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# Joint Adventure or Joint Enterprise—Two Theories of Vicarious Liability

Rex B. Stratton III
*University of Montana School of Law*

# JOINT ADVENTURE OR JOINT ENTERPRISE— TWO THEORIES OF VICARIOUS LIABILITY

In the recent case of *Sumner v. Amacher*[1] the Montana Supreme Court questioned the application of the joint venture[2] doctrine as it imputed contributory negligence of the driver of an automobile to the passenger.[3] The court decided that as a matter of law, no joint adventure[4] existed because in that case no common pecuniary interest was involved nor did the evidence establish a common right of control.[5]

The facts of the case are that the defendent, Amacher, an employee of the co-defendent Wellington D. Rankin,[6] was driving a vehicle owned by Rankin and was within his scope of authority. At the time of the accident the plaintiff, Floyd Sumner, was riding with his wife Belinda, who was driving. They were traveling to Great Falls, Montana, for a dual purpose: he was to attend a business meeting and his wife was going with him to visit friends there. The car was jointly owned by the Sumners, but driven almost exclusively by Belinda Sumner. They intended to share the driving during the trip.

The court held that Amacher's unsafe and illegal left turn across the traffic lane was a proximate cause of the accident, but that Belinda Sumner was contributorily negligent for passing the defendant's vehicle within a yellow-lined no passing zone. The jury returned a verdict for the plaintiff against both defendants in the sum of $37,000, and after judgment was entered each defendant separately filed a motion for a new trial and a motion to set aside the verdict and the judgment. All motions denied, both defendants appealed. The second issue, on appeal, involved whether Belinda Sumner's contributory negligence

[1]..... Mont. ....., 437 P.2d 630 (1968).

[2]The doctrine of joint venture is also referred to by courts and writers as joint adventure or joint enterprise. The terms are generally applied interchangeably, however, for the purpose of clarity the terms as used in this article will have these precise meanings: A joint adventure is defined by the following essential elements: (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) and equal right to a voice in the direction of the enterprise, which gives an equal right of control. The distinctive element in a joint adventure is the seeking of profits associated with a correlative obligation to share the losses. A joint enterprise if defined by the same four elements except pecuniary interest is not required among the members, only that there be a community of interest for the mutual benefit or pleasure of the members. See Shook v. Beals, 96 Cal. App.2d 963, ....., 217 P.2d 56, 61, 18 A.L.R.2d 919, 924 (1950); RESTATEMENT (SECOND) OF TORTS § 491, Comment *c* (1965); 48 C.J.S. *Joint Adventure* § 1 (1947).

[3]Passenger is used in the generic sence of a rider or guest in the same vehicle and does not express the technical meaing set forth in the RESTATEMENT (SECOND) OF TORTS § 490, Comment *a* (1965).

[4]The Court does not distinquish between joint enterprise and joint adventure but applies the term joint venture to both concepts. *See* note 2, *supra*.

[5]437 P.2d at 635.

[6]Wellington D. Rankin died prior to commencement of litigation and his Executrix, Louise R. Rankin was substituted as defendant.

should be imputed to her husband to bar his recovery on the ground that the Sumners were involved in a joint venture.[7]

In affirming the lower court's judgment, the Supreme Court said that in Montana a community of pecuniary interest is an indispensable element of the doctrine of joint adventure.[8] The court further rejected expressly a concept of joint enterprise established by the evidence of a common purpose and a mere community of interest, but involving no business interest.[9] The court noted that the concept of joint adventure in the usual sense is strictly a commercial or business venture for the mutual financial gain of the members.[10]

The court's rejection of the joint enterprise doctrine in favor of the joint adventure doctrine under circumstances of imputing contributory negligence presents three fundamental questions:

(1) Whether the theory of joint enterprise should have been rejected;

(2) Whether rejection of joint enterprise theory, as it is applied to contributory negligence, should also be rejected when applied to imputing negligence to several enterprisers jointly; and (3) Whether the acceptance of the doctrine of joint adventure promotes the principles of social benefit which underly the concepts of vicarious liability.

