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Assumption of Risk-Whether a Licensed Driver Accompanying a Person in Possession of a Learner's Permit Should be Held to Assume the Risk of the Latter's Inexperience

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ASSUMPTION OF RISK—WHETHER A LICENSED DRIVER ACCOMPANYING A PERSON IN POSSESSION OF A LEARNER'S PERMIT SHOULD BE HELD TO ASSUME THE RISK OF THE LATTER'S INEXPERIENCE

The pre-eminence which the automobile occupies in today's society has resulted in its being one of the most prominent causes of litigation in our courts. Indeed, its frequent appearance indicates the problems and confusion inherent in our present laws. One issue which demonstrates the conflict in automobile negligence law is whether a licensed driver who accompanies a person in possession of a learner's permit assumes the risk, as a matter of law, of any personal injuries resulting from that learner's inexperience. This issue was discussed in *Chalmers v. Willis*.[1]

Defendant Willis had obtained a learning driver's permit because her friend, Mrs. Chalmers, had agreed to teach her to drive. Mrs. Chalmers demonstrated various elements of the car's operation and allowed Mrs. Willis to drive in an isolated area. On the second day of lessons, having safely driven over forty miles, Mrs. Willis made a left-hand turn between two pillars. Her failure to allow the wheel to "come back"[2] properly caused the car to run off the road into a ditch and collide with a telephone pole. The court of appeals determined that while some jurisdictions hold that a driving instructor assumes the risk of his pupil's inexperience as a matter of law,[3] Maryland would agree with those states which hold that he does not.[4]

A review of pertinent case law reveals the utter confusion of terms surrounding the issue, and illustrates that the difficulty in reaching an enlightened solution to the problem raised by *Chalmers* is due in a large part to the imprecise and ambiguous language used by the courts. They have mingled the legal terms of negligence, inexperience, contributory negligence and assumption of risk into an unintelligible jumble. This Note will analyze the terms which have given rise to the confusion and will propose a standard to be applied in beginning driver cases.[5]

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1. 247 Md. 379, 231 A.2d 70 (1967).

2. Brief for Appellant at 27, Chalmers v. Willis, 247 Md. 379, 231 A. 2d 70 (1967).

3. 247 Md. 379, 386, 231 A.2d 70, 73-74.

4. *Id.* at 387, 231 A.2d 70 at 74.

5. Related issues, such as the passenger's liability to third persons injured by the driver, will be omitted. For a discussion of this problem see Annot., 5 A.L.R.3d 271 (1966).

Assuming the risk of a driver's inexperience is not the same as assuming the risk of his negligence.[6] Negligence is "the failure to exercise the care that a prudent person usually exercises."[7] Negligence is the lack of reasonable care.[8] The defendant is usually capable of exercising the care required but abandons it knowingly or inadvertently.[9] Experience, on the other hand, is not determined by the exercise of reasonable care. "The word 'experience' implies skill, facility, or practical wisdom, gained by personal knowledge, feeling, or action."[10] For example, the defendant may exercise all the care that a reasonable man in the position of an inexperienced driver, would exercise, but due to inexperience or lack of skill, his care is not enough to prevent the accident. This difference can best be seen by comparing the standards used to test the defendant's conduct. Negligence is measured by an objective standard of what a reasonable man exercising due care would or would not do in a particular situation.[11] Inexperience, however, is measured subjectively[12] by what a particular person can or cannot do due to a lack of some factor, such as training, in a given situation.

A reasonable man may be inexperienced. He may be doing an act for the first time which will become progressively better with practice. Being the reasonable man, he will be exercising due care. An unintended result may nevertheless occur because the exercise of due care cannot insure a perfect result. The result is the product of inexperience in doing the act and not of the actor's negligence. Yet, the same act done by any other man may be negligent. In comparing the acts, the critical question is: "Would the reasonable man have done this act, knowing that he is inexperienced?" If the answer is yes, there is no negligence; if it is no, then there probably is negligence. It is not being inexperi-

6. Corbet v. Curtis, 225 A.2d 402 (Me. 1967); *cf.* Roberts v. Craig, 124 Cal. App. 2d 202, 268 P.2d 500 (1954) (A plaintiff does not assume the risk of a learning driver's negligence as a matter of law. Inexperience was not in issue).

