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Standard of Care of Students--Assumption of Risk Misapplied to Avoid Negligence Issue--Wall v. Gill

George Creedle
University of Kentucky

STANDARD OF CARE OF STUDENTS – ASSUMPTION OF RISK MISAPPLIED TO AVOID NEGLIGENCE ISSUE –WALL V GILL

The doctrine of assumption of risk received a strange application in two recent cases involving students; one a South Dakota case, and the other a Kentucky case which provoked this inquiry. In the latter case, *Wall* v. *Gill*,[1] the Kentucky Court of Appeals held that the patron of a beauty college, who received a permanent wave at cost from an operator she knew to be a student, assumed the risk of the student operator's inexperience, and could not recover damages for burns. This holding does not appear startling on its face. But let us view it in the light of established principles of negligence.

Negligence is conduct which falls below the standard established by law for the protection of others from unreasonable risk of harm. The standard is the conduct of a reasonable man under the same or similar circumstances and is essentially objective.[3] Although "circumstances" refers generally to external conditions, other factors are sometimes taken into consideration. "An exception is made in favor of infants because their normal condition is one of incapacity and the state of their progress toward maturity is reasonably capable of determination."[4] The conduct of an infant should be judged according to the average conduct of reasonable persons of his age and experience.[5] Other exceptional circumstances taken into account in applying the standard are the superior skill and knowledge which the actor possesses or holds himself out to possess. In general, the actor will be bound to exercise that superior degree of skill and knowledge which he possesses,[6] or holds himself out to possess.

The student of a trade occupies a position that bears similarities to each of these exceptions. From one vantage he is a learner like the infant, immature vocationally, but again one whose progress toward proficiency (in the skill he practices) is capable of determination. In another view, he possesses skills in his trade superior to those of the ordinary man, which puts him in the position of a skilled person. The truth of the matter is that he is both of these.

The precise issue of the degree of care the law imposes on students of a trade does not appear to have been decided. It is submitted that the standard should embody the principles of the two exceptions mentioned because of the analogous position of the student to each, and because common justice demands it. It is unreasonable, unless a vital public interest dictates otherwise, to hold a student to a degree of skill he cannot be expected to have, and yet he should not be left to disregard whatever proficiency he has acquired through training. The student should be held to the exercise of that superior degree of skill he possesses, the standard, however, as in the case of infants, being that of a reasonable student of similar experience and training. Of course, if the student holds himself out to be a skilled operator, either expressly or by implication by undertaking to

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[1] 311 Ky. 796, 225 S.W 2d 670 (1949).

[3] RESTATEMENT, TORTS sec. 282 (1932). *See* Southeastern Geyhound Lines v. Callahan, 244 Ala. 449, — 13 So. 2d 660, 663 (1943); Diamond v. McDonald Service Stores, 211 N.C. 632, — 191 S.E. 358, 359 (1937).

[3] PROSSER, TORTS 225, 226 (1941). *See* Milkulski v. Morgan, 268 Mich. 314, 256 N.W 339 (1934); Armit v. Loveland, 115 F 2d 308, 311 (C.C.A. 3rd 1940).

[4] Charbonneau v. MacRury, 84 N. H. 501, — 153 Atl. 457, 463 (1931).

[5] Instruction approved in Charbonneau v. MacRury, *supra* note 4.

[6] *See* Harris v. Fall, 177 F 79, 82 (C.C.A. 7th 1910).

[7] Rann v. Twitchell, 82 Vt. 79, 71 Atl. 1045 (1909).

perform the work of one fully qualified without announcing that he is merely a student, he may be held to the degree of skill required of persons regularly engaged in the trade.

Another principle of negligence particularly concerned with this case is that of assumption of risk, that "one who voluntarily exposed himself or his property to a known and appreciated danger due to the negligence of another may not recover for injuries sustained thereby. "[8] This doctrine seems to be bottomed on the maxim *volenti non fit injuria*—that he who consents to an injury cannot complain of it,[9] and the consent of the plaintiff to assume the risk of injury to himself has the operative effect of relieving the defendant actor of his legal duty toward the plaintiff insofar as the particular danger to which the plaintiff consents is concerned.[10]

With these principles before us, the cases may now be examined in detail. In *Wall* v. *Gill*, the defendant operated a college, licensed by state authorities, wherein students were instructed in the art of beauty culture. In order that they might gain practical experience, students were permitted to serve the public before they completed the course and became licensed operators. However, state regulations required that signs be displayed announcing that the work was done by students, and that charges be limited to the cost of materials. The plaintiff, a patron, who knew that the work was done by students at reduced prices, was being given a permanent wave by a student operator when she was burned about the head and received injuries for which she sued the proprietor of the college. She recovered damages in the circuit court on the basis of the student's negligence, but the judgment was reversed by the Court of Appeals, primarily on the ground that she assumed the risk of the student operator s inexperience.

