

CHAPTER SEVEN DEFENCES

7.2. ASSUMPTION OF RISK

Introductory Note

a) Assumption of risk (as expressed by the maxim *volenti non fit injuria*) is a defence which in theory can be easily distinguished from contributory negligence as it has nothing to do, as a matter of principle, with the plaintiff committing a wrongful act or fault, but on the contrary with some kind of acceptance of risk on his part, based on consent, implicitly or explicitly given. Moreover, the effect of the defence is different from the effect of the defence of contributory negligence as the former operates as a full waiver of liability, and therefore as a complete defence on behalf of the defendant, whilst the latter constitutes a partial defence leading to a reduction of the defendant's liability only. In practice, however, the defence of assumption of risk is often very close to the defence of contributory negligence where it involves some fault on the part of the plaintiff either because he or she is committing a fault in the course of conduct, which he or she voluntarily undertakes (e.g. a rescuer¹), or because accepting to enter into a risky situation) may constitute a fault in itself (e.g. accepting a lift by a drunken driver).

b) Assumption of risk is about the plaintiff exposing himself or herself to an undue risk of harm without a sound reason for doing so. Even if the injured party would not be guilty of fault, exposure to known risk may exonerate the defendant from liability, as such exposure may indicate that the injured party consented to take on himself or herself the risk of harm of a certain sort, provided such consent and the ensuing exoneration of liability are legally effective.²

The answer to the question as to when exposure to risk amounts to consent is generally, as we will see, when the injured party knowingly incurs and assumes a risk. The risk is known when the injured party appreciates the risk involved and yet decides to take it. Knowledge is not sufficient, however. There must also be an assumption of risk. The latter exists when the injured party consents to bear the legal risk of shouldering the consequences of the harm himself and to exonerate the other party from liability, either generally or for certain items of harm or certain grounds of liability.³

¹ The intervention of rescuers can also have an impact on causation: see *supra*, Chapter IV, 4.3.3.

² Honoré at 112 ff., para. 7-163. For a more recent discussion of assumption of risk in the legal systems of Member States of the EU other than the three legal systems discussed hereafter, see von Bar II at 539-547, para. 512-513.

³ Honoré, *ibid.* at 7-164.

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The consent to assume risk can be express or implied, and it can result from an agreement or a unilateral act. Implied assumption of risk “presupposes an understanding and acceptance of the risk and also that the injured party’s decision to incur the risk was taken voluntarily in circumstances which show a willingness to forego his rights”.⁴ Although, as stated, knowledge is not sufficient in itself, it may be evidence of assumption of risk by virtue of an implied agreement or unilateral renunciation of rights.⁵ Assumption of risk by way of explicit consent on the part of the injured party to suffer the very harm later complained of – as when a patient asks a doctor to sterilise him or her – or in the form of a legally valid exemption clause,⁶ are not dealt with herein, such defences being normally raised in a context of contract law.

c) Implied acceptance of risk is considered as an implied exclusion of liability in English and German law but not in French law where acceptance of risk is primarily considered from the point of view of fault.⁷

7.2.1. ENGLISH LAW

Introductory Note

The maxim *volenti non fit injuria* is commonly used to mean that the plaintiff consented to a course of conduct which caused harm to him or her and, by virtue of such consent, lost the right to a remedy in tort. Nonetheless, and although the terminology in case law is by no means consistent, the maxim *volenti non fit injuria* is mainly used in relation to the tort of negligence whilst *consent* is normally the expression used in relation to intentional torts.⁸ *Volenti non fit injuria* is in modern language replaced by “voluntary assumption of risk”.⁹

For the defence to apply, the defendant must prove not only that the plaintiff consented to the risk of actual damage, but also that he agreed to waive his rights in respect of such damage. As a consequence the application of the defence is most straightforward in the case of intentional torts, e.g. where each party to a boxing match consents to being struck by the other. In contradistinction, the application to a negligence action will have less success since it is not possible to foresee the

⁴ Ibid.

⁵ Ibid. at 7-165.

⁶ Subject e.g. to the limitations imposed by national legislation taken pursuant to the Directive 93/13 on Unfair Terms in Consumer Contracts [1993] OJ L 95/29.

⁷ Honoré at 7-166. In German law there is a general doctrine of acting at one’s own risk (*Handeln auf eigene Gefahr*) which may take the form either of an express or implied exclusion of liability: *infra*, 7.2.2., Introductory Note The common law has a similar doctrine of voluntary assumption of risk which comprises both bilateral exclusions, express or implied, and unilateral exclusions: *ibid*.

⁸ Rogers at 845.