7. Chicago I. & L. Ry. v. Gorman, 58 Ind. App. 381 at 385, 106 N.E. 897 at 899 (1914).

8. Garland v. Boston & Maine R.R. Co., 76 N.H. 556, 86 A. 141 (1913); Yerkes v. Northern Pacific R.R. Co., 112 Wis. 184, 88 N.W. 33 (1901); RESTATEMENT (SECOND) OF TORTS § 282 (1957); PROSSER, THE LAW OF TORTS § 31 (3d ed. 1964). (Hereinafter cited as PROSSER, TORTS).

9. If the defendant knowingly abandons due care, this does not necessarily mean that he anticipated what consequences would follow. If he did so anticipate, the proper term would be intent and not negligence. PROSSER, TORTS §§ 8, 31.

10. *See, e.g.*, Getsinger v. Corbell, 188 N.C. 553, 125 S.E. 180 (1924); Paul v. Consolodated Fireworks Co., 177 App. Div. 85, 163 N.Y.S. 953 (1917).

11. Vaughan v. Menlove, 3 Bing. N.C. 468, 132 Eng. Rep. 490 (1837); Blyth v. Birmingham Waterworks Co., 11 Ex. 781, 156 Eng. Rep. 1047 (1856); Seavey, *Negligence-Subjective or Objective*, 41 HARV. L. REV. 1, 8 (1927).

12. Harris v. Fall, 177 F. 79 (7th Cir. 1910); Rann v. Twitchell, 82 Vt. 79, 71 A. 1045 (1909).

enced which is negligent, but rather the doing of an act while inexperienced which a reasonable man would not do.

As matters of defense, the terms of assumption of risk and contributory negligence must also be distinguished. In some respects they are similar,[13] but in most respects they are inapposite. Three essentials must be present in order for the defense of assumption of risk to exist: (1) a danger inconsistent with the plaintiff's welfare,[14] (2) a realization or knowledge of the danger by the plaintiff[15] and (3) a voluntary choice by the plaintiff to proceed in the face of the known danger.[16] Contributory negligence, on the other hand, does not depend on all three of these elements. Contributory negligence involves a second actor failing to use reasonable care with respect to the *already existing* negligence of the first actor. Since inexperience is not a form of negligence, it is error for a court to say that a person may be contributorily negligent with respect to a learning driver's inexperience.[17]

Inexperience, however, is a risk in itself,[18] and the plaintiff may assume it. If it is found that inexperience caused the accident, the proper question is whether the plaintiff assumed the risk of injury from it, not whether he was contributorily negligent in relation to it. Of course, if negligence as distinguished from inexperience caused the accident, the plaintiff may be subject to either defense.[19] Courts have not limited their consideration of a driver's experience to his overall ability to drive. When considering whether a defendant is inexperienced, they have looked to the specific act which he was performing. Thus, whether a man is experienced in turning left or right, in backing up, in driving in the country, or in the city, or in starting and stopping the automobile

13. PROSSER, TORTS § 67.

14. Cincinnati, N. O. & T. P. R.R. Co. v. Thompson, 236 F. 1 (6th Cir. 1916); Guerrero v. Westgate Lumber Co., 167 Cal. App. 2d 612, 331 P.2d 107 (1958); Ricks v. Jackson, 169 Ohio St. 254, 159 N.E.2d 225 (1959).

15. *See* cases cited note 14 *supra.*

16. Gibson v. Beaver, 245 Md. 418, 226 A.2d 273 (1967); Krause v. Hall, 195 Wis. 565, 217 N.W. 290 (1928).

17. *See, e.g.*, Bogen v. Bogen, 220 N.C. 648, 18 S.E.2d 162 (1942); Joyce v. Quinn, 204 Pa. Super. 580, 205 A.2d 611 (1964); Sargent v. Williams, 152 Tex. 413, 258 S.W.2d 787 (1953).

18. Richards v. Richards, 324 S.W.2d 400 (Ky. 1959); Spellman v. Spellman, 309 N.Y. 663, 128 N.E.2d 317 (1959); St. Denis v. Skidmore, 14 App. Div. 2d 981, 221 N.Y.S. 613 (1961); Le Fleur v. Vergilia, 280 App. Div. 1035, 117 N.Y.S.2d 244 (1952); Aloisio v. Nelson, 27 Misc. 2d 343, 209 N.Y.S. 2d 674 (Sup. Ct. 1961).

