from recovery.[5] So, in the normal negligence case, the plaintiff's contributory negligence is only a partial bar to his recovery while assumption of risk is a complete bar.

Gross Negligence

Prior to the enactment of the comparative negligence statute a plaintiff who was contributorily negligent could recover against a defendant who was grossly negligent, since the types of negligence were different in kind rather than merely degree.[6] Since the enactment of the comparative negligence statute, however, it is unclear whether the defendant who was grossly negligent may use the contributory negligence of the plaintiff as a partial defense.[7] It is clear, on the other hand, that plaintiff may assume the risk of defendant's gross negligence and thus be completely barred from recovery. The willful and wanton nature of defendant's conduct does not prevent plaintiff's acquiescence to it.[8]

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[4] WIS. STAT. § 331.045 (1957).

[5] See concurring opinion of Fowler, J., in Scory v. LaFave, 251 Wis. 21, 33, 254 N.W. 643, 648 (1934).

[6] Tomasik v. Lanferman, 206 Wis. 94, 238 N.W. 857 (1931); Astin v. Chicago, M. & St. P. Ry., 143 Wis. 477, 128 N.W. 265 (1910). Also, since the passage of the comparative negligence statute the court has treated gross negligence as a distinct category based on the willful and wanton nature of defendant's conduct. See Twist v. Aetna Cas. & Sur. Co., 275 Wis. 174, 81 N.W.2d 523 (1957); Ayala v. Farmers Mut. Auto. Ins. Co., 272 Wis. 629, 76 N.W.2d 563 (1956); Zent v. Yanny, 244 Wis. 342, 12 N.W.2d 45 (1943); Kuchenreuther v. Chicago, M., St. P. & P. R.R., 225 Wis. 613, 275 N.W. 457 (1937). See also Comment, 37 MARQ. L. REV. 334 (1954).

[7] Note, 1939 WIS. L. REV. 427. It was the opinion of the draftsman of the statute, however, that the act did abolish gross negligence. See Padway, *Comparative Negligence*, 16 MARQ. L. REV. 3, 20 (1931).

[8] Topel v. Correz, 273 Wis. 611, 79 N.W.2d 253 (1956); Erickson v. Pugh, 268 Wis. 53, 66 N.W.2d 691 (1954); Watland v. Farmers Mut. Auto. Ins. Co., 261 Wis.

Workmen's Compensation Statutes

The Workmen's Compensation legislation has for the most part stripped the employer of the defenses of contributory negligence and assumption of risk and makes him absolutely liable for injuries sustained by the employee arising out of and in the course of employment.[9] The law, however, does have certain exceptions: (1) a farm laborer is not covered by the Act unless the farmer so elects; and, (2) the employees of a person who employs less than three people are not covered.[10] In these cases the defenses of assumption of risk and contributory negligence, as modified by the comparative negligence law, are both available to an employer who is being sued by his employee.[11]

Public Interest Statutes

The court has held that the public interest in statutes governing adulterated food[12] and safe place[13] is such that express or implied assumption of risk is not a defense to their violation. However, the injured plaintiff's recovery may still be limited by the comparative negligence statute if he is found to be contributorily negligent.[14]

Pleadings

Procedurally, assumption of risk is considered an affirmative defense which must be specifically pleaded in answer to the complaint.[15] The burden is on the defendant to prove the plaintiff's

477, 53 N.W.2d 193 (1951); Gilbertson v. Gmeinder, 252 Wis. 210, 31 N.W.2d 160 (1948); Schubring v. Weggen, 234 Wis. 517, 291 N.W. 788 (1940). The great bulk of gross negligence litigation deals with driving while under the influence of alcohol.

[9] WIS. STAT. § 331.37 (1) (1957); WIS. STAT. §§ 102.03-.04 (1957).

[10] *Ibid.* In Hillman v. Industrial Comm'n, 190 Wis. 196, 208 N.W. 928 (1926), the court recognized that by taking out insurance the farmer may thereby elect to operate under the Workmen's Compensation Act.

[11] WIS. STAT. § 331.37 (3) (1957). Haile v. Ellis, 5 Wis.2d 221, 92 N.W.2d 863 (1958); Venden v. Meisel, 2 Wis.2d 253, 85 N.W.2d 766 (1957); Frei v. Frei, 263 Wis. 430, 57 N.W.2d 731 (1953). When there are less than three employees, the employer may also use the defense that the injury was caused by a fellow servant.

[12] Metz v. Medford Fur Foods, Inc., 4 Wis.2d 96, 90 N.W.2d 106 (1957). For discussion of this case see Note, 1960 WIS. L. REV. 337. See also Arndt Bros. Minkery v. Medford Fur Foods, Inc., 274 Wis. 627, 80 N.W.2d 776 (1957); McAleavy v. Lowe, 259 Wis. 463, 49 N.W.2d 487 (1951); See also Kuhl Motor Co. v. Ford Motor Co., 270 Wis. 488, 71 N.W.2d 420 (1955).

