

Restatement (Second) of Torts § 496A (1965) – Assumption of Risk

A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm.

Comments:

(a) This Section states the general principle of assumption of risk. As to the application of the principle to particular situations, see the following §§ 496B- 496G.

(b) The defense whose general principle is stated in this Section is given the name, in most jurisdictions, of “assumption of risk.” A few courts have limited the use of that term to cases of master and servant, or in some instances to other relations where there is a contract between the parties. Such courts have applied the same principle to other situations under the ancient maxim, “Volenti non fit injuria,” which signifies that no wrong is done to one who consents. The distinction is, however, one without a difference, of terminology only, and the rules applied are the same in either case.

(c) Meanings of assumption of risk. “Assumption of risk” is a term which has been surrounded by much confusion, because it has been used by the courts in at least four different senses, and the distinctions seldom have been made clear. These meanings are as follows:

(1) In its simplest form, assumption of risk means that the plaintiff has given his express consent to relieve the defendant of an obligation to exercise care for his protection, and agrees to take his chances as to injury from a known or possible risk. The result is that the defendant, who would otherwise be under a duty to exercise such care, is relieved of that responsibility, and is no longer under any duty to protect the plaintiff. As to such express assumption of risk, see § 496B.

(2) A second, and closely related, meaning is that the plaintiff has entered voluntarily into some relation with the defendant which he knows to involve the risk, and so is regarded as tacitly or impliedly

agreeing to relieve the defendant of responsibility, and to take his own chances. Thus a spectator entering a baseball park may be regarded as consenting that the players may proceed with the game without taking precautions to protect him from being hit by the ball. Again the legal result is that the defendant is relieved of his duty to the plaintiff. As to such implied assumption of risk, see § 496C.

(3) In a third type of situation the plaintiff, aware of a risk created by the negligence of the defendant, proceeds or continues voluntarily to encounter it. For example, an independent contractor who finds that he has been furnished by his employer with a machine which is in dangerous condition, and that the employer, after notice, has failed to repair it or to substitute another, may continue to work with the machine. He may not be negligent in doing so, since his decision may be an entirely reasonable one, because the risk is relatively slight in comparison with the utility of his own conduct; and he may even act with unusual caution because he is aware of the danger. The same policy of the common law which denies recovery to one who expressly consents to accept a risk will, however, prevent his recovery in such a case. As to such implied assumption of risk, see § 496C. As to the necessity that the plaintiff's conduct be voluntary, see § 496E.

(4) To be distinguished from these three situations is the fourth, in which the plaintiff's conduct in voluntarily encountering a known risk is itself unreasonable, and amounts to contributory negligence. There is thus negligence on the part of both plaintiff and defendant; and the plaintiff is barred from recovery, not only by his implied consent to accept the risk, but also by the policy of the law which refuses to allow him to impose upon the defendant a loss for which his own negligence was in part responsible. (See § 467.)

(d) Relation to contributory negligence. The same conduct on the part of the plaintiff may thus amount to both assumption of risk and contributory negligence, and may subject him to both defenses. His conduct in accepting

the risk may be unreasonable and thus negligent, because the danger is out of all proportion to the interest he is seeking to advance, as where he consents to ride with a drunken driver in an unlighted car on a dark night, or dashes into a burning building to save his hat. Likewise, even after accepting an entirely reasonable risk, he may fail to exercise reasonable care for his own protection against that risk.

The great majority of the cases involving assumption of risk have been of this type, where the defense overlaps that of contributory negligence. The same kind of conduct frequently is given either name, or both. Ordinarily it makes no difference which the defense is called. In theory the distinction between the two is that assumption of risk rests upon the voluntary consent of the plaintiff to encounter the risk and take his chances, while contributory negligence rests upon his failure to exercise the care of a reasonable man for his own protection. Where the plaintiff voluntarily consents to take an unreasonable chance, there may obviously be both.