## VICARIOUS LIABILITY— THE DOCTRINE OF "SOCIAL INSURANCE"

In making an evaluation of the effects of a joint adventure or joint enterprise on the innocent party, it is necessary to discuss the policy roots supporting the doctrine of vicarious liability. The policy of holding an innocent defendant vicariously liable for the torts of another person has not always been part of the law. Historically, if *A* is injured because of *B's* wrongful conduct, under traditional tort principles the loss which occurred is shifted from *A* to *B*. However, society acquired no benefit from merely shifting the burden of loss to the tort-feasor. The good derived by compensating the plaintiff is wholly offset by the harm caused when taking that amount from the defendant. Shifting the loss from one party to the other is based on concepts of fairness or a desire to discourage harmful conduct or a combination of both. The resulting standard is no liability without fault.[11]

With the advent of the machine age, a transition in traditional tort doctrine occurred. During this industrialization period an increas-

[7]437 P.2d at 634. In this instance the Court applies the term joint venture to the concept of joint enterprise and not to a joint adventure situation.

[8]RESTATEMENT (SECOND) OF TORTS § 491(1) (1965).

[9]437 P.2d at 635.

[10]*Id.* at 635.

[11]James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L. REV. 549 (1948). [Hereinafter cited as James, *Liability Reconsidered*].

ing number of injuries fell upon employees and third persons who, as a class, could least sustain the burden of loss. Because of a distinct social benefit accruing from compensating victims of these accidents, new doctrines developed within the framework of the law, but without changing the substantive body of the law.[12] What eventually emerged was a doctrine of deliberate allocation of risk,[13] which endeavored to assure compensation to injured parties by shifting the liability for the loss to the employer whenever possible. Such losses to him, considered as a cost of doing business, would be reflected in prices and the burden ultimately shifted foreward to the consuming public. The process is called "social insurance" and is the theoretical foundation for shifting liability from the negligent party onto the innocent but financially responsible employer.

Necessary to this theory of vicarious liability is the agency concept of Respondeat Superior. Because of the agency relationship between *A* and *B*, *B's* tortious conduct is imputed to *A*, even though *A* is not neglinor has he participated in or ratified *B's* actions. In one sense, this is a doctrine of strict liability applied to A when he is held vicariously liable to a third party for B's conduct. In another sense, the theory is an extension of fault liability to an additional, albeit innocent, party. Liability is still determined by negligence of some one and the usual rules of torts are applicable to it.[14]

One important consideration in imputing *B's* negligence to *A* is the presence of liability insurance. Although the existence of insurance is rarely, if ever, mentioned in court, its presence is assumed by both the judge and the jury. Accordingly, this assumption affects the willingness of the courts to allow liability to be shifted to an innocent party.

Increases in the number of tort actions historically were not in claims against individuals; rather the increases occurred in claims against incorporated enterprises. The practice of issuing liability insurance began with the indemnifying of employers who were being held vicariously liable for their employees' torts. Insurance was demanded, at first, by small enterprises who could not afford the loss incurred by successful claims against them.[16]

Once courts acknowledged that losses could be shifted so that the

[12]*Id.* at 551.

[13]PROSSER, HANDBOOK OF THE LAW OF TORTS § 68, at 471 (3d ed. 1964) [Hereinafter cited as PROSSER, TORTS].

[14]*See* Williams, *Vicarious Liability: Tort of the Master or of the Servant?* 72 L. Q. REV. 522 (1956).

[15]PROSSER, TORTS § 69, at 572 (3d ed. 1964).

[16]Gardner, *Insurance Against Tort Liability: An Approach to the Cosmology of the Law*, 15 LAW & CONTEMP. PROB. 454 (1950).

burden rested on society generally, the capacity to bear the loss [17] became a factor in determining the existence of a duty on the part of the defendant.[18] To summarize, the purpose of vicarious liability is to assure compensation to the injured plaintiffs while placing the burden of loss on the parties best able to shift the costs forward onto the greatest number of persons.

Society benefits from the distribution of loss in two ways: (1) from the sum of the good accruing to those who are compensated in cases which would not have been compensated without vicarious liability; and (2) indirectly, from preventing the repercussions of individual financial ruin.[19] Because society approves of this general distribution of loss, it assumes the ultimate responsibility for compensating injuries arising from growing social interdependence and measures the merits of applying joint adventure or joint enterprise doctrines to vicarious liability by the breadth of loss distribution.[20]

## JOINT ADVENTURE OR JOINT ENTERPRISE—THE EFFECTS OF IMPUTING CONTRIBUTORY NEGLIGENCE ON THE PRINCIPLE OF DISTRIBUTING THE LOSS.

