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## Torts -- Negligence -- Availability of Defense of Assumption of Risk

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which hold that a prosecution under a void warrant will not support an action for malicious prosecution in that no offense has been legally charged.<sup>36</sup> There is a conflict of authority on this point however.<sup>37</sup> If the law enforcement officer, or other public officer, escapes an action for malicious prosecution, he may still be liable for the tort of false arrest<sup>38</sup> or abuse of process<sup>39</sup> in the jurisdictions where he is not given immunity for malicious acts in the performance of his duties.

There seems to be a growing tendency to extend immunity for malicious prosecution to administrative, executive, and law enforcement officers, but it is submitted that North Carolina's position is more fair to the citizen in refusing to extend such immunity beyond judicial officers acting in a judicial capacity. It is conceded that governmental administrative, executive, and police officers should not be unduly hampered in the exercise of their duties, but it is of paramount importance that the individual citizen be granted some protection and be compensated for injury to him without right and with malice.

ELTON C. PRIDGEN

### Torts—Negligence—Availability of Defense of Assumption of Risk

In an action brought by the administrator of a guest passenger in defendant's automobile to recover damages for the wrongful death of plaintiff's intestate, the North Carolina Supreme Court recently said, "Assumption of risk was not available as a defense for there was no

stated does not seem to be in accord with the weight of authority as it obtains in other jurisdictions . . . , but it has been too long accepted and acted on here to be now questioned, and we are of opinion, too, that ours is the safer position."

<sup>36</sup> *Satilla Mfg. Co. v. Cason*, 98 Ga. 14, 25 S. E. 909 (1895); *Moser v. Fulk*, 237 N. C. 302, 74 S. E. 2d 729 (1953); *Wadkins v. Digman*, 82 W. Va. 623, 96 S. E. 1016 (1918). *Contra: Calhoun v. Bell*, 136 La. 149, 66 So. 761 (1914); *Williams v. Vanmeter*, 8 Mo. 339 (1844).

<sup>37</sup> 34 AM. JUR., *Malicious Prosecution* § 21 (1941).

<sup>38</sup> "The second question of law involves the distinction between actions for false arrest or imprisonment and malicious prosecution. *Corpus Juris*, Vol. 25, p. 444, draws the distinction as follows: 'Put briefly, the essential difference between a wrongful detention for which malicious prosecution will lie, and one for which false imprisonment will lie, is that in the former the detention is malicious but under due forms of law, whereas in the latter the detention is without color of legal authority.' The Court adopted the same view of the law in *Rhodes v. Collins*, 198 N. C. 23, 150 S. E. 492. *Clarkson, J.*, said: 'False imprisonment is based upon the deprivation of one's liberty without legal process, while malicious prosecution is for a prosecution founded upon legal process, but maintained maliciously and without probable cause.'" *Young v. Hardwood Co.*, 200 N. C. 310, 311, 156 S. E. 501, 502 (1931).

<sup>39</sup> "The tort of abuse of process is sometimes confused with malicious prosecution. In both, an injury is caused by the wrongful employment of legal process, but the two are definitely distinguishable. In malicious prosecution the gist of the injury is commencing an action or causing process to issue as an incident thereto, without justification. Malice, want of probable cause, and a termination of the proceeding adverse to the party who commenced it must be shown. On the other hand, an action for abuse of process lies not because the defendant has set process in motion but because he has misapplied or perverted it for a wrongful end after it has been issued." Note, 16 N. C. L. REV. 277, 278 (1938).

contractual relation between plaintiff's intestate and the defendants."<sup>1</sup>

The term "assumption of risk" is often confusing, as it is used by courts in different senses and in various situations. Assumption of risk means that the plaintiff has "consented to relieve the defendant of an obligation of conduct toward him, and to take his chance of injury from a known risk."<sup>2</sup> The basis of the defense is consent as expressed by mental willingness and not necessarily through a contractual relationship between the parties.<sup>3</sup> Although there is some authority to be found for confining the doctrine to cases arising out of the relation of master and servant,<sup>4</sup> or cases involving a contractual relationship between the parties,<sup>5</sup> the general trend seems to be toward the availability of the doctrine as a defense in situations where neither contractual relationship nor the relationship of master and servant exists,<sup>6</sup> under the general principle expressed in the maxim *volenti non*

<sup>1</sup> *Goode v. Barton*, 238 N. C. 492, 496, 78 S. E. 2d 398, 402 (1953). This note does not attempt to discuss the *adequacy* of the defense of assumption of risk, but is limited in its scope to a brief discussion of the *availability* of the doctrine as a defense in certain areas of the law.

