HOST-GUEST RULES IN WISCONSIN

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INTRODUCTION

The significance of the relation of a gratuitous guest in an automobile to his driver was considered by the Wisconsin Supreme Court for the first time in 1921.[1] In the following twenty-two years many such cases have been presented for decision. It requires only a cursory glance at the opinions to discover that the term "assumption of risk" overshadows all others in dealing with the host-guest cases. One not skilled in legal science would assume that this term described a single principle; but such a person would be sadly disillusioned. He would soon discover that "assumption of risk" describes three distinct doctrines relevant to the liability of the host to the guest.

It is apparent that before we can intelligently discuss the host-guest rules we must isolate these distinct principles and use some other name to describe each. If we do otherwise we will soon find that we are traveling in circles and never reach our destination.

In one sense the term "assumption of risk" is used to describe policy limitations on the duty of the host (H) to the guest (G) that are entirely independent of any conduct or consent of the guest, except the general willingness to enter into the relation. Our Supreme Court, in common with the appellate courts of many jurisdictions, feels that the relation of a possessor of land to a licensee is somewhat analogous. It has accordingly held that the duty of H to G is more limited than his duty to other users of the highway.

In both the second and third senses "assumption of risk" is used to describe limitations on liability that are in some way connected with G's awareness of H's defective driving and his failure to object thereto. But the principles of law involved are entirely distinct and separate and should not be tested by the same process. One is a rule of negligence and is in no way different than any other rule of negli-

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[1] O'Shea v. Lavoy, 175 Wis. 456, 185 N.W. 525 (1921). The problem was raised the year before in Howe v. Corey, 172 Wis. 537, 179 N.W. 791 (1920). But the court found that as a matter of law the guest was guilty of contributory negligence baring recovery; thus it was unnecessary to decide the duty of the host.

gence, except that when it involves a plaintiff it is commonly called assumption of risk. The other is a rule based on consent or relation, probably the former. If such is the case, it is a doctrine in the field of negligence analogous to the law of consent administered in intentional tort cases. In any event it is entirely independent of questions relating to the guest's negligence.

A. Limitations on Duty Independent of Consent

1. Condition of the Automobile

The first expression of the Wisconsin Supreme Court of special rules regulating the liability in host-guest automobile cases appears in *O'Shea v. Lavoy*.[2] The action was one for injuries resulting from a defect in the automobile—a delapidated spring. The language of the court indicates that it might have disposed of the litigation before it by holding that as a matter of law there was no negligence toward anyone, but it elected to decide in favor of *H* without making such a ruling.

The court held that the liability of the owner of a car to a guest for defects in the condition thereof is analogous to that of a possessor of land toward a social guest. Wisconsin there holds in accord with the general rule that such guest is a licensee.[3] It is commonly said that the responsibility of the licensor to the licensee for conditions of the land is limited to "traps". The *Restatement of Torts* now defines the "trap" rule more definitely as follows:[4]

> "A possessor of land is subject to liability for bodily harm caused to gratuitous licensees by a natural or artificial condition thereon if, but only if, he (a) knows of the condition and realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover the condition or realize the risk, and (b) invites or permits them to enter or remain upon the land, without exercising reasonable care
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> (i) to make the condition reasonably safe or
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> (ii) to warn them of the condition and the risk involved therein."

Wisconsin's decision in *Greenfield v. Miller*[5] in 1921 indicates that

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[2] 175 Wis. 456, 185 N.W. 525 (1921).
[3] Greenfield v. Miller, 173 Wis. 184, 180 N.W. 834 (1921).
[4] Restatement, Torts (1934) §342.
[5] Greenfield v. Miller, 173 Wis. 184, 180 N.W. 834 (1921).

such was the rule in this state when the *O'Shea* case was presented later that same year.

In the *O'Shea* case it appeared that *H* knew the spring was defective. He had taken it to a garage for repairs. A temporary job was done pending the receipt of necessary parts. *H* was told that it would be safe to use it if he "watched himself on the road." The court held that the condition did not constitute a "trap"; that *H* placed the car at the disposal and enjoyment of *G* on equal terms of security. In the language of the *Restatement*, the court apparently was convinced that although *H* knew of the defective condition, he did not realize the risk involved therein. As *H* also apparently had no reason to expect danger from the defective spring, the decision is not entirely realistic on its facts, but the court's opinion expresses the rule stated above.

Later cases have consistently treated the *O'Shea* case as the law of the state. It should be noted, however, that a change in the expression of the rule has appeared. In *Waters v. Markham*,[6] *Campbell v. Spaeth*[7] and *Jensen v. Jensen*,[8] the court without discussion states that *G* is entitled to recover if he shows that *H* (1) knew of the defect and (2) realized or *should have realized* it involved an unreasonable risk to *G* and the defect was so concealed or hidden as not to be reasonably obvious or patent to the guest. This test differs fundamentally from the rule of the *Restatement* and the *O'Shea* case in the respect underlined above. Under it actual realization of the unreasonable character of the risk to *G* is unnecessary; it is sufficient if *H* realizes or should realize the serious character of the risk. However, as this inconsistency in the *O'Shea* case on the one hand and the later cases on the other has not been recognized in any way by the court, it is difficult to decide how much weight to give to it. Of course the unreasonableness of the risk is a factor in determining whether the host actually realized the grave character of such risk or not, but the test at least should be settled one way or the other and consistently administered. If the rule is applied as it is now stated, a host who actually knows of a defect in the condition of the car, has the same general duty to the guest as to any other user of the highway.

I will point out later that Wisconsin's consent test is stated subjectively but administered somewhat objectively. It will be interest-

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[6] 204 Wis. 332, 235 N.W. 797 (1931).
[7] 213 Wis. 162, 250 N.W. 394 (1933).
[8] 228 Wis. 77, 279 N.W. 628 (1938).

ing to compare what is done in administering the test of duty with reference to the condition of the car. That test is now stated subjectively through the stage of knowledge of the defective condition by the host but objectively from that point on. Will it be handled that way or will the administration be more along the subjective lines implied by the use of the term "trap" to describe the duty? The answer to this question must await future developments. Present authorities do not justify a prediction.

2. *Condition of the Driver*

a. *The Early Rule*

In the *O'Shea* case the Supreme Court mentioned the conflict in precedents on the liability for activities of the driver.[9] Under the rule in Massachusetts responsibility was limited to cases of gross negligence.[10] As the opinion noted, however, gross negligence has quite a different meaning in Massachusetts from that which it has in Wisconsin. In the former state it means a high degree of lack of ordinary care. Contributory negligence remains a defense. In Wisconsin, on the other hand, gross negligence is considered different in kind than ordinary negligence.[11] Contributory negligence was not a bar under the common law[12] and does not reduce recovery under the comparative negligence statute.[12a] As the liability for negligent activities of the driver was not in issue in the *O'Shea* case, the court did not pass on it. It simply raised the question and suggested that the matter be given careful attention by the bar.