[13] Menetti v. West Side Businessmen's Ass'n, 246 Wis. 586, 18 N.W.2d 487 (1945); Bent v. Jonet, 213 Wis. 635, 252 N.W. 290, 126 A.L.R. 1245 (1934); Neitzke v. Kraft-Phenix Dairies, Inc., 214 Wis. 441, 253 N.W. 579 (1934).

[14] Blong v. Ed. Schuster & Co., 274 Wis. 237, 79 N.W.2d 820 (1957); Powers v. Cherney Constr. Co., 223 Wis. 586, 270 N.W. 41 (1937).

[15] Stanley v. Milwaukee Auto. Ins. Co., 274 Wis. 226, 79 N.W.2d 662 (1956); Sandley v. Pilsner, 269 Wis. 90, 68 N.W.2d 808 (1955); Catura v. Romanofsky, 268 Wis. 11, 66 N.W.2d 693 (1954); Wibbeler v. Reed, 265 Wis. 141, 60 N.W.2d 700 (1953).

assumption of risk. Contributory negligence, on the other hand, though it is considered an affirmative defense which the defendant has the burden of proving,[16] need not be expressly pleaded.[17] The jury is given an instruction and special verdict question on contributory negligence whenever there is credible evidence to support it.

DIFFERENCES BETWEEN ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE

Areas Where the Distinction is Clear

The court has sometimes used the language of assumption of risk in cases where defendant owed only a limited duty to plaintiff. For example, in *Haugen v. Witthopf*[18] the court said: ". . . the duty of the host is to use ordinary care not to increase the dangers to his guest inherent in the condition of the car or the skill or judgment of the host-driver. *Such risks the guest assumes as a matter of law.*" (Emphasis added.)[19] The host owed the guest only a limited duty analogous to that which a landowner owes to a licensee.[20] Similarly, a limited duty is found in that owing by the landowner to a trespasser.[21]

So long as defendant's conduct is not such as to breach this limited duty, plaintiff must assume the risk of this conduct. Although the property owner or host might be negligent as to another plaintiff, in view of the limited duty he owes to the guest, licensee, or trespasser, the defendant cannot be negligent.

Since this type of assumption of risk is concerned only with duty, it cannot be confused with contributory negligence. There are two reasons for this. First, because defendant owes only a limited duty, there is no question of negligence involved. Second, when defen-

[16] Zarling v. LaSalle Coca-Cola Bottling Co., 2 Wis.2d 596, 87 N.W.2d 263 (1958).

[17] Arneson v. Buggs, 231 Wis. 499, 286 N.W. 19 (1939); Harper v. Holcomb, 146 Wis. 183, 130 N.W. 1128 (1911). However for a contrary view see 3 CALLAGHAN, WISCONSIN PLEADING & PRACTICE § 21.28 (3d ed. 1954).

[18] 242 Wis. 276, 7 N.W.2d 886 (1943).

[19] *Id.* at 278, 7 N.W.2d at 887. See also Wheeler v. Rural Mut. Cas. Ins. Co., 261 Wis. 528, 53 N.W.2d 190 (1952).

[20] Stanley v. Milwaukee Auto. Ins. Co., 274 Wis. 226, 79 N.W.2d 662 (1956); Whirry v. Rural Mut. Cas. Ins. Co., 267 Wis. 302, 64 N.W.2d 841 (1954). In discussing licensor-licensee in property cases the court has said that the licensee must take the land as he finds it. Brady v. Chicago & N.W. Ry., 265 Wis. 618, 62 N.W.2d 415 (1954). It is this degree of duty which has been carried over to host-guest cases.

[21] The landowner only owes the trespasser the duty of not injuring him by willful and wanton conduct. Schiro v. Oriental Realty Co., 272 Wis. 537, 76 N.W.2d 355 (1956); Nalepinski v. Durner, 259 Wis. 583, 49 N.W.2d 601 (1951).

dant is under a limited duty, it is unnecessary that plaintiff have a knowledge and appreciation of the danger. He accepts these dangers as a matter of law.[22]

Contributory negligence cannot be confused with assumption of risk in cases where the plaintiff's negligence is independent of the defendant's negligent conduct. Whenever the plaintiff independently contributes to his own injuries either by performing a negligent act or by omitting to perform an act which a reasonable and prudent man would perform, he is guilty of contributory negligence. For example, a pedestrian who crosses the street against the red light has performed a negligent act quite apart from the negligence of the driver who hit him. Likewise, an automobile guest who omits to maintain proper lookout may be guilty of contributory negligence in an action against his host since this omission was quite apart from the negligence of the host.[23] In these cases it is unnecessary to consider whether the defendant was negligent because the conduct of the plaintiff, standing by itself, was unreasonable, and therefore he was contributorily negligent.

Area Where the Distinction is Unclear

In cases where the plaintiff knew of the danger created by the defendant's negligence and allowed himself to be injured, or actively contributed to his own injury, the court has used either the analysis of assumption of risk or contributory negligence. In these cases, in order to establish either of the defenses, it is necessary to find that defendant was negligent and that plaintiff knew of this negligence. It is in this area that there is a real problem in determining which defense is to apply.