The doctrine of vicarious liability with respect to joint adventure and joint enterprise rests on an analogy to the law of partnerships.[21] A joint adventure is distinguished from a partnership only in that the joint adventure is narrower in scope and purpose and is usually formed to carry out a single undertaking, although this undertaking may extend over a considerable period of time or require multiple transactions.[22] One problem of joint adventure is that it is not easily identified; it is a conclusion of law and need not be expressly named in a complaint or an agreement. "The bar is aware of it mainly as a device to impose legal liability as an additional cause of action in a complaint. The bench has used the relationship to impose certain legal consequences of the relationship as a measure of justice."[23]

[17]Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases*, 78 U. PA. L. REV. 805, 807 (1930) [Hereinafter cited at Feezer, *Capacity to Bear Loss*].

[18]POUND, THE SPIRIT OF THE COMMON LAW 189 (1921): "There is a strong and growing tendency, where there is no blame on either side, to ask in view of the exigencies of social justice, who can bear the loss."

[19]James, *Liability Reconsidered* 550.

[20]Feezer, *Capacity to Bear Loss* 810.

[21]PROSSER, TORTS § 71, at 488 (3d ed. 1964).

[22]30 Am. Jur. § ( ); (approved in) Rae v. Cameron, 112 Mont. 159, 167, 114 P.2d 1060, 1065 (1941). In Hamman v. U.S., 276 F. Supp. 420, 424 (1967) the Federal District Court, Montana District, Billings Division, applied the UNIFORM PARTNERSHIP ACT [Hereinafter cited as U.P.A.] as adopted in Title 63, REVISED CODES OF MONTANA 1947 [Hereinafter cited as R.C.M. 1947] to a joint adventure in determing under Section 63-207 whether the members of a joint adventure were jointly liable for claims arising under the Workman's Compensation Act. See In re Mc Anelly's Estate, 127 Mont. 158, 258 P.2d 741 (1953); Bradburry v. Negelhus, 132 Mont. 417, 319 P.2d 503 (1957).

[23]Taubman, What Constitutes a Joint Adventure, 41 Corn. L. Q. 640, 641 (1956).

The members of a joint adventure are, as are members in a partnership, jointly and severally liable for the conduct of any member.[24] Likewise, the contributory negligence of one of its members is imputed to the others.[25] A joint adventure is based on the same principles of agency as partnership.[26]

A joint enterprise may be considered as broadening the theory of joint adventure because it does not require a profit-or-loss venture. To this extent, the doctrine of joint enterprise rests, as best, on an attenuated analogy to a partnership.[27] Unlike the joint adventure, the application of a joint enterprise has been mostly in the field of automobile law.[28] It is more a defendant's tool to impute contributory negligence of the driver to the passenger, rather than a method of joining several innocent parties as co-defendants with the tort-feasor.[29]

An example of the positive effect of the application of the joint enterprise is the California case of *Shook v. Beals*.[30] The Court of Appeals applied the doctrine of joint enterprise to a group of five men who shared the expenses of chartering an air plane to fly to a fishing area.[31] Of the five men only one was a pilot, but on the facts the court found that the other men had a common right of control.[32] Due to the negligence of the pilot, the plane flipped during the landing. The lessor of the plane sued all of the men jointly as co-defendants on the theory that the men were involved in a joint enterprise.

In determining if there was sufficient evidence to conclude the existence of a joint enterprise, the court declared that the elements constituting a joint enterprise were: a common destination; a power to determine or change the route from time to time by mutual agreement; and the fact that the trip was for a common but *non*-business [Court's italics] purpose. Although no other cases in California involved plane charters, the court saw no distinction between this case and cases applying the same doctrine to automobiles.[33]

[24]R.C.M. 1947 § 63-207.

[25]RESTATEMENT (SECOND) OF TORTS § 491(1) (1965).

[26]*Id.* Comment *b* at 548 (1965).