The problem was specifically presented for the first time in 1923 in *Mitchell v. Raymond*.[13] The court rejected the Massachusetts rule, and decided that the driver was obliged to exercise reasonable care in the operation of the automobile. In making this ruling the court was consistent with its analogy—the land cases. It is the gen-

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[9] 175 Wis. 456 at 460, 185 N.W. 525 at 527 (1921); *see also* Mecham & Mickelwait, *Gross Negligence* (1930) 5 WASH. L. REV. 91; Note (1937) 35 MICH. L. REV. 804.

[10] Massaletti v. Fitzroy, 228 Mass. 487, 118 N.E. 168 (1917).

[11] Bolin v. Chicago, St.P. M. & O. Ry., 108 Wis. 333, 84 N.W. 446 (1900); Rideout v. Winnebago Traction Co., 123 Wis. 297, 101 N.W. 672 (1904); Gould v. Merrill R. & L. Co., 139 Wis. 433, 121 N.W. 161 (1909); Berndl v. Director Gen. of Rys., 177 Wis. 210, 188 N.W. 81 (1922); Bentson v. Brown, 186 Wis. 629; 203 N.W. 380 (1925).

[12] *Ibid.*

[12a] Weld v. Klein, 229 Wis. 419, 282 N.W. 606 (1938).

[13] 181 Wis. 591, 195 N.W. 855 (1923).

eral rule in those cases that with reference to activities the licensor owes his licensee a duty of reasonable care. Thus, in its initial decision the court holds that with reference to acts connected with the operation of the automobile the host owes the same duty to the guest that he owes to other users of the highway.

b. The Rule Changed in 1926 by Cleary v. Eckart

In *Cleary v. Eckart*,[14] *G* was injured when *H*, an inexperienced driver, was unable to handle the car when a tire went flat while traveling on a graveled road. *G* was fully aware of *H's* lack of experience. The court suggested that whether *G* consented to the risk under the circumstances presented an interesting problem. Instead of deciding that problem, however, the court concluded that *G* was not entitled to recover from *H* anyway. In making this decision it partially overruled *Mitchell v. Raymond*. It held that the guest by virtue of the relationship accepts the driver with such skill, competency and experience as he possesses.

In explaining the extent to which the rule of *Mitchell v. Raymond* was changed the court said:[15]

> "As to the gratuitous guest in a vehicle on a public highway, the owner or driver of such vehicle owes to such guest the duty of exercising ordinary care not to increase the danger to the guest or to create a new danger."

It is apparent that this generalization is not a real guide to the law. What limitations on duty were meant to be included in the rule of *Cleary v. Eckart* remained a mystery until refinements were made in later decisions.

c. The Rule of Cleary v. Eckart in Action

The rule of *Cleary v. Eckart* sounded like a sweeping restriction on liability. Skill, capacity and experience could easily be defined to include a large segment of bad driving. It was soon apparent, however, that *Mitchell v. Raymond* was not as materially curtailed as the opinion in *Cleary v. Eckart* implied.

There is even language in some decisions indicating that the *Cleary* case is limited to instances of consent to the particular risk;

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[14] 191 Wis. 114, 210 N.W. 267 (1926).
[15] *Id.* at 117, 210 N.W. at 268.

that it applies to a guest only where he knows of the host's limited skill.[16] Suggestions of this kind were not entirely repudiated until 1933. In that year in *Eisenhut v. Eisenhut*[17] the injured guest was a five year old child. Counsel for the child contended it could not be held that he actually consented to the risk. The Supreme Court agreed with this reasoning but concluded that it was immaterial in the instant case. The host was held free from liability under the limited duty rule of *Cleary v. Eckart.*

(1) Qualities Lifted Out of the Rule

In 1930 it was held in *Poneitowcki v. Harres*[18] that excessive speed and defective lookout could not be excused under the rule of *Cleary v. Eckart.* These hazards in the host's driving might be based upon personal habits which in a strict sense were a part of his skill, competency and experience. However, they are not within the coverage of the legal rule. There seems to be no standard for determining exactly what is included. The rule must be defined by a process of inclusion and exclusion as cases are decided from year to year.

The broad language of the *Poneitowcki* case indicates the difficulty. The court said:[19]

> "While the guest cannot demand of the host a higher degree of skill and experience than he actually possesses, in the management and control of the automobile under special and peculiar circumstances, even though they do not amount to emergencies, nevertheless there are certain duties imposed upon the drivers of automobiles, the abilities to perform which do not depend upon experience or acquired skill. Among these is the duty to maintain a reasonable speed, obey the law of the road, keep a proper lookout, etc. These are duties which are required to be observed for the safety of every one,—those within as well as those without the automobile,—and failure to perform them may result in liability in the absence of acquiescence or contributory negligence on the part of the guest. The driver of an automobile who maintains an excessive or reckless speed, who fails to maintain a lookout or to observe the laws of the road, plainly increases the dangers which the guest assumed upon entering the automobile and adds new ones, and there manifestly is no difference between the degree of care he is required to use in these respects for the safety of his guests and for the safety of other persons."

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[16] *See* Sommerfield v. Flury, 198 Wis. 163, 223 N.W. 408 (1929).
[17] 212 Wis. 467, 250 N.W. 441 (1933).
[18] 200 Wis. 504, 228 N.W. 126 (1930).
[19] *Id.* at 511, 228 N.W. at 129.

The only amplification of "law of the road" as that term is used in the *Poneitowcki* case appears in 1940 when the court held driving on the wrong side of the road to be a violation of such law.[20]

(2) Conscientious Exercise of Driver's Skill, Capacity and Experience

In 1934 in accordance with language used in *Cleary v. Eckart*, the court held in *Monsos v. Euler*[21] that the host must conscientiously exercise such skill, capacity and experience as he actually possesses. The use of the term "conscientiously" might be said to imply a deliberate failure to exercise the skill he has acquired. The opinion in *Mauermann v. Dixon*[22] in 1935 seems to support such a construction. The court there inferred that you could not reasonably make a finding that the host had not conscientiously exercised such skill, competency and experience as he possessed unless you could show that he was attempting to commit suicide or do himself great bodily harm. If this view is followed the rule of *Monsos v. Euler* is not of much practical importance. But the decision in *Monsos v. Euler* itself does not seem consistent with such an interpretation. And later cases have taken no notice of *Mauermann v. Dixon*.[23]

It is probable that under the present law if the host is a person of some experience he must exercise the skill that he should have, at least unless he shows that he actually does not have such skill. The cases are not free from doubt on this point, but it seems significant that almost all the cases relieving the host from liability under the limited skill, compentency and experience rule involve situations where the host is either inexperienced in driving a car, or has had no experience with the type of car involved or the general traffic conditions prevalent.