In order to establish assumption of risk the court has required both a "consensual relationship"[24] and the traditional elements of: (1) hazard or danger inconsistent with the safety of the plaintiff, (2) knowledge and appreciation of the danger by the plaintiff, (3) acquiescence or a willingness to accept the danger.[25] When the

[22] Haugen v. Wittkopf, 242 Wis. 276, 7 N.W.2d 886 (1943).

[23] Vandenack v. Crosby, 275 Wis. 421, 82 N.W.2d 307 (1957). The guest is not required to keep as sharp a lookout as the driver, however. Le Mere v. Le Mere, 6 Wis.2d 58, 94 N.W.2d 166 (1959); Cherney v. Simonis, 220 Wis. 339, 265 N.W. 203 (1936).

[24] Braun v. Jewett, 1 Wis.2d 531, 85 N.W.2d 364 (1957); Schiro v. Oriental Realty Co., 272 Wis. 537, 76 N.W.2d 355 (1956); Whirry v. Rural Mut. Cas. Ins. Co., 267 Wis. 302, 64 N.W.2d 841 (1954).

[25] Topel v. Correz, 273 Wis. 611, 79 N.W.2d 253 (1956); Muehlenbeck v. Fitchett, 270 Wis. 373, 71 N.W.2d 293 (1955); Egan v. Wege, 260 Wis. 118, 50 N.W.2d 457 (1951). Although stated in various ways, this is in essence the test of assumption of risk. See PROSSER, TORTS § 55 (2d ed. 1955).

court uses the analysis of contributory negligence, the test is whether a reasonable man, having knowledge of the danger created by the defendant's negligence would, under the circumstances, proceed in the face of the danger.[26]

Three methods of distinction may be drawn from the wording of these tests. First, it has been said that assumption of risk requires that plaintiff have actual knowledge of defendant's negligence, while contributory negligence only requires that plaintiff have the knowledge of a reasonable man under the circumstances. The suggested distinction is between subjective and objective knowledge.[27] Second, the theory has been advanced that assumption of risk depends upon the *consent* (acquiescence or a willingness) of the plaintiff to the danger, while contributory negligence depends upon the way he *conducts* himself after learning of the negligence.[28] Finally, it is suggested that assumption of risk is to be applied only to "consensual relationships,"[29] while contributory negligence is to be applied only to "nonconsensual relationships." In order for there to be a valid doctrinal distinction between assumption of risk and contributory negligence it seems essential that at least one of these suggested differences allow meaningful distinctions to be drawn. It is the thesis of this Comment that only the requirement of a consensual relationship is meaningful in making this distinction.

Knowledge

Although Wisconsin does not seem to accept the distinction, some writers and jurisdictions have found that the distinction be-

[26] This language is paraphrased from Paepcke v. Sears Roebuck & Co., 263 Wis. 290, 57 N.W.2d 352 (1953). See also Wear v. Northern States Power Co., 262 Wis. 9, 53 N.W.2d 777 (1952).

[27] See PROSSER, TORTS § 55 (2d ed. 1955) which recognizes the distinction between subjective and objective knowledge:

> "The two [assumption of risk and contributory negligence] may coexist, or either may exist without the other. The difference is frequently one between risks which were in fact known to the plaintiff, or so obvious that he must be taken to have known them, and risks which he merely might have discovered by the exercise of ordinary care."

See also concurring opinion in Scory v. LaFave, 215 Wis. 21, 33, 254 N.W. 643, 650 (1934); and Schlemmer v. Buffalo, R. & P. Ry., 205 U.S. 1, 12, 27 (1907).

[28] See Scory v. LaFave, 215 Wis. 21, 33, 254 N.W. 643, 650 (1934) (concurring opinion); Olson v. Williams, 270 Wis. 57, 68, 70 N.W.2d 10, 16 (1954); Frei v. Frei, 263 Wis. 430, 434, 57 N.W.2d 731, 733 (1953); Switzer v. Weiner, 230 Wis. 599, 603, 284 N.W. 509, 511 (1939). See also PROSSER, *ibid.*, which says:

> "In working out the distinction, the courts have arrived at the conclusion that assumption of risk is a matter of knowledge of the danger and intelligent acquiescence in it, while contributory negligence is a matter of some fault or departure from the standard of reasonable conduct. . . ."

[29] Braun v. Jewett, 1 Wis.2d 531, 85 N.W.2d 364 (1957); Schiro v. Oriental Realty Co., 272 Wis. 537, 76 N.W.2d 355 (1956); Whirry v. Rural Mut. Cas. Ins. Co., 267 Wis. 302, 64 N.W.2d 841 (1954).

tween contributory negligence and assumption of risk is based upon a difference between subjective and objective knowledge.[30] The argument is that in some cases the negligence of defendant is so great that plaintiff must have had actual knowledge of it, while in other cases defendant's negligence was only such that, although a reasonable man would have been aware of it, this particular plaintiff need not have been aware of it. In essence the actual plaintiff and the reasonable man may have different degrees of knowledge.