⁹ *Ibid*.

circumstances in which the harm will occur, and prior consent will therefore be less likely to have been given with full knowledge and appreciation of the risk.¹⁰

The defence of *volenti non fit injuria* in negligence cases has, moreover, been closely considered and, in consequence, has been severely limited now that contributory negligence is no longer a complete defence, but only a ground for reducing the damages.¹¹ This illustrates that complete defences are on the retreat.

The defence has mainly been relied on in cases of rescuers,¹² car or plane passengers,¹³ and in sporting events.¹⁴ In the case of car passengers the scope of application of the defence is limited by s. 149 of the Road Traffic Act 1988 which prohibits any restriction on the driver's liability to his passenger when required to be covered by insurance.¹⁵ In employer/employee cases the defence is almost bound to fail, as employees are no longer considered to accept risks incidental to their employment.¹⁶ Another situation where the defence of *volenti non fit injuria* is frequently invoked (in combination, often, with the defence of *ex turpi causa*¹⁷) is in cases of a successful or unsuccessful attempt at suicide.¹⁸

*Court of Appeal*¹⁹
Baker v. T.E. Hopkins & Son Ltd

7.E.15.

VOLENTI NON FIT INJURIA IN RESCUER CASES

Rescuer overcome by fumes

For the defendant to be able to rely on the maxim volenti non fit injuria, it must be established that the plaintiff freely and voluntarily, with full knowledge of the nature and the extent of the risk he ran, implicitly agreed to incur it.

¹⁰ *Infra*, 7.E.15, and Note (2) thereunder. See further Markesinis and Deakin at 692-693. See also Lord Denning MR in *Lane v. Holloway*, *supra*, Chapter III, 3.E.30., who accepts that defence applies in the case of "an ordinary fight with fists".

¹¹ Lord Denning in *Nettleship v. Weston*, *infra*, 7.E.16.

¹² *Infra*, 7.E.15.

¹³ *Infra*, 7.E.16. and 7.E.17.

¹⁴ *Infra*, 7.E.18.

¹⁵ *Infra*, 7.E.16., Note (3) and 7.E.17., Note (1), and with respect to the defence of illegality (*ex turpi causa*), see *Pitts v. Hunt*, *infra*, 7.E.28. and notes thereafter.

¹⁶ *Infra*, 7.E.17., Note (2).

¹⁷ *Infra*, 7.3.3, Introductory Note under b).

¹⁸ See *Kirkham v. Chief Constable of Greater Manchester* [1990] 3 All ER 246, where an action in negligence was brought against the police who had failed to pass information on the plaintiff's suicidal tendencies to the authorities of the remand centre, where he committed suicide. In that case Lloyd LJ was inclined to apply the defence against the person committing suicide (or his estate or dependants) but in the end decided not to do so, because he was persuaded that the man committing suicide was not of sound mind, and therefore not "truly volens".

¹⁹ [1959] 3 All ER 225.

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Facts: The defendant company was employed to clean out a contaminated well and decided to use a pump powered by a petrol engine inside the well. Having noticed that the pump produced noxious fumes the director of the company instructed his workmen not to enter the well, but they did and were overcome by fumes. Baker, a doctor, went down in the well with a rope but was also overcome by fumes and died in the well as the two workmen did.

Held: The court of first instance allowed the actions brought by one of the workmen and Dr. Baker, although the workman was found to be contributorily negligent at 10 %. The appeals were dismissed.

Judgment: WILMER LJ: "It seems to me that in this case, as in any case where a plaintiff is injured in going to the rescue of a third party put in peril by the defendants' wrongdoing, the questions which have to be answered are fourfold. (1) Did the wrongdoer owe any duty to the rescuer in the circumstances of the particular case? (2) If so, did the rescuer's injury result from a breach of that duty, or did his act in going to the rescue amount to a *novus actus*? (3) Did the rescuer, knowing the danger, voluntarily accept the risk of injury, so as to be defeated by the maxim *volenti non fit injuria*? (4) Was the rescuer's injury caused or contributed to by his own failure to take reasonable care for his own safety? All these questions are raised by the circumstances of this case, and have been much canvassed in argument before us. I will endeavour to deal with each in turn..."

MORRIS LJ: "Equally unavailing in my judgment is the plea which is expressed in the words *volenti non fit injuria*. In *Letang v. Ottawa Electric Rly Co* [1926] AC 725, at 730, it was said:

'It is quite a mistake to treat *volenti non fit injuria* as if it were the legal equipollent of *scienti non fit injuria*.'

Approval was given of the proposition in the judgment of Wills J in *Osborne v. London and North Western Rly Co* [1888] 21 QBD 220, at 223, that:

'If the defendants desire to succeed on the ground that the maxim *volenti non fit injuria* is applicable, they must obtain a finding of fact that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it.'

