Voluntary assumption of risk

By Gerard Mullins

It is a defence at common law in a claim for damages for negligence for the defendant to prove that the plaintiff fully comprehended the risk of injury that materialised and freely chose to accept it.[1] The defence underpins a philosophy of individualism: that no wrong is done to one who consents *(volenti non fit injuria)*.

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Before the civil liability legislation was passed in each of the Australian states earlier this century, the defence of voluntary assumption of risk was described as a 'highly endangered species, but not yet extinct'.[2] Its boundaries were narrowly confined and the defence was successful only in rare cases. The *Review of the Law of Negligence* recommended that state and federal lawmakers add a statutory layer to the defence to bolster its usefulness. This article briefly considers the position at common law, the changes wrought by the civil liability legislation, and the current position.

COMMON LAW

Fleming summarises the development of the defence in the 19th century:

> 'The central element of the *volenti* defence, around which the ties of shifting social policy have eddied, is the supposition that the risk was *voluntarily assumed*. How real >>

must be the proof? 19th century theory, motivated by an overriding concern to shield industry and business from tort law, readily endorsed the proposition that one who encountered a known danger tacitly assumed the risk of an accident, content to absolve anyone responsible for it even if he or she turned out to be negligent. "*Volenti*" was interpreted as if it were synonymous with "*scienti non fit injuria*". This approach was most ruthlessly invoked in employment cases so as to debar injured workers on the barest finding that they continued in their job after learning that the working conditions were hazardous. But with the growing strength of industry and changing social ideas, this draconic doctrine began to yield, culminating in the drastic reformulation of the defence in the greater case of *Smith v Baker*. It was there laid down that voluntary assumption of risk cannot be imputed to a plaintiff merely because he or she encountered a known hazard; in order to disqualify the plaintiff from all redress, the plaintiff must be shown to have consented to run that risk at his or her own expense so that the plaintiff, and not the negligent defendant, should bear the loss in the event of an accident. In other words, the defence was henceforth available only in those rare cases where it can be generally predicated that the injured person assumes not merely the *physical* but also the *legal* risk of injury."[3]

Thus, the three elements of the defence of voluntary assumption of risk which must be proved by the defendant at common law include:

1. That the plaintiff perceived the existence of the danger or risk;
2. That he or she fully appreciated it; and
3. That he or she voluntarily agreed to accept the risk.[4]

At common law, the defendant must prove that the plaintiff had actual knowledge of the risk and fully appreciated the danger. The risk that a plaintiff must have an awareness of is not a generalised risk of injury; the defendant must prove that the plaintiff appreciated the risk of the defendant's breach of duty.[5] The extent of knowledge must correlate with the extent of the risk. In *Monie v Commonwealth of Australia*,[6] the plaintiff was a grazier who employed a worker on referral from the Commonwealth Employment Service. The worker had recently been released from a lengthy prison sentence and had an extensive criminal history. The plaintiff alleged that the Commonwealth Employment Service failed to reveal to the plaintiff the criminal history of the worker. Three months later the worker shot the plaintiff at his home.

The trial judge found that shortly before the shooting, the plaintiff had learnt that the worker had been imprisoned. The plaintiff had chosen not to dismiss him at the time, presumably because of the worker's satisfactory performance in the recent past. The trial judge found that the plaintiff had decided 'to keep [his] eyes closed and hope for the best'. He thereby voluntarily assumed any risk consequent upon the worker's violent propensity.

The Court of Appeal overturned the findings of the trial judge and concluded that all that was demonstrated was that the plaintiff had knowledge that the worker had been in prison. The court found that even if the plaintiff could be taken to have consented to having a man who had once been imprisoned for assault working and living on his property near his house, this was a long way short of consenting to the risk of being shot.[7] The court concluded that the defence of voluntary assumption of risk was not open on the facts.