Although it is true that the particular plaintiff might not have known and appreciated the danger as would a reasonable man, such a distinction is not particularly helpful in distinguishing between assumption of risk and contributory negligence. How is the trier of fact to distinguish between subjective and objective knowledge? Unless the plaintiff admits that he knew of and appreciated the risk, the only way for the jury to decide whether or not he did is to consider the facts of the case and credibility of witnesses. The jury cannot consider these circumstances from the plaintiff's subjective point of view, but rather must view these circumstances objectively in retrospect. Viewing these circumstances retrospectively, it is unlikely that the jury would be able to distinguish between what the plaintiff actually knew and what he should have known. One court recognized this problem in *Cincinnati, N. O. & T. P. Ry. v. Thompson:*

> It may well be said that the notice of danger which a prudent plaintiff should have taken, and the knowledge of that danger which the actual plaintiff must have had, are things which shade into each other and are different in degree, but not in kind. Indeed, the jury will have practical difficulty in distinguishing between that danger which was merely so apparent that every reasonably prudent man would observe it, and that danger which was so obvious that the plaintiff could not help but know it; yet the knowledge which the plaintiff should have had and the actual knowledge to be imputed to him are distinct —at least in theory—and the authoritative cases cited on the opinion must be accepted as establishing this distinction.[31]

Since the distinction is virtually impossible to make, it is of no value as a method of distinguishing between assumption of risk and contributory negligence. Therefore, the better view seems to be the one taken by the Wisconsin court in recent cases such as

[30] See note 27 *supra*.

[31] 236 Fed. 1, 16 (6th Cir. 1916).

Steffes v. Farmers Mut. Auto. Ins. Co.[32] and *Topel v. Correz.*[33] The view of these cases is that plaintiff may assume the risk when it is found that he either knew or *reasonably should have known* of defendant's negligence. It is therefore unnecessary to distinguish between subjective and objective knowledge, since they merge together.

Consent and Conduct

A second distinction suggested by the tests of assumption of risk and contributory negligence is that the former is based on "consent" while the latter is based on "conduct."[34] Indeed, the court has often used these terms in describing assumption of risk and contributory negligence. In using the word "consent" the court is expressing in a short-hand way the element of assumption of risk which requires plaintiff either to acquiesce or to willingly accept the danger created by the defendant. The implication of the word is that "consent" may be found when the plaintiff either passively or affirmatively agrees to accept the danger. The implication of the word "conduct," on the other hand, is that the plaintiff actively participated in causing his injuries either by doing an unreasonable act or omitting to do an act which he reasonably should have done.

The recent case of *Haile v. Ellis*[35] drew the distinction between consent and conduct along these lines:

> Voluntary assumption of risk is the mere passive subjection by the plaintiff of himself to a risk of injury inherent in known defective conditions. Contributory negligence is an act or omission on the plaintiff's part tending to a reasonable probability to add new dangers to his situation, not necessarily incident to the known defective conditions, and bringing upon himself a harm not solely caused by them but created in part at least by his own misconduct.[36]

The cases, however, do not seem to support this distinction. In

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[32] 7 Wis.2d 321, 329, 96 N.W.2d 501, 506 (1959). The court said:
"[D]uty to protest or object does not arise until the guest, under all the circumstances existing at the time in question, has had a reasonable time and opportunity to ascertain or know of the improper conduct of the driver. . . ."

[33] 273 Wis. 611, 613, 79 N.W.2d 253, 255 (1956). The court said:
"[B]efore the assumption [of risk] attaches to him the guest must have known or *should have known* the risk which it is claimed he has assumed."

[34] See note 28 *supra.*

[35] 5 Wis.2d 221, 92 N.W.2d 863 (1958).

[36] *Id.* at 227, 92 N.W.2d at 866. This language is quoted from Bohlen, *Contributory Negligence,* 21 HARV. L. REV. 233, 249 (1908).

the *Haile* case, for instance, it was found that plaintiff, a farm laborer, might assume the risk of manually clearing the rollers of a machine which operated defectively due to the negligence of the defendant. Also, an automobile guest is guilty of assuming the risk in entering the car of a driver he knows to be intoxicated[37] or otherwise disabled.[38] In all these cases the injured plaintiff did not merely passively subject himself to defendant's negligence, but rather performed an act or conducted himself in such a way that he could be found to have assumed the risk. The consent which is required for assumption of risk was found in the plaintiff's conduct.

Conversely, there have been cases where the court has found contributory negligence when the conduct of the plaintiff could legitimately be labeled "passive subjection." In *Western Cas. & Ins. Co. v. Dairyland Mut. Ins. Co.*[39] the guest in an automobile stalled on the wrong side of the road sat and watched the defendant's car approaching for approximately one minute without removing himself to safety. Although the court found plaintiff guilty of contributory negligence, it would not find assumption of risk.

