

## Maurer School of Law: Indiana University Digital Repository @ Maurer Law

---

Articles by Maurer Faculty

Faculty Scholarship

---

1966

# Survey of North Carolina Case Law: Torts: Part Two

Philip C. Thorpe

*Indiana University School of Law*

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>

 Part of the [State and Local Government Law Commons](#), and the [Torts Commons](#)

---

### Recommended Citation

Thorpe, Philip C., "Survey of North Carolina Case Law: Torts: Part Two" (1966). *Articles by Maurer Faculty*. Paper 2314.  
<http://www.repository.law.indiana.edu/facpub/2314>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact [wattn@indiana.edu](mailto:wattn@indiana.edu).

however, any fair interpretation of the opinion compels a recognition of termination of immunity as one of the grounds for the Court's decision. Otherwise, over six pages of the Court's opinion must be discarded as idle ramblings. This portion of the opinion is too thoroughly documented by authority from other jurisdictions to be dismissed so lightly.

If termination of immunity is accepted as one of the grounds for decision in *Hackney*, serious doubt arises as to whether either *Cox* or *Capps* continues as authority, although neither was expressly overruled by the Court. Neither *Cox* nor *Capps* involves an action against a deceased parent, but this factual distinction seems unimportant as the disruption of family harmony is as unlikely in one case as the other. All who have considered the problem apparently treat the death of either parent or child, without regard to who brings the action, as sufficient to terminate immunity<sup>30</sup> when the basic rule that death terminates immunity by destroying the reason for it has been adopted. Thus, unless what would appear to be artificial factual distinctions are made by the Court or unless the Court later abandons the position taken in *Hackney*, *Cox* and *Capps* should no longer be the law.

## TORTS: PART TWO

*Philip C. Thorpe\**

### FRAUD

*Fox v. Southern Appliances, Inc.*<sup>1</sup> was an action for specific performance of a contract to purchase land. The defendant refused to purchase, claiming that it had been misled by plaintiff's representations that the property could be used for commercial purposes, when in fact it was restricted to residential use. Although the zoning ordinance permitted commercial structures, restrictive covenants prohibited such a use. The contract provided that the sale was made

<sup>30</sup> See *Harlan Nat'l Bank v. Gross*, 346 S.W.2d 789 (Ky. 1961); *Oliveria v. Oliveria*, 305 Mass. 297, 25 N.E.2d 766 (1940); *Logan v. Reaves*, 209 Tenn. 631, 354 S.W.2d 789 (1962). In all these cases, other grounds may have been the primary basis for the decision.

\* Assistant Professor of Law, University of North Carolina at Chapel Hill.

<sup>1</sup> 264 N.C. 267, 141 S.E.2d 522 (1965).

subject to restrictions appearing as a matter of record title. Plaintiff demurred to the defense on the theory that defendant's neglect in failing to check the record title made the defense of fraud insufficient. Despite the contract's provisions, the Court held that the pleaded defense was sufficient.

To what extent must a person make an independent investigation as to the truth or falsity of representations made to induce a sale? In actions for fraud, plaintiff must not only have relied upon the representations, but his reliance must have been reasonable. The precise question raised by *Fox* is whether reliance is reasonable when an investigation would have disclosed the falsity of the representations. In an earlier day the doctrine of caveat emptor prevailed. The buyer was under an obligation to beware and was required to investigate. Today there is little need to undertake an independent investigation.<sup>2</sup> Several reasons explain this change in attitude. First, if the basis of the claim is an intentional misrepresentation, negligently failing to investigate would not defeat the claim.<sup>3</sup> More importantly, courts have been moving away from strict caveat emptor for many years. In 1906 our Court stated:

It seems plausible at first sight to contend that a man who does not use obvious means of verifying the representations made to him does not deserve to be compensated for any loss he may incur by relying upon them without inquiry. But the ground of this kind of redress is not the merit of the plaintiff, but the demerit of the defendant; and it is now settled law that one who chooses to make positive assertions without warrant, shall not excuse himself by saying that the other party need not have relied upon them. . . .<sup>4</sup>

In general, a person may reasonably rely upon representations without investigating their truth.<sup>5</sup> A few cases have required some investigation as to the truth of represented facts<sup>6</sup> but they are not

---

<sup>2</sup> PROSSER, TORTS § 103 (3d ed. 1964).

