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Assumption of Risk: Application of the Doctrine in Montana

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Rochl: Notes
ASSUMPTION OF RISK:

APPLICATION OF THE DOCTRINE IN MONTANA

The plaintiff who voluntarily assumes a risk of harm caused by the negligent conduct of the defendant cannot recover for such harm. This general principle is a statement of the defense which has been given the name assumption of risk in a majority of jurisdictions¹ including Montana.² It has been generally recognized that the doctrine of assumption of risk is not based on contract law³ but "is founded on the principle . . . that he who consents to an act will not be heard to claim that he is wronged by it."⁴ Although many of the cases in which this defense is asserted involve an action by an employee against his employer, Montana follows the general rule which does not limit the defense of assumption of risk to the master-servant relationship.⁵ Courts which have limited assumption of risk to the master-servant relationship allow the same defense to be asserted in other situations under a different name.⁶

Assumption of risk is one of three common law defenses which in effect relieved the employer from liability to his employee for injuries caused by the negligence of the employer or another employee.⁷ Workman's Compensation Acts have alleviated this hardship on the employee by denying to the employer the defenses of assumption of risk, contributory negligence, and the fellow servant rule.⁸ The employer is prohibited from asserting these defenses even though he does not elect to come under the Workman's Compensation Act.⁹ Montana's act prohibits use of these defenses to all employers except those engaged in farming, operating railroads,¹⁰ or employing persons in work of a casual nature.¹¹

The concept of assumption of risk has been applied by the courts in three different situations:¹² (1) The plaintiff expressly agrees to relieve the defendant of his duty to exercise care for the person or property of the plaintiff. E.g., the defendant lessor may exempt himself from liability

¹RESTATEMENT (SECOND) TORTS section 496A (1965).

²Cassady v. City Of Billings, 135 Mont. 390, 340 P.2d 509 (1959).

³PROSSER, TORTS 459 (3d ed. 1964).

⁴Osterholm v. Boston & Montana Consol. Copper & Silver Mining Co., 40 Mont. 508, 107 P.499 (1910).

⁵Cassady v. City Of Billings, *supra* note 2.

⁶The most common of the other names under which the doctrine of assumption of risk is applied is "volenti non fit injuria." See, e.g., Walsh v. West Coast Mines, 31 Wash. 2d 396, 197 P.2d 233 (1948).

⁷PROSSER, *supra* note 3 at 550.

⁸*Id.* at 555.

⁹Chancellor v. Hines Motor Supply Co., 104 Mont. 603, 69 P.2d 764 (1937).

¹⁰R.C.M., 1947, section 72-650 prohibits railroads from asserting the defense of assumption of risk against their employees, but is not apart of the workman's Compensation Act.

¹¹E.C.M., 1947, section 92-201 prohibits all employers from asserting the defense of assumption of risk against their employees. R.C.M., 1947, section 92-202 exempts the above named employers from the operation of section R.C.M., 1947, 92-201.

¹²PROSSER, *supra* note 3 at 450

to plaintiff lessee by a provision in the lease.¹³ (2) The plaintiff voluntarily enters into some relation with the defendant which he knows to involve a risk and so impliedly agrees to assume that risk. E.g., the employee who voluntarily rides a mine shaft elevator which the employer has negligently failed to equip with doors assumes the risk of injury should he fall.¹⁴ (3) The plaintiff proceeds voluntarily to encounter a known risk caused by defendant's negligence. E.g., the plaintiff who while ice skating in defendant's rink observes a rough surface on the ice yet proceeds to skate assumes the risk of a fall caused by the rough surface.¹⁵

It should be noted that the plaintiff's conduct in assuming the risk may be either reasonable or unreasonable and if unreasonable the plaintiff is contributorily negligent.¹⁶ The later Montana cases have recognized that in the latter situation the defendant is entitled to two defenses, assumption of risk and contributory negligence.¹⁷ These cases must be taken to overrule a statement in the early Montana case of *Ball v. Gussenhoven*¹⁸ which declared that "The defenses of assumption of risk and contributory negligence are entirely inconsistent with each other . . . and the existence of one necessarily excludes the existence of the other."