(3) "Traps" in Connection with the Condition of the Driver

In a case where the host knows his own limitations and realizes the risk involved therein and fails to warn his guest who he has no reason to expect will realize these risks, is he liable under the "trap" doctrine? This question has never been squarely decided although

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[20] Tracy v. Malmstadt, 236 Wis. 642, 296 N.W. 87 (1941).
[21] 216 Wis. 133, 256 N.W. 630 (1934).
[22] 217 Wis. 29, 258 N.W. 352 (1935).
[23] Pecor v. Home Indemnity Co., 234 Wis. 407, 291 N.W. 313 (1940).

there is language in the *Eisenhut* case indicating that he may be responsible on this ground.[24] On analogy to liability for "traps" in connection with the condition of the car one would expect a similar rule to apply to the condition of the driver. In fact, if the law here keeps pace with the development in *Campbell v. Spaeth*[25] and similar cases it might be held that the host is responsible for a "trap" if he knew of his own limitations and realized or should realize the risk involved therein and failed to warn his guest.

B. Limitations on Liability Based on Consent

1. Cases Before 1934

The Wisconsin Supreme Court has often referred to assumption of risk as a form of contributory negligence.[26] As late as 1931, in *Biersach v. Wechselberg*, the court said:[27]

> "To the lay mind at least the term 'assumption of risk' is distinguished from that of 'contributory negligence' because contributory negligence involves fault and assumption of risk does not. While the notion of fault is involved in so-called assumption of risk it is not so apparent."

If this is an accurate expression of the assumption of risk doctrine, it is merely the law of negligence in operation. It is settled that a negligent act may be one which involves an unreasonable risk (a) although it is done with reasonable care, skill, preparation and warning, or (b) only if it is done without reasonable skill, preparation or warning.[28] Some will probably contend that negligence does not extend beyond the field of pure inadvertence, but this is not a tenable position. The present trend of the authorities supports the view that it may be negligent to deliberately encounter a known risk. Wisconsin adopted this theory as early as 1868.[29] A clear expression of it is found in 1879 in *Goldstein v. Chicago, Milw., & St. P. Ry.*[30]

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[24] The court said, "A host might, presumably, under some circumstances, become liable for injuries to a child he permitted to ride in his automobile, but the basis of liability would not be grounded upon inability to exercise skill he did not possess, but upon permitting the child to enter the car under the circumstances involved." 212 Wis. 467, 250 N.W. 441 (1933).

[25] 213 Wis. 162, 250 N.W. 394 (1933).

[26] Dugal v. City of Chippewa Falls, 101 Wis. 533, 77 N.W. 878 (1899); Johnson v. St.P. & W. Coal Co., 126 Wis. 492, 105 N.W. 1048 (1906); Tosty v. Morgan Co., 151 Wis. 601, 139 N.W. 402 (1913).

[27] 206 Wis. 113, 118, 238 N.W. 905, 907 (1931).

[28] Restatement, Torts (1934) §297.

[29] Cornelius, Admr. v. City of Appleton, 22 Wis. 635 (1868); Langhoff v. Milwaukee & Prairie du Chien Ry., 23 Wis. 43 (1868).

[30] 46 Wis. 404 (1879).

The plaintiff in that case was driving his horse and wagon along a narrow unguarded passage which bordered on a canal, when the horse became frightened and backed into the canal. He had driven over the passageway frequently, and was fully aware of the danger involved. In analyzing his conduct, the court said:[31]

> "True, the complaint states that the plaintiff 'carefully and cautiously turned his horse to the outer or canal side', but this averment does not negative his negligence. The negligence is not in the manner of driving, but in attempting to drive there at all."

In numerous other cases, conduct of the plaintiff which exposed him to a known danger created by the defendant has been treated solely as a problem of contributory negligence.[32] In others although the conduct has been labeled assumption of risk, or has been referred to interchangeably as assumption of risk and contributory negligence, the reasonable man standard has been the test uniformly applied.[33] The decision in *Keller v. Port Washington*[34] is an excellent illustration. The action was one against a city to recover for injuries to an automobile which slipped off the street while going up a hill which was covered with ice. The hill had been slippery for several weeks, and the plaintiff knew of its precise condition, having driven over it daily. In considering his conduct, the Supreme Court said that the question was one of assumption of risk which is a form of contributory negligence; that the problem was not whether the plaintiff was negligent in handling his automobile at the immediate time of the injury, but whether he was negligent in attempting to climb the hill at all; that is whether considering all of the circumstances a reasonably prudent man would have acted as the plaintiff did.

These cases fully demonstrate that negligence may be found in unreasonably facing a known risk; but it does not settle our real problem. Is assumption of risk simply a name for this type of negligence on the part of a plaintiff or does it involve some other principle

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[31] *Id.* at 407.

[32] Kenworthy v. Town of Ironton, 41 Wis. 647 (1877); Devine v. Fond du Lac, 113 Wis. 61, 88 N.W. 913 (1903); Ottman v. Wis.-Mich. Power Co., 199 Wis. 4, 225 N.W. 179 (1929); Reiland v. Wis. Valley Elec. Co., 202 Wis. 499, 233 N.W. 91 (1930); Glander v. Milwaukee E. R. & L. Co., 155 Wis. 381, 144 N.W. 972 (1914); McKeigue v. City of Janesville, 68 Wis. 50, 31 N.W. 298 (1887); Kavanaugh v. City of Janesville, 24 Wis. 618 (1869).

[33] Schiffler v. Chicago & N.W. Ry., 96 Wis. 141, 71 N.W. 97 (1897); Haselmaier v. Milwaukee E.R. & L. Co., 185 Wis. 210, 201 N.W. 257 (1924); Douglas v. Chicago, M. & St.P. Ry. Co., 100 Wis. 405, 76 N.W. 356 (1898); Salzer v. City of Milwaukee, 97 Wis. 471, 73 N.W. 20 (1897); Culbertson Adm'r. v. Milwaukee & No. Ry. Co., 88 Wis. 567, 60 N.W. 998 (1894).

[34] 200 Wis. 87, 227 N.W. 284 (1929).

of law? Under the common law the plaintiff's action for negligence was barred if his conduct was designated either contributory negligence or assumption of risk. When courts were asked to settle the matter, they frequently brushed it aside with the observation that if either rule operated the plaintiff was not entitled to recover. Occasionally, however, statutes were passed altering one defense or the other. It then became necessary to take a definite stand.