[27]Although some writers have said that the doctrine is grounded strictly on the principles of Responeat Superior, in the case of Thorogood v. Bryan, 8 C.B. 115 (1849) an omnibus passenger was denied recovery from a third person on a presumption of agency between the passenger and the driver—the driver's contributory negligence was imputed to the passenger. Weintraub, *The Joint Enterprise Doctrine in Automobile Law*, 16 CORN. L. Q. 320 (1931) [Hereinafter cited as Weintraub, *Joint Enterprise Doctrine*].

[28]James, *Vicarious Liability*, 28 TULANE L. REV. 161, 210 (1954) [Hereinafter cited as James, *Vicarious Liability*].

[29]PROSSER, TORTS § 71 at 489 (3d ed. 1964).

[30]96 Cal. App.2d 963, 217 P.2d 56, 18 A.L.R.2d 919 (1950).

[31]96 Cal. App.2d at ....., 217 P.2d at 61, 18 A.L.R.2d at 926.

[32]The evidence showed that the men had, in fact, exerted control over the plane by (1) mutually deciding to make an intermediate stop; and (2) by mutually agreeing to land at an air field despite warnings that the air strip was too short for the plane which they had chartered.

[33]96 Cal. App.2d at ....., 217 P.2d at 61, 18 A.L.R.2d at 925.

This case differs from other joint enterprise cases not in that it extended the use of joint enterprise to fields other than automobile law, but because it is one instance where the doctrine is employed by the plaintiff to join several innocent persons as co-defendants.[34] Notwithstanding the absense of a mutual business, the California court found sufficient agency among the members to hold all enterprisers jointly liable for the pilot's negligence.[35] In the *Beals* case, the result of utilizing the joint enterprise doctrine was that the loss was distributed among the enterprisers. In this way, the joining of the members of the enterprise as co-defendants better assured the plaintiff full compensation but also limited the possibility of financial harm to any one of the defendants.

The alternative reasons for developing the joint enterprise doctrine were a defensive means of replacing discarded theories which had once been employed by defendants to bar the claims of passengers riding with contributorily negligent drivers.[36] In Montana, at one time, contributory negligence of the driver was automatically imputed to any passenger riding with him,[37] but the doctrine was since overruled.[38] The marital relationship between the driver and passenger spouse is is another discarded defense to the passenger's claim against the defendant.[39] Because contributory negligence is a complete defense, once the defendant established a joint enterprise, imputed contributory negligence bars the passenger's claim against him.[40]

In *Sumner v. Amacher*[41] the Montana court rejected the joint enterprise doctrine completely.[42] Prior to that case, the court had in all joint adventures,[43] except in automobile cases,[44] required a common business venture. The decision in Amacher is consistent with the trend of thought which believes that the doctrine of joint enterprise should be discarded.[45]

Because Montana does not recognize the concept of comparative

[34]PROSSER, TORTS § 71, at 489 (3d ed. 1964).

[35]96 Cal. App.2d at ....., 217 P.2d at 61, 18 A.L.R.2d at 926.

[36]PROSSER, TORTS § 71; Weintraub, *Joint Enterprise Doctrine*, 320 (1930).

[37]Whittaker v. City of Helena, 12 Mont. 124, 35 P.904 (1894).

[38]Laird v. Berthelote, 63 Mont. 122, ....., 206 P.445, 448 (1922); RESTATEMENT (SECOND) OF TORTS § 490 (1964). For a passenger to be barred from stating a claim against a third party he must be contributorily negligent himself. The passenger in a vehicle is required to exercise reasonable care for his own safety. Wolf v. Barry O'Leary Inc., ..... Mont. 318 P.2d 582 (1957).

[39]R.C.M. 1947 §§ 36-109, 93-2803. *See* RESTATEMENT (SECOND) OF TORTS § 487, at 543 and Comment *b*, at 544 (1965).

[40]*Id.* § 491(1), at 547 (1965).

[41]..... Mont. ....., 437 P.2d 630 (1968).

[42]437 P.2d at 636.

[43]*Rae v. Cameron, supra,* note 22.

[44]Hurley v. Tymofichuk, 139 Mont. 50, 359 P.2d 378 ( ); *Laird v. Bertelote, supra,* note 38.