Express Assumption of Risk

The plaintiff may expressly assume the risk by an agreement between the parties. This principle was recognized in an early Montana decision¹⁹ and has been applied in at least five cases under Montana law although in none of them did the court call the defense assumption of risk.²⁰ Such an agreement will ordinarily take the form of a contract,²¹ but Montana appears to have taken cognizance of the fact that it may also be a gratuitous agreement.²²

There is no general policy of the law which prevents the parties from agreeing that the defendant is under no duty or is under a limited duty to the plaintiff²³ "so long as the contract itself does not violate the law

¹³*Ryan Mercantile Co. v. Great Northern Ry.*, 186 F. Supp. 660 (D.C. Mont. 1960), *aff'd*, 294 F.2d 629 (9th Cir. 1961).

¹⁴See *Osterholm v. Boston & Montana Consol. Copper & Silver Mining Co.*, *supra* note 4.

¹⁵See *Cassady v. City Of Billings*, *supra* note 2.

¹⁶PROSSER, *supra* note 3 at 451.

¹⁷*D'Hooede v. McCann*, 25 St. Rep. 442, 443 P.2d 747 (1968); *Cassady v. City Of Billings*, *supra* note 2.

¹⁸29 Mont. 321, 74 P.871 (1904).

¹⁹*Schroeder v. Montana Iron Works*, 38 Mont. 474, 100 P.619 (1909).

²⁰*Ryan Mercantile Co. v. Great Northern Ry.*, *supra* note 13; *Jones v. Great Northern Ry.*, 68 Mont. 231, 217 P.673 (1923); *Rose v. Northern Pacific Ry.*, 35 Mont. 70, 88 P.767 (1906); *Nelson v. Great Northern Ry.*, 28 Mont. 297, 72 P.642 (1903); *Great Northern Ry. v. Melton*, 193 F.2d 729 (9th Cir. 1951).

²¹RESTATEMENT (SECOND) TORTS section 496A (1965).

²²See *John v. Northern Pacific Ry.*, 42 Mont. 18, 111 P.632 (1910). The agreement in question was a gratuitous railroad pass containing a provision limiting defendant's liability. The court stated that if the giving of such passes was constitutional defendant was exonerated from liability for negligence.

²³PROSSER, *supra* note 3 at 456.

or contravene public policy."²⁴ A recent case, *Ryan Mercantile Co. v. Great Northern Ry.*, 186 F.Supp. 660 (D.C.Mont.1960), expressly adopted the *Restatement Of Contracts* position that a contract for exemption from liability for negligence is legal except where the contract exempts the defendant from liability for a wilfull breach or is against public policy.²⁵ Such a contract is against public policy if it exempts an employer from liability for the negligent injury of his employee or exempts one charged with a duty of public service from liability for the negligent performance of that duty.²⁶

Of course, a contract exempting the defendant from liability for his negligence must conform to all contract requirements. The court will scrutinize the transaction carefully to ascertain whether the requirement of mutual assent has been met,²⁷ particularly when the contract was prepared by the defendant and there is some reason to doubt that the terms were fully understood by the plaintiff.²⁸ Where the plaintiff checks his luggage and receives a claim check on which is printed a liability limiting provision, for example, Montana has ruled that the mere fact that the plaintiff retains the check does not show the required mutual assent. "If the bailee does not call attention to the provision for limited liability and the bailor does not have actual knowledge of its existence, he is not bound by it, unless his course of conduct is such as to lead the bailee, as a reasonable person to believe that he assents to the provision . . ."²⁹

Montana law does not allow an employer to expressly exempt himself from liability to his employee for injuries caused by the employer's negligence. Contracts between master and servant exempting the master from liability for his negligence are void both under the Montana Constitution³⁰ and by statute.³¹ The employer who requires such a contract of his employee as a condition to employment commits a crime punishable as a felonk under R.C.M., 1947, section 94-1614. These provisions, however, apply only to agreements entered into before the injury occurs.³² They do not apply to a release discharging an employer from responsibility when he voluntarily settles the claim of an injured employee.³³

Montana statutes allow a common carrier to limit its liability for negligently caused damages by special contract³⁴ except those damages

²⁴*Jones v. Northern Pacific Ry.*, *supra* note 20.

