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Assumption of Risk—Basis for Denial of Recovery?

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with the tenet that "the essence of a 'transfer' [for purposes of taxation] is the passage of control over the economic benefits of property rather than any technical changes in its title."[9] The result is further supported by the fact that the incorporators were the shareholders of the corporation, a fact indicative of control remaining static.

Recitation of nominal consideration in quitclaim deeds is desirable as a factor in insuring irrevocability.[10] To hold that such recitation is sufficient to assess a second tax would be to ignore the fact that nothing given by the trustees had been bargained for. As the distribution in *Deer Park* was in satisfaction of the pre-existing rights of the shareholders, so the transfer in the principal case was in satisfaction of the pre-existing right of the transferee corporation. In neither case was there the bargained-for consideration required by the statute.

Since transfers of real property can be accomplished without even nominal consideration, to regard the payment of such consideration as sufficient for purposes of the excise tax would accomplish nothing beyond creating a trap for the unwary. Plaintiffs, for example, could have avoided the possibility of their transaction falling within the provisions of the transfer tax statute by originally taking the property in fee, and making a gift of it to the corporation[11] after acquisition of a few shares of corporate stock. Clearly, the court was correct in its refusal to foster the development of a situation in which the question of imposition of a tax would depend upon the form of the transfer, without regard to its substance.

ASSUMPTION OF RISK—BASIS FOR DENIAL OF RECOVERY?

A recent decision of the Washington Supreme Court casts considerable doubt on the exact status of the defense of assumption of risk, and illustrates a serious problem concerning the judicial process in Washington. The action was brought against a school district for injuries

[9] Sanford's Estate v. Commissioner, 308 U.S. 39, 43 (1939) (dictum).

[10] A conveyance is not a contract, although it results from an agreement, and consideration is not necessary in a deed unless it operates under the Statute of Uses. Most conveyances, however, recite at least nominal consideration in order to rebut the reservation of an equitable estate in favor of the grantor and to furnish support for the conveyance as a bargain and sale. Such acknowledgement is conclusive upon the parties for the purpose of supporting the conveyance. See generally TIFFANY, REAL PROPERTY 680 & nn. 59, 61-64 (new abr. ed. 1940), and cases cited therein.

[11] WASH. REV. CODE § 28.45.010 (1963) provides that the term "sale" "shall not include a transfer by gift, devise, or inheritance...."

received by a spectator at a high school football game. The school district supervised the game, no admission was charged, and the plaintiff, as a relative of one of the football players, was encouraged to attend. The plaintiff, who had previously seen only one football game, was standing about one foot from the side lines when a player was knocked out of bounds and into her, permanently injuring her. The superior court concluded that defendant school district was not negligent, that the plaintiff was contributorily negligent, and that the plaintiff had voluntarily assumed the risk of being injured by standing in close proximity to the side lines. On appeal, the Washington Supreme Court affirmed. *Held:* Assumption of risk is one valid ground for denying a "social invitee" recovery for personal injuries. *Perry v. Seattle School District,* 66 Wash. Dec. 2d 786, 405 P.2d 589 (1965).

Historically, assumption of risk emerged, or at least received its greatest development, from the common-law action of a servant against his master.[1] For many years, Washington recognized assumption of risk as a defense[2] in master-servant relationships.[3] The Washington Supreme Court, however, later overruled those previous decisions and abolished the doctrine as a defense in master-servant cases.[4] Subsequently, the court stated that it had abolished the doctrine in a relationship other than master-servant,[5] and noted with approval decisions from other jurisdictions that treat assumption of risk not as a separate defense, but rather as included within the general concept of contributory negligence.[6]

The court in the principal case did not refer to these recent Washington decisions concerning assumption of risk. The court in the prin-

[1] PROSSER, TORTS 450 n.3 (3d ed. 1964) citing Priestly v. Fowler, 3 Mees. & W. 1., 150 Eng. Rep. 1030 (1837).

[2] Except as otherwise indicated, "defense" is used in this note in a broad sense of denial of relief, including both "no legal cause," which is an affirmative defense with the burden of pleading and proof on the defendant, and "no duty," which is a negation of part of the plaintiff's prima facie case.

[3] See, *e.g.,* Focht v. Johnson, 51 Wn. 2d 47, 315 P.2d 633 (1957). See also Walsh v. West Coast Coal Mines, 31 Wn. 2d 396, 197 P.2d 233 (1948).

[4] Miller v. St. Regis Paper Co., 60 Wn. 2d 484, 374 P.2d 675 (1962); Siragusa v. Swedish Hosp., 60 Wn. 2d 310, 373 P.2d 767 (1962), 38 WASH. L. REV. 349 (1963). For a good historical analysis of assumption of risk in master-servant cases, see Tiller v. Atlantic Coast Line Ry. Co., 318 U.S. 54 (1943) (including Justice Frankfurter's concurring opinion).