In *Dann v. Hamilton* [1933] 1 All ER 59 at 63 Asquith J said:

'When a dangerous physical condition has been brought about by the negligence of the defendant, and, after it has arisen, the plaintiff, fully appreciating its dangerous character, elects to assume the risk thereof, the maxim has often been held to apply, and to protect the defendant.'

If however, A by negligence places B in peril in such circumstances that it is a foreseeable result that someone will try to rescue B and if C does so try – ought C in any appropriate sense to be described as a 'volunteer'? In my judgment the answer is No. I confess that it seems to me to be indeed ungracious of A even to suggest it. C would not have agreed to run the risk that A might be negligent, for C would only play his part after A had been negligent. C's intervention comes at the moment when there is some situation of peril and the cause of or the responsibility for the creation of the peril may be quite unknown to C. If C, actuated by an impulsive desire to save life, acts bravely and promptly and subjugates any timorous overconcern for his own well-being or comfort, I cannot think that it would be either rational or seemly to say that he freely and voluntarily agreed to incur the risks of the situation which had been created by A's negligence. When Dr. Baker arrived at the well, he proceeded to act as the promptings of humanity directed. He tried to save life. He tried to save the defendant company's servants. He was doubtless trying to do the very thing that the company hoped could be done. But in any event what he did was

brought about by and was caused by the negligence of the company. In these circumstances, the company cannot say that he was a volunteer...”

Notes

(1) Rescue cases give rise under English law to different questions set out in the excerpt from Wilmer LJ’s judgment. He answered each of them as follows: (i) There is a duty of care because “Dr. Baker was one of the class who ought to have been within the contemplation of Mr. Hopkins when he brought about the dangerous situation in this well”; (ii) Dr. Baker’s act did not constitute a *novus actus interveniens* as it was likely that a doctor would be called in, and “having regard to the traditions of his profession, would, even at the risk of his own safety, descend the well for the purpose of attempting a rescue”; (iii) the maxim *volenti non fit injuria* is not applicable;²⁰ (iv) Dr. Baker was not guilty of contributory negligence as he had taken the “very wise precaution of securing himself with a rope” which against his will became caught on some obstruction.

Of these four defences only those under (iii) and (iv) constitute proper defences in the sense of this chapter, the first two being defences to prove that two conditions for liability to arise (existence of a duty of care and of causation) are not fulfilled.

(2) As for the maxim *volenti non fit injuria*, Morris LJ’s judgment, and the references to earlier judgments, make it clear that knowing the risk of injury is not enough (‘volenti’ is not the equivalent of ‘scienti’) but that it must be established that “the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, implicitly agreed to incur it” (thus Wills J in *Osborne*, cited in the excerpt) and that the plaintiff “elect[ed] to assume the risk”.²¹ Morris LJ’s judgment indicates why *volenti non fit injuria* cannot be invoked against the rescuer. First of all, because his intervention occurred after a situation of peril had been created as a consequence of the defendant’s negligence, he cannot be regarded as having assumed the risk of the defendant’s negligence. Secondly, he proceeded to act “as the promptings of humanity directed” and thus not as a ‘volunteer’.

(3) A rescuer’s legal position may be looked at from a viewpoint of fault, consent and causal connection.²² However that be, the strong tendency in most systems, also in English law, is towards a lenient assessment of the rescuer’s conduct.²³ That is not different in the case of a professional rescuer, as in *Ogwo v. Taylor*.²⁴

²⁰ See further Morris LJ’s excerpted judgment and Note (2).

²¹ Asquith J. in *Dann v. Hamilton*, also cited in the excerpt; see also *infra*, 7.E.16., Note (2).

²² The position of rescuers from the point of view of causation is examined *supra*, Chapter IV, 4.3.3. See in particular, for English law, *Knightly v. Johns*, *supra*, Chapter IV, 4.E.36.

²³ Honoré at 204, para. 7-154.

²⁴ *Ogwo v. Taylor* [1988] AC 431, [1987] 1 All ER 668. See also the landmark case *Haynes v. Harwood* [1935] 1 KB 146 (CA).

*Court of Appeal*⁵
Nettleship v. Weston

7.E.16.

VOLENTI NON FIT INJURIA IN DRIVER'S CASE

Learner-driver injures instructor

The defence of volenti non fit injuria can only be relied on against a plaintiff who has agreed, expressly or implicitly, to waive any claim for negligence.

Facts: The plaintiff, Mr N, taught a friend, Mrs W, to drive using her husband's car. Despite help and instruction from Mr N, Mr. N's knee was injured when Mrs. W hit a lamppost while turning a corner.

