TORTS—ASSUMPTION OF RISK—A JURY QUESTION

In *Stukes v. Trowell*,[1] the plaintiff, a guest passenger in defendant's automobile, alleged he was injured when the defendant negligently drove into a telephone pole. Both parties testified they had been imbibing before the accident and plaintiff testified he knew prior to entering the car that the defendant was intoxicated. Defendant moved for summary judgment on the basis of assumption of risk and the motion was granted. On appeal, the court of appeals reversed, holding, except in "extreme circumstances", the question of assumption of risk by a guest passenger who knows the driver has consumed an amount of intoxicating beverage is best left to a jury and not decided on summary judgment.

The maxim, "volenti non fit injuria"[2] has been an important concept in many court decisions involving negligence cases. Early Georgia courts held that one who knowingly and willingly takes a risk of obvious physical injury amounting to a failure to exercise ordinary care for his own well-being, cannot hold another liable for resulting damage, although it may be partially attributable to the other's negligence.[3] The court later strengthened its position by holding that the plaintiff is bound to avoid the consequences of the defendant's negligence by "remaining away, going away or getting out of the way of a probable or known danger."[4] If the party failed to apprehend the likelihood, even if not the eventuality of danger, and was injured, he would not be permitted to recover if he could have avoided the consequences of the negligence of the person who caused the injury.[5]

Powell v. Berry[6] provided the first opportunity for the court to rule on an automobile case similar to *Stukes*. The court held:

> If a driver, from intoxication, is in a condition which renders him incapable of operating it (the automobile) with proper diligence and skill and this is known or palpably apparent to one entering the car, this is a fact which may be proved for the consideration of the jury, along with other facts, to throw light on the question of whether such person exercised ordinary care in entering the car, or in reference to his conduct while in it.[7]

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1. 119 Ga. App. 651, 168 S.E.2d 616 (1969).
2. "He who consents cannot receive an injury." BLACK'S LAW DICTIONARY 1746 (4th ed. 1968).
3. City of Columbus v. Griggs, 113 Ga. 597, 38 S.E. 953 (1901).
4. Mansfield v. Richardson, 118 Ga. 250, 45 S.E. 269 (1903).
5. Southern Ry. Co. v. Hogan, 131 Ga. 157, 62 S.E. 64 (1908); Moore v. Southern Ry. Co. 136 Ga. 872, 72 S.E. 403 (1911).
6. 145 Ga. 696, 89 S.E. 753 (1916).
7. *Id.* at 700, 89 S.E. at 755.

However, there was one important observation in the *Powell* case, not found in *Stukes*. The court declared that the evidence as to the condition of the parties in regard to the compotation was not lucid enough to authorize the judge to proclaim as a matter of law the status of each as to negligence.[8] However, in the subsequent case of *Redding v. Morris*[9] where a police officer informed the plaintiff that the defendant was too intoxicated to drive and the plaintiff continued to ride, the court stated, through dicta, that if the plaintiff had been injured as a result of the defendant's negligence, he could not recover because of the inescapable conclusion that the plaintiff voluntarily assumed the risks of such an enterprise.

It is at this point the Georgia courts begin a seemingly inconsistent approach in the decisions relating to the assumption of risk theory, but as acknowledged by the Georgia Supreme Court, the Georgia courts do not always "follow the crowd."[10] In 1964 the court attempted to supplement the *Powell* case by enouncing the mere knowledge of the passenger that the driver is under the influence of intoxicants is not knowledge that the motorist is unable to drive safely, and does not establish that the passenger assumes the risk of injury because he continues to ride with the driver.[11] It was held that questions of negligence, except in "plain, palpable and undisputed cases" are solely for the jury, and it is not the intention of the summary judgment law to alter the standards with reference to submitting questions to the jury, except where there are no valid issues of material fact.[12] The court apparently reverses itself later in *Freeman v. Martin*[13] by asserting it would be an assumption of risk to enter an automobile driven by a person known to be intoxicated or whose inebriated state is "palpably apparent." However, just one year later the courts reverted to the *Powell* case and exclaimed that anything to the contrary in *Freeman* must submit to the higher authority of the state supreme court.[14] During that same year the court held that the plaintiff assumed the risk as a result of voluntarily riding in a vehicle operated by one who was known to be intoxicated, and it mattered not that the plaintiff did not realize the defendant was tippled to the extent of rendering himself incompetent of manipulating the vehicle, because this was precisely the risk which was

8. *Id.* at 701, 89 S.E. at 756.
9. 105 Ga. App. 152, 123 S.E.2d 714 (1961).
10. Cox v. Gen. Elec. Co., 211 Ga. 286, 85 S.E.2d 514 (1955).
11. Sparks v. Porcher, 109 Ga. App. 334, 136 S.E.2d 153 (1964).
12. Malcom v. Malcom, 112 Ga. App. 151, 144 S.E.2d 188 (1965).
13. 116 Ga. App. 237, 156 S.E.2d 511 (1967).
14. Few v. Weekes, 118 Ga. App. 190, 162 S.E.2d 884 (1968).

assumed when a decision was made to ride with the defendant knowing he was under the influence of intoxicants.[15] This brings us to the present case in which the court reverses itself once again and holds the question of assumption of risk to be one for the jury where the plaintiff knowingly rides in an automobile being operated by a defendant who has had several drinks.

