Volume 30 | Number 2 Article 15

2-1-1952

Negligence -- Automobiles -- Joint Enterprise

Robert L. Whitmire Jr.

with this problem when mutual benefit association certificates were involved.[20] Concededly, these cases are distinguishable in that the association's charter or by-laws contained a provision for alternative or contingent beneficiaries if the original designation failed; yet, any distinction appears unreal when an old line insurance policy contains a contingent beneficiary provision.

As the precise issue presented by the *Bullock* case was one of first impression before any court of final jurisdiction in the United States,[21] it is regrettable that the decision reached was contrary to the existing authority on the subject. Furthermore, as the result was patently contrary to the intention of the insured[22] and will probably be binding on the court under the doctrine of stare decisis, the following statutory proposal is offered for consideration:

> Where the beneficiary of a life insurance policy or certificate, or the assignee of such policy or certificate, or the survivor of a joint life policy or certificate, has feloniously taken, or procured to be taken, the life of the insured, any proceeds payable under the terms of such policy or certificate shall be paid to any alternative or contingent beneficiary named in the policy or certificate who does not claim through the slayer; provided, if no alternative or contingent beneficiary is designated in the policy or certificate, such proceeds shall be paid to the estate of the insured decedent.[23]

DAVID L. STRAIN, JR.

Negligence—Automobiles—Joint Enterprise

In cases involving automobile accidents, North Carolina has recognized and followed the joint enterprise doctrine since 1921.[1] In a recent decision, *James v. Atlantic & E. C. R. R.*,[2] the court stated that

[20] Supreme Lodge v. Menkhausen, 209 Ill. 277, 70 N. E. 567 (1904); Schmidt v. Northern Life Ass'n., 112 Ia. 41, 83 N. W. 800 (1900); Sharpless v. Grand Lodge, 135 Minn. 35, 159 N. W. 1086 (1916).

[21] See note 3 *supra.*

[22] Bullock v. Expressmen's Mut. Life Ins. Co., 234 N. C. 254, 258, 67 S. E. 2d 71, 74 (1951) (". . . in the case at bar it may be presumed in the light of subsequent happenings the insured would have wished his foster son to have the insurance money. . . .").

[23] See Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution,* 49 HARV. L. REV. 715, 741 (1936), for an extensive discussion of the intent and purpose of such a statute.

[1] Pusey v. Atlantic Coast Line R. R., 181 N. C. 137, 106 S. E. 452 (1921). In the *Pusey* case the court seemingly states that the doctrine of joint enterprise was adopted by North Carolina in Hunt v. Railroad, 170 N. C. 442, 87 S. E. 210 (1915), but the court in the *Hunt* case does not mention the doctrine. It merely reiterates the rule that the negligence of the driver will not be imputed to a passenger unless he is the owner of the car or controls the driver in some way.

[2] 233 N. C. 591, 65 S. E. 2d 214 (1951). Other N. C. cases dealing with the doctrine are: Matheny v. Central Motor Lines, 233 N. C. 681, 65 S. E. 2d 368 (1951); Rollison v. Hicks, 233 N. C. 99, 63 S. E. 2d 190 (1951); Pike v. Seymour, 222 N. C. 42, 21 S. E. 2d 884 (1942); Harper v. Seaboard Air Line Ry. Co., 211 N. C. 398, 190 S. E. 750 (1937); Exum v. Poole, 207 N. C. 244, 176 S. E. 556

when two or more persons are engaged in a joint enterprise, the contributory negligence of one of them will be imputed to the others so as to bar their recovery against a negligent defendant.[3]

In the *James* case, the plaintiff and the driver of the automobile were police officers, fellow employees of the city of Goldsboro, and were of equal rank. While engaged in their duty of patrolling the city, they were involved in an accident with a switch engine belonging to the defendant railroad. The court concluded that there was sufficient evidence to support a finding that the officers were engaged in a joint enterprise; that they were mutually engaged in a joint undertaking for a common purpose; and each had an equal right of control in the management of the automobile. Therefore, any contributory negligence on the part of the driver would be imputed to the plaintiff so as to bar his recovery from the defendant.