A situation of this kind was before the Wisconsin Supreme Court in 1915 in *Fandek v. Barnett Record Co.*[35] In that case the person for whose death the action was brought, an employee of the defendant, had been working in the presence of a known danger. The jury found contributory negligence on the part of the deceased barring the action. The trial judge changed this finding on the theory that as it was based solely upon his advertent conduct it was really a finding of assumption risk, and that said defense had been abolished by statute. In reversing this decision, the Supreme Court said:[36]

> "The abolition of the defense of assumption of risk does not absolve the employee from the duty of exercising ordinary care for his own safety. And whenever his failure to do that causes his injury in whole or in part, he is guilty of contributory negligence, irrespective of whether the negligence consists in an omission to discover a danger that ought to be discovered and shunned, or in a careless or bungling manner of doing an act otherwise reasonably safe, or in voluntarily assuming a risk that an ordinarily careful and prudent man similarly situated would not usually assume. Negligence exists when conduct does not measure up to the standard of ordinary care. The defense of assumption of risk abolished by the statute related to such risks as could be assumed within the field of ordinary care . . . There is no other rational line of demarcation."

This opinion clearly implies that assumption of risk involves a principle entirely separate and distnct from that of negligence; that it may be present with or without negligence; that there is no relation between the two. What then is this so-called assumption of risk? It is obvious that it is either a rule of limited duty based on policies governing certain relations or a rule of consent. I am inclined to believe that it is the latter. In either event it undoubtedly will involve the same policy considerations in the administration of the liability of the host to the guest in automobile cases. The plaintiff

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[35] 161 Wis. 55, 150 N.W. 537 (1915). *But cf.* Beck v. Siemers, 174 Wis. 437, 183 N.W. 157 (1921).

[36] *Id.* at 66, 150 N.W. at 541.

should never be barred by this form of assumption of risk unless the facts justify the conclusion that he has fully and freely consented to the risk or risks causing his injury.

It is, of course, well settled that consent by the person involved may bar recovery in a case that would otherwise constitute an intentional tort.[37] Some courts refuse to apply this rule in cases involving criminal acts intended to invade the person.[38] Wisconsin apparently follows this view.[39] The *Restatement of Torts* adopts the opposite rule.[40] But all agree that in general consent by the person invaded defeats the claim in tort that he would otherwise have.

Symmetry of legal rules would imply a similar doctrine in the field of torts based on negligence insofar as the facts justify its application. Apparently it is this doctrine that the courts are attempting to express by the term assumption of risk, but it is hard to isolate it because that term is also loosely used to describe both limitations on duty independent of consent and contributory negligence. It is often said that the doctrine is limited to contracts.[41] On the other hand, the statement also appears that where one voluntarily faces a known danger he assumes the risks connected therewith. I am convinced that the first proposition stated is too narrow; that the last one stated is too broad.

It is frequently said that when one uses a street which is defective with knowledge of the fact that an equally convenient and safer street is available, he consents to the risk. This type of statement gives the rule a bad flavor. It is not a legitimate application of the law of consent. The person using the dangerous street under those conditions may be negligent but that is a separate and distinct question. It in no way tends to prove consent. The nature of the doctrine of assumption of risk as one of consent indicates that its application will be largely limited to the field of voluntary relations, not necessarily, however, contract relations. It is generally difficult in other negligence cases to locate any basis for finding a full and free consent. The mere fact that you know of a defect in a highway or other public place does not indicate that you consent to the risk involved therein when you encounter it. You are entitled by law to be

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[37] RESTATEMENT, TORTS (1934) Ch. 3.

[38] *See* Stout v. Wren, 8 N.C. 420, 9 Am. Dec. 653 (1821); Strawn v. Ingram, 118 W. Va. 603, 191 S.E. 401 (1937); (1938) 22 MINN. L. REV. 546.

[39] Shay v. Thompson, 59 Wis. 540, 18 N.W. 473 (1884); Miller v. Bayer, 94 Wis. 123, 68 N.W. 869 (1896).

[40] RESTATEMENT, TORTS (1934) §60; *cf.* §61.

[41] *See* (1923) 2 TENN. L. REV. 39.

there and free from the risk if it is the result of negligence. Consent can rarely be shown in cases of this kind except by proof that the party was taking advantage of the situation in an attempt to commit suicide.

An examination of precedents indicates that the consent doctrine has flourished in the field of voluntary relations. It has been applied frequently in actions by employees against employers for defects in premises and equipment. Today, however, in a number of jurisdictions, including Wisconsin,[42] this defense has been abrogated by legislation in such actions. The principle has also been used freely in dealing with the liability of a possessor of land toward the various classes of persons entering thereon. More recently it is appearing in the case of the automobile in actions by guests against their hosts. In all of these cases, the claimant's position is dependent on the will of the other party—the employer, the land owner, the car owner—he has no right by law to be where he is. Being there solely at the will of the other party, he comes on the terms put by said party. It is in this that we find the factual foundation for a broad application of rules of consent. The guest has his choice. He is not obliged to go; the host is not obliged to take him.

2. *Walker v. Kroger Grocery & Baking Co. and Scory v. LaFave in 1934*

When the legislature passed the comparative negligence statute in 1931,[43] it was apparent that contributory negligence and assumption of risk would have to be more distinctly defined than had been the custom in the past. In 1934 in *Walker v. Kroger Grocery & Baking Co.*[44] and *Scory v. LaFave*,[45] the Supreme Court held that the guest was completely barred in an action against the host by assumption of risk. The comparative negligence doctrine was held inapplicable to this defense. Although the host is 100% at fault, the guest is not entitled to recover anything if he has assumed the risks involved. These decisions clearly illustrate that we are not dealing with a principle of contributory negligence in any form. Thus, the view stated in 1931 in the *Biersach* case[46] as that of the layman is now the established law of the state. Fault is not involved in this defense.

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[42] WIS. STAT. (1939) §331.37.
[43] WIS. STAT. (1939) §331.045.
[44] 214 Wis. 519, 252 N.W. 721 (1934).
[45] 215 Wis. 21, 254 N.W. 643 (1934).
[46] 206 Wis. 113, 238 N.W. 905 (1931).

It should be remembered, however, that this development has not taken place without dissent. One Supreme Court Justice has consistently opposed it. His views are fully stated in a special opinion in *Scory v. LaFave.*[47] He apparently feels that the host-guest situation is adequately taken care of by the limited duty applied in those cases independent of consent, together with the rules of contributory negligence. However, he apparently would reach the same result as that reached by the majority in an action by the guest against the host by ruling that where the guest voluntarily acquiesces in a known unreasonable risk in the host's method of driving he is not only contributorily negligent but as a matter of law is as negligent as the host and thus barred from recovery against the host under our limited comparative negligent statute.