<sup>2</sup> *Mountain v. Wheatley, Foss v. Wheatley*, 106 Cal. 2d 333, 234 P. 2d 1031 (1951); *Pierce v. Clemens*, 113 Ind. App. 65, 46 N. E. 2d 836 (1943); *Bull S. S. Line v. Fisher*, 196 Md. 519, 77 A. 2d 142 (1950); *Bouchard v. Sicard*, 113 Vt. 429, 35 A. 2d 439 (1944); *Emerick v. Mayr*, 39 Wash. 2d 23, 234 P. 2d 1079 (1951); PROSSER, TORTS § 51, p. 377 (1941).

<sup>3</sup> *Edwards v. Kirk*, 227 Iowa 684, 288 N. W. 875 (1939); *Bull S. S. Line v. Fisher*, 196 Md. 519, 77 A. 2d 142 (1950); *Landrum v. Roddy*, 143 Neb. 934, 12 N. W. 2d 82 (1943); *Fay v. Thrasher*, 77 Ohio App. 179, 66 N. E. 2d 236 (1946); *Hunn v. Windsor Hotel Co.*, 119 W. Va. 215, 193 S. E. 57 (1937); *Switzer v. Weiner*, 230 Wis. 599, 284 N. W. 509 (1939); 4 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW § 2511 (1946); PROSSER, TORTS § 51 (1941); Note, 26 TEMPLE L. Q. 206 (1952).

<sup>4</sup> *Conrad v. Springfield Consol. R. Co.*, 240 Ill. 12, 88 N. E. 180 (1909) (*but cf. Campion v. Chicago Landscape Co.*, 295 Ill. App. 225, 14 N. E. 2d 879 [1938]); *Modlin v. Consumers Cooperative Ass'n.*, 172 Kan. 428, 241 P. 2d 692 (1952); *Parker v. Grand Trunk Western R. Co.*, 261 Mich. 293, 246 N. W. 125 (1933); *Peyla v. Duluth M. & I. R. R. Co.*, 218 Minn. 196, 15 N. W. 2d 518 (1944); *Biskup v. Hoffman*, 220 Mo. App. 542, 287 S. W. 865 (1926); *Papakalos v. Shaka*, 91 N. H. 265, 18 A. 2d 377 (1941); *Dowse v. Maine Cent. R. R.*, 91 N. H. 419, 20 A. 2d 629 (1941); *Rutherford v. James*, 33 N. M. 440, 270 Pac. 794 (1928); *Eddy v. Wells*, 59 N. D. 663, 231 N. W. 785 (1930); *Eldred v. United Amusement Co. et al.*, 137 Ore. 452, 2 P. 2d 1114 (1931); *Furbeck v. I. Gevurtzo & Son et al.*, 72 Ore. 12, 143 Pac. 654 (1914).

<sup>5</sup> *Edwards v. Southern Ry. Co.*, 233 Ala. 65, 169 So. 715 (1936); *McGeever v. O'Byrne*, 203 Ala. 266, 82 So. 508 (1919); *Reed v. Zellers*, 273 Ill. App. 18 (1933); *Walsh v. Moore*, 244 Ill. App. 458 (1927); *Pittsburgh C. C. & Sd. Ry. Co. v. Hoffman*, 57 Ind. App. 431, 107 N. E. 315 (1914); *Goode v. Barton*, 238 N. C. 492, 78 S. E. 2d 398 (1953); *Schiller v. Rice*, 151 Tex. 116, 246 S. W. 2d 607 (1952).