It is submitted that it is impossible to distinguish between assumption of risk and contributory negligence by use of the terms "consent" and "conduct." The cases do not differentiate between these defenses by applying "consent" and "conduct" according to their commonly understood meanings. Rather, it is suggested that these terms are merely labels which the court attaches after deciding whether assumption of risk or contributory negligence is to apply.

Consensual Relationship

Although there are a number of Wisconsin cases which cast doubt on the proposition,[40] the key to distinguishing between assumption

[37] Erickson v. Pugh, 268 Wis. 53, 66 N.W.2d 691 (1954); Gilbertson v. Gmeinder, 252 Wis. 210, 31 N.W.2d 160 (1948); Koepke v. Miller, 241 Wis. 501, 6 N.W.2d 670 (1942); Schubring v. Weggen, 234 Wis. 517, 291 N.W. 788 (1940).

[38] In Storlie v. Hartford Acc. & Indem. Co., 251 Wis. 340, 28 N.W.2d 920 (1947), the court said in dictum that the guest in an automobile may assume the risk of the host's negligence which results from the fact that the host had a tiring and trying day of which the guest knew. This dictum was reaffirmed in Chistensen v. Tollison, 7 Wis.2d 216, 96 N.W.2d 330 (1959).

[39] 273 Wis. 349, 77 N.W.2d 599 (1956).

[40] If the analysis is correct that assumption of risk applies to consensual relationships while contributory negligence applies to nonconsensual relationships, the language and implications of a number of cases must be discounted as being too broad. For example, in Rudolph v. Ketter, 233 Wis. 329, 289 N.W. 674 (1940), the jury found the automobile guests to be contributorily negligent. The court did not find that it was improper to use contributory negligence in this situation, but rather said that there was insufficient evidence to support the jury finding. The court supported this finding with language taken from an assump-

of risk and contributory negligence seems to lie in the requirement that there be a consensual relationship between the litigants in order for assumption of risk to apply. It is submitted that notwithstanding these few cases, assumption of risk is the proper defense when there is a consensual relationship, and contributory negligence is the proper one when this relationship does not exist. So long as it is possible to define clearly what constitutes a "consensual relationship," this analysis allows a meaninguful distinction to be made between assumption of risk and contributory negligence.

Although the court has not thoroughly defined "consensual relationship," both historical evidence and the court's attitude in recent cases give clear indications of how far the court will go in finding these relationships. On the basis of this evidence it appears that a "consensual relationship" is found, and therefore assumption of risk is applied only in employer-employee or host-guest cases where the association between the litigants is sufficiently close that the plaintiff could protest effectively.[41] The doctrine of contributory negligence is applied in all other cases.

Historical evidence supporting this view may be found in the development of the assumption of risk doctrine. As it originated, assumption of risk required a contractual relationship such as that which existed between master and servant. Because of this formal relationship, it was a simple matter to find that the employee assumed the risks of the hazards incident to the contract.[42] Soon after the enactment of the comparative negligence statute the court extended assumption of risk to cases involving host-guest relationships.[43] Although these relationships are not contractual, the court

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tion of risk case and said that this language applied equally on the question of contributory negligence.

In Frei v. Frei, 263 Wis. 430, 57 N.W.2d 731 (1953), there was clearly a consensual relationship between a farmer and a farm laborer. The court, however, said that it was unnecessary to decide whether he assumed the risk or was contributorily negligent in putting his hand too close to a dangerous machine.

In Olson v. Williams, 270 Wis. 57, 70 N.W.2d 10 (1955), the court implied that in a host-guest situation assumption of risk may apply when the guest was not negligent in accepting the risk, while contributory negligence might apply when he was unreasonable in accepting the risk.

[41] In Schiro v. Oriental Realty Co., 272 Wis. 537, 548, 76 N.W.2d 355, 360 (1956) the court said:

> "Wisconsin has limited the application of the defense of assumption of risk to situations where there is a consensual relationship between the defendant and plaintiff such as host and guest, or master and servant."

[42] Whirry v. Rural Mut. Cas. Ins. Co., 267 Wis. 302, 305, 64 N.W.2d 841, 843 (1954). Knauer v. Joseph Schlitz Brewing Co., 159 Wis. 7, 149 N.W. 494 (1914). James, *Assumption of Risk*, 61 YALE L. J. 141, 154 (1952).

[43] The leading cases are Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934); Scory v. LaFave, 215 Wis. 21, 254 N.W. 643 (1934). For discussion see Campbell, *Host-Guest Rules in Wisconsin*, 1943 WIS. L. REV. 180.

apparently concluded that they were sufficiently analogous to employer-employee cases to warrant extending the assumption of risk doctrine to cover them. Thus, quite clearly, employer-employee and host-guest cases are historically subject to the defense of assumption of risk.

