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# Torts—Assumption of Risk by Driving Instructor

John J. Callahan

## TORTS—ASSUMPTION OF RISK BY DRIVING INSTRUCTOR

Plaintiff voluntarily accompanied defendant, who had just received a learner's permit, in defendant's car for the purpose of teaching her to drive. Injured in an ensuing accident, plaintiff brought this action for negligence. *Held:* Failure to charge separately as to assumption of risk constituted reversible error. *Le Fleur v. Virgilia,* 280 App. Div. 1035, 117 N. Y. S. 2d 244 (4th Dep't 1952).

The rule that a passenger assumes the risk of his driver's inexperience and lack of skill, while employed by some jurisdictions, *Cleary v. Eckart,* 191 Wis. 114, 210 N. W. 267 (1926), 51 A. L. R. 576 (1927); *Kelly v. Gagnon,* 121 Neb. 113, 236 N. W. 160 (1931); *Bogen v. Bogen,* 220 N. C. 648, 18 S. E. 2d 162 (1942); *contra: Holland v. Pitachelli,* 299 Mass. 554, 13 N. E. 2d, 390 (1938), has not been directly before the courts of New York. See dissenting opinion of McNamee, J., in *Spaulding v. Mineah,* 239 App. Div. 460, 463, 268 N. Y. Supp. 772, 775 (3d Dep't 1933), *aff'd,* 264 N. Y. 589, 191 N. E. 576 (1934), see *Howard v. Reid,* 225 App. Div. 399 (4th Dep't 1929). However, New York has applied the doctrine of assumption of risk to cases involving mechanical defects in automobiles, *Higgins v. Mason,* 255 N. Y. 104, 177 N. E. 77 (1930); *Lynes v. Debenedictus,* 277 App. Div. 674, 102 N. Y. S. 2d 684 (3d Dep't 1951); blowouts, *Kemp v. Stephenson,* 139 Misc. 38, 247 N. Y. Supp. 650 (N. Y. Cty. Ct. 1931); riding in exposed position, *Wunsch v. Colonial Sand & Stone Co.,* 257 App. Div. 857, 12 N. Y. S. 2d 488 (2d Dep't 1939); riding fire truck on festive occasion, *Nardone v. Milton Fire Dist.,* 261 App. Div. 717, 27 N. Y. S. 2d 489 (3d Dep't 1941), *aff'd,* 288 N. Y. 654, 42 N. E. 2d 746 (1942).

The doctrine of assumption of risk is based on the maxim *Volenti non fit injuria, i. e.,* that to which a person assents is not deemed in law an injury. *Murphy v. Steeplechase Amusement Co.,* 250 N. Y. 479, 166 N. E. 173 (1929), noted, 15 Corn. L. Q. 132 (1930). To invoke the doctrine it is essential that there be: (1) Knowledge and appreciation of the danger on the part of the one assuming the risk, *i. e.,* some foresight of the consequences, *McFarlane v. City of Niagara Falls,* 247 N. Y. 340, 160 N. E. 391 (1928); *Maltz v. Board of Education of New York City,* 114 N. Y. S. 2d 856 (Sup. Ct. 1952); therefore, the doctrine is not applicable if the danger is obscure and unrecognized. *Tantillo v. Goldstein Amusement Co.,* 248 N. Y. 286, 162 N. E. 82 (1928); *Zurick G. A. & L. Ins. Co. v. Childs,* 253 N. Y. 324, 171 N. E. 391 (1930). (2) The risk must have been freely and voluntarily entered into. This consent may be expressed, *Kirshinbaum v. Gen-*

*eral Outdoor Advertising Co.*, 258 N. Y. 489, 180 N. E. 245 (1932); or implied from the parties' conduct under the circumstances. *Ingersoll v. Onondaga Hockey Club*, 245 App. Div. 137, 281 N. Y. Supp. 505 (3d Dep't 1935).

The defenses of assumption of risk and contributory negligence, while closely associated, are entirely distinct. *McEvoy v. City of New York*, 266 App. Div. 445, 42 N. Y. S. 2d 746 (1943), *aff'd*, 292 N. Y. 654, 55 N. E. 2d 517 (1944). Contributory negligence involves some fault or breach of duty on the part of the plaintiff, who has failed to exercise reasonable care for his own safety. PROSSER, TORTS § 51; HARPER ON TORTS §§ 130, 131. On the other hand, assumption of risk may bar recovery even though the plaintiff has been free from any fault. See Warren, *Volenti Non Fit Injuria in Actions of Negligence*, 8 HARV. L. R. 457 (1895).

The court in the instant case, therefore, rationalized that since assumption of risk is a separate defense, it was confusing in the eyes of this court for the trial judge to introduce his charge as to assumption of risk by stating, "It is the law of this state that when a person voluntarily proceeds into a dangerous position, he is usually guilty of contributory negligence if an accident results by reason of that. This is so because when a person assumes a risk which is obvious that fact is to be taken into account in measuring his care or lack of care as I have defined it . . ." Record p. 494. See 10 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE §§ 6627, 6741.

Although the immediate procedural basis for the court's ruling was the failure to instruct separately as to assumption of risk, the court has in effect declared that if the jury finds that one instructing another how to drive an automobile:

(1) Knew of the inexperience and lack of skill of the learner,

(2) Voluntarily entered into this relationship, and

(3) Was injured by reason of this lack of skill and inexperience,

such instructor has as a matter of law assumed the risk and is barred from recovery. In view of the elements of assumption of risk, as previously discussed, this would not seem to be an incorrect application of the doctrine.

*John J. Callahan*