²⁵RESTATEMENT CONTRACTS sections 574 and 575 (1932).

²⁶*Id.* section 575.

²⁷PROSSER, *supra* note 3 at 456.

²⁸RESTATEMENT (SECOND) TORTS section 496B.

²⁹*Jones v. Great Northern Ry.*, *supra* note 20.

³⁰MONT. CONST. art. XV, section 16.

³¹R.C.M., 1947, section 13-803.

³²*Carlson v. Northern Pacific Ry.*, 82 Mont. 559, 268 P.549 (1928).

³³*Id.*

³⁴*Nelson v. Great Northern Ry.*, *supra* note 20. The court stated that sections 8-707 and 8-708 of the R.C.M., 1947, construed together permit the common carrier to provide against liability for negligence by special contract.

caused by delay.³⁵ It is essential, however, that the common carrier charge a lower tariff for a contract limiting its public responsibility than for a contract giving the plaintiff full protection.³⁶

IMPLIED ASSUMPTION OF RISK

It has been generally recognized in Montana that the plaintiff's consent to assume the risk may be implied from his conduct,³⁷ but there appears to be some confusion as to the basis for this principle. The Montana Court has stated unequivocally that the defense of assumption of risk in Montana arises from R.C.M. 1947, section 41-103.³⁸ That statute provides:

An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed.

The Montana Court does not include risks which are the result of the employer's negligence in their definition of the term "ordinary risks" as used in section R.C.M., 1947, section 41-103.³⁹ Hence, the Montana Court has mistakenly interpreted section 41-103 because assumption of risk is a defense to a negligence action and the statute, as interpreted by the Montana Court, applies only to ordinary risks not caused by negligence. Furthermore, the statute covers only the employer-employee relationship and the Montana Court itself has recognized that assumption of risk is not so limited.⁴⁰ The traditional basis of assumption of risk and that recognized by several early Montana cases in consent⁴¹ and it is doubtful whether section R.C.M., 1947, 41-103 can correctly be said to have supplanted this common law basis.

The Montana Supreme Court explicitly stated four elements which must be proved to establish implied assumption of risk in 1963 in *Wollen v. Lord*⁴² and restated these requirements in 1968 in *D'Hooge v. McCann*.⁴³ The necessary elements which must be proved by the defendant to establish assumption of risk on the part of the plaintiff are: (1) knowledge, actual or implied, of the particular condition; (2) appreciation of the condition as dangerous; (3) a voluntary remaining or continuing in the face of the known dangerous condition; and (4) injury resulting as the usual and probable consequence of the dangerous condition.

³⁵*Id.* The court was lead to the delay exception by its interpretation of R.C.M., 1947, section 8-814.

³⁶See *Rose v. Northern Pacific Ry. and Great Northern Ry. v. Melton*, *supra* note 20.

³⁷See *D'Hooge v. McCann*, *supra* note 17; *Keck v. Bairs*, 25 St. Rep. 140, 437 P.2d 380 (1968); *Cassady v. City Of Billings*, *supra* note 2.

³⁸*Wollen v. Lord*, 142 Mont. 498, 385 P.2d 102 (1963).

³⁹*Id.*

⁴⁰*Cassady v. City Of Billings*, *supra* note 2.

⁴¹*Osterholm v. Boston & Montana Consol. Copper & Silver Mining Co.*, *supra* note 4; *Fotheringill v. Washoe Copper Co.*, 43 Mont. 485, 117 P.8b (1911).

⁴²*Supra* note 38.

⁴³*Supra* note 17.