3. The Test of Consent

We have now isolated our rule to one of consent. The serious question remains of determining how this consent is tested. Opinions written before 1934 are not particularly helpful, because consent was not distinguished sharply from contributory negligence. Naturally, we would expect the test to be stated under those conditions largely in objective terms as is the law of negligence. The earlier cases frequently say that if the guest knew or ought to have known of the risk and fails to object to it, he assumes it. But now that a distinct consent doctrine is recognized, how is it tested?

It is not difficult to find the rule which is now commonly stated. It is phrased exclusively in terms of a real consent. The requirements are commonly enumerated as follows:[48] (1) A hazard or danger inconsistent with the safety of the guest; (2) Knowledge and appreciation of the hazard by the guest; (3) Acquiescence or willingness to proceed in the face of the danger. But can the administration of this rule be reconciled with its statement? The court has been rather liberal in holding that as a matter of law the guest has consented to the risk.[49] In a number of the cases where such a ruling has been made it is difficult to explain it if the issue is solely one of actual consent.

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[47] 215 Wis. 21, 33, 254 N.W. 643, 648 (1934).

[48] Knipfer v. Shaw, 210 Wis. 617; 246 N.W. 328 (1933); Scory v. LaFave, 215 Wis. 21, 254 N.W. 643 (1934).

[49] *See* Knipfer v. Shaw, 210 Wis. 617; 246 N.W. 328 (1933); Young v. Nunn, Bush & Weldon Shoe Co., 212 Wis. 403, 249 N.W. 278 (1933); 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).

Let us look for a moment at the situation in the field of intentional torts. There we find that the consent defense is available if the claimant gives either *actual* or *apparent* consent.[50] In other words even though the party does not intend in his own mind to give consent, he is barred from recovery if his conduct justifies the other party in reasonably inferring that consent has been given. It may be that we are using a similar test in our assumption of risk cases. The court has never mentioned this point. Our formal rule states the requirements for an actual consent. This is, of course, sufficient. But results indicate that the host may also defend by showing an apparent consent; that is, by proving that he was reasonably justified in assuming from his guest's conduct that the guest actually consented to his dangerous driving.

Several interesting features of our consent doctrine were presented to the court recently in *Schubring v. Weggen*.[51] In this case *H* and *G* were both intoxicated. *G* relied on gross negligence and contended that assumption of risk was not a defense in that situation. Gross negligence has been uniformly defined in Wisconsin as in the nature of a constructive intentional tort[52] rather than one based on a high degree of negligence. According to the *Restatement of Torts*[53] an action for recklessness (comparable to gross negligence in this state) is barred by contributory recklessness. A majority of courts, where the issue has been raised, seem to support that proposition. Our gross negligence doctrine has not been altered by the comparative negligence statute,[54] and the issue of contributory gross negligence might have been raised. However, the case was disposed of solely on the assumption of risk defense. This is the first case to specifically present in Wisconsin the question whether that doctrine applies where the host is guilty of gross negligence. The nature of the doctrine would necessarily imply that it does and the court so held. The more aggravated the negligence of the host the more certain that the guest was aware of it and consented to it if he failed to object. It seems clear that if a sober man voluntarily rides with one who is obviously drunk he is barred from recovery for the consequences of drunkenness under the rules that have developed in this state.

A second problem was involved in the instant case due to the fact that *G* was also intoxicated. Counsel for *G* naturally contended

[50] RESTATEMENT, TORTS (1934) §50.
[51] 234 Wis. 517, 291 N.W. 788 (1940).
[52] *Supra* note 11.
[53] RESTATEMENT, TORTS (1934) §482 (2).
[54] Wedel v. Klein, 229 Wis. 419, 282 N.W. 606 (1938).

that if his client was "dead drunk" when he entered the automobile he could not have appreciated the risk. The court decided that *G's* condition did not prevent the application of the assumption of risk doctrine. In making this decision the court placed emphasis on the rule in contributory negligence that voluntary intoxication does not exempt one from his obligation to act with reasonable prudence. However, as our assumption of risk rule is a consent doctrine rather than a fault doctrine, it seems that an analogy in the field of consent to intentional torts more nearly fits the situation. There if the actor is sober and aware of the intoxication of the other party, the latter's consent is ineffective.[55] It is not clear what the rule is where both parties are intoxicated. Suppose in the instant case the driver had been sober and had driven in a negligent or grossly negligent manner. Would *G* be barred from recovery on the ground that if he had been sober he would have realized the danger and objected? It is clear that a negative answer should be given to this question, at least where *H* knows of *G's* intoxication. The decision in the *Schubring* case should be limited strictly to the facts of the case.

G also contended that the doctrine of assumption of risk was inapplicable because one cannot consent to a criminal act under the decisions in *Shay v. Thompson*[56] and *Miller v. Bayer*.[57] As I mentioned earlier the rule of these cases has been severely criticized and is not followed in a number of jurisdictions or in the *Restatement of Torts*.[58] The *Shay* and *Miller* cases were decided over forty years ago. But the court tacitly approves them in the instant case by ruling that their application is limited to situations where there is actual intent to harm, with a few possible exceptions. They are not controlling in cases where gross negligence is involved.

4. Relation Between Risk Assumed and Other Risks Causal to the Injury

It was settled law prior to comparative negligence that contributory negligence in any respect barred an action based on negligence. This is because contributory negligence is improper conduct. Such is not the case with assumption of risk. The bar there is based on consent. Unless such consent can be found as to each risk otherwise actionable the suit is not barred. This point may seem so clear that it

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[55] *See* McCue v. Klein, 60 Tex. 168 (1883); RESTATEMENT, TORTS (1934) §59.
[56] 59 Wis. 540, 18 N.W. 473 (1884).
[57] 94 Wis. 123, 68 N.W. 869 (1896).
[58] RESTATEMENT, TORTS (1934) §60; *cf.* §61.

is unnecessary to state it. It is the view one would expect to be taken and several decisions of the Wisconsin Supreme Court have so held or implied. But two cases which look somewhat in the other direction require us to pause and give some attention to the matter.[59] One is odd because of the language of the opinion; the other because of the result reached in the decision.

In *Kauth v. Landsverk* the court said:[60]

> "In this connection it should perhaps be mentioned that the question submitted to the jury whether the possible assumption of risk was a cause of her injuries was beside the case. The bar from recovery by assumption of risk is not dependent on causal connection with the injuries. While this has perhaps not heretofore been expressly stated in the opinions of the court, it follows from the rule of the *Scory* case, *supra*, if that rule is adhered to, that assumption of risk is not contributory negligence. If it is not contributory negligence, causal relation between the acquiescence and the injuries is entirely immaterial."