Held: The Court of Appeal found against the learner-driver.

Judgment: LORD DENNING MR: "...The learner-driver may be doing his best, but his incompetent best is not good enough. He must drive in as good a manner as a driver of skill, experience and care, who is sound in wind and limb, who makes no errors of judgment, has good eyesight and hearing, and is free from any infirmity: see *Richley v. Faull and Watson v. Thomas S. Whitney & Co. Ltd.*

The high standard thus imposed by the judges is, I believe, largely the result of the policy of the Road Traffic Acts. Parliament requires every driver to be insured against third-party risks. The reason is that a person injured by a motor-car should not be left to bear the loss on his own, but should be compensated out of the insurance fund. The fund is better able to bear it than he can. But the injured person is only able to recover if the driver is liable in law. So the judges see to it that he is liable, unless he can prove care and skill of high standard: see *The Merchant Prince and Henderson v. Henry E Jenkins & Sons Ltd.* Thus we are in this branch of the law, moving away from the concept: "No liability without fault". We are beginning to apply the test: "On whom should the risk fall?" Morally the learner-driver is not at fault; but legally she is liable to be because she is insured and the risk should fall on her...

The special factor in this case is that Mr N was not a mere passenger in the car. He was an instructor teaching Mrs W to drive. Seeing that the law lays down, for all drivers of motor cars, a standard of care to which all must conform, I think that even a learner-driver, so long as he is the sole driver, must attain the same standard towards all passengers in the car, including an instructor. But the instructor may be debarred from claiming for a reason peculiar to himself. He may be debarred because he has voluntarily agreed to waive any claim for any injury that may befall him. Otherwise he is not debarred. He may, of course, be guilty of contributory negligence and have his damages reduced on that account. He may, for instance, have let the learner take control too soon, he may not have been quick enough to correct his errors, or he may have participated in the negligent act himself: see *Stapley v. Gypsum Mines Ltd.* But, apart from contributory negligence, he is not excluded unless it be that he had voluntarily agreed to incur the risk.

²⁵ [1971] 2 QB 691, [1971] 3 All ER 581. This case is also discussed *supra*, Chapter III, 3.E.17., Note (1).

This brings me to the defence of *volenti non fit injuria*. Does it apply to the instructor? In former times this defence was used almost as an alternative defence to contributory negligence. Either defence defeated the action. Now that contributory negligence is not a complete defence, but only a ground for reducing the damages, the defence of *volenti non fit injuria* has been closely considered, and, in consequence, it has been severely limited. Knowledge of risk of injury is not enough. Nor is a willingness to take the risk of injury. Nothing will suffice short of an agreement to waive any claim for negligence. The plaintiff must agree, expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of reasonable care up to the standard of care that the law requires of him. That is shown in England by *Dann v. Hamilton* and *Slater v. Clay Cross Co Ltd*; and in Canada by *Lehnert v. Stein*; and in New Zealand by *Morrison v. Union Steamship Co. of New Zealand Ltd*. The doctrine has been so severely curtailed that in the view of Diplock LJ: ‘...the maxim, in the absence of express contract, has no application to negligence simpliciter where the duty of care is based solely on proximity or “neighbourship” in the Atkinian sense’: see *Wooldridge v. Summer*.

Applying the doctrine in this case, it is clear that Mr N did not agree to waive any claim for injury that might befall him. Quite the contrary. He enquired about the insurance policy so as to make sure that he was covered. If and in so far as Mrs W fell short of the standard of care which the law required of her, he has a cause of action. But his claim may be reduced in so far as he was at fault himself – as in letting her take control too soon or in not being quick enough to correct her error. I do not say that the professional instructor – who agrees to teach for reward – can like-wise sue. There may well be implied in the contract an agreement by him to waive any claim for injury. He ought to insure himself, and may do so, for aught I know. But the instructor who is just a friend helping to teach never does insure himself. He should, therefore, be allowed to sue...

In all that I have said, I have treated Mrs W as the driver who was herself in control of the car. On that footing, she is plainly liable for the damage done to the lamppost. She is equally liable for the injury done to Mr N. She owed a duty of care to each. The standard of care is the same in either case. It is measured objectively by the care to be expected of an experienced, skilled and careful driver. Mr N is not defeated by the maxim *volenti non fit injuria*. He did not agree, expressly or impliedly, to waive any claim for damages owing to her failure to measure up to the standard. But his damages may fall to be reduced owing to his failure to correct her error quickly enough. Although the judge dismissed the claim, he did (in case he was wrong) apportion responsibility. He thought it would be just and equitable to regard them equally to blame. I would accept this apportionment.”