The court, in discussing the case, said that "negligence does not become an issue in the case in view of our theory of it."[11] But assumption of risk is a technical legal phrase, although it has not always been so used. If it is to mean anything at all in a case where liability is dependent upon negligence, it should be limited to the assumption of a risk created by some negligent act of the defendant. Therefore, if the case is decided on the ground of assumption of risk, negligence would always be at least a factor.[12]

In this case, the decision of the court should have turned on whether or not

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[8] C.J.S. 849; Paul v. United States, 54 F Supp. 60 (E. D. La. 1943); Meyers v. Paro Realty and Mortgage Co., 128 Conn. 249, 21 A. 2d 379 (1941).

[9] *See* Standard Oil Co. v. Titus, 187 Ky. 560, 563, 219 S.W 1077, 1078 (1920).

[10] PROSSER, TORTS 377 (1941). *See* Silver v. Cushner, 300 Mass. 583, —— 16 N.E. 2d 27, 29 (1938).

[11] Wall v. Gill, 311 Ky. 796, 797, 225 S.W 2d 670, 671 (1949).

[12] Although there is no direct statement of it on record, it seems clear that in legal writing the "risk" which is contemplated in assumption of risk has always been regarded as a risk born of negligence. The definition of assumption of risk quoted *infra*, p. —— states this indirectly—"one who voluntarily exposed himself to a known danger *due to the negligence of another* " 65 C.J.S. 849 [Italics, writer s]. Assumption of risk is a defense to a case already established on negligence, and if there had been no negligence there would be no need for a defense.

The operative effect of assumption of risk is to dissolve the duty on the part of the defendant and it may appear that if there were no duty there could be no negligence, but it must become apparent that there must have been negligent conduct in the first instance creating a risk which the plaintiff could observe, appreciate and assume before the duty could be dissolved.

there was negligence rather than on assumption of risk. In the opinion, the court said, "It seems to us that under the facts of this case the appellee assumed the risk of the student operator's inexperience. This risk can not be confined to less professional hair styling, but must include all the dangers which might result from treatment by one who is not yet qualified."[13] The "risk" assumed appears to be the danger which necessarily arises from the fact that the student is not as skillful in the trade as a licensed operator. However, while the student is not held to the standard of a licensed operator, he should be held to the standard of a reasonable student of similar experience and training. Therefore, the dangers necessarily attendant on the fact that students are not consummate in their skill are not dangers created by negligence, and the doctrine of assumption of risk has no application to them.

The very danger which the court points out and rules is assumed is one arising from the natural state of vocational immaturity of the student and not from negligence since, by application of the standard of care, a student would be negligent *only* if he failed to conform to the conduct of a reasonable student similarly situated and of a similar stage of development.

This distinction was highlighted by the opinion in the South Dakota case,[14] where the court recognized that the student could be free from negligence, but nonetheless unfortunately misapplied the name of assumption of risk to the dangers inherent in the fact that the student lacks the higher degree of skill required of licensed operators. The case was one wherein the proprietor of a flying school where the defendant was receiving flying lessons sought to recover the value of an airplane which was crashed by the defendant in practicing one of his solo lessons. The court said, "Frequently it is difficult to distinguish between lack of skill and carelessness in exercising a possessed skill"[15] and held that it was a question for the jury whether the accident was caused by a lack of skill or a failure to exercise the skill possessed, thus discerning the issue overlooked in the Kentucky case. After exercising such perception, however, they sacrificed precision by apparently misapplying the name assumption of risk to the dangers created by the lack of skill,[16] which were not of negligent origin, as the court recognized in distinguishing lack of skill from carelessness.

In *Hall* v. *Hall*,[17] an earlier South Dakota case, the court again was careful to distinguish between an accident due to the lack of skill of the driver of an automobile, and one due to carelessness in exercising such skill and judgment as she possessed.[18]

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[13] Wall v. Gill, 311 Ky. 796, 798, 225 S.W 2d 670, 671 (1949).

[14] Vee Bar Airport v. De Vries, — S.D. — 43 N.W 369 (1950).

[15] *Id.* at — 43 N.W 2d at 370.

[16] "Further, that any damage resulting to the appellant's airplane due to respondent's lack of skill is one of the risks appellant assumes in its training program." *Ibid.*

[17] 63 S.D. 343, 258 N.W 491 (1935).

[18] Defendant driver was not a student, having been driving for five years. Plaintiff, her father, who was aware of the poor qualities of her driving, was accompanying defendant as a guest when the accident occurred and he sustained an injury. The defense was that he assumed the risk of accident. The court sent the case back to the jury to determine whether the accident was due to lack of skill, or carelessness in exercising whatever skill was possessed, which is a risk a non-paying passenger does not assume.

Assumption of risk was correctly applied to the lack of skill in this case, since the driver was not a student and not the subject of an exception such as

Applying this distinction and the general negligence principles as set out earlier to the Kentucky case, it appears that if the student exercises the skill of a reasonable student of the same experience, he will not be negligent, and assumption of risk cannot be raised in the legal sense of a risk created by negligence. But what if the student has failed to observe the care required of students? This is an event one does not ordinarily expect and therefore not a risk appreciated and acquiesced in by the plaintiff. The risk is not assumed because "One is not required to anticipate that he will be exposed to a danger not naturally incident to his situation, but arising from negligence which he has no reason to foresee."[19]

It then follows that in the ordinary case involving students, unless the injured party knows that the student is acting *carelessly,* there will never be any application of assumption of risk. Even though the same conduct might be negligent in a skilled operator, if the conduct of the student conforms to the standard as applied to students it is not negligent and the technical phrase "assumption of risk" cannot be applied to it. If the conduct does not come up to the standard, then it is a risk the plantiff had no reason to foresee and could not, therefore, have assumed, as she could reasonably expect the operator to use that degree of skill ordinarily possessed by students.