<sup>3</sup> HARPER & JAMES, TORTS § 7.12 (1956).

<sup>4</sup> *Griffin v. Lumber Co.*, 140 N.C. 514, 520-21, 53 S.E. 307, 309 (1906). In *Griffin* the defendant prevented the plaintiff from reading a deed.

<sup>5</sup> *Johnson v. Owens*, 263 N.C. 754, 140 S.E.2d 311 (1965); *Currie v. Mallory*, 185 N.C. 206, 116 S.E. 564 (1923); *Blacknell v. Rowland & Cooper*, 108 N.C. 554, 13 S.E. 191 (1891); *Stout v. Harper*, 51 N.C. 347 (1859).

<sup>6</sup> *Calloway v. Wyatt*, 246 N.C. 129, 97 S.E.2d 881 (1957) (amount of water in well); *Harding v. Southern Loan & Ins. Co.*, 218 N.C. 129, 10 S.E.2d 599 (1940) (condition of hotel); *Simmons v. Horton*, 51 N.C. 278 (1859) (obvious defect on leg of horse).

in conflict with the line of authority represented by *Fox*. In such cases, an investigation was either simple to make,<sup>7</sup> or the party claiming to have relied was better equipped to determine the truth or falsity of the representations than was the maker.<sup>8</sup> Clearly, reliance on a statement is not reasonable in either situation. However, where an investigation would require an outlay of time, expense, or the hiring of special help, an independent investigation will not and ought not be required. Thus, in *Fox*, a title search would require an attorney's services. It follows that defendant did not act unreasonably in relying upon the plaintiff's representations of the permitted use of the property without obtaining the title search.

### STRICT LIABILITY

Since the 1963 decision in *Guilford Realty & Ins. Co. v. Blythe Bros.*,<sup>9</sup> the Court has been committed to the modern strict liability theory of the Restatement of Torts.<sup>10</sup> We can anticipate decisions from time to time clarifying the Court's position concerning the application of the theory to a variety of situations.<sup>11</sup> In *Trull v. Carolina-Virginia Well Co.*,<sup>12</sup> plaintiff claimed that strict liability should be applied where his house received damage from vibrations caused by well-drilling on his land. Noting that the only similarity between *Guilford* and *Trull* was the claimed damage by vibration, the Supreme Court affirmed the granting of an involuntary nonsuit in *Trull*.

The modern theory of strict liability rests upon the ultrahazardous nature of the injury-causing activity.<sup>13</sup> Subsection 520(a) of the Restatement of Torts defines an ultrahazardous activity as one which "necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care. . . ." Plaintiffs who wish to make use of

<sup>7</sup> *Calloway v. Wyatt*, 246 N.C. 129, 97 S.E.2d 881 (1957); *Simmons v. Horton*, 51 N.C. 278 (1859).

<sup>8</sup> *Harding v. Southern Loan & Ins. Co.*, 218 N.C. 129, 10 S.E.2d 599 (1940).

<sup>9</sup> 260 N.C. 69, 131 S.E.2d 900 (1963).

<sup>10</sup> RESTATEMENT, TORTS §§ 519-23 (1938).

<sup>11</sup> The *Guilford* case involved blasting, an area traditionally utilizing some type of liability without fault. See Gregory, *Trespass to Negligence to Absolute Liability* 37 VA. L. REV. 359 (1951). PROSSER, TORTS § 77 (3d ed. 1964).

<sup>12</sup> 264 N.C. 678, 142 S.E.2d 622 (1965).

<sup>13</sup> See RESTATEMENT, TORTS §§ 519, 520 (1938).

strict liability must be prepared to prove that the activity which caused their injury was ultrahazardous within this definition. Not only did plaintiff in *Trull* fail to do so, but his initial pleading was based upon negligence. Furthermore, the way in which damages are caused is irrelevant. The Supreme Court was clearly correct in disregarding this argument in *Trull*.

