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Commentary

Citation Information
http://digitalcommons.osgoode.yorku.ca/ohlj/vol3/iss2/16

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By its decision in the case of *Lehnert v. Stein*, the Supreme Court of Canada has again followed a recent line of cases enunciating the proposition that the defence of volenti non fit injuria is no longer of universal utility.

The facts were as follows: after an evening of dining and drinking, the plaintiff Stein agreed to be driven home by the defendant Lehnert. On the evidence, the plaintiff was unaware of the exact amount of alcohol consumed by the defendant but did realize that it had been sufficient to increase the chances of a collision resulting from the latter's negligence. An accident in fact occurred and the plaintiff was seriously injured.

At trial, Campbell J. dismissed the action on the ground that the defendant was *volens*. Alternatively, he would have found the plaintiff contributorily negligent to the extent of 75 per cent. The Manitoba Court of Appeal, by a majority judgment allowed the appeal on the ground that the plaintiff was not *volens* but guilty of contributory negligence to the extent of 25 per cent. The decision of the Supreme Court of Canada was delivered by Cartwright J. (Kerwin C.J. dissenting) and the defendant's appeal was dismissed. Furthermore, it was stated that the Court was reluctant to interfere with the quantum of damages determined by an appellate court which had in turn waived the trial judge's assessment.

Reliance was placed on the case of *Car and Personal Insurance Corporation v. Seymour and Maloney* which established that where a driver of a motor vehicle invokes the maxim *volenti non fit injuria*, the burden lies upon the defendant to prove that the plaintiff by express or by necessary implication, agreed to exempt the defendant from liability for any damage occasioned by the latter's negligence. This will always depend on the inference to be drawn from the facts. The Court also expressed their approval of the two English decisions *Slater v. Clay Cross Co. Ltd.* and *Donn v. Hamilton* and Mr. Glanville Williams' distinction between physical and legal risk. In summary, the plaintiff must always consent either by an express or implied bargain to a waiver of liability without compensation.

It is submitted by the writer that the defence of "volenti" has outlived its usefulness. The doctrine of contributory negligence can absolve a defendant from any liability whatsoever, and also has a far greater degree of flexibility. It is readily apparent that the courts are loathe to apply the doctrine as is evidenced by the instant case. In addition the test for its application is quite unreal. In the absence

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6 Williams, *Joint Torts and Contributory Negligence*. 

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of an express bargain, or active encouragement by the plaintiff the inference is almost never drawn and therefore the defence ought to be abolished as a useless appendage to the law of torts. A.R.A.S.

E. CRIMINAL LAW


The material facts of the case are as follows. Kerim Brothers, Limited (hereinafter referred to as “the company”), for some years had been the registered owner of the Kingsway Hotel in Metropolitan Toronto. The company was licensed to carry on the business of a public hall and to sell refreshments and cigarettes. From February of 1959 to June of 1961, the company leased its hall on four successive nights of each week to four different religious and charitable organizations, which conducted bingo games, the proceeds of which were used for charitable purposes. These organizations, in each case, made their own arrangements for the conduct of the games, supplying their own equipment and personnel for that purpose. They paid to the company a standard rental per night for the use of the hall, which was not in any way dependent upon the number of persons who played the games. Accused was the president of the company and was on the premises each evening, but he did not, himself, participate in any way in the bingo games. The company did employ a commissionaire and it operated a soft drinks refreshment stand. Accused was charged under s. 176(1) of the Canadian Criminal Code and convicted. His appeal was allowed by the Ontario Court of Appeal, and the Crown then appealed to the Supreme Court of Canada.

Section 176(1) provides that,

Everyone who keeps a common gaming house or common betting house is guilty of an indictable offence and is liable to imprisonment for two years.

Section 176(2) (b) provides that,

Everyone who — (b) as owner, landlord, lessor, tenant, occupier or agent, knowingly permits a place to be let or used for the purposes of a common gaming house or common betting house, is guilty of an offence punishable on summary conviction.

Section 168(h) provides that,

“keeper includes a person who (i) is an owner or occupier of a place, (ii) assists or acts on behalf of an owner or occupier of a place, (iii) appears to be, or to assist or act on behalf of an owner or occupier of a place, (iv) has the care or management of a place, or (v) uses a place permanently or temporarily, with or without the consent of the owner or occupier.

2 2-3 Eliz. II, c. 51.