

A man and his friend, who were both adults, went to a party. The man and the friend had many drinks at the party and became legally intoxicated. They decided to play a game of chance called "Russian roulette" using a gun loaded with one bullet. As part of the game, the man pointed the gun at the friend and, on her command, pulled the trigger. The man shot the friend in the shoulder.

The friend has brought a negligence action against the man. Traditional defenses based on the plaintiff's conduct apply. What is likely to be the dispositive issue in this case?

- A. Whether the friend could validly consent to the game.
- B. Whether the friend was also negligent.
- C. Whether the game constituted a joint venture.
- D. Whether the man was legally intoxicated when he began playing the game.

Explanation:

Contributory negligence

(defense to negligence)

Traditional contributory negligence jurisdiction

Plaintiff's negligence completely bars recovery

Pure comparative negligence jurisdiction*

Plaintiff's negligence reduces recovery by plaintiff's proportionate fault (eg, plaintiff 90% at fault can recover 10% of damages)

*Default rule on MBE.

In **traditional common law** jurisdictions (as seen here), **contributory negligence** is a **complete defense** to **negligence** when the plaintiff's failure to use reasonable care contributed to his/her injury. Here, the man negligently shot his friend during a game of Russian roulette. But the friend cannot recover from the man if she was contributorily negligent in becoming intoxicated at the party and agreeing to play the game. Therefore, whether the friend was also negligent is likely to be the dispositive issue in her negligence action against the man.

(Choice A) Consent may be a defense to negligence if the plaintiff **assumed the risk** of harm. Here, the friend did not assent to a liability waiver (no express assumption). And since the friend was intoxicated, she may not have understood and voluntarily accepted the risk of Russian roulette (no implied assumption). As a result, the friend's case is more likely to turn on whether she was contributorily negligent.

(Choice C) When multiple tortfeasors participate in a joint venture (eg, playing Russian roulette together), they are jointly and severally liable for any harm caused to *nonparticipants*. But the existence of a joint venture is irrelevant when the participants harm *each other*.

(Choice D) Voluntarily intoxicated persons are held to the same "reasonable person" standard as sober persons in negligence actions, so the man's intoxication would not shield him from liability in this case.

Educational objective:

Under traditional common law rules, contributory negligence is a complete defense to negligence if the plaintiff's failure to use reasonable care contributed to his/her harm.

References

Restatement (Second) of Torts § 467 (Am. Law Inst. 1965) (explaining that a plaintiff's contributory negligence is a complete bar to recovery for negligence).

Restatement (Second) of Torts § 496D (Am. Law Inst. 1965) (explaining that implied assumption of the risk is only a defense if the plaintiff understood the unreasonable character of the risk).

Copyright © 2013 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.