

February 1959

Torts--Assumption of Risk and Contributory Negligence as Separate Defenses

G. H. A.

West Virginia University College of Law

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Recommended Citation

G. H. A., *Torts--Assumption of Risk and Contributory Negligence as Separate Defenses*, 61 W. Va. L. Rev. (1959).

Available at: <https://researchrepository.wvu.edu/wvlr/vol61/iss2/15>

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there must be an actual allocation of the selling price to the respective portions of the property as if there were two separate transactions. Rev. Rul. 286, 1953-2 CUM. BULL. 20.

It is submitted that by application of these regulations the transaction in the principal case can be construed as a sale of a principal residence, with an apportionment of the "boot" received in the exchange between the residence and the other property. This would allocate 90/902 of the "boot" received, or \$1,516.63, to the residence, and the remainder allocable to the farm exchanged, making the taxable gain to the taxpayer as a result of the exchange of like property held for productive use \$13,683.37, the amount which the government contended was correct.

It is contended that the government has provided, in the regulations herein discussed, applicable regulations for this exchange, and that a consideration of them would lend support to the contention made by the government in this novel fact situation.

M. D. W., Jr.

TORTS—ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE AS SEPARATE DEFENSES.—*D* and *P*, residents of Florida, were planning a trip to *D*'s cabin at a lake resort in North Carolina. Upon arrival at the resort but prior to going to *D*'s cabin, *P* and *D* went to the lakeside in *D*'s truck, towing the latter's motorboat on a trailer which was attached to the truck by an old and worn cable. *D* was familiar with the launching procedure but *P* was not. When they attempted to launch the boat, the truck bogged down, and after several unsuccessful attempts to free the boat and truck, *D* requested that *P* push on the rear of the truck as he, *D*, attempted to pull it forward. In the process the cable snapped and severed *P*'s foot. In an action for negligent tort the federal district court, sitting without a jury, found for *P*. Held, on appeal, that *D* was guilty of actionable negligence in using the cable and in failing to warn *P*, and that *P* was not guilty of contributory negligence in standing near the rear of the truck at *D*'s request. *Ferguson v. Smith*, 257 F.2d 694 (4th Cir. 1958).

The court in the principal case concluded that the plaintiff was not a social guest at *D*'s home as they were not on *D*'s property at the time of the accident. Thus *P* was not a licensee.

The court in concluding that *P* was not guilty of contributory negligence ruled out what is possibly the most common defense in a negligent tort action. Contributory negligence is conduct on the part of the plaintiff, which, because he has fallen below the standard of care required of him, has contributed, in a legal sense, to the harm that has befallen him. RESTATEMENT, TORTS § 463 (1934). Contributory negligence is to be distinguished from negligence in its normal interpretation in that the former is conduct by one which creates an unreasonable risk of harm, in a legal sense, to himself, whereas the latter is the creation of an unreasonable risk of harm toward someone other than the actor himself. *Pappas v. Evans*, 242 Iowa 804, 48 N.W.2d 298 (1951). The presence of contributory negligence will bar the plaintiff's action for damages in a majority of jurisdictions. See PROSSER, TORTS § 55 (2d ed. 1955).

On the facts of the principal case, it would seem that *P* might have been guilty of contributory negligence if his injury could have resulted from a failure to discover or appreciate a risk which would have been apparent to a reasonable, prudent man exercising reasonable care, but the court resolved this issue in favor of *P*, indicating that *P* acted as a reasonable man.

A defense that is closely analogous to contributory negligence and is also a very common defense in negligence tort actions is the defense of assumption of risk. The court spoke of this defense only indirectly and in such a fashion as to lead one to believe that it was identical to contributory negligence. However, while under certain circumstances the plaintiff may by the same acts or omissions be guilty of both contributory negligence and assumption of risk, still there is a definite distinction. *Heureux v. Hurley*, 117 Conn. 347, 168 Atl. 8 (1933). The plaintiff may assume the risk voluntarily if the dangers are known even though he exercises due care. *Hunn v. Windsor Hotel Co.*, 119 W. Va. 215, 193 S.E. 57 (1937); *Heureux v. Hurley, supra*. In the *Hunn* case, *supra*, the court in the syllabus said:

"Assumption of risk and contributory negligence are not convertible terms, though sometimes used as such. The essence of contributory negligence is carelessness; of assumption of risk, venturousness. Thus, an injured person may not have acted carelessly; in fact, may have exercised the utmost care, yet may have assumed, voluntarily, a known hazard. If so, he must accept the consequence. This doctrine has developed from the maxim, *volenti non fit injuria*. It rests on two premises: first,

that the nature and extent of the risk are fully appreciated; and second, that it is voluntarily incurred. It was formerly confined by many courts to cases where a contractual relation existed. That limitation is generally no longer regarded."

Thus, assumption of risk consists of a mental state of willingness and knowledge, whereas contributory negligence is a matter of conduct. *Landrum v. Roddy*, 143 Neb. 934, 12 N.W.2d 82 (1943); *Peoples Drug Stores v. Windham*, 178 Md. 172, 12 A.2d 532 (1940).

Assumption of risk can arise out of contract by express agreement or may be implied from the action and conduct of the parties. As there was no contractual relation in the principal case, then if the defense existed it arose by implication. Professor Prosser states that assumption of risk whether it be express or implied means: "By entering freely and voluntarily into any relation or situation which presents obvious danger, the plaintiff may be taken to accept it and to agree that he will look out for himself and relieve the defendant of responsibility." PROSSER, TORTS § 55 (2d ed. 1955). It would seem, therefore, that this statement would be qualified to the extent that if the defendant is guilty of gross negligence, the plaintiff will not be held to have assumed the risk since gross negligence, in the ordinary case, is seldom anticipated, and it is clear that unless it definitely appears from the plaintiff's words and conduct that he does consent to relieve the defendant of his obligation to act toward the plaintiff as a reasonable man he will not be held to have assumed the risk. *Ridgeway v. Yenny*, 223 Ind. 16, 57 N.E.2d 581 (1944). Thus, since *D*'s negligence in the principal case may be said to have approached gross negligence, then it may be said *P* did not assume the risk.

While the court reached a just verdict, the distinction between *D*'s two principal defenses could have been more clearly indicated.

G. H. A.

TORTS—INTERVENING CAUSE—LIABILITY OF ORIGINAL TORTFEASOR FOR SUBSEQUENT DAMAGES TO PROPERTY BY A REPAIRMAN.—*D* chartered a barge from *P*, a barge owner. During the period of the charter the barge was damaged through the negligence of *D* in navigating through ice floes encountered during a journey. *P* and *D* agreed that the barge should be delivered to a drydock where it was to be repaired. Five days after redelivery, while the barge was being placed in drydock, cakes of ice became lodged, through