<sup>6</sup> *Paul v. U. S.*, 54 F. Supp. 60 (E. D. La. 1943); *Mountain v. Wheatley, Foss v. Wheatley*, 106 Cal. 2d 333, 234 P. 2d 1031 (1951); *Hedding v. Pearson et al.*, 76 Cal. App. 2d 481, 173 P. 2d 382 (1946); *Doberrentz v. Gregory*, 129 Conn. 57, 26 A. 2d 475 (1942); *Jackson v. McMillan et al.*, 64 Idaho 351, 132 P. 2d 773 (1943); *Campion v. Landscape Co.*, 295 Ill. App. 225, 14 N. E. 2d 879 (1938); *Bohnsack v. Driftmier*, 243 Iowa 383, 52 N. W. 2d 79 (1952); *McLeod Stores v. Vinson*, 213 Ky. 667, 281 S. W. 799 (1926); *Brown v. Waller*, 8 So. 2d 304 (La. Ct. App., 2d Cir., 1942); *Miner v. Conn. River R. R. Co.*, 153 Mass. 398, 26 N. E. 994 (1891); *Landru v. Stensrud et al.*, 219 Minn. 227, 17 N. W.

*fit injuria*—a principle broad enough to cover all cases where an injury results to plaintiff from a risk knowingly and willingly incurred.<sup>7</sup>

The doctrine had its earliest and most frequent application in master and servant cases.<sup>8</sup> The 1939 amendment to the Federal Employer's Liability Act abolished assumption of risk as a defense in actions brought under that statute, as did the various state Workmen's Compensation Acts.<sup>9</sup> These statutory bars to its availability as a defense have probably been responsible for the decline of its use in the courts.

In the last two decades, however, considerable litigation has arisen from injuries to spectators at athletic contests and other places of amusement. In jurisdictions allowing the doctrine, in its broader aspect, to be used as a defense, the courts have held that assumption of risk is available in these actions.<sup>10</sup> In these cases, proprietors of

2d 322 (1945) (although Minn. court in *Peyla v. Duluth*, 218 Minn. 196, 15 N. W. 2d 518 [1944], had said that in other than master and servant cases, assumption of risk is but a phase of contributory negligence, the earlier case was not referred to in this opinion); *Saxton v. Rose*, 201 Miss. 814, 29 So. 2d 646 (1947); *Lake v. Enigh*, 118 Mont. 325, 167 P. 2d 575 (1946); *Landrum v. Roddy*, 143 Neb. 934, 12 N. W. 2d 82 (1943); *Bianchi v. South Park Presbyterian Church et al.*, 123 N. J. L. 325, 8 A. 2d 567 (1939); *McLean v. Studebaker Bros. Co. of N. Y.*, 221 N. Y. 475, 117 N. E. 951 (1917); *Fay v. Thasher*, 77 Ohio App. 179, 66 N. E. 2d 236 (1946); *Gargaro v. Kroger Groc. & Baking Co.*, 22 Tenn. App. 70, 118 S. W. 2d 561 (1938); *Wilson v. Moudy*, 22 Tenn. App. 356, 123 S. W. 2d 828 (1938); *Bouchard v. Sicard*, 113 Vt. 429, 35 A. 2d 439 (1944); *Tiller v. Norfolk & W. Ry. Co.*, 190 Va. 605, 58 S. E. 2d 45 (1950); *Emerick v. Mayr*, 39 Wash. 2d 23, 234 P. 2d 1079 (1951); *Wright v. Valan*, 130 W. Va. 466, 43 S. E. 2d 364 (1947); *Hunn v. Windsor Hotel Co.*, 119 W. Va. 215, 193 S. E. 57 (1937); *Johnsen v. Pierce*, 262 Wis. 367, 55 N. W. 2d 394 (1952); 4 BLASHFIELD, *CYCLOPEDIA OF AUTOMOBILE LAW* § 2511 (1946); PROSSER, *TORTS* § 51 (1941); *Bohlen, Voluntary Assumption of Risk*, 20 HARV. L. REV. 14 (1906); 38 AM. JUR., *Assumption of Risk* § 171 (1941).

