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Automobiles - Assumption of Risk - No Longer a Defense in Wisconsin

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RECENT CASES

AUTOMOBILES — ASSUMPTION OF RISK — NO LONGER A DEFENSE IN WISCONSIN. — Plaintiff was injured in an automobile collision while riding as a guest in the defendant's vehicle and sued to recover damages. Under a comparative negligence statute the jury found the plaintiff fifteen per cent negligent and that the plaintiff had assumed the risk of the defendant's negligence. On this finding the trial court dismissed the complaint. On appeal the Wisconsin Supreme Court *held* that assumption of risk was no longer a defense available to the host in automobile host-guest cases and granted a new trial. The decision reasoned that the policy judgment involved in applying the doctrine to automobile cases was not valid under present public policy. *McConville v. State Farm Mut. Auto. Ins. Co.*, 113 N.W.2nd 14 (Wis. 1962).

In most jurisdictions, in absence of a guest statute, a host driver is bound to exercise reasonable and ordinary care for the safety of a guest passenger.[1] However, the doctrine of assumption of risk,[2] when applied to automobile host-guest cases, limited this duty.[3] In the United States *McKinney v. Neil*[4] made the first reference to the doctrine of assumption of risk in vehicle cases.[5] In time, assumption of risk was applied to automobile host-guest cases.[6] In adapting the doctrine to such cases the courts, reasoning from the licensor-licensee relationship found in property cases,[7] held the guest to take the automobile as he found it except as to latent defects known only to the driver-owner.[8] The guest assumed the risk of injuries proximately caused by conditions of which he knew

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1. See, **e.g.,** Central Copper Co. v. Klefisch, 34 Ariz. 230, 270 Pac. 629 (1938); Lorance v. Smith, 173 La. 883, 138 So. 871 (1931).

2. See generally White, **The Liability of an Automobile Driver to a Non-Paying Passenger,** 20 Va. L. Rev. 326 at 346-55 (1933) and Rice, **The Automobile Guest and the Rationale of Assumption of Risk.** 27 Minn. L. Rev. 323, 429 (1943) for a discussion of the doctrine of assumption of risk.

3. Roberson v. Roberson, 193 Ark. 669, 101 S.W.2d 961 (1937); 2 HARPER & JAMES, TORTS § 21.8, at 1191 (1956) "The doctrine of assumption of risk however it is analyzed and defined is in most of its aspects a defendant's doctrine which restricts liability. . . ."

4. (C.C. Ohio), 1 McLean 540, Fed. Cas. No. 8865 (1840) "And every passenger must make up his mind to meet the risks incident to the mode of travel he adopts, which cannot be avoided."

5. See Rice, **The Automobile Guest and the Rational of Assumption of Risk,** 27 Minn. L. Rev. 323, 429, at 327 (1943).

6. See, **e.g.,** Beard v. Klusmeier, 158 Ky. 153, 164 S.W. 319 (1914); Patnode v. Foote, 153 App. Div. 494, 138 N.Y.S. 221 (1912).

7. See James, **Assumption of Risk,** 61 Yale L. J. 141, 157 (1952).

8. Shrigley v. Pierson, 189 Ark. 386, 72 S.W.2d 541 (1934); Olson v. Buckley, 220 Minn. 155, 19 N.W.2d 57 (1945); PROSSER, TORTS, § 55, at 310 (2d ed. 1955).

or should have known.[9] In justifying this reasoning it has been said that if recovery was allowed for mere negligence, the host and guest might collude at the expense of the insurance companies[10] and a high degree of care required of the host would discourage automobile owners from extending their hospitality to guests.[11]

With the increasing usage of automobiles the legislatures of many states enacted guest statutes[12] with the purpose of limiting the recovery of a guest.[13] These statutes allowed recovery only in the event of gross negligence, wilful misconduct or intoxication on the part of the host.[14] Under these statutes, however, if it could be shown that the guest had assumed the risk, recovery would be barred.[15]

Assumption of risk has been held to be a defense separate from contributory negligence.[16] The doctrine of assumption of risk is important to the defendant host because many states do not recognize contributory negligence as a defense under their guest statutes.[17]

In North Dakota the defenses of contributory negligence and assumption of risk are both available to the host driver.[18] Only in the event of the host-driver's wilful misconduct does it appear that a defense of contributory negligence would be denied and then only if the alleged contributory negligence was an inducing factor to wilful misconduct.[19] It is submitted that assumption of risk is not as important in North Dakota

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9. Valencia v. Jan Jose Scavenger Co., 21 Cal. App. 2d 469, 69 P.2d 480 (1937); White v. McVicker, 216 Iowa 90, 246 N.W. 385 (1933); Nardone v. Milton Fire Dist., 261 App. Div. 717, 27 N.Y.S. 2d 489 (1941).