[5] Feigenbaum v. Brink, 66 Wash. Dec. 2d 117, 121, 401 P.2d 642, 645 (1965), citing Engen v. Arnold, 61 Wn. 2d 641, 379 P.2d 990 (1963) (business invitee).

[6] Feigenbaum v. Brink, 66 Wash. Dec. 2d 117, 121, 401 P.2d 642, 645 (1965), citing: Ford Motor Co. v. Arguello, 382 P.2d 886 (Wyo. 1963); McGrath v. American Cyanamid Co., 41 N.J. 272, 196 A.2d 238 (1963); Rocky Mountain Trucking Co. v. Taylor, 79 Wyo. 461, 335 P.2d 448 (1959); Howe v. Gambuzza, 15 N.J. Super. 368, 83 A.2d 466 (1951); White v. Ellison Realty Corp. 5 N.J. 228, 74 A.2d 401 (1950); Porter v. Cornett, 306 Ky. 25, 206 S.W.2d 83 (1947).

cipal case stated that, ordinarily, the defense of assumption of risk serves no useful function, since it introduces nothing that is not fully covered either by the idea of an absence of duty on the part of the defendant, or by the concept of contributory negligence of the plaintiff. This statement would seem to be consistent with the statements in the recent cases that appear to abolish the doctrine. However, the court in the principal case reasoned that assumption of risk does focus attention upon the voluntary acceptance of a known risk, which is not always involved in the other ideas.[7] The court cited with approval decisions from another jurisdiction which denied recovery because of assumption of risk by the plaintiff,[8] and, in its holding, the court concluded that a finding of plaintiff's assumption of risk would have been decisive.

Because of the conclusion reached by the court in the principal case, the status of the defense of assumption of risk is very unsettled. Definitive statements can be made only in master-servant cases. It does seem quite clear that assumption of risk as a defense has been abolished in cases in which the servant was injured by the master's negligence.[9] In other relationships, however, the court has not adequately defined the applicability of assumption of risk as a defense.

The Washington court has stated that assumption of risk is the correct terminology only in employment cases, and that the proper doctrine in other cases is *volenti non fit injuria.*[10] This approach has been criticized as a "distinction without a difference," and termed a minority position.[11] Moreover, it appears that the Washington court is moving away from this distinction, as the terminology used in both the prin-

[7] *Accord,* PROSSER, *op. cit. supra* note 1, at 451-52.

[8] Modec v. City of Eveleth, 224 Minn. 556, 29 N.W.2d 453 (1947); Brisson v. Minneapolis Baseball & Athletic Ass'n, 185 Minn. 507, 240 N.W. 903 (1932).

[9] Siragusa v. Swedish Hosp., 60 Wn. 2d 310, 319, 373 P.2d 767, 773 (1962):

> The time has now come, therefore, to state unqualifiedly that an employer has a duty to his employees to exercise reasonable care to furnish them with a reasonably safe place to work. We now hold that if an employer negligently fails in this duty, he may not assert, as a defense to an action based upon such a breach of duty, that the injured employee is barred from recovery merely because he was aware or should have known of the dangerous condition negligently created or maintained. However, if the employee's voluntary exposure to the risk is unreasonable under the circumstances, he will be barred from recovery because of his contributory negligence. Knowledge and appreciation of the risk of injury, on the part of the employee, are properly important factors which should be given weight in the determination of the issues of whether the employer is *negligent* in maintaining the dangerous condition and whether the employee is *contributorily negligent* in exposing himself to it.

[10] See, *e.g.,* Walsh v. West Coast Mines, 31 Wn. 2d 396, 408, 197 P.2d 233, 239 (1948).

[11] PROSSER, *op. cit. supra* note 1, at 450; See also R. Keeton, *Assumption of Risk in Products Liability Cases,* 22 LA. L. REV. 122, n.1 (1961).

cipal case and *Feigenbaum v. Brink*[12] was assumption of risk rather than *volenti non fit injuria*. Since the Washington court seems to have abandoned the distinction, discussion in this note will be in terms of assumption of risk.