<sup>7</sup> *Hedding v. Pearson et al.*, 76 Cal. App. 2d 481, 173 P. 2d 382 (1946); *Edwards v. Kirk*, 227 Iowa 684, 288 N. W. 875 (1939); *McLeod Stores v. Vinson*, 213 Ky. 667, 281 S. W. 799 (1926); *Miner v. Conn. River R. Co.* 153 Mass. 398, 26 N. E. 994 (1891); *Landrum v. Roddy*, 143 Neb. 934, 12 N. W. 2d 82 (1943); *Fay v. Thrasher*, 77 Ohio App. 179, 66 N. E. 2d 236 (1946); *Gargaro v. Kroger Groc. & Baking Co.*, 22 Tenn. App. 70, 118 S. W. 2d 561 (1938); *Bouchard v. Sicard*, 113 Vt. 429, 35 A. 2d 439 (1944); *Walsh v. West Coast Coal Mines, Inc.*, 31 Wash. 2d 396, 197 P. 2d 233 (1948); *Wright v. Valan*, 130 W. Va. 466, 43 S. E. 2d 364 (1947); 1 SHEARMAN AND REDFIELD ON NEGLIGENCE § 135 (Rev. ed. 1941).

<sup>8</sup> PROSSER, *TORTS* § 51 (1941).

<sup>9</sup> 45 U. S. C. A. § 54 (1943); N. C. GEN. STAT. §§ 97-14, 15, 16 (1950).

<sup>10</sup> *Uline Ice, Inc. v. Sullivan et al.*, 187 F. 2d 82 (D. C. Cir. 1950); *Thurman et al. v. Ice Palace et al.*, 36 Cal. App. 364, 97 P. 2d 999 (1939) (ice hockey); *Quinn et al. v. Recreation Park Ass'n et al.*, 3 Cal. 2d 725, 46 P. 2d 144 (1935) (baseball); *Campion v. Chicago Landscape Co.*, 295 Ill. App. 225, 14 N. E. 2d 879 (1938); *Shanney v. Boston Madison Square Garden Corp.*, 296 Mass. 168, 5 N. E. 2d 1 (1936) (ice hockey); *Modoc v. City of Eveleth*, 224 Minn. 556, 29 N. W. 2d 453 (1947) (ice hockey); *Wells v. Minneapolis Baseball & Ath. Ass'n.*, 122 Minn. 327, 142 N. W. 2d 706 (1913) (baseball) (*cf. Peyla v. Duluth, M. & I. R. Co.*, 218 Minn. 196, 15 N. W. 2d 518 [1944]); *Page v. Unterreiner*, 106 S. W. 2d 528 (Mo. App. 1937) (golf; this case does not refer to *Biskup v. Hoffman*, 220 Mo. App. 542, 287 S. W. 865 [1926], wherein the court held that the doctrine of assumption of risk was not applicable in absence of relationship of master and servant, nor to *Crane v. Kan. City Baseball & Exhibition Co.*, 168 Mo. App. 301, 153 S. W. 1076 [1913] wherein it was held that plaintiff, injured by foul ball at a baseball game, was precluded from recovery by his own con-

premises in which athletic events are held are required to use ordinary and reasonable care for the protection and safety of patrons, and the doctrine is applied if plaintiff is known to have an appreciation and knowledge of the hazard.<sup>11</sup> In the words of Mr. Justice Cardozo, "The timorous may stay at home."<sup>12</sup>