19. A person may assume the risk of any act, whether it be negligent or not. For example, a plaintiff assumes the risk of injury from a defendant's negligent act when he, as a hotel guest, encounters defective and unsafe stairs but nevertheless descends them. Hunn v. Windsor Hotel Co., 119 W. Va. 215, 193 S.E. 57 (1937). A plaintiff assumes the risk of injury from a lawful activity, such as blasting, when he voluntarily places himself in the danger area. Worth v. Dunn, 98 Conn. 51, 118 A. 467 (1922).

has been determinative of actions against him.[20] One court recognized the absurdity of subdividing the driver's experience; it held that the risk which the plaintiff assumed was not that the learning defendant would accelerate too hard, but rather the risk of being injured from any act due to the learner's inexperience in driving.[21]

The assumption of risk defense is dependent on the plaintiff's having knowledge of the risk.[22] If driving is broken down into its component parts, such as turning, backing up, et cetera, the plaintiff must have knowledge of the defendant's inexperience with respect to the specific act which caused the accident in order to have assumed the risk of it. Implicit in this argument is the idea that a defendant, in order to hold the plaintiff to have assumed any risk, must manifest to the plaintiff that he is inexperienced in some given act of driving. The courts may well recognize the impracticality of such an approach, but nevertheless say that the plaintiff must have knowledge of the defendant's inexperience in a particular act in order to rule out the disfavored defense of assumption of risk.[23]

By requiring knowledge of specific areas of inexperience, a court violates sound reasoning. Accidents usually do not occur as a result of specific inexperience, but are rather due to a general inexperience. Thus, even though a learner may skillfully accomplish specific acts, he may, on the whole, be a poor driver. It is submitted that if one is to assume any risk it is the inexperience of the totality of driving.

The general rule is that, as a matter of law,

> one who is licensed to operate a motor vehicle, and who voluntarily accompanies a driver who has just received a learner's permit for the purpose of teaching him to drive, assumes the risk of the learner's inexperience and may not recover damages for personal injuries caused by the lack of skill or inexperience of the driver.[24]

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20. Chalmers v. Willis, 247 Md. 379, 231 A.2d 70 (1967); Constantin v. Banker's Fire & Marine Ins. Co., 129 So. 2d 679 (La. App. 1961); Holland v. Pitocchelli, 299 Mass. 554, 13 N.E.2d 390 (1938). In the *Holland* case, the plaintiff was teaching the defendant how to drive. The defendant turned too wide of an arc while turning left and an accident resulted. During the turn plaintiff anticipated the accident and pulled on the emergency brake. The defendant, however, pressed on the accelerator and cancelled the brake's effect. The court said, "There is nothing in the record to show that this plaintiff knew or appreciated that the defendant would press on the 'gas pedal' with such force as to overcome the effect of the continued application of the emergency brake." 299 Mass. at 558, 13 N.E.2d at 392.

21. Richards v. Richards, 324 S.W.2d 400 (Ky. 1959) (accident resulted when the defendant accelerated too hard).

22. See cases cited note 14 *supra*.

23. See case cited note 21 *supra*.

24. 8 AM. JUR. 2d *Automobiles* § 539 (1963); *accord*, Richards v. Richards, 324 S.W.2d 400 (Ky. 1959); Spellman v. Spellman, 309 N.Y. 663,

The three essentials of the assumption of risk theory are satisfied in the following manner. The *danger* is that the learner may somehow get involved in or cause an accident due to his inexperience in driving and reacting to various situations, or in meeting hazards from which an experienced driver could emerge harmless or could have avoided in the first instance. Secondly, the plaintiff is held to have *realized the danger* of the inexperience merely because of the defendant's status as a learner,[25] it matters not if the plaintiff has actual knowledge. Finally, the plaintiff *voluntarily proceeds in the face of the danger* by getting into the car with the defendant; driving distance or riding time seems to be immaterial.[26]

Courts following the majority rule apparently believe that public policy will best be served by their decisions. One policy reason may be to deter licensed drivers who are not qualified as instructors from teaching other people to drive.[27] Obviously not all licensed drivers are safe drivers. A learner who is being taught by a friend or relative will be exposed to bad driving habits and may incorporate those habits into his own driving technique. Driving-school instructors, however, are usually much more capable than lay teachers. The trained instructor will have an objective attitude towards the learner, whereas a friend or relative may have a relationship with his pupil that interferes with proper instruction; such feelings may inhibit necessary criticism, or provoke unwarranted criticism, thereby causing the learner to become nervous and panicky. The policy favoring trained instructors is also promoted by the concern for safe equipment. Driver education automobiles are generally equipped with dual controls which reduce the chance of an accident during the learning process.