Notes

(1) In his judgment, Lord Denning MR went very far in finding liability in negligence on the part of the learner-driver. First, he imposed a high standard of care upon the driver notwithstanding her lack of experience (brought about by policy considerations drawn from Road Traffic Acts, as he admits himself).²⁶ Second, he limited the scope of the defence of *volenti non fit injuria* to situations where the willingness of the plaintiff to take the risk of injury results from an agreement,

²⁶ See *supra*, Chapter III, 3.E.17., Note (1).

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express or implied, to waive any claim for negligence. Referring to *Woodridge v. Sumner*,²⁷ he added that the doctrine of *volenti non fit injuria* has been so severely curtailed that in the absence of express contract it “has no application to negligence simpliciter where the duty of care is based solely on proximity or ‘neighbourship’ in the Atkinian sense”, as Diplock LJ said in that case.

(2) Lord Denning’s dictum that nothing short of an express or implied contract will suffice for the defence to apply, has been very much criticized²⁸ as much as Lord Diplock’s dictum to which it refers.²⁹ Markesinis and Deakin write:³⁰

“A contract or notice as such is not necessary. Nor is the defence confined to the case of an agreement to waive a future claim. Consent in the sense of a general assumption of risk can still prevent liability arising”

The reference in that context to Asquith J in *Dann v. Hamilton*³¹ (a case concerning drunken driving) distinguishes two situations. In the first situation, the defendant by his negligence creates a risk of physical danger which the plaintiff, in full knowledge of the risk, chooses to accept regardless. In the second situation, the plaintiff is taken by his words or conduct to consent to a subsequent act of negligence. In that second situation, it is more difficult to establish the defence of *volenti non fit injuria*, and it is worthwhile to quote Asquith J. in that respect.

“Cannot a yet further step be safely taken? I find it difficult to believe, although I know of no authority directly in point, that a person who voluntarily travels as a passenger in a vehicle driven by a driver who is known by the passenger to have driven negligently in the past is *volens* as to future negligent acts of such driver, even though he could have chosen some other form of transport if he had wished. Then, to take the last step, suppose that such a driver is likely to drive negligently on the material occasion, not because he is known to the plaintiff to have driven negligently in the past, but because he is known to the plaintiff to be under the influence of drink. That is the present case. Ought the result to be any different? After much debate, I have come to the conclusion that it should not, and that the plaintiff, by embarking in the car, or re-entering it, with knowledge that through drink the driver had materially reduced his capacity for driving safely, did not impliedly consent to, or absolve the driver from liability for, any subsequent negligence on his part whereby the plaintiff might suffer harm.

There may be cases in which the drunkenness of the driver at the material time is so extreme and so glaring that to accept a lift from his is like engaging in an intrinsically and obviously dangerous occupation, inter-meddling with an unexploded bomb or walking on the edge of an unfenced cliff. It is not necessary to decide whether in such a case the maxim *volenti non fit injuria* would apply, for in the present case, I find as a fact that the driver’s degree of intoxication fell short of this degree. I therefore conclude that the defence fails, and the claim succeeds...”

It has been rightly said³² that Asquith J’s judgment left very little scope for the defence to apply in passenger-driver cases. The defence would apply only when the drunkenness of the driver was “so extreme and so glaring that [it] is like engaging in an

²⁷ *Woodridge v. Sumner* [1963] 2 QB 43, [1962] 2 All ER 978 (CA).

²⁸ Markesinis and Deakin at 696.

²⁹ Rogers at 852-853.

³⁰ Markesinis and Deakin at 696.

³¹ *Dann v. Hamilton* [1939] 1 KB 509 at 516-12.

³² Markesinis and Deakin at 697.

inherently and obviously dangerous occupation”³³, or when the plaintiff had actively participated in encouraging a driver whom he knew to be drunk to drive recklessly and dangerously, trying to frighten members of the public, as in *Pitts v. Hunt*.³⁴ Even in respect of such reckless driving, the doctrine of *volenti non fit injuria* would no longer apply now because of s. 149 of the Road Traffic Act 1988, which prohibits any restriction on the vehicle user’s liability to a passenger in circumstances where the user is required to be covered by an insurance policy and provides that “the fact that a person so carried has willingly accepted as his the risk of negligence on the part of the user shall not be treated as negating any such liability on the part of the user”.³⁵

The foregoing does not prevent, however, that a plea of contributory negligence could be accepted,³⁶ or that as in *Pitts v. Hunt* the plaintiff’s claim would be barred by the maxim *ex turpi causa non oritur actio*.³⁷

*Court of Appeal*³⁸
Morris v. Murray

7.E.17.