Another area in which the doctrine is finding greater application concerns automobile guest cases. Of course, in jurisdictions where the rule is applied only in its limited form the defense is not available in these cases.<sup>13</sup> But where the doctrine prevails in the more general and extensive aspect, the defendant may avail himself of the defense of assumption of risk as a bar to plaintiff's recovery.<sup>14</sup> In jurisdictions allowing the assumption of risk as a defense, and having a guest statute limiting liability to cases of the driver's gross negligence or wanton misconduct, the doctrine has been applied with effectiveness.<sup>15</sup> The elements of assumption of risk by a guest are (1) a hazard or danger inconsistent with the safety of the guest, (2) knowledge and apprecia-

tributory negligence "if it cannot be said that he assumed the risk"); *Tite v. Omaha Coliseum Corp.*, 144 Neb. 22, 12 N. W. 2d 90 (1943) (ice hockey); *Ingersoll v. Onondaga Hockey Club*, 245 App. Div. 137, 281 N. Y. S. 505 (3d Dep't 1935) (ice hockey); *Povanda v. Powers*, 152 Misc. 75, 272 N. Y. S. 619 (Sup. Ct. N. Y. Cty. 1934) (golf); *Murphy v. Steeplechase Amusement Co.*, 250 N. Y. 479, 166 N. E. 173 (1929) (amusement park ride called "The Flopper"); *Benjamin v. Nernberg*, 102 Pa. Super. 471, 157 Atl. 10 (1931); *Douglas et al. v. Converse*, 248 Pa. 232, 93 Atl. 955 (1915) (polo); *James v. Rhode Island Auditorium*, 60 R. I. 405, 199 Atl. 293 (1938) (ice hockey); *Keep v. Alamo City Baseball Co.*, 150 S. W. 2d 368 (Tex. Civ. App. 1941) (*cf.* *Schiller v. Rice*, 151 Tex. 116, 246 S. W. 2d 607 [1952]); *Kavafian v. Seattle Baseball Club*, 105 Wash. 215, 181 Pac. 679 (1919) (baseball).

<sup>11</sup> See cases cited note 10 *supra*; Note, 26 TEMPLE L. Q. 206 (1952) (pointing out distinction drawn by some courts between ice hockey games and baseball games, based on theory that sport of baseball and possibility of being hit by ball is more commonly known to general public than the game of ice hockey and its incidents of danger).

<sup>12</sup> *Murphy v. Steeplechase Amusement Co.*, 250 N. Y. 479, 166 N. E. 173, 174 (1929).

<sup>13</sup> *Goode v. Barton*, 238 N. C. 492, 78 S. E. 2d 398 (1953).

<sup>14</sup> *Mountain v. Wheatley*, *Fox v. Wheatley*, 106 Cal. 2d 333, 234 P. 2d 1031 (1951); *Dobberrentz v. Gregory et al.*, 129 Conn. 57, 26 A. 2d 475 (1942); *Bohnsack v. Driftmier*, 243 Iowa 383, 52 N. W. 2d 79 (1952); *White v. McVicker*, 216 Iowa 90, 246 N. W. 385 (1933); *Brown v. Waller*, 8 So. 2d 304 (La. App., 2d Cir., 1942); *Landru v. Stensrud et al.*, 219 Minn. 227, 17 N. W. 2d 322 (1945); *Saxton v. Rose*, 201 Miss. 814, 29 So. 2d 646 (1947); *Landrum v. Roddy*, 143 Neb. 934, 12 N. W. 2d 82 (1943); *Woodman v. Peck*, 90 N. H. 292, 7 A. 2d 251 (1939); *Fay v. Thrasher*, 77 Ohio App. 179, 66 N. E. 2d 236 (1946); *Gill v. Arthur*, 69 Ohio App. 386, 43 N. E. 2d 894 (1941); *Wilson v. Moudy*, 22 Tenn. App. 356, 123 S. W. 2d 828 (1938); *Bouchard v. Sicard*, 113 Vt. 429, 35 A. 2d 439 (1944); *Johnsen v. Pierce*, 262 Wis. 367, 55 N. W. 2d 394 (1952).