This might sound as though it is immaterial whether there is any connection between the risk causing the injuries and the one assumed where some risk is assumed. It does not seem possible, however, that the court could have meant to say this. Obviously the guest is not barred from recovering simply because he assumed some risk that is not causal to the accident. Apparently the court means to point out that the usual proximate cause question has no place in the assumption of risk issue. Thus construed the statement is undoubtedly correct. The actual decision in the case quoted from is entirely consistent with this view. The only negligence involved was that as to speed and that was the negligence which the guest was found to have assumed.

In *Raddant v. Labutzke*[61] there is nothing unusual in the opinion. The statements there are strictly orthodox in every respect, but it is extremely difficult to find an explanation of the result. The jury found *H* negligent as to speed, control and lookout. It also found that *G* assumed the risk of *H's* negligence in each respect mentioned above. The trial court changed each of the answers on the assumption of risk question from "yes" to "no". The Supreme Court ruled that the trial judge was correct in changing the answers as to the

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[59] Kauth v. Landsverk, 224 Wis. 554, 271 N.W. 841 (1937); Raddant v. Labutzke, 233 Wis. 381, 289 N.W. 659 (1940).

[60] Kauth v. Landsverk, 224 Wis. 554, 559, 271 N.W. 841, 843.

[61] 233 Wis. 381, 289 N.W. 659 (1940).

assumption of risk of *H's* negligence as to control and lookout because there was neither time nor occasion to object to such acts. However, it was decided that the evidence supported the finding of the jury that *G* assumed the risk as to speed. The court then held without additional explanation that *H* should have had judgment on the verdict in view of *G's* assumption of risk. Apparently this conclusion must be explained on one of two grounds. It may be that the negligence as to control and lookout was so related and intermixed with that as to speed that assumption of risk as to the latter necessarily included the former.

Early cases tended to keep acts of negligence completely distinct for assumption of risk purposes. Thus, in *Krause v. Hall*[62] where *H* was one arm driving at an excessive speed and crashed into a freight train, the court held that *G*, his girl friend, may have assumed the risk as to lookout but this did not include speed. But later decisions have made it clear that acts of negligence may be so blended that assumption of risk of one necessarily carries with it certain others. For example, in *Young v. Nunn, Bush and Weldon Shoe Co.*,[63] it was held that when *G* assumes the risk of negligence which leads to an emergency it is impossible to isolate this from *H's* further negligence in handling himself in this emergency. *G* assumes the latter also. Likewise, in *Scory v. LaFave*[64] where *G* assumed the risk of *H's* negligence in parking on the left side of the road, it was held that this included *H's* further negligence in turning on her country driving lights as a car approached although there was no showing that *G* knew of this latter act on *H's* part. But in all instances where the court has held that the assumption of one risk includes other related risks, it has carefully explained the way in which the acts were related. The point is not even mentioned in the *Raddant* case. On the contrary, the approval of the trial court's action in reversing the jury and ruling that *G* had not assumed the risk of lookout and control would seem to indicate that the Supreme Court did not have this feature in mind.

The only other explanation seems utterly untenable. It is that assumption of risk in one respect bars *G's* relief irrespective of the number of acts of negligence committed by *H*. As I mentioned earlier, such a conclusion would be contrary to reason and to many decisions of the court. This leaves us without a satisfactory explana-

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[62] 195 Wis. 565, 217 N.W. 290 (1928).
[63] 212 Wis. 403, 249 N.W. 278 (1933).
[64] 215 Wis. 21, 254 N.W. 643 (1934).

tion of the decision in *Raddant v. Labutzke*, but that seems much better than to construe the case to establish a rule that is clearly unsound.

C. Negligence of the Guest

1. In Connection with His Right to Recover

a. In General

In early Wisconsin law the negligence of the host was imputed to the guest, at least in actions by the guest against a third party.[65] But this rule was repudiated in 1921 in *Reiter v. Grober*.[66] Questions immediately arose with reference to the responsibility of the guest for the operation of the car. The court adopted the view that the guest was obliged to exercise reasonable care for his own safety.[67] He could not rely blindly on the driver. He was required, for example, to keep a reasonable lookout,[68] although this did not mean that he must do as much in this connection as the driver.[69] A failure on the part of the guest to exercise reasonable care if a proximate cause of his injuries barred his action at common law against either the host or a third party. Today it is assessed against him under the comparative negligence statute.

b. Voluntary Acquiescence in Host's Defective Driving

The guest's voluntary acquiescence in the host's defective driving presents a particularly interesting question. Courts in a number of states apparently treat that as purely a problem of negligence on the part of the guest.[70] Many members of the bar have urged that this same policy should be followed in Wisconsin. But we have seen that the court has definitely rejected this view. Such a showing is a consent to the risk of the host's driving under Wisconsin law and completely bars an action by the guest against the host. Naturally then the host is not particularly interested in whether this acquiesence also constitutes negligence on the part of the guest. But in cases where

[65] Prideaux v. Mineral Point, 43 Wis. 513 (1878).
[66] Reiter v. Grober, 173 Wis. 493, 181 N.W. 739 (1921).
[67] Howe v. Corey, 172 Wis. 537, 179 N.W. 791 (1920); Wappler v. Schenck, 178 Wis. 632, 190 N.W. 555 (1922); Teas v. Eisenlord, 215 Wis. 455, 253 N.W. 795 (1934).
[68] Rock v. Sarazen, 209 Wis. 126, 244 N.W. 577 (1932).
[69] Tomberlin v. Chicago St.P., M. & O. Ry., 208 Wis. 30, 242 N.W. 677 (1932).
[70] Frank Machen, *The Contributory Negligence of Automobile Passengers* (1930) 78 U. of Pa. L. Rev. 736.

the guest has not consented to all of the risks which are otherwise actionable this element may be important as a means of decreasing the guest's recovery under comparative negligence. It may be urged, however, that the negligence of the host which the guest has consented to should not be used against the host in computing comparative negligence. If that view is accepted, should the guest's negligence, if any, in acquiescing in the risk be used against him? More important, in all cases where the guest sues a third party, the guest's possible negligence in this respect is a vital factor.[71] In those cases the consent doctrine is no protection to the third party. He is unable to show that the guest consented to his negligent driving. If he is to make any use of the guest's consent to the host's dangerous driving, it must be by showing that it is unreasonable under the circumstances and thus an item of contributory negligence.

The thought is expressed at times that this acquiescence must be treated as either assumption of risk or contributory negligence; thus implying that it is impossible for both doctrines to operate on the same facts. This position is clearly unsound. If a consent is factually present the law gives such effect to that consent as it deems proper. This does not in any way alter or interfere with the operation of ordinary rules of negligence. The plaintiff must exercise reasonable care in this respect for his own safety as in other respects. There is no per se connection between the two issues. One is dependent upon the consent of the party. It is decided without any relation to fault. The other is based solely on fault. It is in no way dependent on consent, but the fact of consent does not automatically cancel the fault.