That the plaintiff must have knowledge of the particular condition and appreciate it as dangerous has been recognized even in the early Montana decisions.⁴⁴ Furthermore, when the defendant's conduct exposes the plaintiff to several risks, the plaintiff's knowledge of one does not mean that he assumes another.⁴⁵ For example, the miner who assumes the risk of dynamite detonated by a fellow miner in the shaft does not assume the risk of dynamite "exploded by the negligent use of a thawer 75 feet away, out of sight, and with which he had nothing to do."⁴⁶ The general rule is that the standard to be applied is a subjective one of what the plaintiff actually knows and appreciates,⁴⁷ yet until the *D'Hooge* decision Montana applied a standard which was more objective than subjective. It appears from a review of the Montana decisions that the plaintiff's actual knowledge of the dangerous condition was formerly unnecessary in order to allow the defendant to assert the defense of assumption of risk⁴⁸ and that knowledge would be implied when the risk and the resulting dangerous consequences would be obvious to the ordinarily prudent person.⁴⁹ Allowance was made, however, for the young who were held only to assume risks which would be fully apparent to children of that age⁵⁰ and for the inexperienced employee whose "experience and understanding . . . [would] . . . be considered."⁵¹ The *D'Hooge* decision, however, expressly rejects the standard of the reasonable man. The Court stated that assumption of risk is governed by the subjective standard and a plaintiff "cannot be said to have assumed a risk of which he was not aware." Hence, the plaintiff in Montana can no longer be said to have knowledge of a risk and appreciate it as dangerous merely because such knowledge and appreciation would be apparent to the ordinary prudent person. *D'Hooge* requires the plaintiff to actually appreciate the risk and its dangerous consequences in order to assume the risk.

The plaintiff who impliedly assumes the risk must voluntarily remain or continue in the face of the known dangerous condition. It is the general rule that the plaintiff who relies upon the defendant's assurances of safety and confronts a known risk against his better judgment does not assume the risk "unless the danger is so extreme that

⁴⁴*Osterholm v. Boston & Montana Consol. Copper & Silver Mining Co.*, *supra* note 4; *Boyd v. Great Northern Ry.*, 84 Mont. 84, 274 P.293 (1929).

⁴⁵RESTATEMENT (SECOND) TORTS section 496C (1965).

⁴⁶*Westlake v. Keating Gold Mining Co.*, 48 Mont. 120, 136 P.38 (1913).

⁴⁷RESTATEMENT (SECOND) TORTS section 496D (1965).

⁴⁸*Sorenson v. Northern Pacific Ry.*, 53 Mont. 268, 163 P.560 (1917); *Grant v. Nahill*, 64 Mont. 420, 210 P.914 (1922); *Palmer v. Great Northern Ry.*, 119 Mont. 68, 170 P.2d 768 (1941).

⁴⁹*Matson v. Hines*, 63 Mont. 214, 207 P.474 (1922); *Kileen v. Barnes-King Development Co.*, 46 Mont. 212, 127 P.89 (1912); *Leonidas v. Great Northern Ry.*, 105 Mont. 302, 72 P.2d 1007 (1937); *Great Northern Ry. v. Wojtala*, 112 F.2d 609 (9th Cir. 1940).

⁵⁰*Shaw v. Kendall*, 114 Mont. 323, 136 P.2d 748 (1943); *Boyd v. Great Northern Ry.*, *supra* note 44.

⁵¹*Id.*

there can be no reasonable reliance on the assurance."⁵² The latest Montana decisions on the subject accord with the general rule. They hold that an employee may rely on his superior's assurances notwithstanding any misgivings of his own⁵³ unless the hazard is so open and obvious that the plaintiff must be held to have assumed the risk of injury as a matter of law.⁵⁴ The Montana decisions do not distinguish between the legal effect of an employer's assurances and commands.⁵⁵ Hence, an employee may rely on his employer's commands to the same degree that he may rely upon his assurances.