A more interesting question was presented in *Trull*, as well as in the appeal, after trial below, of *Guilford Realty & Ins. Co. v. Blythe Bros.*<sup>14</sup> Modern liability for ultrahazardous activity is not absolute. However the defenses which will defeat a claim of strict liability are not clear. *Trull* and *Guilford* suggest defenses that can be used. In *Trull*, the Court based its holding in part upon the fact that plaintiff had contracted for the defendant's services and thus could not rely upon strict liability to recover. The Court's position is clearly in accord with section 523 of the Restatement, which denies use of the theory to any person who "takes part in it" (*i.e.*, the ultrahazardous activity). It seems clear that anyone who invites such activities upon his land should be proscribed from recovery without a showing of fault. This is akin to the assumption of risk defense in negligence actions. Several cases have denied to plaintiffs any reliance upon strict liability where the ultrahazardous activities were carried on for their benefit.<sup>15</sup> In *Guilford*, the defense was governmental immunity. The defendant argued that since the city of High Point was supervising its activities, it was entitled to the city's immunity. The Court held that since the city was not immune from liability for inherently dangerous activities, the defense could not benefit defendant.<sup>16</sup>

*Trull*, *Guilford*, and a third case decided this year, *Keith v. United Cities Gas Co.*,<sup>17</sup> raised a problem for practitioners in North Carolina. The term "inherently dangerous" has been used in the past in several senses in the law of torts. For many years, it described those products to which privity of contract did not serve to bar actions against the manufacturer.<sup>18</sup> In *Guilford*, it was used both to justify imposing liability without fault and to limit municipi-

---

<sup>14</sup> 266 N.C. 229, 145 S.E.2d 838 (1966).

<sup>15</sup> *E.g.*, *E.I. DuPont de Nemours & Co. v. Cudd*, 176 F.2d 855 (10th Cir. 1949).

<sup>16</sup> See 18 McQUILLAN, MUNICIPAL CORPORATIONS § 53.76(c) (3d ed. 1963).

<sup>17</sup> 266 N.C. 119, 146 S.E.2d 7 (1966).

<sup>18</sup> PROSSER, TORTS § 96 (3d ed. 1964).

pal governmental immunity. The *Keith* case used "inherently dangerous" to describe standards of due care. Because of the multiple usages, care should be taken to determine the correct use in a given context before concluding that resort to liability regardless of fault is warranted.

#### CONTRIBUTION, INDEMNITY AND SETTLEMENT

Prior to 1965, the Court took the position that an insurer of one joint tort-feasor had no right to contribution from the other joint tort-feasor.<sup>19</sup> Two recent cases appear to overturn in part the no-contribution rule. In *Pittman v. Snedeke*<sup>20</sup> the plaintiff sued one of two potential defendants. The original defendant filed a cross-action against the other potential defendant. The jury found both defendants' fault contributed to plaintiff's injury. The original defendant's insurer satisfied plaintiff's judgment, and the original defendant, pursuant to the right of contribution granted by the judgment in accordance with G.S. § 1-240, sought execution against the third-party defendant. Although the third-party defendant argued that *Herring v. Jackson*<sup>21</sup> denied the right of contribution against a joint tort-feasor to an insurer who paid the judgment on behalf of another joint tort-feasor, the Court affirmed the lower court's refusal to enjoin execution by the original defendant. In *Safeco Ins. Co. of America v. Nationwide Mut. Ins. Co.*<sup>22</sup> the Court allowed the original defendant's insurer to recover from the third-party defendants under substantially the same facts.

Since earlier authorities were not overruled by *Pittman* and *Safeco*, the Court apparently has distinguished two situations. Where a plaintiff sues and obtains judgment against all joint tort-feasors, the insurer of one of them cannot get contribution from the others after satisfying plaintiff's judgment.<sup>23</sup> However, where plaintiff sues one, or less than all joint tort-feasors, contribution is possible if the defendant brings the other joint tort-feasors into the suit by a cross-action. The basis for this distinction seems to

<sup>19</sup> *E.g.*, *Herring v. Jackson*, 255 N.C. 537, 122 S.E.2d 366 (1961); *Squires v. Sorahan*, 252 N.C. 589, 114 S.E.2d 277 (1960).