In landlord-tenant relationships, use of assumption of risk may have been abolished. Four members of the court[13] in *Feigenbaum* reasoned that it should be abolished, citing *Siragusa v. Swedish Hospital*[14] and *Engen v. Arnold*.[15] However, the concurring opinion in *Feigenbaum*, although agreeing with the result, disagreed with abolishing assumption of risk. Consequently, the decision in *Feigenbaum* probably must be limited to its facts.[16]

In "invitee" cases, the use of assumption of risk is extremely confused. The court in *Feigenbaum* stated that the defense of assumption of risk had been abolished in an "invitee" case, citing *Engen v. Arnold*. The court in *Engen* did state that the instruction to the jury on assumption of risk should be redrafted in consonance with the holding in *Siragusa*. However, it appears from both the reported decision and the briefs that abolition of the defense of assumption of risk was not in issue in *Engen*.[17] *Engen* was "a business invitee" case, and consequently, it may be distinguishable from the "social invitee" facts of the principal case. The court in the principal case, however, did not even mention *Engen*. It is quite probable that the failure to discuss

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[12] 66 Wash. Dec. 2d 117, 401 P.2d 642 (1965).

[13] Judges Ott, Donworth, Hamilton and Hardyn B. Soule (pro tem.).

[14] 60 Wn. 2d 310, 373 P.2d 767 (1962).

[15] 61 Wn. 2d 641, 379 P.2d 990 (1963).

[16] Judge Hill wrote the concurring opinion. Not only was there not a majority favoring abolition (four-one-four split), but, in addition, Judge Hardyn B. Soule, who was sitting pro tem, was one of the four members advocating abolition. Judge Soule was sitting in his capacity pursuant to the legislative policy declaration in WASH. REV. CODE § 2.04.240 (1965):

> Whenever necessary for the prompt and orderly administration of justice ... a majority of the supreme court may appoint any regularly elected and qualified judge of the superior court or any retired judge of a court of record in this state to serve as judge pro tempore of the supreme court.

This procedure undoubtedly assists the court in handling its tremendous workload, and there is little criticism of this procedure when the court is sitting in departments. When sitting en banc, however, the drawbacks in using the pro tem system may well outweigh any benefit.

One of the principal advantages of stare decisis is that it lends predictability to the law. By their very nature, appellate cases are close questions, and grave doubt is raised as to the precedential value of decisions rendered by a divided court containing a pro tem judge. *Feigenbaum* serves as an illustration of this problem. Had the vote been five to four in favor of abolition of assumption of risk, with the pro tem judge voting for abolition, the rule of law could be quickly and unpredictably changed with a change in the pro tem judge. If a case is sufficiently important to be heard en banc, it should be heard by all nine regular judges.

[17] Brief for Appellant, p. 22; Brief for Appellee, p. 26, Engen v. Arnold, 61 Wn. 2d 641, 379 P.2d 990 (1963).

Engen was due to oversight rather than to a reasoned policy decision. Nevertheless, the principal case is the more recent statement, and the court gives complete support to the use of assumption of risk as a defense.[18]

The court should decide on a definite approach to assumption of risk, and should consistently apply the approach adopted. What the proper approach should be has been a subject of considerable controversy among commentators. There has been a strong movement among certain legal scholars to abolish the defense in all cases other than express agreements to assume.[19] The basic argument is that assumption of risk serves no function that is not included in the concepts of lack of duty or contributory negligence. Certainly not all writers in the field are in agreement; some feel assumption of risk has merit as an independent defense, which must be preserved.[20]

A suggested approach would be to recognize assumption of risk as an affirmative defense, with the burden of pleading and proof on the defendant, in cases in which the plaintiff actually agreed to assume the risk. Agreement cases would include both express and implied-in-fact agreements.[21] In non-agreement situations, analysis would be in terms of absence of duty or contributory negligence, rather than assumption of risk. This is basically the approach taken by the New Jersey Supreme Court,[22] and, in terms of theoretical soundness and practical applicability, it is perhaps the best. The New Jersey court, attempting to avoid confusion, presents the trier of fact with only two issues, negligence and contributory negligence.[23] The important point is not so much what approach is taken, but that *some definite approach be taken.*

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[18] Judge Hunter concurred in part and dissented in part, and Judge Hale dissented, joined by Judge Hamilton and Chief Justice Rosellini. However, neither of these opinions expressed disapproval of the doctrine of assumption of risk.

[19] See FLEMING, TORTS 249-58 (2d ed. 1961); 2 HARPER & JAMES, TORTS 1162-92 (1956); Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14 (1906); James, *Assumption of Risk*, 61 YALE L.J. 141 (1952); Mansfield, *Informed Choice in the Law of Torts*, 22 LA. L. REV. 17 (1961); Payne, *Assumption of Risk and Negligence*, 35 CAN. BAR REV. 350 (1957); Rice, *The Automobile Guest and the Rationale of Assumption of Risk*, 27 MINN. L. REV. 33 (1943); Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5 (1961).

[20] See PROSSER, *op. cit. supra* note 1, at 453-56; R. Keeton, *supra* note 11.

