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Margaret P. Winslow

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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).

broken away from the control of an adult.⁴

When the child has been visible for some distance, however, the defendant is not relieved of liability, because such action should have been anticipated.⁵ This is true if the child *was* seen or *could have been* seen by a proper lookout. The reasoning of the cases differs as to the degree of care required. Some hold that more than ordinary care is required.⁶ Others only require ordinary care but recognize that the vigilance of the operator varies with the age, physical condition, and circumstances under which the child is seen.⁷ Thus, the standard of care remains the same, but the amount of diligence, attention, or effort required varies. The expectation that children act heedlessly⁸ is merely one circumstance to be considered. This, of course, means that "the greater the danger, the greater the care which must be exercised."⁹ While a motorist may reasonably presume that an adult will remain in a place of safety,¹⁰ the prevailing view today requires an assumption that a child may move into danger.¹¹

⁴ *Fox v. Barlow*, 206 N. C. 66, 173 S. E. 43 (1934); *Kennedy v. Lookadoo*, 203 N. C. 640, 166 S. E. 752 (1932); *Fisher v. Deaton*, 196 N. C. 461, 146 S. E. 66 (1928). *But cf.* *Mills v. Moore*, 219 N. C. 25, 12 S. E. 2d 661 (1940) (eighteen-month-old whose presence in the road could not be explained was struck by defendant's truck; nonsuit was allowed because it was highly speculative as to whether defendant could have seen the child; four-to-three decision with vigorous dissent by Justice Seawell.).

In *Green v. Bowers*, 230 N. C. 651, 55 S. E. 2d 651 (1949), and *Bass v. Hocutt*, 221 N. C. 218, 19 S. E. 2d 871 (1942), new trials were granted because of the failure of the trial court to charge the jury concerning the possibility that the act of the child was the proximate cause of the injury.

⁵ *Butler v. Allen*, 233 N. C. 484, 64 S. E. 2d 561 (1951); *Register v. Gibbs*, 233 N. C. 456, 64 S. E. 2d 280 (1951); *Yokeley v. Kearns*, 223 N. C. 196, 25 S. E. 2d 602 (1943); *Caulder v. Motor Sales, Inc.*, 221 N. C. 437, 20 S. E. 2d 338 (1942); *Smith v. Miller*, 209 N. C. 170, 183 S. E. 370 (1935); *Moore v. Powell*, 205 N. C. 636, 172 S. E. 327 (1934); *Goss v. Williams*, 196 N. C. 213, 145 S. E. 169 (1928). *But cf.* *Parks v. Willis*, 228 N. C. 25, 44 S. E. 2d 343 (1947) (nonsuit reversed where six-year-old evidently ran out from a garage across street and fell under the rear wheels of a truck which had turned to avoid hitting her; the truck was exceeding the speed limit by five miles per hour); *Hughes v. Thayer*, 229 N. C. 773, 51 S. E. 2d 488 (1949) (two children alighted from a school bus; one ran across safely in front of the bus, but the other, an eight-year-old, waited for the bus and two cars following to pass, then ran across the road in front of defendant's car approaching from the other direction.).

⁶ *Yokeley v. Kearns*, *supra* note 5; *Kelly v. Hunsucker*, 211 N. C. 153, 189 S. E. 664 (1936); *Smith v. Miller*, *supra* note 5; *Fox v. Barlow*, 206 N. C. 66, 173 S. E. 43 (1934); *Moore v. Powell*, *supra* note 5; *Goss v. Williams*, 196 N. C. 213, 145 S. E. 169 (1928); *State v. Gray*, 180 N. C. 697, 104 S. E. 647 (1920).

⁷ In *Rea v. Simowitz*, 225 N. C. 575, 35 S. E. 2d 871 (1945), Justice Barnhill attempted to clarify the misconception that a higher standard of care is required, stating that there are no degrees of care in fixing responsibility for negligence. The motorist is only held to the standard of care which a prudent man would have used under the circumstances.