The great mass of Wisconsin cases clearly support what has been said.[72] It is hard to justify any other conclusion. But before dismissing the matter I wish to say a few words about certain misleading language in the opinion in *Scory v. LaFave*.[73] In portions of the opinion the court appears to fully recognize that one may be negligent in the way I have suggested. But it also approves the statement of an earlier case which implies otherwise. The statement is based on section 495 of the *Restatement of Torts*.[74] Unfortunately this Section standing alone, is misleading in this respect. The *Restatement* as a

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[71] Brubaker v. Iowa County, 174 Wis. 574, 183 N.W. 690 (1921); Sommerfield v. Flury, 198 Wis. 163, 223 N.W. 408 (1929).

[72] Howe v. Corey, 172 Wis. 537, 179 N.W. 791 (1930); *supra* note 71.

[73] 215 Wis. 21, 254 N.W. 643 (1934).

[74] Tentative Draft No. 10, §31.

whole,[75] however, leaves no doubt of its meaning. Its effect is clearly different than the language of the court indicates. Justice Fowler refers carefully to the matter in a special opinion. He says:[76]

> "Under that statement (the one adopted by the majority) Miss Scory could not have been guilty of contributory negligence as to Swanson unless she had ability to control the conduct of Mrs. LaFave. This ignores the proposition that has always obtained under the common law that one could not recover for the negligence of another if his own negligence contributed to produce his *injuries*. It must be borne in mind that contribution to the injury to the plaintiff, not contribution to the accident that caused his injury, is the only contribution that is essential to contributory negligence. Thus one who carelessly takes a position of danger is guilty of contributory negligence, although his conduct has nothing to do with the accident caused by the negligence of another in which he sus-

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[75] Section 466 provides:

"The plaintiff's contributory negligence may be either

(a) an intentional and unreasonable exposure of himself to danger created by the defendant's negligence of which danger the plaintiff knows or has reason to know, or

(b) conduct which, in respects other than those stated in Clause (a), falls short of the standard to which the reasonable man should conform in order to protect himself from harm."

Comment *e* states:

"A common form of the type of contributory negligence dealt with in Clause (a) consists of the plaintiff's entrusting his safety to a third person whom he knows to be incompetent, customarily negligent or ill-equipped. Thus, if a plaintiff rides in an automobile knowing that the driver is drunk, ignorant of driving or habitually reckless or careless or that the machine has insufficient brakes or headlights, he can ordinarily not recover against the defendant through whose negligence an accident occurs, if the drunkenness, incompetence or carelessness of the driver or the bad condition of the vehicle is a contributing factor in bringing about the accident. However, special circumstances may make such conduct reasonable and so prevent it from being contributory negligence, as when he cannot otherwise preserve some interest of sufficient value to justify the risk which his conduct entails. Thus, it is not contributory negligence to accept or solicit a ride from a driver who is known to be incompetent if there is no other way of getting one's seriously injured child to a hospital. Where the plaintiff is ignorant of the person by whom, and the vehicle in which he is offered a ride until after the ride has begun, he may be negligent in not asking to be allowed to get out of the car. Whether his failure to do so is contributory negligence depends upon the circumstances in the particular case. A factor of particular importance is the extent of the known incompetence or carelessness of the driver or of the bad condition of the car as compared with the disadvantages of the position in which the plaintiff will be if he leaves the car. Thus, if the incompetence of the driver is discovered at a point at which the plaintiff might obtain other means of transportation or without danger or serious inconvenience walk home or to his destination, it would be contributory negligence to continue in the car. On the other hand, if the incompetence is not discovered until the vehicle is on a lonely road in a part of the country with which the plaintiff is unfamiliar, particularly if late at night, it may be the part of prudence to remain in the vehicle, unless the driver is so reckless or incompetent that a reasonable man would recognize that there was a great likelihood of an accident."

[76] 215 Wis. 21, 37; 254 N.W. 643, 650.

tains his injuries. See *Wiese v. Polzer* 212 Wis. 337, 345, 248 N.W. 113, and the railroad and street railroad cases there cited, wherein the plaintiff occupied a place upon the platform or steps of cars or trains that collided with obstacles. Taking the position of danger did not operate to cause the collision involved, but was nevertheless contributory negligence. I make bold to suggest that in final analysis it will be found that the statement quoted in the opinion of the court herein from the opinion in the *Colby Cheese Box Co. case, supra,* must be limited to cases wherein the defendant seeks recovery from the plaintiff by counterclaim on the ground of the latter's negligence. A plaintiff is not liable to the defendant (Miss Scory would not be liable to Swanson) unless the plaintiff's (Miss Scory's) conduct squared with the statement in the opinion. But a plaintiff might be barred from recovery at common law by his contributory negligence in putting himself in a position of danger, although his act in so doing had no connection whatever with causing the accident in which he sustained his injury."

2. In Connection with the Guest's Liability to Third Persons

The Supreme Court has never had to decide whether the guest is liable to third persons for his failure to exercise reasonable care for his own safety. When the question is presented it is likely that the court will hold that the guest has no duty in this respect to others; that consequently he is not negligent toward them. It is probable that to this extent the statements approved by the majority in *Scory v. LaFave*[77] are sound. Of course, there may be cases of a guest-owner who is held under a duty to third persons because of his right to control the acts of the driver;[78] but these are not the ordinary cases.

D. Extent to Which Host-Guest Rules Govern Various Driver-Passenger Relations

The court held at an early date that no distinction would be drawn between a guest who was present by formal invitation and one who was there at his own suggestion or request.[79] In 1929 in *Sommerfield v. Flury,*[80] counsel for the claimant urged that several grades of relationship should be recognized with varying degrees of responsibility. The court denied the validity of these arguments. It decided that the parties would uniformly be treated as members of a conven-

[77] 215 Wis. 21, 254 N.W. 643 (1934).
[78] Restatement, Torts (1934) §308; *see also* §491.
[79] Mitchell v. Raymond, 181 Wis. 591, 195 N.W. 855 (1923).
[80] 198 Wis. 163, 223 N.W. 408 (1929).

tional host-guest relation unless the driver was found to be in a joint enterprise with the passenger or an agent of the passenger. Naturally, of course, passengers in vehicles for hire would also be excluded from the host-guest relation.

