ASSUMPTION OF RISK AND NEGLIGENCE

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Though the maxim *Volenti non fit injuria* may, as Lord Herschell once said,[1] be founded on good sense and justice, this has not prevented a remarkable division of opinion in the cases and textbooks on the application of the maxim to an action of negligence.

One view is that no duty of care is owed to a person who consents to a risk.[2] This is based on the reasoning that negligence consists in failure to take reasonable care in the circumstances of the case, and that among the factors to be taken into account in deciding whether a defendant acted reasonably is whether and to what extent the plaintiff consented to the risk of injury. As Beven once put it: "Negligence is the failure to bestow the skill and care which the situation demands; therefore, if the situation does not demand it, it is not negligent to omit what is not demanded."[3] According to this view, to ask whether the plaintiff consented to a particular risk of injury is merely another way of asking whether the defendant was negligent in relation to that risk. Once it is held that the plaintiff did consent to the risk, it is therefore unnecessary to consider whether the defendant was negligent; while, on the other hand, once it has been held that the defendant was negligent, it is no longer necessary or permissible to consider whether the plaintiff consented to the risk.

The other view, and the one which has won increasing support of recent years, is that the maxim is a defence to a breach of duty

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[1] [1891] A.C. 325, at p. 360.

[2] Beven, Negligence in Law (4th ed., 1928) vol. I, p. 796; Pollock, The Law of Torts (13th ed., 1929) pp. 168, 172; Salmond, The Law of Torts (11th ed., 1953) p. 40 ("The duty to take care which is necessary to found an action of negligence is negatived by the plaintiff's consent"); Bowen and Fry L.JJ. in *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685, at pp. 697 and 701; Lord Bramwell and Lord Watson in *Smith* v. *Baker*, [1891] A.C. 325, at pp. 344 and 352-3; Asquith J. in *Dann* v. *Hamilton*, [1939] 1 K.B. 509, at p. 512 ("the plea *volenti* is a denial of any duty at all").

[3] *Op. cit.*, *ante*, footnote 2.

and that no question of *volens* arises until it is established that the defendant was negligent.[4]

Statements in support of both these views are to be found in the cases. The clearest expression of the first is contained in the judgments of Bowen and Fry L.JJ. in *Thomas* v. *Quartermaine*,[5] while the principal authority for the second is the speeches of Lords Halsbury and Herschell in *Smith* v. *Baker*.[6] Though the balance of authority at the present time is probably in favour of the second view, that the maxim is a defence to a breach of duty, the dispute cannot be said to have been settled, and in this article arguments will be advanced in favour of the first.

The logic of the view that negligence and assumption of risk are interdependent and that no duty is owed to a person who consents to a risk would seem to be inescapable. As an American writer has said, "the concept of negligence implies the creation of an unreasonable risk of harm. But a risk to which the person threatened, with full knowledge thereof, gives his full and free consent, can hardly be regarded as unreasonable."[7] The contrary view, that the maxim affords a defence to a breach of duty, would seem to ignore the fact that the law is not concerned with negligence "in the air" but only with the breach of a legal duty owing to the plaintiff.

What at first sight might seem to be an acceptable compromise between these two views on the application of the maxim has been put forward by Dr. Glanville Williams,[8] Dr. Ellis Lewis[9] and Professor Street.[10] This is that the plaintiff must prove, before any question of *volens* can arise, that the defendant has committed a "presumptive" tort, that is to say, has been guilty of conduct which would, *apart from the issue of volens*, constitute actionable negli-

[4] Lords Halsbury and Herschell in *Smith* v. *Baker*, *ante*, footnote 2, at pp. 335-6 and 366-7; Lord Oaksey in *London Graving Dock Co.* v. *Horton*, [1951] A.C. 737, at p. 758 ("The maxim *volenti non fit injuria* is a maxim which affords a defence to a person who has committed a breach of duty."); Lord Wright, Invitation, 2 Univ. of West Australia Ann. L.R. 543 at p. 546 ("It [assumption of risk] involves a tort by the defendant and a waiver of the tort by the plaintiff if he consents to assume the danger created by the tort. Its foundation is a breach of duty which the plaintiff may waive if he consents to it."); Clerk & Lindsell on Torts (11th ed., 1954) p. 58; Winfield on Tort (6th ed., 1954 by T. Ellis Lewis) p. 28; Street, The Law of Torts (1955) p. 169; Glanville Williams, Joint Torts and Contributory Negligence (1951) p. 295; Charlesworth, Law of Negligence (3rd ed., 1956) pp. 540-541.

[5] *Ante*, footnote 2.

[6] *Ante*, footnote 2, at pp. 335-6 and 366-7.

[7] F. V. Harper, Law of Torts (1933) p. 25.

[8] *Op. cit.*, *ante*, footnote 4, at p. 295.

[9] *Op. cit.*, *ante*, footnote 4, at p. 28.