Since extending the doctrine to host-guest situations, however, the court has apparently refused to extend it further. Recently, this disinclination to extend the doctrine was implied in *Schiro v. Oriental Realty Co.*[44] In this case defendant maintained a defective retaining wall between his property and the property of the plaintiff. As a result of this defect there was a declivity on the land of the plaintiff into which plaintiff stumbled and was injured. The defect in defendant's wall and the resulting dangerous condition were well known to both parties. The trial court submitted special verdict questions asking whether plaintiff had assumed the risk of defendant's negligence. On appeal the supreme court found that assumption of risk was inapplicable since there was no consensual relationship, and that the trial court should have submitted a question concerning the contributory negligence of the plaintiff. The question then would probably be whether the plaintiff, as a reasonable and prudent man, having knowledge of the danger created by the defendant, should have walked along the wall in the manner in which the plaintiff did.

This case may be contrasted with *Haile v. Ellis*[45] where there was clearly the consensual relationship of employer-employee. Plaintiff was a farm laborer whose hand was severely mangled by the rollers of a corn picker when he attempted to unclog the machine without first turning off the power. The negligence of the defendant employer was alleged to be in failing to repair a defect in the machine which impaired the proper operation of the rollers. This defect was known to both plaintiff and defendant. The court said that if it was necessary for the power to be left on the machine during the clearing operation, the plaintiff assumed the risk of the dangers inherent in this operation.

With the exception of the fact that there was clearly a consensual relationship in *Haile,* the cases are alike in almost all essentials. In both cases plaintiff had knowledge of defendant's negligence. Further, once they had knowledge of the danger, both plaintiffs did some act which precipitated their injuries. Mrs. Schiro walked

[44] 272 Wis. 537, 76 N.W.2d 355 (1956). The narrow holding of this case was that the court refused to extend assumption of risk to nuisance cases.

[45] 5 Wis.2d 221, 92 N.W.2d 863 (1958).

without paying attention to where she was going, and Gerald Haile put his hand into the defective machine. Since the *Schiro* and *Haile* cases are so similar on their facts, the court's refusal to apply assumption of risk to the former seems to reflect a reluctance to extend assumption of risk beyond its present bounds.

As the foregoing discussion indicates, consensual relationship is a necessary prerequisite to finding assumption of risk. However, the existence of a consensual relationship does not preclude the possibility that the plaintiff may be found contributorily negligent. He may be contributorily negligent if his conduct is independently negligent. To repeat an earlier example, the guest in an automobile may be contributorily negligent in failing to maintain proper lookout. In this case the consensual relationship and the conduct of the host are both immaterial, since the conduct of the guest is in and of itself unreasonable.

Justification for Limiting Assumption of Risk to Employer-Employee and Host-Guest Situations. The defense of assumption of risk is apparently limited to employer-employee and host-guest cases because of public policy considerations. The reason it is so restricted is because it would generally be "difficult in other negligence cases to locate any basis for finding full and free consent."[46]

This limitation seems to make sense. In traditional consensual relationship cases the plaintiff's consent can easily be shown since the plaintiff is in such a relationship with the negligent employer or host that he could protest the defendant's negligence, or, if he so desired, terminate the relationship. So long as the plaintiff had occasion and opportunity[47] either to protest or terminate the relationship, his failure to do so would indicate that he fully and freely consented to the negligence.

The plaintiff's ability either to lodge an effective protest or conveniently to terminate the relationship in situations less intimate than this may be illusory. For instance, in *Paepcke v. Sears Roebuck & Co.*,[48] plaintiff was injured when she fell on defendant's parking lot, which defendant had negligently allowed to remain

[46] Campbell, *supra* note 43, at 190. The court, in Schiro v. Oriental Realty Co., 272 Wis. 537, 548, 76 N.W.2d 355, 359 (1956), seems to approach the same view as does Professor Campbell. The court in discussing assumption of risk in nuisance cases says: "Such a person 'does not assume the risk since he is not free; the risk is being forced upon him by the defendant's unlawful conduct.'" The included language was quoted from Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984, 994-95 (1952).

[47] Peterson v. Magnus, 272 Wis. 461, 76 N.W.2d 289 (1956); Olson v. Williams, 270 Wis. 57, 70 N.W.2d 10 (1955).

[48] 263 Wis. 290, 57 N.W.2d 352 (1953).

icy. Plaintiff walked across the parking lot knowing it was icy and unlighted. But how can it be said that she fully and freely consented to the risk? To whom could plaintiff complain? Defendant had confronted her with a hazard, and left plaintiff with the alternative of either crossing the lot or walking another route. The mere fact that plaintiff chose to encounter the danger did not mean that she had fully and freely consented to the negligence which created it. Plaintiff was not in such a close relationsihp with defendant that she could effectively protest, so it is very difficult to determine whether or not she fully and freely consented to the negligence.

The *Schiro*[49] case is similar to *Paepcke,* but here plaintiff, a neighboring landowner, had complained to defendant about the defective retaining wall. Once having lodged her ineffective complaint, had done all she could be reasonably expected to do to halt defendant's negligent conduct. It could hardly be said that plaintiff had fully and freely consented to defendant's negligence simply because she could not make defendant stop this conduct.