In the usual case where assumption of risk is pleaded as a defense and the plaintiff is not precluded from prosecuting as a

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128 N.E.2d 317 (1959); St. Denis v. Skidmore, 14 App. Div. 2d 981, 221 N.Y.S.2d 613 (1961); Le Fleur v. Vergillia, 280 App. Div. 1035, 117 N.Y.S.2d 244 (1953); Aloisio v. Nelson, 27 Misc. 2d 343, 209 N.Y.S.2d 674 (Sup. Ct. 1961).

25. Due to the knowledge requirement of assumption of risk, the standard to be applied is not the objective standard of the reasonable man, but rather a subjective standard: the plaintiff must have actual knowledge of the risk. There are, though, certain risks and dangers that everyone will be presumed to know and appreciate. PROSSER, TORTS § 67. Apparently the courts holding that any licensed driver assumes the risk of a learning driver's inexperience as a matter of law believe that such inexperience is a risk which should be known by everyone.

26. *But see* Constantin v. Banker's Fire & Marine Ins. Co., 129 So. 2d 269 (La. App. 1961) where the court found it difficult to believe that a learning driver would drive the car into a ditch immediately after starting the automobile.

27. Insurance companies recognize that drivers who have received their instruction in an approved driving school are safer drivers by charging them lower premiums.

matter of law, the functions of the jury may be categorized. The first functon is to determine whether the plaintiff's allegation of negligence or actionable inexperience is supported by the facts as brought out during the trial. Then it must determine whether this was the cause of the plaintiff's injury. Finally, the jury must determine whether the plaintiff assumed the risk of either the inexperience or negligence. All of which involves time and expense at trial. Under the rule barring the plaintiff as a matter of law, however, the jury merely has to determine whether the alleged inexperience did in fact exist and whether it was the cause of plaintiff's injury. Therefore, the jury need not decide whether the three essentials of assumption of risk were present and trial time is saved.

Only two reasons have been advanced to support the majority rule. It is questionable whether they have sufficient merit to justify keeping the defense of assumption of risk from going to the jury.

Although the weight of authority appears to be in favor of holding the plaintiff-teacher to have assumed the risk as a matter of law, a few courts have rejected this rule.[28] *Chalmers* exemplifies the question of fact approach:

> In our opinion, the better rule is that the person helping the learning driver does not, as a matter of law, assume the risk of anything that may happen to him as the result of an accident in which the driver's inexperience plays a part. Rather, we think the questions are whether the plaintiff assumed the particular kind of risk involved, the degree of incompetence or inexperience of the driver, which, on the facts, should reasonably have been anticipated by the plaintiff, and whether, given the driver's experience in the act or omission which caused the accident, the driver may properly be held negligent, despite his inexperience. Where these questions are involved, as we believe they are in the present case, then we think the question of whether the plaintiff assumed the risk of the driver's conduct under all the circumstances, in which inexperience is included, is for the trier of the facts.[29]

The *Chalmers* court clearly placed on the jury the burden of determining whether the cause of the accident was due to the defendant's negligence or to his inexperience.

The court also refers to the particular risk and to what is termed the "degree of inexperience." At the core of this concept is the number of hours which the learner has spent behind the wheel. The teacher may well believe that there is little or no risk involved when riding with a more "experienced" learner as com-

28. Constantin v. Banker's Fire & Marine Ins. Co., 192 So. 2d 269 (La. App. 1961); Chalmers v. Willis, 247 Md. 349, 231 A.2d 70 (1967); Holland v. Pitocchelli, 299 Mass. 554, 13 N.W.2d 390 (1938).

29. 247 Md. 379 at 387, 231 A.2d 70 at 74.

pared to one just beginning to drive; the risk diminishes as the learner gains driving experience over a period of time.