In the famous case of *Thorogood v. Bryan*,[4] the court held that the negligence of the driver of a conveyance would be imputed to a passenger therein. But the English court later repudiated this unreasonable rule in the case of *Mills v. Armstrong*[5] insofar as it was applied to passengers having no control over the driver. Though some American courts followed the rule of the *Thorogood* decision, most of them have likewise repudiated its original broad application and now hold that the negligence of the driver will not be imputed to a *mere* passenger or guest.[6] North Carolina has never adopted the broad rule of the *Thorogood* case.[7]

One of the exceptions to the general proposition that the negligence of a driver will not be imputed to a passenger is the doctrine of imputed negligence as applied in the case of a joint enterprise.[8] The scope of

---

(1934); Newman v. Queen City Coach Co., 205 N. C. 26, 169 S. E. 808 (1933); Butner v. Whitlow, 201 N. C. 749, 161 S. E. 389 (1931); Albritton v. Hill, 190 N. C. 429, 130 S. E. 5 (1925); Pusey v. Atlantic Coast Line R. R., 181 N. C. 137, 106 S. E. 452 (1921).

[3] However, the case was sent back for a new trial because of erroneous instructions given by the trial judge with respect to the burden of proof on the issue of contributory negligence.

The terms *joint enterprise* and *imputed negligence*, should not be confused. Imputed negligence is used to hold one person liable for the negligence of another in certain situations. Joint enterprise is *one* of those situations where negligence will be imputed.

[4] 8 C. B. 115 (1849).

[5] 13 App. Cas. 1, 58 L. T. 425 (1887).

[6] Bessey v. Salemme, 302 Mass. 188, 19 N. E. 2d 75 (1939); Bunting v. Hogsett, 139 Pa. 363, 21 Atl. 31 (1890); Reiter v. Grober, 173 Wisc. 493, 181 N. W. 739 (1921); See collection of cases in 38 AM. JUR. p. 936 n. 20 (1941).

[7] Duval v. Atlantic Coast Line R. R., 134 N. C. 331, 46 S. E. 750 (1904); Crampton v. Ivie, 124 N. C. 591, 32 S. E. 968 (1889).

[8] 2 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW, §28 (1927); Negligence may, of course be imputed in master-servant relationships, Rollison v. Hicks, 233 N. C. 99, 65 S. E. 2d 190 (1951), and principal-agent relationships, Snow v. DeButts, 212 N. C. 120, 193 S. E. 224 (1937), and when the doctrine of joint enterprise can be applied.

this note is primarily concerned with the application of the doctrine of imputed negligence in automobile accident cases where the occupants of one of the vehicles were engaged in a joint enterprise at the time of the accident.

As the court states in the principal case, "much has been written on what is not a joint enterprise, rather than what is."[9] In the *James* case however, the court quotes the following excellent statement of the rule from Blashfield.[10]

> "An essential and perhaps the central element which must be shown in order to establish a joint enterprise is the existence of joint control over the management and operation of the vehicle and the course and conduct of the trip . . . in order that two persons riding in an automobile, one of them driving, may be deemed engaged in a joint enterprise for the purpose of imputing the negligence of the driver to the other, [there must] exist concurrently two fundamental and primary requisites, to wit, a community of interest in the object and purpose of the undertaking in which the automobile is being driven, and an equal right to direct and govern the movements and conduct of each other in respect thereto. The mere fact that the occupant has no opportunity to exercise physical control is immaterial."[11]

Some states have held that a joint enterprise may exist without the element of the legal right of joint control.[12] But apparently North Carolina has, from the first case dealing with the subject, required the presence of the legal right to control, or actual control of the operation of the vehicle before invoking the doctrine of imputed negligence.[13]

The doctrine can also be applied when a third person is trying to hold the passenger liable to him because of the negligence of the driver. So far this situation has not arisen in North Carolina, but when and if it does, the court might well follow the Restatement of Torts rule[14] and

[9] James v. Atlantic & E. C. R. R., *supra* note 2 at 598.