<sup>15</sup> *Mountain v. Wheatley*, *Foss v. Wheatley*, 106 Cal. 2d 333, 234 P. 2d 1031 (1951); *Dobberrentz v. Gregory et al.*, 129 Conn. 57, 26 A. 2d 475 (1942); *Pierce v. Clemens*, 113 Ind. App. 65, 46 N. E. 2d 836 (1943) (this court distinguishes between "assumption of risk" and "incurred risk," limiting "assumption of risk" to contractual relations and applying doctrine of "incurred risk" where the relation is non-contractual); *Bohnsack v. Driftmier*, 243 Iowa 383, 52 N. W. 2d 79 (1952); *Bouchard v. Sicard*, 113 Vt. 429, 35 A. 2d 439 (1944).

tion of the hazard by the guest, (3) acquiescence or a willingness to proceed in the face of danger.<sup>16</sup>

The general recognition by the courts of the distinction between assumption of risk and contributory negligence has come about fairly recently. The Virginia court, in distinguishing between the two terms, said: "The essence of contributory negligence is carelessness; of assumption of risk, venturousness."<sup>17</sup> The Ohio court expressed the distinction: "Assumption of risk embraces a mental state of willingness whereas contributory negligence is a matter of conduct."<sup>18</sup> Sometimes courts do not make the distinction, holding that in cases other than master and servant and contract, assumption of risk is but a phase of contributory negligence.<sup>19</sup> In actions involving assumption of risk, it is sometimes said that the terms may be used interchangeably, as assumption of risk is the practical equivalent of contributory negligence.<sup>20</sup>

The North Carolina court has not recognized the distinction, consistently holding that

If two ways are open to a person to use, one safe and the other dangerous, the choice of the dangerous way, with knowledge of the danger constitutes contributory negligence . . . and where a person *sui juris* knows of a dangerous condition and voluntarily goes into a place of danger, he is guilty of contributory negligence which will bar his recovery.<sup>21</sup>

In *Norfleet v. Hall*,<sup>22</sup> where plaintiff was a guest in defendant's automobile and was injured in a collision due to defendant's excessive speed, the Supreme Court referred to and did not allow a defense of assumption of risk. Mr. Justice Stacy, in his dissent, declared that

<sup>16</sup> *Pierce v. Clemens*, 113 Ind. App. 65, 46 N. E. 2d 836 (1943); *Saxton v. Rose*, 201 Miss. 814, 29 So. 2d 646 (1947); *Johnsen v. Pierce*, 262 Wis. 367, 55 N. W. 2d 394 (1952); 4 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW § 2511 (1946); 1 SHEARMAN AND REDFIELD ON NEGLIGENCE § 135 (1941); Note, 37 MARQUETTE L. REV. 35 (1953).

<sup>17</sup> *Tiller v. Norfolk & W. Ry. Co.*, 190 Va. 605, 612, 58 S. E. 2d 45, 48 (1950); *Hunn v. Windsor Hotel Co.*, 119 W. Va. 215, 217, 193 S. E. 57, 58 (1937).

<sup>18</sup> *Fay v. Thrasher*, 77 Ohio App. 179, 66 N. E. 2d 236, 241 (1946).

<sup>19</sup> *Warlich v. Miller et al.*, 73 F. Supp. 593 (W. D. Pa. 1947) (cf. *Rauch v. Penn. Sports & Enterprises*, 237 Pa. 632, 81 A. 2d 548 [1951]); *McGeever v. O'Byrne*, 203 Ala. 266, 82 So. 508 (1919); *Peyla v. Duluth M. & I. R. R. Co.*, 218 Minn. 196, 15 N. W. 2d 518 (1944); *Bogen v. Bogen*, 220 N. C. 649, 18 S. E. 2d 162 (1941); *Singletary v. A. C. L. R. Co.*, 217 S. C. 212, 60 S. E. 2d 305 (1950).

<sup>20</sup> *Bogen v. Bogen*, 220 N. C. 649, 18 S. E. 2d 162 (1941); *Wilson v. Moudy*, 22 Tenn. App. 356, 123 S. W. 2d 828 (1938).