The second essential element of the defence that the defendant must prove is that the plaintiff fully appreciated the risk. For example, in circumstances where the plaintiff's judgement has been adversely affected by alcohol to the extent of being incapable of appreciating the full extent of the risk, the defence of voluntary assumption of risk has failed. Similarly, in *Scanlon v American Cigarette Co (Overseas) Pty Ltd (No. 3)*,[8] the Victorian Supreme Court struck out the words 'or ought to have known' in a defence by a tobacco company pleading voluntary assumption of risk where the plaintiff argued that the defence might only be substantiated where the plaintiff *knew* of the risk, rather than *ought to have known*. Nicholson J concluded that knowledge may well be inferred, but that for a defendant to succeed in a defence of voluntary assumption of risk, he or she must establish that the plaintiff had actual knowledge of the matters giving rise to the risk.[9]

The third and most controversial element of the common law defence is that the plaintiff must 'freely and voluntarily' agree to accept the risk. The plaintiff would not ordinarily be presumed or deemed to have voluntarily accepted a risk merely because he or she knew about it and exposed themselves to it. The decision to voluntarily accept the risks associated with the negligence of the defendant might be inferred, but there are many cases in which the courts are loathe to infer that knowledge given the peculiar circumstances in which the plaintiff was placed. For example, the courts have been reluctant to infer voluntary agreement in cases where the alternatives to accepting the risk are onerous or repugnant, such as where avoiding the risk would require the plaintiff to give up their employment,[10] might cause them not to rescue another person from danger[11] or circumstances where the plaintiff perceived and fully appreciated a risk, but had a genuine belief that the risk would not materialise.[12]

CIVIL LIABILITY LEGISLATION

The authors of the *Review of the Law of Negligence, Final Report* considered that 'making it easier to establish the defence of assumption of risk would obviously promote' the objective underlying the Review's Terms of Reference. Two modifications were suggested. The first was to reverse the burden of proof on the issue of awareness of risk in circumstances where it was demonstrated that the risk in question was an 'obvious risk' within the meaning of the legislation. The second proposed change would be that to provide for the purposes of the defence of voluntary assumption of risk, the test of whether a person was aware of a risk is whether he or she was aware of the type or kind of risk and not its precise nature, extent or manner of occurrence.[13]

The Ipp Report led to the introduction of two provisions

relating to the operation of voluntary assumption of risk.[14] Broadly speaking, the two provisions define the meaning of 'obvious risk'[15] and thereafter provide:

1. That where a defence of voluntary assumption of risk is raised by the defendant and the risk is an obvious risk, the plaintiff is taken to have been aware of the risk unless the plaintiff proves, on the balance of probabilities, that he or she was not aware of the risk; and
2. That a person is aware of a risk if s/he is aware of the type or kind of risk, even if s/he is not aware of the precise nature, extent or manner of occurrence of the risk.[16]

In *Carey*,[17] McClellan J observed that until the recent statutory amendments provided by the *Civil Liability Act* 2002 (NSW), a defendant faced a difficult task to establish the defence of voluntary assumption of risk. The effect of the amending provisions was that a plaintiff was rebuttably presumed to be aware of a risk where the risk would have been obvious to a reasonable person in the position of the plaintiff. A plaintiff could not rebut the presumption by claiming that even though he or she was aware of the general risk of harm, he or she was not aware of all of its possible manifestations, including the one that eventuated.[18]

In *Dodge v Snell*,[19] Wood J applied the provisions of the Tasmanian legislation in circumstances where a jockey was injured in a horse race as a consequence of the negligence of a fellow rider. Wood J found that the risk was obvious to a reasonable person in the plaintiff's position and that the presumption under the Act that he was aware of the risk of harm that eventuated had not been displaced. As a consequence, the first two elements of the defence of voluntary assumption of risk had been proved.

The remaining question was whether the plaintiff had accepted the risk of the defendant's negligence. His Honour concluded that awareness of the risk, albeit one that was obvious in a generalised sense, was still a relevant factor in considering whether there had been voluntary acceptance of the relevant risk. His Honour found:

> 'It is evident that [the plaintiff] would have been aware of the risk of a fall arising from another jockey shifting inwards well short of the two lengths clearance, causing interference in clipping heels. However, his awareness of that risk was in a generalised sense and not the subject of any specific attention or focus; it was merely one of the ways in which he and other jockeys may come to harm; just one of the ways in which other jockeys may ride unsafely putting other jockeys at risk. The risk that materialised was not a risk that he specifically adverted to when he chose to ride on that day, or indeed any day. In this sense, his awareness of it was much like the awareness that motorists have when they set out on a driving journey. His awareness of the risk was accompanied by a belief in his own skill and competence and capacity to manage many situations of risk and, at the outset of the race, a trust of fellow jockeys to ride safely vis-à-vis other jockeys. Furthermore, there was in this case, in a real and practical sense, a lack of choice about the risk. There was nothing that the plaintiff could do to avoid or reduce the risk if he was to work as a successful jockey. I positively conclude that the plaintiff did not voluntarily agree to the risk that eventuated. Accordingly, the defendant has failed to establish the third element of the defence. The defence of *volenti* fails.'