The last element which the Montana Court requires to be proved in order to establish assumption of risk is that injury resulted as the usual and probable consequence of the dangerous condition.⁵⁶ An adult, however, who voluntarily engages in an act from which injury will result as the usual and probable consequence will almost always be negligent because no reasonable man would voluntarily encounter such a grave risk of injury. Hence, this element appears to require the plaintiff to be contributorily negligent when he assumes the risk. Such a position is clearly contrary to the position of other jurisdictions which recognizes that a plaintiff may be acting quite reasonably when he assumes the risk.⁵⁷ In order to ascertain what the Montana Court means by its fourth requirement it is useful to look at the *D'Hooge* and *Wollen* cases in which the requirement was stated. In *D'Hooge*, plaintiff was cleaning an engine block with gasoline and the gas fumes unexplainably ignited injuring him. There was evidence that plaintiff observed careful precautions and had frequently cleaned machinery with gasoline in the past. In *Wollen*, plaintiff was injured by the malfunction of an electro-magnetic switch which failed to shut off the power to the forward part of a combine from which he was removing a stone. Prior to his injury, plaintiff had used the switch as many as 50 times a day and it had operated properly. In neither case did the injury result as the usual and probable consequence of the dangerous condition because in *D'Hooge* the plaintiff had repeatedly cleaned machinery with gasoline in the past without incident while in *Wollen* the plaintiff had used the switch countless times without injury. One must draw the conclusion that although the Montana Court states that injury must result as the usual and probable consequence of the dangerous condition it does not require it, and the plaintiff can assume the risk in Montana without being contributorily negligent as in other jurisdictions.

The fact that the defendant's negligence consists of violation of statute does not of itself foreclose to the defendant the availability of

⁵²RESTATEMENT (SECOND) TORTS section 496E (1965).

⁵³*Palmer v. Great Northern Ry.*, *supra* note 48; *Leonidas v. Great Northern Ry.*, *supra* note 49.

⁵⁴*Id.*

⁵⁵*Id.*; *Palmer v. Great Northern Ry.*, *supra* note 48.

⁵⁶*D'Hooge v. McCann*, *supra* note 17.

⁵⁷PROSSER, *supra* note 3, at 451-30.

the defense of assumption of risk.⁵⁸ Where, however, the defendant violates a statute whose purpose it is to protect the plaintiff against his own inability to protect himself the defense will be proscribed.⁵⁹ Montana holds that one who violates the Child Labor Law cannot assert assumption of risk against his youthful employee⁶⁰ nor may one who violates the Scaffolding Act assert the defense against workmen and others injured by reason of a defective scaffold.⁶¹ The Court has twice held, however, that a statute requiring doors in mine shaft safety cages does not deny the defense of assumption of risk to the employer whose employee is injured due to the absence of such doors.⁶² Other jurisdictions have generally denied assumption of risk to the employer who violates a safety statute enacted for the benefit of employees.⁶³

There is one Montana statute which denies the defense of assumption of risk to a particular employer. R.C.M., 1947, section 72-650 is part of the State Railroad Employers Liability Act and provides:

“An employee of . . . any corporation so operating such railroad shall not be deemed to have assumed any risk incident to his employment, when such risk arises by reason of the negligence of his employer, or any person in the service of such employer.”

Although this statute appears to clearly prohibit the use of the defense of assumption of risk by the employer railroad it has not been so interpreted by the Montana Court which has ruled that the defense is still available to the railroad “provided the employee is aware of the condition of increased hazard . . . , or it is so obvious that an ordinarily prudent person, under the same circumstances, would have observed and appreciated it.”⁶⁴ A federal decision has questioned the Montana Court’s interpretation and stated that “[t]here is good ground for holding that assumption of risk of any kind is no defense under the act, if the risk arises by reason of the negligence of the employer . . .”⁶⁵

CONCLUSION

The Montana decisions on express assumption of risk largely accord with the weight of authority elsewhere. The Montana cases, however, do not follow the growing tendency in other jurisdictions to deny to certain bailees the right to limit their liability for negligence by contract. The modern trend does not allow certain professional bailees, for example, parking lot and luggage checkroom owners, to limit their liability for

⁵⁸RESTATEMENT (SECOND) TORTS section 496F (1965).

⁵⁹PROSSER, *supra* note 3 at 468.

⁶⁰Daly v. Swift & Co., 90 Mont. 52, 300 P.265 (1931).

⁶¹Pollard v. Todd, 148 Mont. 171, 418 P.2d 869 (1966).