<sup>21</sup> *Dunnevant v. Southern Railway Co.*, 167 N. C. 232, 233, 234, 83 S. E. 347, 348 (1914); *Groome v. Statesville*, 207 N. C. 538, 540, 177 S. E. 638, 639 (1934); *Gordon v. Sprott*, 231 N. C. 472, 476, 57 S. E. 2d 785, 788 (1950); *Bogen v. Bogen*, 220 N. C. 649, 18 S. E. 2d 162 (1941).

<sup>22</sup> 204 N. C. 573, 169 S. E. 143 (1953).

the case "runs counter to the doctrine of *volenti non fit injuria*," and Mr. Justice Brogden, also dissenting, made the comment, "It is rather difficult to be reconciled to the idea that a person can recover damages for being bitten by his own dog."

In *Bogen v. Bogen*,<sup>23</sup> another guest case, wherein plaintiff testified that she and her husband started on an auto trip from Columbus, Ohio, through North Carolina to Washington, D. C., to Philadelphia and back to Columbus, and that she had theretofore had to remonstrate with her husband about his careless and reckless driving 365 days in the year, the court said:

The . . . conclusion that she thereby committed a primary act of negligence conclusively evidencing a want of due care for her own safety contributing to her own injury seems to us to be inescapable. . . . That this is the necessary result of such conduct is sustained by the authorities in other jurisdictions. Some treat it under the doctrine of assumption of risk and some as contributory negligence. By whatever name it may be called, the consensus of opinion expressed in these authorities is to the effect that one who voluntarily places himself in a position of peril known to him fails to exercise ordinary care for his own safety and thereby commits an act of continuing negligence which will bar any right of recovery for injuries resulting from such peril.<sup>24</sup>

In *Bruce v. Flying Service*,<sup>25</sup> an action for wrongful death of plaintiff's intestate in a plane crash, the defendant contended in the Supreme Court that plaintiff's intestate had assumed the risk. The court reversed the granting of a nonsuit on the ground that there was some evidence of negligence which should have been submitted to the jury. In the course of its opinion, the court said:

Under the evidence the plea of assumption of risk is not tenable. . . . The pleas of assumption of risk and contributory negligence are both affirmative and require a showing on the part of the defendant to be considered at all; and to prevail as a matter of law, as to either, it must plainly appear from the evidence that a reasonable mind could draw no other inference.<sup>26</sup>

In *Erickson v. Baseball Club, Inc.*,<sup>27</sup> plaintiff sued for damages for injuries sustained when hit by a foul ball while he was attending a

<sup>23</sup> 220 N. C. 649, 18 S. E. 2d 162 (1941).

<sup>24</sup> *Id.* at 651, 18 S. E. 2d at 164.

<sup>25</sup> 231 N. C. 181, 56 S. E. 2d 560 (1951).

<sup>26</sup> *Id.* at 187, 188, 56 S. E. 2d at 564.

<sup>27</sup> 233 N. C. 627, 65 S. E. 2d 140 (1951).

baseball game. The court held a nonsuit proper, evidently on grounds of assumption of risk, and said:

Anyone familiar with the game of baseball knows that balls are frequently fouled into the stands and bleachers. Such are common incidents of the game which necessarily involve danger to spectators. And where a spectator, with ordinary knowledge of the game of baseball, on finding all screened seats filled, proceeds to sit in an unscreened stand, as did the plaintiff under the circumstances of this case, he thereby accepts the common hazards incident to the game and *assumes the risk* of injury, and ordinarily there can be no recovery for an injury sustained as a result of being hit by a batted ball. . . . Thus, it would seem that the plaintiff, with full knowledge of all the dangers of the occasion, voluntarily *assumed the risk* of his situation, or failed to exercise due care to protect himself from the natural dangers incident to his situation. And no other reasonable inference being deducible from the evidence, the motion for nonsuit was properly allowed.<sup>28</sup> (Italics added.)