[10] *Op. cit.*, *ante*, footnote 4, at p. 169.

gence. "Suppose," says Professor Street,[11] "that X is walking along a busy highway when he is hit by a golf ball struck from a tee placed dangerously near to the highway. If X is an ordinary pedestrian he may be able to sue the golf club in negligence, but if, on the other hand, he is a golfer who is crossing the highway in order to reach the next tee he would be met by the defence of assumption of risk".

The objection, however, to this suggestion is that it still ignores the fact that in order to succeed in an action of negligence the plaintiff must prove the breach of a duty which the defendant owed to him. The duty owed by a defendant is a duty to take reasonable care in all the circumstances of the case. If the plaintiff did in fact consent to the risk of injury, this is one of the circumstances of the case relevant to the question whether the defendant acted reasonably, and one cannot just put it aside in order to establish a "presumptive" tort. In the case instanced by Professor Street, the golfer would be met with a denial that the club was, in all the circumstances of the case, negligent towards him.[12]

It is true that when it does not emerge from the plaintiff's own evidence that he consented to the risk of injury, the practical burden of proving that he did so will lie on the defendant. But this does not entitle one to speak of the *volens* maxim as a defence to a presumptive tort. In an action of negligence, as in other actions, each party adduces evidence of those facts which are in his favour. Though the legal burden of proving negligence lies on the plaintiff throughout, the risk of failing to prove facts in his favour will often lie on the defendant. But we do not ordinarily regard the proof by a defendant of facts relevant to the question whether he acted reasonably, as, for example, where he adduces evidence to show that it was not practicable in the special circumstances of the case to take certain precautions,[13] as a defence to a "presumptive" tort.

We have seen that according to the first view regarding the application of the maxim the issue of negligence and the issue of assumption of risk are interdependent, to ask whether the plaintiff consented to the risk in question being merely another way of inquiring whether the defendant was negligent in the circumstances of the case. Despite the fact that the courts have often dealt with the two issues as distinct and unrelated, the cases, in their results,

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[11] *Ibid.*

[12] *Hall* v. *Brooklands Auto Racing Club*, [1933] 1 K.B. 205.

[13] As in *Latimer* v. *A.E.C. Ltd.*, [1953] A.C. 643, where the defendant showed that it was not practicable in the special circumstances to prevent a factory floor from being slippery.

are not inconsistent with this view. For though the courts have frequently assumed that the *volens* maxim might afford a defence to an established breach of duty, in fact whenever it has been held that the plaintiff consented to the risk, it has always been held either that the defendant was not negligent[14] or that his negligence was not the cause of the plaintiff's injuries.[15] Conversely, whenever the courts have held that the defendant was negligent, they have always held that the plaintiff did not consent to the risk of injury.[16]

Not the least of the advantages that would result from recognising that negligence and assumption of risk are interdependent would be to put an end to the duplication of issues involved in the belief that the two questions are distinct.

Moreover, if it were generally recognised that assumption of risk by a plaintiff is merely one of the factors bearing upon the reasonableness of the defendant's conduct, it would, I think, be clearer that the crucial question is, or should be, not whether the plaintiff did in fact consent to the risk, but whether the defendant reasonably believed that he did so. American courts have expressly recognised this,[17] and it is implicit in two decisions of our own Court of Appeal.[18] One of the most misleading features of many accounts of the *volens* maxim at the present time is the suggestion that the cases turn on the actuality of the plaintiff's knowledge and consent rather than on the reasonableness of the defendant's conduct in the circumstances of the case. If a person takes dangerous work, such as demolishing bombed houses, or watches a danger-

[14] *Smerkinich* v. *Newport Corporation* (1912), 76 J.P. 454; *Taylor* v. *Sims*, [1942] 2 All E.R. 375; *Murray* v. *Harringay Arena Ltd.*, [1951] 2 K.B. 529.

[15] *Torrance* v. *Ilford U.D.C.* (1909), 73 J.P. 225; (1909), 25 T.L.R. 355; *Cutler* v. *United Dairies*, [1933] 2 K.B. 297.

[16] *Yarmouth* v. *France* (1887), 19 Q.B.D. 647; *Obsorne* v. *London & North Western Ry* (1888), 21 Q.B.D. 220; *Smith* v. *Baker*, *ante*, footnote 2; *Williams* v. *Birmingham Battery Co.*, [1899] 2 Q.B. 338; *Baker* v. *James*, [1921] 2 K.B. 674; *Pyner* v. *Bullard* (1897), 14 T.L.R. 57; *Haynes* v. *Harwood*, [1935] 1 K.B. 146; *Monoghan* v. *W. H. Rhodes & Son*, [1920] 1 K.B. 487; *Bowater* v. *Rowley Regis Corporation*, [1944] K.B. 476; *Merrington* v. *Ironbridge Metal Works*, [1952] 2 All E.R. 1101.

[17] In a New York case it was held that the owner of a hockey rink was not required to ask each intending patron whether he had ever witnessed a hockey game before, but might reasonably assume that the danger of being hit by a puck would be understood and accepted: *Ingersoll* v. *Onondaga Hockey Club* (1935), 245 App. Div. 137, 281 N.Y.S. 505 (cited by Prosser, Law of Torts (2nd ed., 1955) p. 310).