It might be argued that this case must necessarily turn on assumption of risk, because the court would have reached the opposite result and allowed recovery if plaintiff had not known that the operator was a student. Knowledge is indeed an important element of assumption of risk. But assumption of risk applies only where there is danger of misconduct by the operator, and not where there is only knowledge of whatever dangers are inherent in his status as a student. The real significance of knowledge, which in this case is knowledge of status, is its effect on the degree of skill required. The actor will be bound to exercise that superior degree of skill and knowledge which he possesses or *holds himself out to possess.*[20] By assuming to give a permanent wave without any indication that he was anything but a licensed operator, the student operator would in effect hold himself out to be fully qualified. This would result in a higher requisite degree of proficiency by which standard his actions would be negligent, and the plaintiff could therefore recover.

It is not suggested that the court in this case necessarily reached the wrong result. The result is the same, whether the plaintiff fails to recover because she assumed the risk or because the defendant was not negligent (as judged by the student standard). The dictinction may at first thought seem one of nomenclature only, but it is important to preserve the distinction as one of theory, as it can become a matter of substance if a case arises in which a student is actually negligent in that his actions fall below the degree of proficiency required of students. A court, misled by past holdings that the plaintiff in such cases assumes the risk of the student's inexperience, might fail to differentiate between a risk born of inexperience and one born of negligence, and refuse recovery or even if

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applying to infants and students. The law does not allow persons to create in their favor an exception to the standard of care simply because they never bother to master the knack of the act they undertake to perform. She was negligent, but because of the knowledge by her father of her continual negligence in driving he cannot complain of an injury due to this lack of skill.

[19] 65 C.J.S. 852.

[20] HARPER, TORTS 162 (1933); PROSSER, TORTS 236 (1941).

they made such a distinction they might decide the question themselves as one of clear-cut assumption of risk, while it is properly a matter for the jury under a negligence instruction. It may be that in a popular sense one who patronizes a beauty culture school for her hairdos "assumes the risk" of certain injuries, but this means only that she takes a chance by placing herself in the hands of one held to a lower degree of skill than a licensed operator. These cases at law should hinge on the jury question of whether the student was negligent, and not on assumption of risk.

GEORGE CREEDLE

EQUAL FACILITIES IN LEGAL EDUCATION UNDER THE EQUAL PROTECTION CLAUSE – EPPS V CARMICHAEL

Plaintiffs, who were Negro citizens and residents of North Carolina possessed of requisite qualifications for admission to the Law School at the University of North Carolina, had applied there for admission. They were refused on grounds of their race and color and because North Carolina had provided a Law School for Negroes at the North Carolina College where they also had applied and had been admitted as law students. Plaintiffs prosecuted a class action against the President of the University and others to restrain the defendants from refusing to admit them. The Federal District Court held for the defendants, deciding that the College Law School afforded the required "separate, but equal, facilities." The court found that there would be no substantial advantage to the parties to be admitted to the University Law School, and that the disadvantages at the College Law School for Negroes were more than offset by the disadvantages existing at the University Law School. *Epps* v. *Carmichael.*[1]

In *Sweatt* v. *Painter,*[2] another recent case involving the right of a Negro to enter a white law school, the United States Supreme Court held that the legal education offered the Negro petitioner in Texas was not substantially equal to that which he would receive if admitted to the University of Texas Law School; and that the Equal Protection Clause of the Fourteenth Amendment required that he be admitted to the University of Texas Law School.

In both Texas and North Carolina, the legislatures had provided for segregation and forbade the attendance of Negroes at schools for white children.[3]

The action of a state in denying a citizen the opportunity to acquire a legal education on the highest level, deprives him of the *equal protection* of the laws guaranteed by the Fourteenth Amendment.

In the *Sweatt* case[4] the trial court continued the petitioner s case for six months to allow the state to supply substantially equal facilities. A law school was then hurriedly established and the Texas trial court found that the new school satisfied the Fourteenth Amendment by offering petitioner privileges, advantages, and opportunities *substantially equivalent* to those offered by the state to white students at the University of Texas. The Supreme Court reversed the Texas decision be-

[1] 93 Fed. Supp. 327 (W.D. N.C. 1950).

[2] 339 U.S. 629 (1950).

[3] Johnson v. Board of Education, 166 N. C. 468, 82 S.E. 832 (1914). TEX. CONST. Art. VII, secs. 7, 14; TEX. REV., CIV. STAT. arts. 2643b (Supp. 1949) 2719, 2900 (Vernon, 1925).

[4] Sweatt v. Painter, *supra,* note 2 at 633.