It seems that the *Chalmers* court is saying that a reasonable man would not necessarily believe that there is an unwarranted risk connected with the defendant-learner. This leads to the question of whether the risk of riding with a learning driver is ever great enough, or so apparent and exceedingly dangerous, to justify using the doctrine of assumption of risk as a matter of law to defeat the plaintiff's claim. It is submitted that it is not. Generally, assumption of risk appears in cases involving extraordinary events which are so dangerous that a warning is associated with them. Examples of such events are riding with a highly intoxicated driver,[30] or in a car without brakes,[31] getting within reach of an animal known to be vicious,[32] or exposing oneself to fire.[33] A beginning driver does not present so grave a potential danger. If he has driven reasonably well under the teacher's instruction, the teacher might be fully justified in believing himself safe. The requirement of knowledge of the risk would not be present. It is therefore submitted that inexperience does not present such an obvious danger that knowledge of it should be imputed to a driving instructor merely because his pupil is in possession of a learner's permit. Even where the learner is beginning to drive, there is not inevitably such a risk as to warrant a conclusion that the teacher assumed it as a matter of law. To this rule certain exceptions should be made. Where a plaintiff instructs a learner to drive in an obviously dangerous area or to encounter a steep, icy hill during the very early period of his training, the defense may be warranted. Only in such extreme situations, however, would the doctrine of assumption of risk as a matter of law be justified.

There is yet another possible consideration. Many of the cases have said that there is a difference between situations in which the plaintiff is along merely to satisfy the statutory requirement[34] that a person driving with a learner's permit must be accompanied by a licensed driver.[35] The reason for the distinction

30. *See, e.g.*, Young v. Wheby, 126 W. Va. 741, 30 S.E.2d 6 (1944); Ven Rooy v. Farmers Mutual Ins. Co., 5 Wis. 2d 374, 92 N.W.2d 771 (1958).

31. *See, e.g.*, Gallegas v. Nash, 137 Cal. App. 2d 14, 289 P.2d 835.

32. *See, e.g.*, Opelt v. Al. G. Barnes Co., 41 Cal. App. 776, 183 P. 241 (1919); Hosmer v. Carney, 228 N.Y. 73, 126 N.E. 650 (1920).

33. *See, e.g.*, Bowen v. Boston & A.R.R. Co., 179 Mass. 524, 61 N.E. 141 (1901).

34. *See, e.g.*, CAL. VEHICLE CODE § 12509; DEL. CODE ANN. tit. 21, § 2708 (1953); D.C. CODE ANN. § 40-301 (1961); MD. ANN. CODE art. 66½, § 90 (1957); N.J. STAT. ANN. § 39: 3-13 (1961); N.Y. VEHICLE & TRAFFIC LAW § 501; PA. STAT. ANN. tit. 75, § 606 (1960); W. VA. CODE ANN. § 17B-2-5 (1961).

35. *See, e.g.*, Roberts v. Craig, 124 Cal. App. 2d 202, 268 P.2d 500 (1954). Turner v. Johnson, 333 S.W.2d 749 (Ky. 1960); Chalmers v. Willis, 247 Md. 379, 231 A.2d 70 (1967); Paone v. Magee, 18 App. Div. 2d 728, 234 N.Y.S.2d

was aptly stated by the dissent in *Chalmers*:

> [T]he giving of instruction is a clear indication of appreciation of the lack of skill and experience of the driver. When no instruction is being given, the facts as to the accompanier's appreciation of the risk ordinarily may be more in dispute and therefore for the jury.[36]

The plaintiff who rides with a beginner to instruct is charged with knowledge of the inexperience. Such knowledge is essential to warrant a correct application of the assumption of risk theory. Knowledge that a driver has only a learner's permit is not necessarily sufficient to warn the plaintiff of a danger, especially when the plaintiff may believe the driver to be "experienced" because of a prior period of training. If the distinction between the two situations were not maintained, a learner who controls himself and his automobile reasonably well may never improve his skills because licensed drivers would be deterred from accompanying him. A learner would then have to enroll in an extensive drivers' training course or abandon his hope of getting a regular license, unless he violated the statute and practiced alone. None of these choices would be particularly desirable. The distinction between riding to teach and riding to allow the defendant to comply with a statute has merit especially in those jurisdictions which allow the assumption of risk doctrine to be applied to all teacher-learner situations.