There may be, however, differences between the two defenses. A subjective standard is applied to assumption of risk, in determining whether the plaintiff knows, understands, and appreciates the risk. (See § 496D.) An objective standard is applied to contributory negligence, and the plaintiff is required to have the knowledge, understanding, and judgment of the standard reasonable man. (See §§ 464, 289, and 290.) Assumption of risk operates as a defense against liability not only for negligent conduct, but also for reckless conduct, and conduct for which the defendant is subject to strict liability. Contributory negligence, on the other hand, is not a defense where the defendant's conduct is reckless. (See §§ 482 and 503.) It is a defense to strict liability only when it amounts to voluntarily encountering a known unreasonable risk, or in other words, to assumption of risk. (See §§ 515 and 524.) It is also possible that where the plaintiff is injured by the concurring negligence of two persons, he may be barred from recovery against one by his contributory negligence, and against the other by his assumption of risk.

There are statutes which make contributory negligence only a partial defense, with the effect of reducing the recoverable damages, which have been construed to leave assumption of risk as a complete defense. It would appear that, unless such a construction is clearly called for, it defeats the intent of the statute in any case where the same conduct constitutes both contributory negligence and assumption of risk, since the purpose of the act would appear to be to reduce the damages in the case of all such negligent conduct, whatever the defense may be called. On the other hand, there are statutes which have abrogated the defense of assumption of risk in certain situations, while contributory negligence is left either as a complete or a partial defense. (See Comment (e) below.)

Examples:

(1) A is setting off dangerous fireworks in a public place with reckless indifference to a serious risk of harm to persons in the vicinity. B and C approach the place where A is acting. B, fully aware of the risk, approaches for the purpose of enjoying the spectacle. C is not aware of the risk, but in the exercise of reasonable care for his own protection should discover or appreciate it. B and C are injured by a rocket which goes off at the wrong angle. B is barred from recovery against A by his assumption of the risk, but C is not barred from recovery for A's reckless conduct by his contributory negligence.

(2) A statute provides that a guest in an automobile shall be entitled to recover from his host for harm caused by the host's driving only if the host is guilty of wilful, wanton, or reckless conduct. A invites B to ride with him. B accepts, knowing that A is drunk, but unreasonably hoping that A will be able to drive safely. B is hurt as a result of A's drunken driving. B is barred from recovery against A by his assumption of risk, although he would not be barred from recovery for A's reckless conduct by his contributory negligence.

(3) A statute provides that where harm results from the concurring negligence of the plaintiff and the defendant, contributory negligence

shall not be a complete defense, but the damages shall be reduced in proportion to the fault of the respective parties. The statute is silent concerning assumption of risk. A, who is known to B to be an incompetent driver, invites B to ride. B accepts the invitation, and is hurt by a collision caused by the incompetence of A and the negligence of C, the driver of another car. In the absence of any guide to construction, the statute should be construed to reduce the damages recoverable by B against both A and C.

(4) The same facts as in Illustration 3, except that the statute expressly provides that assumption of risk shall remain as a complete defense. B is barred from recovery against A by his assumption of the risk, but C is subject to liability to B, with the damages reduced in proportion to their respective negligence.

(e) Statutes eliminating assumption of risk. In many states there are statutes which, by their express provisions, have abrogated the defense of assumption of risk in particular relations or situations. Thus a statute may provide that the defense shall not be available to a master whose servant is injured in the course of a dangerous employment, or to a landlord whose tenant is injured by a condition of the premises. There are other statutes which, although they do not expressly so provide, are construed to have that effect, because the purpose of the legislature is found to be to place the entire responsibility for the safety of the plaintiff upon the defendant, and that purpose would be defeated if the defense were available. Under such statutes the plaintiff is protected if he acts with reasonable care in view of the danger which he encounters, even though he knows the danger and proceeds in the face of it. Although assumption of risk is eliminated by such statutes, it may be held that the defense of contributory negligence is still open to the defendant; or, as under the present form of the Federal Employers' Liability Act, contributory negligence may remain as a partial defense, reducing the damages in proportion to the fault. Occasional statutes may, however, be construed to eliminate both defenses where the plaintiff acts unreasonably in assuming the risk. As to assumption of risk as applied to the law of master

and servant, and its relation to contributory negligence in such cases, see Restatement of Agency, Second, §§ 521-524.