It would appear policy reasons influenced the decision in *Stukes* perhaps more than any other factor. The majority contends in its terminal sentence that, "any other conclusion would be to hold as a matter of law that the negligence of an intoxicated driver must be rewarded by penalizing the injured passenger, regardless of the circumstances of the case."[16] This, of course, is a veritable analysis but it is not consistent with precedent. Georgia courts have held it to be an assumption of risk, as a matter of law, when a passenger rides on the running board of an automobile and is struck by another vehicle,[17] or when a passenger is injured by another vehicle because at the request of the driver he descends and pushes a stalled automobile from the rear.[18] It has also been held to be an assumption of risk in this state for a passenger to continue to ride with a driver who is somnolent while making no effort to keep him awake or to evacuate the automobile,[19] and, of course, it is an assumption of risk for a passenger to enter a vehicle that is about to engage in drag racing.[20] The courts agree that the passenger in cases such as these does assume the risk, but the tribunals cannot seem to accede as to precisely what constitutes assumption of risk in intoxicated driver cases.

It has been said that it is the purported "plain, palpable and undisputable"[21] rule which creates the confusion and unpredictability. This rule simply states that questions of negligence are for the jury except in "plain, palpable and undisputed cases." No doubt this did create some perplexity for the judiciary deciding which cases would fall under the rule. The court demonstrates this quandary through its persisting oscillation in its decisions, decreeing in *Powell v. Berry*[22] and *Sparks v. Porcher*[23] that assumption of risk entailed by a plaintiff riding

15. Davis v. Ferrell, 118 Ga. App. 690, 165 S.E.2d 313 (1968).
16. 119 Ga. App. at 652, 168 S.E.2d at 618.
17. Taylor v. Morgan, 54 Ga. App. 426, 188 S.E. 44 (1936).
18. Beasley v. Elder, 88 Ga. App. 419, 76 S.E.2d 849 (1953).
19. Oast v. Mopper, 58 Ga. App. 506, 199 S.E. 249 (1938).
20. Roberts v. King, 102 Ga. App. 418, 116 S.E.2d 885 (1960).
21. Malcom v. Malcom, 112 Ga. App. 151, 153, 144 S.E.2d 188, 191 (1965).
22. 145 Ga. 696, 89 S.E. 753 (1916).
23. 109 Ga. App. 334, 136 S.E.2d 153 (1964).

with an intoxicated driver is an issue for the jury, then ruling in *Freeman v. Martin*[24] and *Davis v. Ferrell*[25] the query is a matter of law and once again deciding in *Stukes* that it was a jury question. The court warned itself of such kaleidoscopic edicts by remarking, "We cannot afford to play fast and loose in applying the assumption of risk doctrine; it is not judicial to 'run with the hare and bark with the hounds'."[26]

Although the minority in *Stukes* felt that the majority was committed to the old adage that "there is nothing in this world constant, but inconstancy",[27] it now appears that the Stukes case was the beginning for more consistent rulings on intoxicated driver cases and the end of the old "plain, palpable and undisputed" rule. In a subsequent action, the court upheld the *Stukes* ruling declaring that, "Knowledge on the part of a guest passenger that the driver of the automobile is under the influence of intoxicating beverages is not, as a matter of law, knowledge that the driver is not able to drive safely so as to make the passenger assume the risk as will bar recovery against the driver."[28] The tribunal cited the policy reasons of *Stukes* as a main consideration in the case.

Recently, the *Stukes* rule was further fortified by the abolition of the "plain, palpable and undisputed" rule in *Royal Frozen Foods Co. v. Garrett*[29] where the court after citing the inconsistencies in the assumption of risk doctrine, pronounced "the plain, palpable and undisputable rule is gone."[30]

In many respects the decision in *Stukes v. Trowell*[31] appeared to be another of those endless reversals in the unpredictable and confused assumption of risk doctrine. However, *Stukes* has already proved and will continue to prove that it was more than that. It was the case to bring an end to the confusion and unpredictability. It was the adjudication to terminate the antiquated, antediluvian "plain, palpable and undisputed" rule. In the future it can be anticipated that such cases as *Stukes* will be sent to the jury and not decided as a matter of law. This appears to be a beneficial and admirable decision because as the court said any other conclusion would be to reward the driver for his toping regardless of the circumstances. This undoubtedly was the key to the decision and there can be very little, if any, argument against such policy.

24. 116 Ga. App. 237, 156 S.E.2d 511 (1967).
25. 118 Ga. App. 690, 165 S.E.2d 313 (1968).
26. 116 Ga. App. at 245, 156 S.E.2d at 517.
27. 119 Ga. App. at 657, 168 S.E.2d at 620.
28. Trussel v. Lawrence, 120 Ga. App. 39, 169 S.E.2d 611 (1969).
29. 120 Ga. App. 686, 171 S.E.2d 871 (1969).
30. *Id.* at 687, 171 S.E.2d at 871.
31. 119 Ga. App. 651, 168 S.E.2d 616 (1969).

It is interesting to note that in 1953 the Georgia General Assembly made it a criminal offense for persons under the influence of intoxicating liquor to drive[32] and it would appear from this act that assumption of risk would not be available in situations involving a breach of statutory duty.[33] Georgia courts have not yet considered this aspect, but other courts such as the Connecticut Superior Court have held that the driver was foreclosed from raising the defense of assumption of the risk because he had violated a statute prohibiting driving while intoxicated.[34] Many states have chosen this method of solving the problem rather than taking the labyrinthine route of the Georgia courts but the important consideration is both solutions reach the same result.

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32. GA. CODE ANN. § 68-1625 (Supp. 1970).
33. *See* 19 DRAKE L. REV. 496 (1970).
34. Casey v. Atwater, 22 Conn. Supp. 225, 167 A.2d 250 (1960).