Authority Which Holds That Any Rider Assumes the Risk of Personal Injury Caused by the Driver's Inexperience

There are a large number of cases which do not involve the learning-driver and teacher-plaintiff situation, but which nevertheless may have application to the issue.[37] The Wisconsin cases of

329 (1962); Joyce v. Quinn, 204 Pa. Super. 580, 205 A.2d 611 (1964); Jennings v. Hodges, 80 S.D. 532, 129 N.W.2d 59 (1964).

36. 247 Md. 379 at 392, 231 A.2d 70 at 77.

37. Cleary v. Eckart, 191 Wis. 114, 210 N.W. 267 (1926), *overruled in* McConville v. State Farm Mutual Auto Ins. Co., 15 Wis. 2d 274, 113 N.W.2d 14 (1962); Olson v. Hermansen, 196 Wis. 614, 220 N.W. 203 (1928) *overruled in* McConville v. State Farm Mutual Auto Ins. Co., *supra*. In *McConville v. State Farm Mutual Auto Ins. Co.*, 15 Wis. 2d 274, 113 N.W.2d 14 (1962) the Wisconsin Supreme Court overruled this line of prior cases. This was done, however, only because the state had enacted a comparative negligence statute, and also because the court felt that a plaintiff's claim should not be completely barred. Assumption of risk is now called contributory negligence. It is believed, however, that a rider who knows that the driver is incompetent and inexperienced will be held to be contributorily negligent as a matter of law. Thus, a plaintiff's claim will not be totally barred but will be reduced in the proportion that his contributory negligence bears to the driver's negligence due to the fact that contributory negligence is not a complete defense under a comparative negligence statute. See 46 Marq. L. Rev. 119 (1962); 8 Wayne L. Rev. 451 (1961); 1961 Wis. L. Rev. 677 (1961).

Although these particular cases have been overruled, the reasoning contained therein is illustrative of the many cases which have followed

Cleary v. Eckart[38] and *Thomas v. Steppart*[39] illustrate a rule that a court will not force a driver to be something that he is not.[40] They hold that *any* rider assumes the risk of personal injury caused by the driver's inexperience and lack of skill.

In *Cleary*, the court asked, "Does the guest have a right to demand of the host a degree of skill for the security of the guest which the host is utterly unable to exercise for his own protection?"[41] The answer was no. Presumably the courts believe that on any given occasion the driver has a certain amount of skill and nothing which he may do will increase it at that time. Likewise, nothing which the rider may do or say can give more skill to the driver. Therefore, the rider must assume any risk of injury due to the driver's inexperience and lack of skill.

One difference, however, between the group of cases illustrated by *Chalmers* and that illustrated by *Cleary* is concerned with the plaintiff's knowledge. Knowledge of the driver's skill is usually required in order to bar recovery in both lines of cases.[42] Some cases hold, however, that the plaintiff need not have knowl-

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this rule. *See, e.g.*, Tillman v. Great American Indemnity Co. of N.Y., 207 F.2d 588 (7th Cir. 1953); Gross v. Gross, 169 F.2d 199 (7th Cir. 1948); Liggett & Myers Tobacco Co. v. De Parca, 66 F.2d 678 (8th Cir. 1933); Roberts v. Commercial Standard Ins. Co., 138 F. Supp. 363 (W.D. Ark. 1956); Peay v. Panich, 191 Ark. 538, 87 S.W.2d 23 (1935); Wilson v. Hill, 103 Colo. 409, 86 P.2d 1084 (1939); Kalamian v. Kalamian, 107 Conn. 86, 139 A. 635 (1927); White v. McVicker, 216 Idaho 90, 246 N.W. 385 (1933); O'Brien v. Anderson, 177 Neb. 635, 130 N.W.2d 560 (1964); Born v. Matzner's Estate, 159 Neb. 169, 65 N.W.2d 593 (1954); Bogen v. Bogen, 220 N.C. 648, 18 S.E.2d 162 (1942); Peters v. Hoisington, 72 S.D. 542, 37 N.W.2d 410 (1949); Hall v. Hall, 63 S.D. 343, 258 N.W. 491 (1935); Maybee v. Maybee, 79 Utah 585, 11 P.2d 973 (1932).

38. 191 Wis. 114, 210 N.W. 267 (1926), *overruled in* McConville v. State Farm Mutual Auto Ins. Co., 15 Wis. 2d 274, 113 N.W.2d 14 (1962).