10. Naudzius v. Lahr, 253 Mich. 216, 234 N.W. 581 (1931).

11. Heesacker v. Boisted, 131 Neb. 42, 267 N.W. 177 (1936).

12. See, **e.g.,** Del. Code Ann., tit, 21 § 6101 (1953), Iowa Code Ann., § 321.494 (1949).

13. Neesen v. Armstrong, 213 Iowa 378, 239 N.W. 56 (1931) "Our statute section 5026 b-1, Code 1931, was enacted for the very purpose of preventing recovery by a guest of damages resulting from the negligence of the driver of the automobile."; White, **The Liability of an Automobile Driver to a Non-Paying Passenger,** 20 Va. L. Rev. 326 (1933).

14. **E.g.,** N.D. Cent. Code ch. 39-15 (1961); For a general discussion of these statutes, see Weber, **Guest Statutes,** 11 U. Cinc. L. Rev. 24 (1937).

15. White v. McVicker, 216 Iowa 90, 246 N.W. 385 (1933); Borstad v. LaRoque, 98 N.W.2d 16 (N.D. 1959).

16. Pierce v. Clemens, 113 Ind. App. 65, 46 N.E.2d 836 (1934).

17. Coconower v. Stoddard, 96 Ind. App. 287, 182 N.E. 466 (1932); Neesen v. Armstrong, 213 Iowa 378, 239 N.W. 56 (1931); Gill v. Arthur, 69 Ohio App. 386, 43 N.E.2d 894 (1941).

18. Borstad v. LaRoque, 98 N.W.2d 16 (N.D. 1959); Ledford v. Klein, 87 N.W.2d 345 (N.D. 1957).

19. Ledford v. Klein 87 N.W.2d 245 (N.D. 1957).

as it is in states not recognizing contributory negligence as a defense to guest statutes.

Wisconsin's rejection of assumption of risk as a defense in host-guest cases is a radical departure from widely accepted principles. The court in the instant case justified its holding by noting the modern prevalence of liability insurance and the desirability of shifting the burden of injuries from the individual to the motoring public. Such arguments involve value judgments.

It is hard to justify the rule of assumption of risk because it prevents the automobile guest from recovering for negligence which in other situations would clearly allow recovery. Such a rule has led to workmen's compensation laws.[20] Similiar proposals have been made regarding automobile legislation.[21]

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COMMERCE — REGULATION OF SALES AS BURDEN ON INTERSTATE COMMERCE. — Plaintiff purchased materials in Utah to be used on a construction job in Oregon. The contract of sale and the bill of lading called for an out-of-state shipment, and the purchase price included freight rates commensurate with common carrier's rates to the out-of-state destination. The nature of the order made it certain that the materials could be consumed only in Oregon. Plaintiff accepted delivery to himself in Utah and immediately transported the goods to Oregon where they were consumed. The Utah Tax Commission levied a sales tax on this transaction. The Supreme Court of Utah *held* that this tax imposed a burden on interstate commerce and therefore was invalid. *Pacific States Cast Iron Pipe Co. v. States Tax Commission* 13 Utah 2d 113, 369 P.2d 123 (1962).

Because Congress has the exclusive power to regulate

20. James, **Assumption of Risk,** 61 Yale L. J. 141, 154 (1952).

21. See Corish, **The Automobile Guest,** 14 B. U. L. Rev. 729 at 750 (1934). "One entrusted with the operation of an automobile upon the crowed highways of today should not be clothed with immunity for negligent driving which results in injuries to the occupants of his machine. The social interests to be protected demand that the rule be changed by legislative function."