[10] 4 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW, §2372 (Perm. Ed.).

[11] *Id.*, cited in James v. Railroad, 233 N. C. 591, 598, 65 S. E. 2d 214, 219 (1951).

[12] Otis v. Kolsky, 94 Pa. Super. 548 (1929); Lawrence v. Denver & R. G. Ry. Co., 52 Utah 414, 174 Pac. 817 (1918); Washington & O. D. Railroad v. Zell, 118 Va. 755; 88 S. E. 309 (1916); Wentworth v. Town of Waterbury, 90 Vt. 60, 96 Atl. 334 (1916); Hurley v. City of Spokane, 126 Wash. 213, 217 Pac. 1004 (1923).

[13] Pusey v. Atlantic Coast Line R. R., *supra* note 1 at 142. Without evidence of joint control in the operation of the automobile, there can be no joint enterprise.

For other cases on this point, see Johnson v. Atlantic Coast Line R. R., 205 N. C. 127, 170 S. E. 120 (1933); Williams v. Seaboard A. L. R. R., 187 N. C. 348, 121 S. E. 608 (1924); White v. Carolina Realty Co., 182 N. C. 536, 109 S. E. 564 (1921); and cases cited therein.

For cases holding that there was no joint enterprise even though the element of community of interest was present, see Jernigan v. Jernigan, 207 N. C. 831, 178 S. E. 587 (1935) and Newman v. Queen City Coach Co., 205 N. C. 26, 169 S. E. 808 (1933).

[14] RESTATEMENT, TORTS, §491 (1938), Any one of several persons engaged in an enterprise is barred from recovery against a negligent defendant by the con-

hold the passenger liable for the negligence of the driver in an action by an injured third party.

However, the joint enterprise doctrine has no application in an action by the injured participant in the enterprise against the driver of the automobile. The reason for this is that the driver of an automobile is always under a duty to exercise due care for the safety of his passengers.[15] The position of the North Carolina court on this point was not clearly stated until the recent decision of *Rollison v. Hicks*,[16] in which the court stated that the driver cannot invoke the doctrine of joint enterprise as a defense in an action brought by his co-adventurer. But apparently the negligence of the driver should be imputed to the plaintiff in a suit against another passenger in the vehicle, all three of them being engaged in a joint enterprise.[17]

The joint enterprise doctrine as applied to automobile accident cases is based on an analogy with joint enterprises in business ventures, such as partnerships.[18] There, all of the partners have a common interest, the pooling of resources for the purpose of making a profit. One partner can, by his negligence, bind his associates, and this is a sound rule so far as business is concerned. The public is dealing with an organization and has a right to be protected to the fullest extent. It is the property aspect of the organization with which the doctrine is concerned. However, in automobile accidents, the defendant is not deceived by appearances, and he should not be permitted to escape liability merely because the plaintiff and the driver were engaged in an activity for mutual benefit and pleasure. The doctrine as applied to non-business ventures has been criticized a good deal[19] but it seems to be too thoroughly imbedded to be overruled by court decision.

It is often said that the doctrine is founded on the law of principal

---

tributory negligence of any other of them if the enterprise is so far joint that each member of the group is responsible to third persons injured by the negligence of a fellow member.

[15] See collection of cases 65 C. J. S. p. 799 n. 38 (1950).

[16] Rollison v. Hicks, 233 N. C. 99, 63 S. E. 2d 190 (1951).

[17] PROSSER, LAW OF TORTS, §65 (1941): "Upon the analogy to the agency rule that where two principals employ the same agent to deal with their common interest, one cannot charge the other with misconduct of their mutual agent, unless the other is personally at fault."