⁶²Osterholm v. Boston & Montana Consol. Copper & Silver Mining Co., *supra* note 4; Monson v. La France Copper Co., 43 Mont. 65, 114 P.778 (1911).

⁶³PROSSER, *supra* note 3 at 468.

⁶⁴Matson v. Hines, *supra* note 49.

⁶⁵Great Northern Ry. v. Wojtala, *supra* note 49.

negligence because of the great disparity of bargaining power between the bailee and the customer.⁶⁶ These decisions properly recognize that the customer will be deprived of the bailee's services should he not agree to the bailee's terms. Since the public interest in these bailment occupations is great the better reasoned cases conclude that an agreement limiting the bailee's liability is against public policy.⁶⁷

The Montana decisions on implied assumption of risk also accord substantially with the cases in other jurisdictions. The fact that the Montana Court considers the defense of assumption of risk to arise from R.C.M., 1947, section 41-103 has not of itself caused the defense to be applied differently in Montana than in the other jurisdictions which apply the defense as a product of the common law. For example, R.C.M., 1947, section 41-103 applies only to the employer-employee relationship but the Montana Court has correctly rejected contentions that assumption of risk is so limited.⁶⁸

The general rule is that three elements must be proved to establish implied assumption of risk: (1) the plaintiff must know of the risk; (2) he must appreciate it as dangerous; and (3) he must voluntarily accept the risk. The Montana Court requires these three elements and adds a fourth — that the injury result as the usual and probable consequence of the dangerous condition.⁶⁹ The Court, however, refrains from enforcing its fourth element⁷⁰ and properly so because a strict application of the requirement would require the plaintiff who assumes a risk to be negligent in doing so.⁷¹ To require the plaintiff to be negligent in assuming a risk would be to confuse the two distinct defenses of assumption of risk and contributory negligence. The plaintiff who assumes the risk may do so either reasonably or unreasonably;⁷² the plaintiff who is contributorily negligent must, of course, act unreasonably.

D'Hooge ended Montana's major deviation from the traditional view of implied assumption of risk by recognizing that assumption of risk is to be governed by the subjective rather than the objective standard. It is essential that assumption of risk be governed by the subjective standard of actual knowledge because a plaintiff must have actual knowledge of the dangerous risk before he can consent to encounter it. Should assumption of risk be governed by the objective standard of the reasonable man there would be no requirement of actual knowledge and, hence, no

⁶⁶*Millers Mutual Fire Ins. Ass'n. of Alton, Ill. v. Parker*, 234 N.C. 20, 65 S.E.2d 341 (1951); *Najaki v. Stockfleth*, 141 Neb. 676, 4 N.W.2d 766 (1942); *Denver Union Terminal R. Co. v. Cullinan*, 72 Colo. 248, 210 P.602 (1922); *Hotels Statler Co. v. Safier*, 103 Ohio St. 638, 134 N.E. 460 (1921).

⁶⁷*Id.*

⁶⁸*Cassady v. City Of Billings*, *supra* note 2.

⁶⁹*D'Hooge v. McCann*, *supra* note 17.

⁷⁰See *D'Hooge v. McCann*, *supra* note 17; *Wollen v. Lord*, *supra* note 38.

⁷¹Refer to text accompanying note 57.

⁷²*Supra* note 16.

requirement of consent upon which the defense of assumption of risk is based.

Montana has twice held that the violation of a safety statute enacted for the benefit of miners did not deny the defense of assumption of risk to the employer.⁷³ These decisions do not accord with the position of other jurisdictions⁷⁴ and seem indefensible in view of the legislative intent to protect employees working in a dangerous occupation. Neither decision is a recent one, however, and one might well conclude that Montana would rule otherwise today in view of the more liberal approach adopted in the recent case of *Pollard v. Todd*⁷⁵ which denied assumption of risk to an employer who violated the Scaffolding Act.

CARL ROEHL

⁷³*Osterholm v. Boston & Montana Consol. Copper & Silver Mining Co.*, *supra* note 4; *Monson v. La France Copper Co.*, *supra* note 62.

⁷⁴*Supra* note 63.

⁷⁵*Supra* note 61.