In an earlier case involving a similar set of facts, the court held a nonsuit proper on the basis that the failure to place a roof over bleacher seats or to erect a wire in front thereof was not negligence on the part of those responsible for the operation of the ball park.<sup>29</sup>

The statement by the court in the principal case is supported by its earlier decisions. In *Morrison v. Cannon Mills Co.*,<sup>30</sup> plaintiff, a truck driver for a transportation company, was injured while unloading caustic soda which he had delivered to defendant's plant. Defendant contended that plaintiff was aware of the dangers involved and that there was no water available nearby, but that he undertook to make the disconnecting operation by himself with knowledge, obtained from past experience, of the manner in which it could be safely done. The court stated that it should be noted at the outset that there was no relation of master and servant or of employer-employee existing between the defendant and the plaintiff and that there was no contractual relation existing between the plaintiff or his employer and the defendant.

In a still earlier decision,<sup>31</sup> in a case where plaintiff's intestate was killed in an explosion at a filling station owned by defendant oil company and leased to defendant employer of the deceased, the court held

<sup>28</sup> *Id.* at 629, 630, 65 S. E. 2d at 141, 142.

<sup>29</sup> *Cates v. Exhibition Co. & City of Durham*, 215 N. C. 64, 1 S. E. 2d 131 (1938).

<sup>30</sup> 223 N. C. 387, 26 S. E. 2d 857 (1943).

<sup>31</sup> *Broughton v. Oil Co.*, 201 N. C. 282, 159 S. E. 321 (1931).



that as between plaintiff and defendant oil company, assumption of risk by plaintiff's intestate was not available as a defense because there was no contractual relation between the parties.

Thus it is seen that the court's statement in the principal case is in accord with previous North Carolina decisions. But in confining the doctrine of assumption of risk as a separate defense to contract cases and master and servant relationships, while in all other areas considering it as a phase of contributory negligence, North Carolina does not follow the general trend of American decisions.

· NAOMI E. MORRIS

### **Workmen's Compensation Act—Accidents Arising Out of and In the Course of the Employment—Street Risks—Dual Employment**

Deceased was employed by the city as cemetery caretaker-salesman. In addition he was allowed to take private employment as a sexton. In this dual capacity he regularly visited local funeral homes to solicit business. On one such trip, while crossing the street, he was struck by an automobile and killed. In awarding compensation the Commission concluded that death resulted from an accidental injury which arose out of and in the course of the employment. The Supreme Court, in a unanimous decision, affirmed, stating that the Commission was correct in its determination that while decedent was paid by others for digging graves, this was related to his general duties as "caretaker," and the employee status, as distinguished from that of an independent contractor, was properly established.<sup>1</sup>

The heart of North Carolina's Workmen's Compensation Act is expressed in the formula "arising out of and in the course of the employment."<sup>2</sup> In interpreting this section our court holds that (1) "in the course of employment" relates to the time, place, and circumstances under which the accidental injury occurs, and (2) "arising out of the employment" refers to the origin or the cause of the injury.<sup>3</sup> This formula has kept the Act within the limits of its intended scope of providing compensation benefits for industrial injuries rather than "branching out into the field of general health insurance."<sup>4</sup> The Act is to be liberally construed to effectuate the legislative intent and no strained nor technical construction should be given to defeat this purpose.<sup>5</sup> Whether or not an accident arose out of the employment is

<sup>1</sup> *Hinkle v. Lexington*, 239 N. C. 105, 79 S. E. 2d 220 (1954).

<sup>2</sup> N. C. GEN. STAT. § 97-2 (f) (1950).

<sup>3</sup> *Sweatt v. Board of Education*, 237 N. C. 653, 75 S. E. 2d 738 (1953); *Withers v. Black*, 230 N. C. 428, 53 S. E. 2d 668 (1949); *Walker v. Wilkins, Inc.*, 212 N. C. 627, 194 S. E. 89 (1937); *Davis v. North State Veneer Corp.*, 200 N. C. 263, 156 S. E. 859 (1931).

<sup>4</sup> *Duncan v. Charlotte*, 234 N. C. 86, 91, 66 S. E. 2d 22, 25 (1951).

<sup>5</sup> *Johnson v. Hosiery Co.*, 199 N. C. 38, 155 S. E. 728 (1930). But as pointed