VOLENTI NON FIT INJURIA IN DRINKING CASE

Drunken pilot

The maxim volenti non fit injuria applies in a case where the plaintiff knowingly and willingly engages in an intrinsically and obviously dangerous situation.

Facts: The plaintiff was a passenger in an aeroplane which crashed because the pilot, M, was drunk. They had met in a pub. After having several drinks M invited the plaintiff to take a ride in his aeroplane. They drove to the aerodrome where, even though flying had been suspended because of poor weather conditions, they took off downwind and uphill. The plane crashed almost immediately, killing the pilot and seriously injuring the plaintiff.

Held: The Court of Appeal held that any claim in negligence was defeated by the defence of *volenti non fit injuria*.

Judgment: FOX LJ: "... In my opinion, on the evidence the plaintiff knew that he was going on a flight, he knew he was going to be piloted by M and he knew that M had been drinking heavily that afternoon. The plaintiff’s actions that afternoon, from leaving the Blue Boar to the take-off, suggest that he was capable of understanding what he was doing. There is no clear evidence to the contrary. I think that he knew what he was doing and was capable of appreciating the risks. I do not overlook that the plaintiff’s evidence was that, if he had been

³³For such a situation, but then in the case of a drunken pilot, see *infra*, **7.E.17.**

³⁴*Pitts v. Hunt*, *infra*, **7.E.28.**

³⁵See further Markesinis and Deakin at 697.

³⁶Thus *Owens v. Brimmell* [1977] QB 859 (QBD). See also *supra*, **7.E.13.**, Note (3). For further references see Rogers at 857.

³⁷*Infra*, **7.E.28.**

³⁸[1990] 3 All ER 801.

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sober, he would not have gone on the flight. That is no doubt so but it does not establish that he was in fact incapable of understanding what he was doing that afternoon.

If he was capable of understanding what he was doing, then the fact is that he knowingly and willingly embarked on a flight with a drunken pilot. The flight served no useful purpose at all; there was no need or compulsion to join it. It was just entertainment. The plaintiff co-operated fully in the joint activity and did what he could to assist it. He agreed in evidence that he was anxious to start the engine and to fly. A clearer source of great danger could hardly be imagined. The sort of errors of judgment which an intoxicated pilot may make are likely to have a disastrous result. The high probability was that M was simply not fit to fly an aircraft. Nothing that happened on the flight itself suggests otherwise, from the take-off down wind to the violence of the manoeuvres of the plane in flight.

The situation seems to me to come exactly within Asquith J's example of the case where 'the drunkenness of the driver at the material time is so extreme and so glaring that to accept a lift from him is like engaging in an intrinsically and obviously dangerous occupation...' (see *Dann v. Hamilton*).

I think that in embarking on the flight the plaintiff had implicitly waived his rights in the event of injury consequent on M's failure to fly with reasonable care.

The facts go far beyond *Dann v. Hamilton*, *Nettleship v. Weston* and *Slater v. Clay Cross Co. Ltd.* It is much nearer to the dangerous experimenting with the detonators in *Imperial Chemical Industries Ltd. v. Shatwell*. I would conclude, therefore, that the plaintiff accepted the risks and implicitly discharged M from liability from injury in relation to the flying of the plane.

The result, in my view, is that the maxim *volenti non fit injuria* does apply in this case... Considerations of policy do not lead me to any different conclusion. *Volenti* as a defence has, perhaps, been in retreat during this century, certainly in relation to master and servant cases. It might be said that the merits could be adequately dealt with by the application of the contributory negligence rules. The judge held that the plaintiff was only 20 per cent to blame (which seems to me to be too low) but if that were increased to 50 per cent, so that the plaintiff's damages were reduced by half, both sides would be substantially penalised for their conduct. It seems to me, however, that the wild irresponsibility of the venture is such that the law should not intervene to award damages and should leave the loss where it falls. Flying is intrinsically dangerous and flying with a drunken pilot is great folly. The situation is very different from what has arisen in motoring cases."

Notes

(1) The defence of *volenti non fit injuria* was accepted here because the plaintiff was "engaging in an intrinsically and obviously dangerous occupation" – that is the second situation mentioned by Asquith J in *Dann v. Hamilton*³⁹ – so much so that the Court preferred the complete defence inherent in *volenti non fit injuria* to a partial defence of contributory negligence, as applied e.g. in *Owens v. Brimmell*.⁴⁰ In that case contributory negligence was accepted, up to 20 per cent, because the plaintiff accompanied a driver of a car with whom he had been on a 'bout of

³⁹ *Dann v. Hamilton* [1939] 1 KB 509, [1933] 1 All ER 59, discussed *supra*, 7.E.16., note (2); see also *supra*, 7.E.15., Note (2).

