Assumption of Risk as a Defense in Malpractice Litigation

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discharge defendant of his liability. Negligence which occurs prior to the defendant's negligence is of no effect at all. Negligence which occurs subsequent to the defendant's negligence can only serve to mitigate damages.

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ASSUMPTION OF RISK AS A DEFENSE IN MALPRACTICE LITIGATION

William Prosser, in his treatise on Torts,\(^1\) discusses three situations that give rise to the defense of assumption of risk. The first occurs when the plaintiff has expressly given his consent to relieve defendant from a duty and has decided to take his chances of injury from a known risk. The second occurs when the plaintiff, with knowledge of the risk, voluntarily enters into some relation with the defendant which will probably result in encountering the known danger. The third situation exists when the plaintiff becomes aware of a risk already created by the negligence of the defendant and elects to continue in the face of the danger.

All three require that the plaintiff has knowledge of the danger that is to be encountered and voluntarily elects to meet it. If the plaintiff's decision to take the risk is in itself unreasonable, below the standard of the reasonable man, the conduct is a form of contributory negligence. Due to this overlap, many courts fail to distinguish between contributory negligence and assumption of risk.\(^2\)

The difficulty in applying assumption of risk to cases of medical malpractice is that plaintiff must be shown to have had knowledge of the risk assumed and to have voluntarily chosen to meet that risk. Proving these two elements is difficult at best. A patient may be aware of the dangers inherent in various medical procedures, but he rarely has any real choice in selecting the treatment given. When he is offered alternatives, both being thoroughly explained, the charge of negligence is most often grounded in an improper execution of the technique or procedure selected, rather than in an improper selection of the technique or procedure utilized.

Another factor, peculiar to cases of surgery and emergency treatment, which makes assumption of risk inapplicable is the usual unconsciousness of the patient at the time of the alleged negligence of the physician. A patient who has neither control over what is being done, nor awareness of the physician's activities, cannot be said to have had knowledge of the risk assumed coupled with a voluntary election to meet it. However, under such circumstances, it would be equally difficult to prove contributory negligence.

\(^1\) Prosser, Torts § 67 (3d ed. 1964).
\(^2\) Ibid.
In general, though assumption of risk and contributory negligence often overlap, it is much simpler to prove contributory negligence. Assumption of risk requires that the plaintiff both know and understand the risk incurred and voluntarily choose to meet that risk. If the decision to meet a known risk is unreasonable, then the plaintiff is also guilty of contributory negligence. Thus, when the plaintiff is charged with refusing to cooperate with the defendant-physician, it is easier to show that the plaintiff's behavior is unreasonable, than it is to prove that the plaintiff, while having full knowledge of the probable consequences, voluntarily failed to cooperate, or selected the treatment now being complained of, or in some other way obstructed the course of treatment. For this reason, assumption of risk is rarely used in malpractice cases.

There are no reported Illinois malpractice cases which rest on the theory of assumption of risk, and there are only a few from other jurisdictions that do. In the main, the reported cases that do rest on assumption of risk concern the selection of a faith healer to effect a cure. Those cases do not concern medical practitioners and are thus beyond the scope of this article. Three of the cases that do involve medical practitioners are discussed below.

In the case of *Hales v. Raines*, the Missouri Court was faced with an assumption of risk problem. The defendant claimed that he had informed the plaintiff that the use of X-rays to treat a skin condition was somewhat dangerous. The patient nevertheless agreed to undergo treatment. The defendant claimed that this amounted to an assumption of the risk and thus, the trial court erred in not giving the jury an instruction concerning that defense. The appellate court agreed, but went on to say that the plaintiff assumed the risk inherent in the use of X-rays, but not the risk that the defendant would prove to be negligent in administering the treatment.

A similar situation was again presented to the Missouri court a few years later. In the case of *Gross v. Robinson*, the court held that though the plaintiff was warned of the dangers of too many X-ray exposures, and thus assumed that risk, he did not assume the risk of too many exposures with a machine that was not in proper working order.

Though neither of these cases adequately defines assumption of risk, they do illustrate that the risk assumed by a patient may be quite narrow and if the injury is caused by an event beyond the scope of that risk, the defendant will be liable.

Illustrative of how difficult it is to prove that a plaintiff assumed a

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3 Ibid.

4 Faith healers are not medical practitioners and thus, that problem will not be discussed here. For an annotation of the subject, see Annot., 19 A.L.R.2d 1219 (1951).

5 162 Mo. App. 46, 141 S.W. 924 (1911).

6 203 Mo. App. 118, 218 S.W. 924 (1920).
known risk is the New Mexico Case of *Los Alamos Medical Center v. Coe*\(^7\)

In that case, the plaintiff was allowed to take morphine at home for relief of pain as needed. The defendant-doctor assured the plaintiff and her family not to worry and to give the plaintiff morphine whenever she wanted it. Relying on this instruction, they administered the drug and the plaintiff became addicted. The court held that the plaintiff did not assume the risk, as she was justified in relying on the superior knowledge of her doctor. The plaintiff was under no duty to distrust her physician or to set her judgment against his.

It is the very disparity in knowledge between a patient and his doctor that makes assumption of risk an unlikely defense in malpractice litigation. Given this disparity, the assumption of a known risk becomes virtually impossible. It is evident that in following a physician's directions, a peculiar set of circumstances would have to arise before a plaintiff could be said to have assumed a known risk. It is probable that an express warning would be required, or that the facts be such that an ordinary man would know the consequences. It is the very peculiarity of the necessary fact situation, combined with the availability of contributory negligence as a defense, that has resulted in assumption of risk being virtually forgotten in cases of medical malpractice.\(^8\)

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THE STATUTE OF LIMITATIONS AS A BAR IN MEDICAL MALPRACTICE LITIGATION

When the statute of limitations is pleaded as a bar to a malpractice claim, three problems peculiar to this kind of litigation arise. These problems are: (1) Which section of the statute is applicable? (2) When does the statute begin to run? and (3) What kind of acts constitute the fraud that tolls the statute?

**Which Section Of The Statute Is Applicable?**

In Illinois, there are three possible solutions to the problem of which statute applies. Chapter 83, § 15 of the Illinois Revised Statutes places a two year limitation on actions for personal injuries\(^1\); Chapter 83, § 16 places

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\(^7\) 58 N.M. 686, 257 P.2d 175 (1954).

\(^8\) In *Maki v. Frelk*, 85 Ill. App. 2d 439, 229 N.E.2d 284 (2d Dist. 1967), the Appellate Court for the Second District held that the doctrine of contributory negligence as a complete bar to recovery would be abandoned and that the doctrine of comparative negligence would henceforth be used. If the holding of the *Maki* case is accepted by the other appellate districts or by the Illinois Supreme Court, it can readily be predicted that defense attorneys will attempt to make more use of the assumption of risk defense, since it is a complete defense while comparative negligence is not.

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\(^1\) Ill. Rev. Stat. ch. 83, § 15 (1965). *[Personal injuries, penalties, etc.]* Action for dam-