[18] 65 C. J. S. NEGLIGENCE, §168 (1950).

[19] Gilmore v. Gross, 68 F. 2d 150, 153 (10th Cir. 1933); 4 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW, §176 (1927); PROSSER, LAW OF TORTS, §65 (1941); Note, 12 N. C. L. REV. 385 (1934).

"The doctrine of joint enterprise has, in rare instances, been applied in cases dealing with other than automobile accidents and business ventures. One such case is Cullinan v. Tetrault, 123 Me. 302, 122 Atl. 770 (1923), where the negligence of one boy purchasing liquor for a drinking party was imputed to his companion. Compare the refusal to apply the doctrine to pedestrians walking together, in Barnes v. Town of Marcus, 96 Iowa 675, 65 N. W. 984 (1896) . . . With these few exceptions, all joint enterprise cases found have involved vehicles or business ventures." PROSSER, LAW OF TORTS, p. 492, n. 26 (1941).

and agent.[20] But it is hard to conceive that people engaged in a joint enterprise for mutual pleasure consider themselves as agents of each other. Another point which illustrates that the rule is a pure fiction, with little if any basis in reality, is the fact that a member of a joint enterprise is deemed by law to have a legal right to control the operation of the vehicle without having any actual control. A theoretical right of control is thus a sufficient basis for imputing the negligence of the driver to the passenger. Of course, if the passenger knows of approaching danger and fails to warn the driver, he himself may be liable on the theory of actual negligence.[21]

One argument in favor of enforcing the joint enterprise rule is the fact that the parties enter into the transaction or enterprise of their own free will. Likewise they have the choice of withdrawing at their pleasure. One striking point about the present case is the fact that the occupants of the patrol car were fellow employees. They were working for a common employer. The plaintiff had no choice in the selection of the person with whom he would be associated during the patrol job. He either had to ride with the man assigned with him or stand the risk of losing his job. In view of this situation the court might have ruled that an important element—the privilege of quitting the venture at will—was lacking, and therefore it was not a true joint enterprise.[22]

ROBERT L. WHITMIRE, JR.

Negligence—Automobiles—Sudden Appearance Doctrine

In a recent action for the wrongful death of a child,[1] the North Carolina Supreme Court applied, for the first time, the descriptive phrase "sudden appearance" to a doctrine long recognized in automobile negligence cases.[2] This doctrine is applied in those cases where a motorist strikes a theretofore unseen child who darts in front of his automobile. Such an accident is regarded as unavoidable, thereby relieving the motorist of liability.[3] Generally, North Carolina has applied this doctrine to cases where the child has run from behind another vehicle or has

[20] Albritton v. Hill, 190 N. C. 429, 130 S. E. 5 (1925); 1 VARTANIAN, THE LAW OF AUTOMOBILES, §59 (1947).
[21] Central of Georgia R. R. v. Watkins, 37 F. 2d 710 (5th Cir. 1930).
[22] For a case exactly in point, with the same result as the principal case, see Collins v. Graves, 17 Cal. App. 2d 288, 61 P. 2d 1198 (1936).

[1] Register v. Gibbs, 233 N. C. 456, 64 S. E. 2d 280 (1951).
[2] In Butler v. Allen, 233 N. C. 484, 64 S. E. 2d 561 (1951), decided one week later, this phrase appears in the headnote but not in the opinion. This phrase has been used by other courts, however. Christian v. Smith, 78 Ga. App. 603, 51 S. E. 2d 857 (1949); Fultz' Adm'r. v. Williams, 266 Ky. 651, 99 S. W. 2d 803 (1936).
[3] See Notes, 113 A. L. R. 528, 536 (1938); 65 A. L. R. 192, 197 (1930). This note does not deal with those cases involving the question of contributory negligence on the part of the child. See generally, Note, 107 A. L. R. 5 (1937).