[21] It has been suggested that it would be difficult to instruct a jury on implied-in-fact agreements of assumption of risk. Juries have been instructed, however, as to implied-in-fact contracts, and the situations seem sufficiently analogous that it should be workable to give instructions on implied-in-fact agreements. See generally P. Keeton, *Assumption of Risk and the Landowner*, 22 LA. L. REV. 108, 112-18 (1961).

[22] McGrath v. American Cyanamid Co. 41 N.J. 272, 196 A.2d 238 (1963); Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90 (1959).

[23] Meistrich v. Casino Arena Attractions, Inc., *supra* note 22, at 96.

The inconsistency in the Washington assumption of risk cases serves to illustrate a serious problem in the judicial process. The language and analysis used by the court in the principal case is contradictory to that used in *Feigenbaum,* yet the cases were decided only five months apart.[24] Possibly the court was dissatisfied with the expressions in *Feigenbaum* that seemed to abolish the defense of assumption of risk. However, if this was the court's reasoning in the principal case, the court should have discussed and overruled or limited *Feigenbaum.* It appears that the failure to discuss the earlier cases was due to oversight rather than choice. *Feigenbaum* was not discussed in either appellate brief. This raises a question of the proper role of the judiciary: should the court sit solely as an arbitrator in an adversary proceeding, or should the court conduct an independent investigation into the state of the law? Certainly, the parties are in no position to complain if the court does no more than read what is cited in the briefs. Society, however, demands more. In a system which places considerable importance on stare decisis, the preferable procedure is for the adversary arguments to serve as an introduction and outline for the court's research. The court should not be limited to the information presented in the appellate briefs, lest the law be *needlessly* confused and unpredictable.

The explanation for the inconsistency may be found in the practical problems facing the court. Appellate courts are traditionally designed to function as multi-judge institutions. They are so designed in order to spread the work load, and because a composite evaluation and disposition of legal problems by courts composed of several judges usually produces better results in terms of justice and order.[25] However, Judge Finley believes that the point of diminishing returns has been reached in Washington. He has stated:[26]

> Instead of functioning as a group whose collective training, experience, wisdom, and judgment can be utilized in evaluating and disposing of cases on appeal, there is a dangerous tendency, almost a necessity, to parcel out the cases proportionately to the individual judges, and to accept and approve their judgment and recommended disposition of such cases. . . . It bears repeating that this problem is not restricted to merely one or two states, but it is chronic in most of them.

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[24] *Feigenbaum v. Brink* was decided on April 29, 1965, and the principal case on Sept. 9, 1965.

[25] Finley, *Some Observations on the Law and the Nature of the Judicial Process,* 35 WASH. L. REV. 1, 5 (1960).

[26] *Id.* at 5-6.

It seems quite likely that the decision in the principal case is the unfortunate consequence of this type of procedure. The net effect of this procedure is that the court tends to be result-oriented. As it appears to have operated in the principal case, the assigned judge wrote an opinion to which the other justices joined or dissented *on result,* and careful attention to theory was neglected. The writer of the majority opinion in the principal case was the author of the concurring opinion in *Feigenbaum,* in which he concurred in the result but disagreed with the abolition of assumption of risk. The writer of the majority opinion in *Feigenbaum* signed the majority opinion in the principal case.[27] It is possible that the latter judge changed his mind, or that the language regarding abolition was unimportant—or that, because of workload pressure, the inconsistency was never discussed and resolved. If the inconsistency is attributable to the decisional procedure forced by the court's tremendous workload, then measures must be taken to improve the situation. An inviting solution is a proposed constitutional amendment which would provide an intermediate appellate court.[28] In conjunction with an intermediate court, the supreme court should have discretionary appellate jurisdiction so that it would have greater control over its workload.

DEFINITION OF GROSS NEGLIGENCE UNDER THE GUEST STATUTE

On a bright summer morning, defendant slowed her automobile, intending to make a left turn. The road stretched dry and straight before her for more than a mile. She turned on her left signal blinker, observed a truck in the distance coming toward her, and looked in her rear view mirror. Seeing a car pulling out to pass her, she slowed further and waited for it to go by. Then she turned abruptly to the left and drove straight into the path of the oncoming truck. Plaintiff passenger, seriously injured in the collision, sued defendant, alleging gross negligence. The trial court sustained defendant's challenge to the evidence, ruling as a matter of law that defendant's actions did

[27] Judge Ott, who wrote the "majority" opinion in *Feigenbaum,* signed the majority opinion in the principal case. Judge Donworth signed the majority opinions in both cases, and Judge Hamilton, who joined Judges Ott and Donworth in *Feigenbaum,* dissented in the principal case, but not because he reasoned that assumption of risk had been abolished in the earlier case.

[28] Washington Judicial Council, Revision of Judicial Article IV of the Washington Constitution (2d proposed draft, docket No. 100, 1962).