39. 200 Wis. 388, 228 N.W. 513 (1930), overruled in McConville v. State Farm Mutual Auto Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962).

40. *But see* Daniels v. Evans, 107 N.H. 407, 224 A.2d 63 (1965). In this case, the court said that minor drivers must exercise an adult standard of care. The rule that minor drivers must only exercise the care commensurate with their age, experience, and wisdom was discarded.

41. 191 Wis. 114, 210 N.W. 267 at 269 (1926).

42. For the requirement of knowledge in the teacher-learner situation, *see* Richards v. Richards, 324 S.W.2d 400 (Ky. 1959); Spellman v. Spellman, 309 N.Y. 663, 128 N.E.2d 317 (1959); St. Denis v. Skidmore, 14 App. Div. 2d 981, 221 N.Y.S.2d 613 (1961); Le Fleur v. Vergillia, 280 App. Div. 1035, 117 N.Y.S.2d 244 (1952); Aloisio v. Nelson, 27 Misc. 2d 343, 209 N.Y.S.2d 674 (Sup. Ct. 1961). For the same requirement in the other line of cases *see, e.g.*, Cleary v. Eckart, 191 Wis. 114, 210 N.W. 267 (1926), *overruled in* McConville v. State Farm Mutual Auto Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962); Olson v. Hermansen, 196 Wis. 614, 220 N.W. 203 (1928), *overruled in* McConville v. State Farm Mutual Auto Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962); Kauth v. Landsverk, 224 Wis. 554, 271 N.W. 841 (1937); Peay v. Panich, 191 Ark. 538, 87 S.W.2d 23 (1935); Stingley v. Crawford, 219 Iowa 509, 258 N.W. 316 (1935); Hall v. Hall, 63 S.D. 343, 258 N.W. 491 (1935); Peters v. Hosington, 72 S.D. 542, 37 N.W.2d 410 (1949).

edge of the driver's lack of skill and inexperience to have assumed the risk as a matter of law.[43] If the rule is followed that the plaintiff must have knowledge of the learner's inexperience, this requirement is met in the teacher-learner cases by the fact that the plaintiff was knowingly teaching. On the other hand, if the rule that the plaintiff's knowledge is immaterial is applied, the court need not even consider why the plaintiff was in the car; the fact that he was voluntarily riding is enough to bar his recovery when the driver's inexperience causes an accident. But an accident due to a learner's inexperience is no different than an accident due to a licensed driver's inexperience. It is submitted that this further supports the contention mentioned earlier that the defense of assumption of risk is a question of fact. Assumption of risk should not be made the automatic inference of law arising from a student-teacher driving situation.

A Possible Solution

As has been noted, the general rule is that a person must accept the driver with whatever skill he has to offer.[44] It has already been suggested that the rule holding a rider or teacher to have assumed the risk of the driver's lack of skill as a matter of law should be abandoned. In its place, a rule requiring drivers to exercise reasonable *skill* for the welfare of people riding in the automobile with him should obtain. In applying this standard there must be a distinction between ordinary skill and ordinary care. Not only must a driver exercise reasonable or ordinary *care* for the welfare of his teacher or passenger, he should also have to exercise ordinary *skill*.

The difference arises in the standards applied. The courts have said that a driver cannot be made to exercise *skill* which he does not possess. This is a subjective standard. Where a question of *care* is involved, though, the courts have not been so lenient with the defendant. The standard is an objective one.[45] It is applied to all men including those whose mental capacity is far below that of a normal person. Neither a slow mind[46] nor actual

43. O'Brien v. Anderson, 177 Neb. 635, 130 N.W.2d 560 (1964); Born v. Matzner's Estate, 159 Neb. 169, 65 N.W.2d 593 (1954); Grover v. Sherman, 214 Wis. 218, 252 N.W. 680 (1934); Harter v. Dickman, 209 Wis. 352, 245 N.W. 157 (1932).

44. *See* cases cited note 25 *supra*.

45. The objective standard of the reasonable man was given its impetus as a rule in *Vaughan v. Menlove*, 3 Bing. N.C. 468, 132 Eng. Rep. 490 at 493 (1837), where the court said:

> Instead, therefore, of saying that the liability for negligence should be coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule, which requires in all cases a regard to caution such as a man of ordinary prudence would observe.