[18] *Hall* v. *Brooklands Auto Racing Club*, *ante.*, footnote 12; *Murray* v. *Harringay Arena Ltd.*, *ante.*, footnote 14. In the first of these cases (at p. 214) Scrutton L.J. said that "what is reasonable care would depend on the perils which might be reasonably expected to occur, and the extent to which the ordinary specator might be expected to appreciate and take the risk of such perils".

ous sport, it can hardly be doubted that he will be deemed to have consented to the inevitable risks involved whether or not he actually knew of and consented to them.[19]

The belief that assumption of risk is distinct from the issue of negligence has tended to obscure important changes in the substantive law. An example of this is in the law governing employers' liability at common law. The lot of the injured workman has improved beyond recognition, and looking back today it is clear that the important change occurred in 1891 in *Smith* v. *Baker*.[20] Whereas previously a workman was deemed as a matter of law to have consented to a risk of his employment which he knowingly faced without complaint,[21] it was held by the House of Lords in *Smith* v. *Baker* that assumption of risk is a question of fact which is not concluded by a workman going on with his work with knowledge of a danger. The effect of the decision was to enhance substantially the duty which an employer owes to his workmen, for whereas previously an employer owed no duty in respect of a risk which a workman knowingly faced, the result of *Smith* v. *Baker* is that he must take reasonable care for the safety of his workmen and if he fails to take some practicable precaution he will almost certainly be held liable to an injured workman, even though the latter knew of the risk.[22] But because it was assumed in *Smith* v. *Baker* that the issue of assumption of risk was distinct from the issue of negligence and because the judgments professed to deal only with the first of these issues, the full effect of the decision on the substantive duty of employers was not immediately perceived. In fact, it was not until 1944[23] that the courts gave clear expression to the paternal doctrine, implicit in *Smith* v. *Baker*, that a workman will never be deemed to have consented to any risk of his employment other than those which are ordinarily incidental to it.

So-called general defences to an action of tort, like Act of God, inevitable accident, necessity and assumption of risk, which afford excuse to a person who has acted reasonably in the special circumstances of the case, are in fact inapplicable to torts which, like negligence, are themselves founded on standards of reason-

[19] In *Murray* v. *Harringay Arena Ltd.*, *ante*, footnote 14, it was held by the Court of Appeal that a child of six, taken by his father to watch an ice-hockey match, was deemed to have consented to the risk of being hit by a puck struck out of the arena.

[20] *Ante*, footnote 2.

[21] *Thomas* v. *Quartermaine*, *ante*, footnote 2.

[22] *Bowater* v. *Rowley Regis Corporation*, *ante*, footnote 16; *General Cleaning Contractors* v. *Christmas*, [1953] A.C. 180.

[23] *Bowater* v. *Rowley Regis Corporation*, *ante*, footnote 16.

ableness. Their application is confined to the older sort of tort, like trespass, in which the plaintiff is not called upon to prove that the defendant acted unreasonably. So far as inevitable accident is concerned, this has long been recognised.[24] It is also coming to be realised that the issues of negligence and necessity are interdependent.[25] There is no reason to believe that negligence and assumption of risk are not equally interdependent.

It is not suggested that the conception of assumption of risk has no utility in the law of negligence. It is an important factor bearing upon the standard of care required of a defendant, and the *volens* maxim serves to concentrate attention upon what may be the vital factor in a case. But it is, on this account, no more a defence to an action of negligence than the many other factors, such as the likelihood of injury, the gravity of the injury threatened, the utility of the defendant's conduct and the practicability of precautionary measures, which are nowadays recognized as having an important bearing on the standard of care called for in a particular situation.

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[24] The point was well brought out in *Stanley* v. *Powell*, [1891] 1 Q.B. 86. The plaintiff, a bearer at a shooting party, was injured by a shot, fired by the defendant, which ricocheted off a tree. The jury found that the defendant was not negligent in firing the shot. Of the plaintiff's claim for damages Denman J. said: "If the case is regarded as an action on the case for an injury by negligence the plaintiff has failed to establish that which is the very gist of such an action; if, on the other hand, it is turned into an action of trespass, and the defendant is (as he must be) supposed to have pleaded a plea denying negligence and establishing that the injury was accidental in the sense above explained, the verdict of the jury is equally fatal to the action."

[25] Thus in *Southport Corporation* v. *Esso Petroleum Co. Ltd.*, [1953] 2 All E.R. 1204, where the master of an oil tanker jettisoned several hundred tons of oil in order to save the ship and the lives of those on board, Devlin, J. held in a claim by the Southport Corporation, whose front had been fouled by the oil, that the master had acted reasonably in the circumstances of the case in discharging the oil, and that therefore it was not necessary to consider separately the defence of necessity. (On appeal the question at issue was whether the defendants, the owners of the ship, were required by the pleadings to show that they were not negligent in permitting the ship to get into the predicament in which it became necessary to discharge the oil: [1954] 2 Q.B. 182; [1956] A.C. 218.)