<sup>20</sup> 264 N.C. 55, 140 S.E.2d 740 (1965), 44 N.C.L. REV. 142 (1965).

<sup>21</sup> 255 N.C. 537, 122 S.E.2d 366 (1961), 41 N.C.L. REV. 882 (1963).

<sup>22</sup> 264 N.C. 749, 142 S.E.2d 694 (1965); 44 N.C.L. REV. 142 (1965).

<sup>23</sup> See cases cited in note 19 *supra*. The Court has very recently reaffirmed this rule. *Nationwide Mut. Ins. Co. v. Bynum*, 267 N.C. 289, 148 S.E.2d 144 (1966).

be the following. In the first situation, all tort-feasors have been sued by the plaintiff. Because the defendants may not cross-claim for contribution,<sup>24</sup> the right to contribution remains inchoate, pending a second action. In the second situation, the cross-claim is permitted, and the right to contribution is adjudicated prior to satisfaction by the insurer. Subrogation then occurs *pro tanto* when the plaintiff's judgment is satisfied.

The situation is, of course, anomalous. Under present law, the insurer's right to recover contribution depends upon plaintiff's choice of defendants. In defense of the Court, it must be pointed out that neither the contribution statute nor any other statutes lend themselves to a construction which would solve this particular hiatus.<sup>25</sup> By ruling as it has in *Pittman* and *Safeco*, the Court has at least made it possible for the insurer to obtain contribution in some cases. The obvious solution is an amendment to the contribution statute, making clear the insurer's right to contribution under all circumstances upon satisfying its insured's obligation to the plaintiff.

An additional aspect of contribution was before the Court in 1965. In *Clemmons v. King*<sup>26</sup> contribution was denied because the pleadings did not properly raise the question. The original defendant, although he brought in a third-party defendant by means of a cross-action, at no time alleged that his own negligence concurred with that of the third-party defendant to cause plaintiff's injury. Careful counsel will make certain that concurrent negligence is pleaded. This can be done as an alternative to other theories, with the concurring negligence pleaded conditionally.<sup>27</sup>

*Gibbs v. Carolina Power & Light Co.*<sup>28</sup> raised an interesting question involving a claim for indemnity. Plaintiff's employer was performing construction and maintenance work for defendant when the plaintiff was injured because of the negligence of defendant's employees. Defendant, claiming plaintiff's employer had agreed by contract to indemnify defendant, sought to bring in the employer by a cross-action for indemnity. The Court affirmed the trial court's striking of the cross-action. It held that since the cross-action was

---

<sup>24</sup> *Greene v. Charlotte Chem. Labs., Inc.*, 254 N.C. 680, 120 S.E.2d 82 (1961). See 40 N.C.L. REV. 633 (1962).

<sup>25</sup> See *Greene v. Charlotte Chem. Labs., Inc.*, note 24 *supra*.

<sup>26</sup> 265 N.C. 199, 143 S.E.2d 83 (1965).

<sup>27</sup> *Id.* at 202, 143 S.E.2d at 86.

<sup>28</sup> 265 N.C. 459, 144 S.E.2d 393 (1965).

not germane to plaintiff's claim, it was not proper.<sup>29</sup> Since the Workmen's Compensation Act<sup>30</sup> clearly indicates that neither the employer nor the compensation insurer are to be joined in actions by the employee against a third person,<sup>31</sup> there was no authorization for the cross-action.

The significant thing to note here is that the problem is peculiar to workmen's compensation situations. In other actions involving indemnity claims plaintiff could assert his claim against either defendant.<sup>32</sup> The cross-action would then be "germane" to plaintiff's action and would be permissible.