46. Worthington v. Mencer, 96 Ala. 310, 11 So. 72 (1892).

insanity[47] will bar the plaintiff's claim.[48] Minors have a unique status. Many courts reduce the reaonable man standard to that of a reasonable minor of the same age, intelligence, and experience.[49] Somewhat inconsistently, however, courts will also demand that a minor who is engaged in an adult activity must conform to the adult standard of care.[50] The present trend appears to hold minor drivers to the adult standards of care.[51] The individual defendant, therefore, must conform to a single standard of *care* whether he himself fits it or not. If he happens to be incapacitated in some way, he is still held to the standard, although there is nothing at all which he can do to actually attain and satisfy its requirements. The reason for such a rigid standard is obviously the public welfare. An injured person should not in the usual case be left uncompensated even if he is harmed by a mentally retarded person. If a person who is physically or mentally handicapped and cannot ever attain the degree of care required of him by law is held liable because he must conform to an objective standard, there would seem to be no valid reason why a person who is unskilled in driving should not be held to a similar standard in relation to people who are riding with him. A few courts have held certain defendants to a standard of ordinary *skill*.[52] Indeed, "[t]he trend seems to be towards requiring the actor to exercise the degree of skill which the general class of persons engaged in that line of activity have."[53] The fact that the defendant cannot exercise ordinary skill should not prevent the courts from holding him to an objective standard when a person riding with him is injured due to the defendant's deficiency. If the mentally retarded must be held to an ordinary *care* standard, the unskilled and inexperienced driver ought, in fairness, be held to exercise, in relation to his passenger or teacher, the standard of *skill* possessed by the reasonably skilled and experienced driver or learning driver.

While a jury will decide the issue in most cases, another al-

47. Johnson v. Lambotte, 147 Colo. 203, 363 P.2d 165 (1961).

48. Justice Holmes expressed the rule when he wrote:

> If, for instance, a man is born hasty and awkward, is always hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his peril, to come up to their standard, and the courts they establish decline to take his personal equation into account.

HOLMES, THE COMMON LAW 108 (1881).

49. *See, e.g.*, Masconi v. Ryan, 94 Cal. App. 227, 210 P.2d 259 (1949); Charbonneau v. MacRury, 84 N.H. 501, 153 A. 457 (1931).

50. PROSSER, TORTS § 32.

51. *See, e.g.*, Daniels v. Evans, 107 N.H. 407, 224 A.2d 63 (1965).

52. *See, e.g.*, Louisville & N. R.R. v. Perry's Administrator, 173 Ky. 213, 190 S.W. 1064 (1917); Borgstede v. Wabauer, 337 Mo. 1205, 88 S.W.2d 373 (1935).

53. 2 F. HARPER & F. JAMES, TORTS 917 § 16.6 (1956).

ternative is available. Rather than barring all plaintiff-teachers as a matter of law, they should be precluded from asserting the assumption of risk defense only when certain obvious dangers are present. Such a solution would form a compromise between the view which bars the plaintiff-teacher as a matter of law in all cases and that which leaves the issue to the jury every time. Besides the three essentials of the assumption of risk theory,[54] the court would consider such factors as: the length of time the defendant has been driving; the place where the accident occurred, whether in the city or country, in relation to driving time; the age and physical condition of the defendant's known intelligence; and any other fact which tends to show that by getting into the automobile with the defendant, the plaintiff was voluntarily subjecting himself to a risk greatly disproportionate to one which would be created by an ordinary learning driver.

CONCLUSION

There is a split of authority whether a licensed driver who accompanies a person in possession of a learner's permit assumes the risk, as a matter of law, of any personal injuries resulting from the learner's inexperience. The cases holding the teacher to have assumed the risk of inexperience as a matter of law appear to be the majority. In deciding this issue, courts must retain the differences between assumption of risk, and contributory negligence. Only unclear decisions are produced when these terms are used synonomously. It is submitted that the learning driver situations do not present so inherent or so great a danger to warrant automatic application of the assumption of risk theory. A plaintiff-teacher who is injured by the defendant's lack of reasonable ability to operate an automobile should not be left uncompensated. A more just result would obtain if a reasonable standard or *skill* were adopted and submitted to a fact-finding body.

HENRY E. SEWINSKY, JR.

54. *See* text accompanying footnotes 13-17.