TORTS—CONTRIBUTORY NEGLIGENCE—VOLENTI—INTOXICATED DRIVER—SUIT BY PASSENGE—APPORTIONMENT

Since the enactment of apportionment legislation in Canada in the "twenties", the defence of Volenti Non Fit Injuria has created much difficulty in litigation between a gratuitious passenger and an intoxicated driver. The recent cases of *Seymour* v. *Maloney*[1] and *Miller* v. *Decker*[2] contrast the different approaches followed by the courts.

The facts of the two cases were quite similar, and in both trials, the drunken drivers were afforded the defence of Volenti Non Fit Injuria. The Appellate decision in *Seymour* v. *Maloney*[3] held the gratuition passenger liable for contributory negligence instead of Volenti Non Fit Injuria, so the damages were apportioned. However, in *Miller* v. *Decker*,[4] the driver's defences were upheld on appeal to effectively bar relief for the injured passenger.

The facts of *Miller* v. *Decker*, briefly stated are these: Miller and Decker were two members of a group of youths who during an evening's activities drank heavily for several hours at a tavern and then went on to a dance. Miller drove with Decker, both being intoxicated, and on the return from the dance Decker drove at an excessive speed, with the result that his car overturned, and Miller was injured.

Bird J.A. determined that the trial judge rightly applied the principle of Volenti Non Fit Injuria. Sidney Simth J.A. started the action failed on the rule *ex turpi causa non oritur actio*. He also approved of the trial judgment of *Seymour* v. *Maloney* which gave a complete defence to the drunken driver on the volenti principle. In the analysis of O'Halloran J.A. Miller and Decker were engaged in a common and joint enterprise, and neither could sue the other for damage that could reasonably be forseen. It is difficult to determine from this short judgment whether this means a defence of ex turpi causa, volenti non fit injuria, or a separate defence entirely.

Now, in an examination as to why the defence of volenti non fit injuria was subsequently reversed in *Seymour* v. *Maloney* Doull J. indicates some of the ridiculous consequences which would follow the application of the volenti defence. The basic reasons for the finding of contributory negligence are summarized in the headnote[5] as follows:

> Where a gratuitous passenger has a cause of action against his driver, as, for example, in Nova Scotia where recovery depends on the existence of gross negligence, both volenti non fit injuria and contributory negligence may be urged in defence; the one as a complete bar and the other, by reason of apportionment legislation, in reduction of the amount of recovery The volenti doctrine assumes the existence of negligence or gross negligence—and excuses the defendant if there is actual knowledge by the plaintiff of the risk and actual consent (which may be implied) to take the risk with full knowledge of the nature and

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[1] *Seymour v. Maloney*, [1955] 4 D.L.R. 104.

[2] *Miller v. Decker*, [1955] 4 D.L.R. 92.

[3] *Supra*, footnote 1, at page 100.

[4] *Seymour v. Maloney*, [1955] 1 D.L.R. 824.

[5] *Supra*, footnote 1, at page 110.

[6] *Supra*, footnote 1.

extent thereof. However, in most cases, the volenti doctrine is not apt in determining the liability of a drunken driver with whom a passenger consents to drive although aware of the drunkeness. The passenger may well be considered careless of his own safety in so riding but he seldom considers the risk or knows how drunk the driver is. Contributory negligence is thus the apt defence It is wrong to say that a drunken driver owes no duty at all to a passenger who rides with him while aware of the drunkeness.

It is submitted, with respect, that *Seymour* v. *Maloney* expreses a better view of the law respecting volenti non fit injuria than the judgments expounded by the British Columbia Court of Appeal. Williams, in *Joint Torts and Contributory Negligence*[7] contends that judges have rarely allowed the defence of volens, and even when allowed, the concession was usually unneceessary. The majority of such cases justified a finding against the paintiff on other and additional grounds of remoteness of damages, contributory negligence, common employment ,or the limitation of duty toward licensees. Before the advent of contributory negligence it was an extraneous task to distinguish precisely between these grounds for dismission of an action; but nowadays it is essential to distinguish contributory negligence because it is no longer an absolute defence.

The changed complexion of contributory negligence is particulary pertinent in view of the fact that Bird J.A. and Smith J.A. relied upon *Dann* v. *Hamilton*[8] and *Insurance Commissioner* v. *Joyce*[9] to support their decisions. Neither England nor Australia had contributory negligence legislation when these cases were decided, so it was immaterial whether the defence was contributory negligence or volenti. Pollock, Beven, Salmond, and Glanville Williams[10] share the prevailing opinion[11] that *Dann* v. *Hamilton* was correctly decided, but that the plaintiff should have been adjudged liable for contributory negligence. Lord Asquith explained the decision regarding volenti non fit injuria.[12] Contributory negligence was not pleaded. Not only was the defence not pleaded, but Lord Asquith's notes show that when the case was before the Court he encouraged counsel for the defence to ask for leave to amend by adding the contributory negligence plea. In *Delaney* v. *Toronto*[13] (decided before apportionment legislation) the mutual application of the two defences is evident. The same proposition is stated in *Insurance Commissioner* v. *Joyce*:

> Thus, the three categories should not be regarded as mutually exclusive. The same evidence may establish a defence under each heading.[14]

Thus, many of the volenti cases the court relied upon in *Miller* v. *Decker* lack sound judicial basis in the light of our modern law.

Furthermore, the defence of volenti non fit injuria rarely applies in

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[7] *Ibid.*, at page 307.

[8] [1939] 1 K.B. 509.

[9] (1948), 77 C.L.R. 39.

[10] *Supra*, footnote 1, at page 113.

[11] Also Charlesworth, Law of Negligence (2nd edition, 1947), p. 507, 598.