Two cases involving settlements need only brief comment. In *Sell v. Hotchkiss*<sup>33</sup> the Court construed a covenant not to sue which had been obtained by one joint tort-feasor to permit plaintiff to bring an action against the other joint tort-feasor. Although the case was made difficult because of the complex and ambiguous language of the covenant, the Court found the intent of the parties was to reserve to plaintiff his right of action against the joint tort-feasor who had not settled. The second case, *Bongardt v. Frink*,<sup>34</sup> presented to the Court a case understood best in contrast to its earlier decision in *Keith v. Glenn*.<sup>35</sup> In *Keith*, plaintiff's insurer had made a settlement with defendant. Plaintiff brought an action for personal injuries, and defendant counterclaimed for his personal injuries. Plaintiff filed a reply, asserting the prior settlement, but alleging it was made against his wishes and without his consent. The Court held that plaintiff could either affirm the settlement, thus barring defendant's counterclaim but also barring his own action; or plaintiff could refuse to ratify the settlement, thus retaining his claim, but permitting the counterclaim by defendant. This case follows a series of earlier decisions establishing the rules permitting the insured's action, and the defendant's counterclaim.<sup>36</sup> The situa-

<sup>29</sup> See, e.g., *Gaither Corp. v. Skinner*, 238 N.C. 254, 77 S.E.2d 659 (1953).

<sup>30</sup> N.C. GEN. STAT. § 97-10.2(d), (e) (1965).

<sup>31</sup> Except, perhaps, in "extraordinary circumstances." *Lovett v. Lloyd*, 236 N.C. 663, 73 S.E.2d 886 (1953).

<sup>32</sup> See, e.g., *Ingram v. Nationwide Mut. Ins. Co.*, 258 N.C. 632, 129 S.E.2d 222 (1963) (primary-secondary liability situation).

<sup>33</sup> 264 N.C. 185, 141 S.E.2d 259 (1965).

<sup>34</sup> 265 N.C. 130, 143 S.E.2d 286 (1965). See *Brandis, Civil Procedure*, 44 N.C.L. REV. 897 (1966).

<sup>35</sup> 262 N.C. 284, 136 S.E.2d 665 (1964).

<sup>36</sup> See, e.g., *Bradford v. Kelly*, 260 N.C. 382, 132 S.E.2d 886 (1963); *Phillips v. Alston*, 257 N.C. 255, 125 S.E.2d 580 (1962); *Lampley v. Bell*, 250 N.C. 713, 110 S.E.2d 316 (1959); *Beauchamp v. Clark*, 250 N.C. 132, 108 S.E.2d 535 (1959).



tion in *Bongardt* was somewhat different. There the plaintiff filed a reply to the defendant's counterclaim, setting forth the earlier settlement between defendant and his insurer. The plaintiff then was permitted to withdraw the reply and the case went to trial upon both plaintiff's claim and defendant's counterclaim. The Court held that defendant was not prejudiced by the withdrawal of the reply. Thus, after a settlement by the insurer, the insured is permitted to sue, and defendant is permitted to counterclaim despite the settlement. The plaintiff may rely either upon the settlement, or go to trial upon his claim, and defend against the counterclaim without insurance protection.<sup>37</sup> Although it is best to be certain as to the insured's choice before proceeding, the trial court, according to *Bongardt*, has discretion to allow a withdrawal of a pleading which acts as a ratification of the settlement. An ill-made choice may be reversed, if done quickly.<sup>38</sup>

## TRIAL PRACTICE

*Herbert Baer\**

### PROCESS

G.S. § 1-105.1 authorizes service of process by serving the Commissioner of Motor Vehicles in cases where the defendant at the time of the accident in question was a resident of this state but has, since the accident, established residence outside of this state or departed from this state and remained absent for sixty days or more continuously whether such absence is intended to be temporary or permanent. G.S. § 1-98.2(6) authorizes service of process by publication where the "defendant, a resident of this state, has departed therefrom or keeps himself concealed therein with intent to defraud his creditors or to avoid the service of summons."

In *Harrison v. Hawvey*<sup>1</sup> plaintiff passenger alleged that defen-

---

<sup>37</sup> Since the insurer has satisfied its contractual obligations by settling, the insured cannot insist upon further protection. See *Bradford v. Kelly*, note 19 *supra*.

<sup>38</sup> In *Bongardt*, the reply was withdrawn about one month after it was filed.

\* Alumni Distinguished Professor of Law, University of North Carolina at Chapel Hill.

<sup>1</sup> 265 N.C. 243, 143 S.E.2d 593 (1965).