It would be harsh to apply the assumption of risk doctrine to cases such as *Paepcke* and *Schiro* where plaintiff was not in a position to effectively protest defendant's negligence. It would absolutely prevent his recovery of damages for accepting the dangerous condition created by defendant without considering whether plaintiff was in a position to either halt or prevent the negligence. The court seems to be following the more equitable policy of limiting assumption of risk to employer-employee and host-guest situations when the plaintiff is in such a relationship with the defendant that he could protest. His failure to protest in these cases more clearly shows that the plaintiff consents to accepting the negligence.

When the litigants are not in a consensual relationship, even though the defense of assumption of risk is taken away, the defendant still has the benefit of the contributory negligence doctrine. The plaintiff would be contributorily negligent if he did not act as a reasonable and prudent man in accepting the known risk created by the defendant. The plaintiff's contributory negligence would be weighed against the defendant's negligence under the comparative negligence statute.

In order to determine the extent of the plaintiff's contributory negligence, it would be necessary to take into consideration all the circumstances surrounding the accident. Some of these might be,

[49] See note 44 *supra.*

the seriousness of the danger posed by the defendant, the amount of precaution which the plaintiff took in entering this dangerous situation, the circumstances which prompted the plaintiff to encounter the danger, and the alternative courses of action which were available to the plaintiff. By using these, and probably other considerations, the jury will have a good basis for comparing the negligence of the plaintiff with that of the defendant.

Policy Considerations

Assumption of Risk is Not Based on the Plaintiff's Unreasonable Conduct

The plaintiff who stands in a consensual relationship with the defendant will be barred from recovery when he knowingly accepts a risk created by the defendant. Unlike the contributory negligence doctrine where it is important to consider whether the plaintiff was reasonable in accepting the risk, it is immaterial with assumption of risk that the risk is no greater than a reasonable and prudent man would encounter under the circumstances.[50]

The plaintiff is barred from recovery because of public policy considerations. The policy is that the court will not allow a plaintiff to consent to a defendant's negligence on the one hand, then sue for damages caused by the negligence. The court clearly recognizes this in the case of *Haines v. Duffy:*

> However, it may suit the pleasure of both the host and guest to drive at a high rate of speed. Where this results with the acquiescence of the guest, the guest is not permitted to recover from the host. This is not because the guest is, strictly speaking, guilty of contributory negligence, or any negligence, but rather because the guest has acquiesced in the conduct of the host, and *it would be against reason and justice to permit a recovery against the host under such circumstances.* (Emphasis added.)[51]

Although it is not important whether the plaintiff acted reasonably or unreasonably in suits against the person with whom he was in a consensual relationship, it may be important when the plaintiff is suing a third party whose negligence also caused his injuries. This situation most often arises in automobile accident cases where the negligence of both the host and the third party caused the guest's injuries. If the guest were found to have assumed

[50] Veverka v. Metropolitan Cas. Ins. Co., 2 Wis.2d 8, 85 N.W.2d 782 (1957); Scory v. LaFave, 215 Wis. 21, 254 N.W. 643 (1934).

[51] 206 Wis. 193, 196, 240 N.W. 152, 153 (1931). This language is cited with approval in Switzer v. Weiner, 230 Wis. 599, 602-3, 284 N.W. 509, 511 (1939).

the risk of the host's negligence, the host would, of course, escape liability. But against the third party it would be important to determine whether the guest was unreasonable in accepting the host's negligence in order to decide whether the guest was contributorily negligent as to the third party.[52] The mere fact that the guest was driving with a negligent host does not mean that the guest was contributorily negligent as a matter of law, rather it must be proved that the guest was unreasonable in driving with his host.[53] Making this determination would, of course, require consideration of a number of circumstances surrounding the accident.

Does the Assumption of Risk Doctrine Work Unfair Results?

There seems to be a great burden on the plaintiff in a consensual relationship to expect him to protest any reasonably obvious negligent conduct of the defendant. The plaintiff is held to an absolute responsibility to protest the defendant's negligence, even though he might have been reasonable in accepting it. Not only is the plaintiff held to absolute responsibility, but the penalty for his failure to live up to this standard is severe, for he is completely barred from recovery rather than having the advantages of the comparative negligence statute.

It might therefore be asked whether the operation of the assumption of risk doctrine imposes an unfair and unrealistic burden on the plaintiff while allowing the defendant to escape liability for his own negligence too easily. It would certainly seem to be an unsound policy to allow a negligent party to escape his responsibility at the expense of a relatively innocent party.

There are numerous cases where the guests's assumption of risk has seemed, if not completely reasonable, only slightly unreasonable. For instance, in *Scory v. LaFave*[54] host negligently parked his car on the wrong side of the road. Plaintiff guest was injured by another car as she entered host's automobile. The guest's assumption of risk was found in her crossing the street to enter the car. Another case where plaintiff was perhaps reasonable in assuming the risk was *Veverka v. Metropolitan Cas. Ins. Co.*[55] In this case a group of motorcyclists molested and threatened the host and guest. When ever the host's car stopped at a red light, they received

[52] See note 50 *supra.*

[53] McCaffrey v. Minneapolis, St. P. & S. St. M. Ry., 222 Wis. 311, 267 N.W. 326 (1936); Reiter v. Grober, 173 Wis. 493, 181 N.W. 739 (1921); RESTATEMENT, TORTS §§ 491, 495 (1934). The rule is that negligence will not be imputed to the passenger unless there is a joint venture.