[12] 69 L.Q.R. 317.

[13] 64 D.L.R. 122, at p. 127.

[14] *Supra*, footnote 9, at p. 39
In the headnote: ". . . that the passenger must fail in his action: by Latham C.J., on the ground that the facts proved were as consistent with (a) contributory negligence on the part of the passenger, or (b) voluntary acceptance by him of an obvious risk."

negligence actions, because the cases where a person truly consents to run the risk of another's negligence are altogether exceptional. Consent is necessary. Moreover, the consent required for volenti is usually evidenced by agreement, expressed or implied, and D. M. Gordon declares[15] that it is practically never shown by conduct. Williams states another necessity:[16]

> . . . the volens doctrine is not brought into operation either by a private resolution to undertake physicial risk or by 'recklessness' in the sense of facing a known danger. To assert the contrary is to ignore the chain of cases deciding that knowledge is not tantamount to consent.

Knowledge, evidently, is a prerequisite for consent, and even "knowledge" must be limited to a precise definition, which again restricts the field of volenti. A learned American authority writes:[17]

> Furthermore, he must only know of the facts which create the danger, but he must comprehend and appreciate the danger itself. If because of age, or lack of information or experience, he does not comprehend the risk involved in a known situation, he will not be taken to consent to assume it.[18]

One is tempted to question whether intoxication could be included with "age, lack of information or experience" as a disability of comprehension, but the question of intoxication is more properly answered by:[19]

> His failure to exercise ordinary care to discover the danger is not properly a matter of assumption of risk, but of the defence of contributory negligence.

An intoxicated passenger who accepts a ride with an intoxicated driver, has by his intoxicated condition, precluded himself (by his acts or omissions) from exercising ordinary care to discover the danger. This is properly "a failure of the duty of a person to take care of himself", which was the definition of contributory negligence advocated by Goodhart[20] and accepted by the Privy Council in *Nance* v. *B.C. Electric Railway Co.*[21]. Both the majority and dissent judgments of *Insurance Commissioner* v. *Joyce*[22] place the intoxicated passenger solely in the realm of contributory negligence. (Whereas, if he were sober, the "mutal" defences of contributory negligence and volenti would operate against him.) The proposition is reiterated in *Hughes* v. *McCutcheon*[23] by this ratio; a person who shuts his eyes to danger and entrusts himself to the control of one whom he knows to be incompetent, contribues proportionately to the injuries which result from such incompetency.

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[15] 61 L.Q.R. at p. 158.

[16] Williams, Joint Torts and Contributory Negligence, at p. 307.

[17] Prosser, On Torts(1941).

[18] *Ibid.*, at p. 305.

[19] *Supra*, footnote 17.

[20] 55 L.Q.R. at p. 185.

[21] [1951] 3 D.L.R. 705.

[22] *Supra*, footnote 9.
Per majority, at p. 47: ". . . he thereby disabled himself from avoiding the consequences of negligent driving by Kettle, and his action fails on the ground of contributory negligence."
Per dissent, at p. 60: "Again he may have been too fuddled with drink himself to know. I cannot accept the view that a man who is unable through drink to know and accept the risk is to be taken as accepting it or is disqualified from denying that he accepted it."

[23] *Hughes* v. *McCutcheon* [1952] 4 D.L.R. at p. 375.

Smith and Drewry's Ltd. v. *Stephenson*[24] reveals this view (on facts similar to *Miller* v. *Decker*), and based the judgment on contributory negligence.

The modern stand concerning defences in which the plaintiff and the defendant were co-operating in a negligent course of conduct is demonstrated by *Dokuchia* v. *Domansch*[25]. Here the plaintiff knew of the performance of the very act that constituted negligence and co-operated in it, though he was not under any obligation to do so. He was allowed to recover a proportion of his damages under the Contributory Negligence Statute, it being held that the volens maxim was no defence. These results were particularly satisfactory, for there is no reason why in a case like this the loss should be borne exclusively by the unfortunate person on which is happens to fall.

No longer would one have to distinguish between cases where a person had knowledge of the danger and its extent and consented to it, and cases where the plaintiff has been guilty of a want of care for his own safety. Instead the two tasks would be integrated, and where a person knew of and consented to take a risk which a reasonable man would not take, or where the person was too intoxicated to be able to have any knowledge, then his contributory negligence would be of such a degree as to almost it not entirely, exclude his recovery.

—J. S. Moore,
Third Year Law.

[24] [1937] 1 W.W.R., at p. 111;
[25] [1945] 1 D.L.R. 757.

WILLS—LEGATEE OMITTED—POWER OF COURT TO ADD OMMITED NAME—CONSTRUCTION

The decision of Freedman J. in *Re Le Blanc Estate*[1] re-opens the problem of a probate court's power to add words to an otherwise incomplete will. In the Le Blanc case the learned judge was faced with an holograph will which in addition to numerous less important errors omitted the name of a legatee. The will read as follows:

Los Angeles, Cafb. U.S.A
14 June 1953
Mother in case of quick desessed, my will his forreward to children
$6000.00 Olive Braden Six towsend Dollars.
$2500.00 Alice Pigott tow tousand amd five husdren Dollars.
$2500.00 Felix Le Blanc tow towsend and five husdren Dollar.
$4000.00 Ernest Le Blanc four towsend Dollars.
$2000.00
$1000.00 Desised expenses and taxes.

$1800.00 entermartion of properter ellath in towsends Dollars.
Mother Mrs. Hossanna Le Blanc

This curious document came before the court in an application brought under the Manitoba Trustee Act[2] by the administrator with will annexed. All the

[1] (1955), 16 W.W.R. (N.S.) 389.
[2] R.S.M., 1954, c. 273.