⁴⁰ *Owens v. Brimmell* [1976] 3 All ER 765 (QBD), discussed *supra*, 7.E.16., Note (3).

drinking’, and taking in account also that the plaintiff was not wearing a seat belt. In the excerpted case, the Court accepted that the plaintiff, notwithstanding being drunk (but not blind drunk), “knowingly and willingly” embarked on a flight which “had no useful purpose at all”⁴¹ with an intoxicated pilot, and in doing so “implicitly waived his rights” in the event of *consequent* injury. In such a case, there “was no question of compulsory liability insurance and no equivalent to section 149 of the Road Traffic Act 1988”.⁴²

(2) Fox LJ opines in the annotated judgment that *volenti non fit injuria* as a defence is in retreat “certainly in relation to master and servant cases”. That is so, since the Law Reform (Personal Injuries) Act 1948 abolished the doctrine of common employment, a defence linked to the defence of *volenti non fit injuria*, according to which an employee “impliedly took the risk of any injury caused by the negligence of a fellow worker in the same employment”.⁴³ As a consequence the employer who would normally have been *vicariously* liable for the acts of [the fellow worker], would thereby escape liability completely ... and could only be made liable for a breach of his *personal* duty of care towards the employee.⁴⁴

The abolition of common employment as a defence (and the conversion of contributory negligence into a partial as opposed to a complete defence⁴⁵) encouraged the courts to reconsider the scope of *volenti non fit injuria* and to limit its operation.⁴⁶ In consequence the assumption that an employee has accepted the risk of being injured by a fellow employee in the course of his employment, has since then only unexceptionally accepted, as in *ICI v. Shatwell*.⁴⁷ In that case two brothers, both employees working in the defendant’s quarry decided, contrary to the express orders of their employer, to circumvent normal safety procedures without taking the required precautions and thereby causing an explosion to occur which injured the plaintiff. Instead of suing his brother, James, the plaintiff sued the defendant, their employer, on the ground of vicarious liability for James’ acts. The House of Lords held that, in a situation where “two fellow-servants combining to disobey an order deliberately though they know the risk involved” the maxim *volenti non fit injuria* is a complete defence if the employer is not himself at fault and is only liable vicariously for the acts of the fellow employee. Contrariwise, in a situation where two fellow employees collaborated carelessly, only the partial defence of contributory negligence is available.

⁴¹ That would seem to imply that the usefulness of the activity engaged in may have an impact on the application of the maxim, as in the case of rescuers.

⁴² *Markesinis and Deakin* at 697.

⁴³ *Markesinis and Deakin* at 692.

⁴⁴ *Ibid.*

⁴⁵ *Supra*, 7.2.1., Introductory Note.

⁴⁶ *Markesinis and Deakin* at 696.

⁴⁷ *Imperial Chemical Industries v. Shatwell* [1965] AC 656 (HL), per Lord Reid.

*Court of Appeal*⁴⁸
Condon v. Basi

7.E.18.

DEFENCE OF *VOLENTI NON FIT INJURIA* IN SPORTS CASES

Serious leg injury

For liability to occur in competitive sports it must be established either that the defendant failed to exercise a degree of care appropriate in all the circumstances or that he acted in a way to which the plaintiff cannot be expected to consent.

Facts: The plaintiff and the defendant were playing for opposing teams in a football match when the plaintiff suffered serious leg injuries as a result of a foul tackle by the defendant.

Held: The court of first instance found in favour of the plaintiff. The Court of Appeal upheld the judgment of the court of first instance.

Judgment: SIR JOHN DONALDSON MR: "...It is said that there is no authority as to what is the standard of care which governs the conduct of players in competitive sports generally and, above all, in a competitive sport whose rules and general background contemplate that there will be physical contact between the players, but that appears to be the position. This is somewhat surprising, but appears to be correct. For my part I would completely accept the decision of the High Court of Australia in *Rootes v. Shelton* [1968] ALR 33. I think it suffices, in order to see the law which has to be applied, to quote briefly from the judgment of Barwick CJ and from the judgment of Kitto J. Barwick CJ said, at p. 34:

'By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises, and, if it does, its extent, must necessarily depend in each case upon its own circumstances. In this connection, the rules of the sport or game may constitute one of those circumstances: but, in my opinion, they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non-observance necessarily constitute a breach of any duty found to exist.'