[54] 215 Wis. 21, 254 N.W. 643 (1934).

[55] 2 Wis.2d 8, 85 N.W.2d 782 (1957).

this sort of abuse. Finally, in order to escape the motorcyclists the host drove at an excessive rate of speed and had an accident which caused the guest's injuries.

In the *Scory* case the defendant's negligence was so slight that the plaintiff might not be expected to protest. In the *Veverka* case, on the other hand, the host's negligence was rather serious, but the circumstances surrounding the negligence perhaps made it reasonable for the guest not to protest. Certainly in neither one of these cases is the plaintiff seriously unreasonable in accepting the negligence of the host, and yet the guests were barred from recovery because they had fully and freely assumed the risk.

As assumption of risk is presently applied, it requires the guest to become a "back-seat driver." The host and guest are treated as equal participants in the negligence and thus being equal participants, the guest is not allowed to recover damages against the host.

However, to find that the guest fully and freely consents to the host's negligence in cases such as these, seems to overlook the realities of the host-guest relationship. The guest in an automobile will generally not be a "back-seat driver" and protest the host's negligence until it becomes sufficiently serious that, under the circumstances, the guest feels obliged and compelled to protest. This does not mean the guest wholeheartedly agrees with the host's negligence up to this point; rather it may mean that the guest did not consider it his position to protest. The guest did not consider it necessary to step out of his role as a passenger and become a "back-seat driver." Although it could be argued that it is sound public policy to demand such a high standard of the guest, the fact remains that it is unrealistic. Also, such a doctrine as this allows the host who is, after all, the primarily and actively negligent party, and who is in the better position to control his negligence, to escape liability. It might be questioned whether this represents sound policy.

In other situations, such as those involving the selling of adulterated foods and the safe place statute, the court has said that the public interest in having these complied with is such that an injured plaintiff may not be allowed to expressly or impliedly assume the risk of the defendant's negligence.[56] The court's continued application of assumption of risk in consensual relationship cases, in spite of the comparative negligence statute, therefore seems to imply that the court has not found a comparable public interest in

[56] See especially Metz v. Medford Fur Foods, Inc., 4 Wis.2d 96, 90 N.W.2d 106 (1958).

carrying out the policy of the latter statute. It must be admitted that the public interest in the former situations is more obvious since these statutes were designed to insure the public safety. However, it could be argued that the comparative negligence statute states a public policy in favor of determining the liability of the parties to a negligence action in accordance with their respective culpability. Inasmuch as the assumption of risk doctrine is concerned with the fact that the plaintiff was in a consensual relationship with the defendant rather than being concerned with his culpability, it might be said that it defeats the purpose of this expressed public policy.

The comparative negligence statute could easily be applied to these cases involving consensual relationships in just the same way it is applied when this relationship does not exist. The extent of the plaintiff's contributory negligence would be determined by considering the reasonableness of his acquiescence in view of the circumstances surrounding the relationship and the negligence. Weighing these considerations against the negligence of the defendant, the trier of fact could then apportion the responsibility.

Conclusion

An analysis of the cases shows that such standards as subjective-objective knowledge and consent-conduct do not really help in distinguishing between assumption of risk and contributory negligence. Rather, it seems that the court will apply assumption of risk when there is a consensual relationship between the litigants, and contributory negligence when this relationship does not exist. This allows clear distinctions to be drawn between the two defenses.

The court has been careful in restricting a finding of consensual relationship to situations in which the plaintiff is in a position to protest effectively the known negligence of the defendant. In practice this consideration has apparently limited assumption of risk to employer-employee or host-guest situations since the plaintiff's acquiescence may be more easily determined here.

In less intimate situations the court will apply the comparative negligence statute. The degree of responsibility which the plaintiff would bear would depend upon how unreasonable he was in proceeding in the face of the defendant's known negligence. This allows the trier of fact to take account of all the circumstances surrounding the injury, while these circumstances are not considered in assumption of risk actions.

The underlying policy of the assumption of risk doctrine is to

hold the plaintiff absolutely responsible for his acquiescence to the defendant's negligence, since he is in a position where he could protest to the defendant. Contributory negligence, on the other hand, applies to situations where the plaintiff is not in a position effectively to protest the defendant's conduct. Since he is unable to protest, he is only held to the standard of a reasonable man.

It might be questioned whether the assumption of risk doctrine to a degree defeats the public policy expressed in the comparative negligence statute. However, inasmuch as the legislature has allowed the court's interpretation of as vital a statute as this to stand since 1934, it would seem that the legislature has given tacit approval to this interpretation. It would certainly seem beyond the power of the court to change its interpretation. Thus, if assumption of risk is to be eliminated, and the comparative negligence law extended to cover consensual relationships, it would fall upon the legislature to make such a change. It is suggested that such a change merits serious consideration.

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