[45]James, *Vicarious Liability* 215; PROSSER, TORTS § 71, at 494 (3d ed. 1964); Weintraub, *Joint Enterprise Doctrine* 338.

negligence,[46] the imputation of contributory negligence to a member of a joint enterprise is a complete bar to his right of recovery against a third party. According to the Restatement position, the innocent enterpriser has a right of recovery from the negligent enterpriser.[47] However, under the Montana Automobile Guest Statutes[48] an automobile passenger is prohibited a right of recovery from the driver in most circumstances. Accordingly, the effect of the joint enterprise doctrine is not only to deny the passenger recovery from the driver of the other car, but also from the driver of the passenger's vehicle. The innocent passenger, as a joint enterpriser, receives no compensation from either of two negligent parties. In terms of the principles of vicarious liability, the application of this doctrine denies recovery where there should be a right of compensation and places the total burden of loss on the innocent plaintiff. For these reasons Montana properly rejected the doctrine of joint enterprise.

The second question was whether the joint enterprise doctrine should be retained where it operates to impute negligence to members of an enterprise jointly as co-defendants. On the basis of the analogy to a partnership, the laws of partnership should have some influence.[49] Imputing negligence of one member of the joint enterprise to the other enterprisers may have several results: (1) The members may be held jointly liable, thereby spreading the loss and risk of financial harm to all of them; (2) The enterpriser carrying insurance may be reached; (3) A member more financially responsible may be held severally liable for the plaintiff's loss.

To some extent the imputing of negligence of one enterpriser to all the enterprisers achieves one desired result of the vicarious liability doctrine. Where the tort-feasor as sole defendant is proof against judgment, the plaintiff may, by joining the other enterprisers, obtain full compensation. However, the joint enterprise is not a financial endeavor and there is no common fund or joint investment which may absorb the loss. The loss distribution will fall upon the individual members, but will not be distributed to a greater number of persons. Although the risk of financial harm is reduced, the doctrine does not spread the loss to society generally. The doctrine effects harsh results on a few, but because it compensates the innocent party it should be retained. The third fundamental question is whether the joint adventure doctrine, by imputing contributory negligence, promotes the distribution principles of vicarious liability. The answer is equivocal depending upon the right of the injured adventurer to receive compensation from the

[46]Sztaba v. Great Northern Ry., ..... Mont. ....., 411 P.2d 379 ( ).

[47]RESTATEMENT (SECOND) OF TORTS § 491, Comment *b* (1965).

[48]R.C.M. 1947 §§ 32-1113 to 32-1116. Under the Montana Guest Statutes, the passenger of the vehicle does not have a right of recovery against the driver unless he has been grossly negligent.

[49]*Hamman v. U.S.*, *supra* note 22, at 424.

common fund of the adventure. The rule as adopted in *Sumner v. Amacher* requiring a community of pecuniary interest pertains only if the venture is for the mutual sharing of the profits and losses.[50]

Title 63 of the R.C.M. 1947, Section 301 reads: "The rights and duties of the partners in relationship to the partnership shall be determined, by the following rules . . . (b) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business." The adventurer, as a member of the joint adventure has a right to indemnity, in the absence of an agreement to the contrary, if it is determined that his injuries are included within the definition of part (b) "personal liabilities."[52]

In making this determination, it should be considered that the member would not be barred by imputed contributory negligence but for his membership in the joint adventure and that the injuries were reasonably incurred by him in the ordinary and proper conduct of its business.[53]

The concept of vicarious liability suggests that if the doctrine of joint adventure applies it both compensates the injured parties and distributes the loss over the greatest number of people. If contributory negligence is imputed, the member barred recovery from third parties should be compensated from the common funds of the venture. To effect the desired results of the doctrine of vicarious liability, the adventure's loss should be treated as a cost of doing business and that loss shifted to the income of the venture. Under these circumstances the loss will be distributed and the injured member compensated.

However, if the loss or liability of the injured member of the joint adventure cannot be recovered from the venture itself, the doctrine of joint adventure has the same pejorative effects as the doctrine of joint enterprise. In cases where the adventurer is not compensated by the joint adventure and is denied recovery from third parties because of the membership in the joint adventure, the doctrine works adversely to the social insurance principles of vicarious liability and should be discarded.

REX B. STRATTON, III

[50]437 P.2d at 635-636.
[51]U.P.A. § 18.
[52]*cf.* Smith v. Hensley, 354 S.W.2d 744, 98 A.L.R.2d 340 (Ky. 1962).
[53]R.C.M. 1947 § 63-301.