⁸ *Hughes v. Thayer*, 229 N. C. 773, 51 S. E. 2d 488 (1949); *Yokeley v. Kearns*, 223 N. C. 196, 25 S. E. 2d 602 (1943); *Smith v. Miller*, 209 N. C. 170, 183 S. E. 370 (1935); *Fox v. Barlow*, 206 N. C. 66, 173 S. E. 43 (1934).

⁹ RESTATEMENT, TORTS, §298 (1947).

¹⁰ *Fox v. Barlow*, 206 N. C. 66, 173 S. E. 43 (1934); *Bryan v. Fewell*, 191 Va. 647, 62 S. E. 2d 39 (1950).

¹¹ *Webster v. Luckow*, 219 Iowa 1048, 258 N. W. 685 (1935); *Hughes v.*

Another situation where the doctrine of "sudden appearance" is inapplicable is where the driver has been guilty of some negligent act which made it impossible to see the child or to avoid the accident after seeing the child.¹² So, where a child darts out from beside the road, and the driver is going at such an excessive rate of speed that he is unable to stop before striking the child, he cannot escape liability under this doctrine.¹³

Whether the driver saw, or could have seen, the child in time to avoid a collision, and whether, once seen, he exercised the care of a reasonable, prudent man to avoid a collision, is always a question of fact. But once it is established that the child was or should have been seen, the doctrine of "sudden appearance" becomes inapplicable, and the tendency of most courts is to hold the driver to an almost absolute liability.¹⁴

MARGARET P. WINSLOW.

Negligence—Railroads—Custom as Evidence

Defendant's train was blocking a city street for longer than five minutes, in violation of a municipal ordinance, when plaintiff attempted to climb between the cars in order to return to his place of employment. The train was suddenly moved without signal injuring plaintiff. The district court excluded evidence of a long standing custom for persons to climb between railroads cars which blocked the crossing, and dismissed on the ground that plaintiff was guilty of contributory negligence. In *Stratton v. Southern Ry.*,¹ the Court of Appeals for the Fourth Circuit

Thayer, 229 N. C. 773, 51 S. E. 2d 488 (1949); *Price v. Burton*, 155 Va. 229, 154 S. E. 499 (1930).

But see *Brown v. Wade*, 145 So. 790 (La. App. 1933), where the court stated that a driver could assume that a child would stay on an urban sidewalk, but could not so assume as to a child on a county road; *Faatz v. Sullivan*, 199 Iowa 875, 200 N. W. 321 (1924), where a boy was struck by defendant after he had passed pathway of car when he retraced his steps, the Supreme Court held the jury should have been told that driver of automobile had right to assume that the boy having reached a place of safety would either remain there or continue on his journey; *Moeller v. Packard*, 86 Cal. App. 459, 261 Pac. 135 (1927); *Hutcheson v. Misenheimer*, 169 Va. 511, 194 S. E. 665 (1938).

¹² *Butler v. Allen*, 233 N. C. 484, 64 S. E. 2d 561 (1951); *Kelly v. Hunsucker*, 211 N. C. 153, 189 S. E. 664 (1936); *Goss v. Williams*, 196 N. C. 213, 145 S. E. 169 (1928); *Harper v. Crislip*, 103 Va. 514, 138 S. E. 93 (1927).

¹³ *Butler v. Allen*, 233 N. C. 484, 487, 64 S. E. 2d 561, 563 (1951), "... where one is driving an automobile at a speed in excess of the statutory limit, or at a greater speed than is reasonable and prudent under the conditions then existing, the mere fact that a child suddenly runs in front of the moving vehicle, does not necessarily relieve the driver from liability. There still remains the question whether the negligent driving of the automobile made it impossible for the driver of the car, under the circumstances, to avoid the accident after seeing the child, or whether by the exercise of reasonable care, such driver could have seen the child in time to avoid the injury."

¹⁴ See note 3 *supra*.

¹ 190 F. 2d 917 (4th Cir. 1951).