CONCLUSION

Despite the passage of ten years since the advent of the civil liability legislation, there is a dearth of case law examining the relevant principles of voluntary assumption of risk. However, the result in *Dodge v Snell* might suggest that the defence, although certainly not extinct, might still be on the endangered species list. ■

Notes: **1** Fleming, *The Law of Torts*, 10th Edition, Law Book Company, 2011, at [12.270]. **2** *Leyden v Caboolture Shire Council* [2007] QCA 134 at [41]. **3** Fleming, see note 1 above, at [12.280]. **4** *Carey v Lake Macquarie City Council* [2007] NSWCA 4 at [85] per McClellan CJ. **5** *Dodge v Snell* [2011] TASSC 19 at [208]. **6** *Monie v Commonwealth of Australia* [2007] NSWCA 230. **7** *Ibid* at [78] - [79]. **8** [1987] VR 289 at [290-1[per Nicholson J. **9** See also *Insurance Commissioner v Joyce* (1948) 77 CLR 39 at [57[per Dixon J; *Banovic v Perkovic* (1982) 30 SASR 34 at [37]; *Bennett v Tugwell* [1971] 2 QB 267; *Roggenkamp v Bennett* (1950) 80 CLR 292. **10** *Carey* per McClellan CJ at [78]; *Smith v Baker* [1891] AC 325. **11** *Haynes v Harwood & Sons* [1935] 1 KB 146 at 157. **12** *Suncorp Insurance and Finance v Blakney* (1993) 18 MVR 361; *Canterbury Municipal Council v Taylor* [2002] NSWCA 24. **13** *Review of the Law of Negligence, Final Report*, September 2002, at [8.31]. **14** Note that this article deals solely with the defence of voluntary assumption of risk. Joachim Dietrich has written a comprehensive article dealing with the related issues of personal injuries and recreational activities (see pp32-7). The ambit of this paper does not extend to the related provisions affecting the duty to warn of obvious risk. **15** 'Obvious risk' is defined in the *Civil Liability Act* 2003 (Qld) in s13. Section 5F of the *Civil Liability Act* 2002 (NSW) replicates CL Act (Qld) s13, except for subs (5). Section 53 of the *Wrongs Act* 1958 (Vic) replicates s13 in its entirety. The *Civil Liability Act* 1936 (SA) replicates subs (1) – (3) only. Section 5F of the *Civil Liability Act* 2002 (WA) replicates the NSW provisions. Section 15 of the *Civil Liability Act* 2002 (Tas) replicates subs (1) – (5), but replaces subs (5) with a statement that a risk will not necessarily be obvious even if a warning has been given. Schedule 3 of the *Civil Law (Wrongs) Act* 2002 (ACT) deals with obvious risks in the instance of equine activities only: see Douglas, Mullins, Grant, *Annotated Civil Liability legislation – Queensland*, 3rd edn, Lexis Nexis, 2012. **16** Section 14 of the *Civil Liability Act* 2003 (Qld). Section 5G of the *Civil Liability Act* 2002 (NSW) replicates s14 except for formally raising the requirement that the defence of 'voluntary assumption of risk' be pleaded. Section 54 of the *Wrongs Act* 1958 (Vic) replicates s14(1), but not subs (2); rather, it states that the section does not apply to provision of professional services, applying the common law instead, and, thereby, further splintering the law. Section 5N of the *Civil Liability Act* 2002 (WA) replicates the NSW provisions. Section 16 of the *Civil Liability Act* 2002 (Tas) and s37 of the *Civil Liability Act* 1936 (SA) replicate s14. Schedule 3 of the *Civil Law (Wrongs) Act* 2002 (ACT) deals with obvious risks in the instance of equine activities alone: See Douglas, Mullins, Grant, *Annotated Civil Liability legislation – Queensland*, 3rd edn, Lexis Nexis, 2012. **17** [2007] NSWCA 4. **18** *Carey* at [87] – [90]. **19** [2011] Tas SC 19.

Gerard Mullins *is a barrister at Darrow Chambers, Brisbane. He has been practising for 25 yaers and is a specialist in tort and insurance.* **PHONE** *(07) 3236 1882*
EMAIL *gerrymullins@qldbar.asn.au*