The *Sommerfield* case carried a strong implication that the relation of joint enterprise or agency would effect the rights of the passenger against the driver.[81] It is uniformly established law that the negligence of a driver who is the agent of or in a joint enterprise with the passenger will be imputed to the passenger in his action against third parties.[82] There are relatively few cases on the effect of the relation in an action by the passenger against the driver. But the established agency rule in general and the great weight of authority in the few automobile cases that have been decided is that the negligence is not imputed in such an action.[83] This question was squarely presented to the Wisconsin Supreme Court in 1934 in *Archer v. Chicago, M. St.P. & P. Ry.*[84] The court adopted the general rule, and refused to impute the negligence. In addition the court concluded that:[85]

> "The relationship between the parties has the same legal consequences, so far as their liability to each other is concerned, as though the driver were the host and the plaintiff the guest. In view of these conclusions a summation of the case that would be proper in a host-guest situation would not be judicially erroneous in this case. Plaintiff is subject to the defense of contributory negligence, and is probably barred if she has assumed any of the items of negligence which constitute the foundation of her recovery, although in view of the state of the record it is not necessary to determine this question."

It appears from these decisions that the only cases not treated as conventional host-guest cases insofar as the action is by a passenger against his driver are those involving a carrier for hire. The effect of the special rules we have been considering on those cases has not been seriously litigated. It is clear that the limits on duty under *O'Shea v. Lavoy*,[86] *Cleary v. Eckart*[87] and similar cases are not available as a defense. The passenger, of course, may be guilty of

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[81] *Ibid.*
[82] RESTATEMENT, TORTS (1934) §491.
[83] *See* (1932) 20 CALIF. L. REV. 458; (1928) 13 MINN. L. REV. 71; (1929) 2 SO. CALIF. L. REV. 193; (1929) 4 WASH. L. REV. 142.
[84] 215 Wis. 509, 255 N.W. 67 (1934).
[85] *Id.* at 515; 255 N.W. at 70.
[86] 175 Wis. 456, 185 N.W. 525 (1921).
[87] 191 Wis. 114, 210 N.W. 267 (1926).

contributory negligence,[88] but a strong showing will be required before such a finding is permitted.

Is assumption of risk as a doctrine of consent available in the case of a paid carrier? Where such carrier is a common carrier, obliged to take impartially, it seems impossible to justify a finding of consent merely because the passenger is aware of defective handling of the cab by the driver. He is entitled by law to the normal facilities of the cab free from these dangers. His failure to leave the cab or even to object does not indicate a consent on his part. But suppose the passenger requests a service that the company is not obliged to provide; one which in fact it is illegal for it to furnish. For example, the passenger directs the driver to violate all speed rules and as a result of excessive speed an accident occurs. Shouldn't it be held that he has consented to this risk?

An interesting case was presented to the Supreme Court in 1939.[89] The plaintiffs hired a cab. In the course of the ride they drank a large quantity of intoxicating liquor and on their invitation the cab driver joined them. The taxi slipped in the ditch and tipped over. The jury found the driver negligent as to speed, lookout, control and driving while intoxicated. Judgment was entered for the plaintiffs for full damages. On appeal, the Supreme Court held that a question of comparative negligence should have been left to the jury. The defendant had argued that the plaintiffs assumed the risk. The court disposed of this by saying:[90]

> "The defendants base their claim that a directed verdict should have been directed upon the proposition that the plaintiffs, in starting on the return trip with a drunken taxi driver, assumed the risk of injury through his conduct resulting from his intoxication. Were this the only act of the plaintiffs involved in the case this would be an interesting and perhaps a controlling point necessary to decide. But the plaintiffs not only voluntarily got into the car with an intoxicated driver (according to the allegations of the company, the admissions of the defendants and the findings of the circuit judge) whose intoxication was a proximate cause of their injuries, but they by their own acts furnished and invited him to partake of the liquor which produced his intoxication. This was an act that might properly be found to be contributory negligence of the plaintiffs. It has been so held in the only cases cited to us involving an intoxicated taxi driver and his passenger in which the passenger supplied the liquor that produced his intoxication."

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[88] Scales v. Boynton Cab Co., 198 Wis. 293, 223 N.W. 836 (1929).
[89] Arneson v. Buggs, 231 Wis. 499, 286 N.W. 19 (1939).
[90] *Id.* at 502, 286 N.W. at 20.

The court's view is hard to understand. Of course, there is evidence of contributory negligence on the part of the plaintiffs. But it also seems that there is evidence that the plaintiffs fully consented to the drunken driving. That would completely bar the action if found unless the findings of negligence by the defendant as to speed, lookout and control were isolated from the drunkenness and held not covered by the consent.

CONCLUSION

It is apparent from this brief review of Wisconsin cases that we have applied a number of legal devices to limit the liability of the host to his guest in automobile cases. I have never made a complete study of all the cases in any other single jurisdiction. But general reading on the subject leads me to believe that common law developments in this respect in Wisconsin have been more comprehensive than in any other state.

In approximately twenty states statutes have been passed limiting the liability in actions by guests against hosts to wanton conduct or its equivalent.[91] These statutes, of course, set up an entirely different test for determining liability from the one used in Wisconsin. But the net effect on recovery of guests as a class is not materially different. The policy underlying this legislation may be urged in justification of the action taken by our Supreme Court in its interpretation of the common law.

Special rules, statutory or common law, regulating the liability of the host to his guest in automobile cases face their most severe test in their effect on the rights of third parties. In the land cases, this problem is conspicuously absent. The only persons commonly involved there are the licensor and the licensee. In automobile cases, the driver of another car is frequently in the picture. The various elements which determine the liability of the host to the guest are entirely beyond the control of the third party. Nevertheless, these elements may vitally affect his ultimate responsibility. He is normally entitled in Wisconsin to contribution in equal proportions from a party whose negligence combines with his in causing damage to a

[91] *See* Appleman, *Wilful and Wanton Conduct in Automobile Guest Cases* (1937) 13 IND. L. J. 131; Hodges, *The Automobile Guest Statutes* (1934) 12 TEX. L. REV. 303; Note (1932) 18 IOWA L. REV. 78; Note (1935) 8 So. CALIF. L. REV. 140; Note (1936) 10 U. OF CINCINNATI L. REV. 289.

claimant.[92] Where one of the host-guest rules destroys liability of the host that right of contribution is lost.[93] In addition in such a case, under the law of this state, the third party is also forced to bear the host's negligence in full in determining how much the recovery of a contributorily negligent guest is reduced.[94] It may be socially desirable to handle the interests of the host and guest among themselves as we now do. But if we continue this policy some steps should be taken to prevent these special rules from prejudicing the position of third parties.

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[92] Ellis v. Chicago & N.W. Ry., 167 Wis. 392, 167 N.W. 1048 (1918); Wait v. Pierce, 191 Wis. 202, at 225, 210 N.W. 822 (1926). This rule is not changed by our Comparative Negligence Law. Wedel v. Klein, 229 Wis. 419, 282 N.W. 606 (1938).

[93] Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934).

[94] *Ibid.*