Kitto J. said at p. 37:

'...In a case such as the present, it must always be a question of fact, what exoneration from a duty of care otherwise incumbent upon the defendant was implied by the act of the plaintiff in joining in the activity. Unless the activity partakes of the nature of a war or of something else in which all is notoriously fair, the conclusion to be reached must necessarily depend, according to the concepts of the common law, upon the reasonableness, in relation to the special circumstances, of the conduct which caused the plaintiff's injury. That does not necessarily mean the compliance of that conduct with the rules, conventions or customs (if there are any) by which the correctness of conduct for the purpose of the carrying on of the activity as an organized affair is judged; for the tribunal of fact may think that in the situation in which the plaintiff's injury was caused a participant might do what

⁴⁸ [1985] 2 All ER 453.

the defendant did and still not be acting unreasonably, even though he infringed the 'rules of the game'. Non-compliance with such rules, conventions or customs (where they exist) is necessarily one consideration to be attended to upon the question of reasonableness; but it is only one, and it may be of much or little or even no weight in the circumstances.'

I have cited from those two judgments because they show two different approaches which, as I see it, produce precisely the same result. One is to take a more generalised duty of care *and to modify it* on the basis that the participants in the sport or pastime impliedly consent to taking risks which otherwise would be a breach of the duty of care. That seems to be the approach of Barwick CJ. The other is exemplified by the judgment of Kitto J, where he is saying, in effect, that there is a general standard of care, namely the Lord Atkin approach that you are under a duty to take all reasonable care *taking account of the circumstances in which you are placed* (see *Donoghue v. Stevenson* [1932] AC 562); which, in a game of football, are quite different from those which affect you when you are going for a walk in the countryside [emphasis added].

For my part I prefer the approach of Kitto J, but I do not think it makes the slightest difference in the end if it is found by the tribunal of fact that the defendant failed to exercise that degree of care which was appropriate in all the circumstances, or that he acted in a way to which the plaintiff cannot be expected to have consented. In either event, there is liability...

Having set out the test – which is the test which I think was applied by the judge in the county court – I ought to turn briefly to the facts, adding before I do so that it was submitted by Mr. Lee on behalf of the defendant that the standard of care was subjective to the defendant and not objective, and if he was a wholly incompetent football player, he could do things without risk of liability which a competent football player could not do. For my part I reject that submission. The standard is objective, but objective in a different set of circumstances. Thus there will of course be a higher degree of care required of a player in a First Division football match than of a player in a local league football match. But none of these sophistications arise in this case, as is at once apparent when one looks at the facts..."

Notes

(1) Sir John Donaldson's speech illustrates that the issue of liability of players in competitive sports may be addressed from two different angles. It may be looked at from a viewpoint of the existence of a duty of care of one player against the other: the acceptance of risks may under the circumstances (of which compliance with the rules of the sport constitutes one) negate the existence of such a duty, or limit its extent, on the part of the defendant player. It may also be looked at from a viewpoint of exoneration from a duty of care otherwise incumbent upon the defendant player: such exoneration will occur if the defendant has acted reasonably, under the circumstances; if he has, the plaintiff may be taken to have assumed the risk. In the Australian case *Rootes v. Shelton* quoted in the excerpt, two of the judges were taking different, and in Sir John's view, alternative approaches which in the end reached the same result.

The consequence of this ambivalence is that *volenti non fit injuria* is rarely invoked as a defence to claims for injuries sustained by sports players, as here, since the issue is more likely to be decided on the ground that the defendant was or was

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not careless in the first place.⁴⁹ *Simms v. Leigh Rugby Football Club Ltd*⁵⁰ is a case where *volenti non fit injuria* was relied on against the plaintiff player.

(2) Also in the participant/spectator relationship, as in *Wooldridge v. Sumner*,⁵¹ the issue was tackled from a viewpoint of whether the defendant was careless in the first place. In his judgment Diplock LJ expressed the practical result of the law of negligence in such a situation as follows: “A person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purposes of the game of competition, notwithstanding that such act may involve an error of judgment or a lapse of skill, unless the participant’s conduct is such as to evince a reckless disregard of the spectator’s safety.” In other words the spectator is regarded as having accepted the risk of injury due to normal playing errors but not the risk of injury due to reckless disregard of his or her safety. In that case the plaintiff, a professional photographer, was filming at the National Horse show when a competitor galloped round the corner of the arena. The plaintiff was knocked down and injured. The defendant was held not to have behaved as an unreasonable participant.

⁴⁹ Markesinis and Deakin at 698-99.

⁵⁰ *Simms v. Leigh Rugby Football Club Ltd* [1969] 2 All ER 923. See Markesinis and Deakin at 699.

⁵¹ *Wooldridge v. Sumner* [1963] 2 QB 43 (CA).