**TORTS**—JOINT ENTERPRISE—IMPUTED CONTRIBUTORY NEGLIGENCE

Defendant and his wife in an inboard motor boat collided with an anchored outboard motor boat occupied by the three plaintiffs who were engaged in night fishing on the navigable waters of Lake Norfolk, Kansas. One plaintiff was seated in the bow, another amidship and the third in the stern. For the dual purpose of a warning light and to attract fish, plaintiffs, had placed a lighted Coleman lantern on an oar lying horizontal with the middle seat. The base of the lantern was below the gunwale and the glass part, equipped with a canopy and reflector that directed the light downward, was above the gunwale. A witness on the dock three-quarters of a mile away in the direction opposite from which the defendant's boat approached testified that the light was visible. It was not stated how long the plaintiffs had been fishing or if any had knowledge of the statute requiring an anchor light.[1]

Defendant and his wife testified that they did not see the anchored boat until they were hard upon it. The trial court found the collision to be solely attributable to the negligence of the defendant in failing to observe the anchored boat, whether or not the plaintiffs were displaying the lighted Coleman lantern. The Court of Appeals held that the plaintiffs were also negligent in not displaying the proper anchor light. Applying the rule of comparative negligence used in admiralty jurisdictions the court adjusted the damages awarded the plaintiffs stating that they were engaged in a joint enterprise at the time of the accident and any contributory negligence is imputable to each of them. *Rogers v. Saegar*, 247 F.2d 758 (10th Cir. 1957).

The facts as related by the court present a prima facie case of contributory negligence on the part of each of the occupants of the claimants' boat whether they be considered as guests, passengers or members of a joint enterprise. A passenger in a vehicle must be in exercise of due care to entitle him to recover against a negligent third party.[2] It cannot reasonably be said that a person is so conducting himself if he remains in an anchored outboard motor boat at night knowing that other motor boats are operating in the same

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[1]"A vessel under one hundred and fifty feet in length when at anchor shall carry forward, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a lantern so constructed as to show a clear, uniform, and unbroken light visible all around the horizon at a distance of at least one mile," 33 U.S.C. § 180, applicable to vessels in inland waters.

[2]Smith v. Atlantic & Y. Ry. Co., 200 N.C. 177, 156 S.E. 508 (1931); Rodgers v. Saxton, 305 Pa. 479, 158 Atl. 166, 80 A.L.R. 280 (1931); Brown v. Crescent Nut & Chocolate Co., 310 Pa. 489, 165 Atl. 743 (1933); Johnson v. Atlantic Coast Line R. Co., 205 N.C. 127,

waters without placing a light in a position that it can be seen from any direction. No knowledge of the applicable statute[3] would seem necessary as the desire of self-preservation should motivate him to take the necessary steps to protect himself.[4] The court, in reaching a desirable result, has called this a joint enterprise. The facts as related show only that the plaintiffs were fishing together from an anchored boat. In the absence of other factors a finding of negligence predicated on the theory of joint enterprise is, in the opinion of this writer, highly questionable.

From the many definitions of a joint enterprise two essentials are contained in all: One, a community of interests in the objects or purposes of the undertaking; two, an equal right to govern the movements and the conduct of each other with respect to the undertaking.[5] From this writer's research the great majority of joint enterprise cases considered under tort law have involved the negligence of the driver of a vehicle being imputed to his passenger, so as to bar the passenger from recovering from a likewise negligent third party. A vehicle is defined as "That in or on which a person or thing is or may be carried from one place to another."[6]

An excellent example of a joint enterprise is presented in the case of *Chimene v. Dow*[7] in which the vehicle used was a rowboat fitted with an outboard motor. Four boys decided to go fishing, each boy to furnish something that was needed for the trip. One boy

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170 S.E. 120 (1933); Bush v. Union Pacific R.R., 62 Kan. 709, 64 Pac. 624 (1901); Sharp v. Sproat, 111 Kan. 735, 208 Pac. 613 (1922); Naglo v. Jones, 115 Kan. 140, 222 Pac. 116 (1924); Ferguson v. Lang, 126 Kan. 273, 268 Pac. 117 (1928); Henderson v. National Mutual Cas. Co., 164 Kan. 109, 187 P.2d 508 (1947); Curtiss v. Fahle, 157 Kan. 226, 139 P.2d 827 (1943); Most v. Holthaus, 170 Kan. 510, 227 P.2d 144 (1951).

[3]*Supra* note 1.

[4]See Feige v. Hurley, 89 F.2d 575 (6th Cir. 1937), where deceased's administrator was denied recovery because of the contributory negligence of the deceased. Referring to a rule that required rowboats to have a lantern available to exhibit to approaching boats the court at page 577 said, "While this rule may not be technically applicable to canoes, it does indicate a standard of care which the canoe party should have observed. The utmost that may be said is that the death of the deceased was caused by the combined and concurring negligence of both parties . . . " *Accord*, D'Hondt v. Hopson, 269 F.2d 759 (10th Cir. 1959), which explains the rule of independent contributory negligence as applied to a passenger in an automobile. The dissenting opinion in that case is written by the same judge who wrote the opinion in the case under consideration.

[5]Crescent Motor Co. v. Stone, 211 Ala. 516, 101 S. 49 (1924); Callahan v. Harm, 98 Cal. App. 568, 277 Pac. 529 (1929); Trumpfeller v. Crandall, 130 Me. 279, 155 Atl. 646 (1931); Koplitz v. City of St. Paul, 86 Minn. 373, 90 N.W. 794, 58 L.R.A. 74 (1902); Mick v. Oberle, 124 Neb. 433, 246 N.W. 869 (1933); Judge v. Wallen, 98 Neb. 154, 152 N.W. 318, L.R.A. 1915E 436 (1915); PROSSER, TORTS, § 65 (2d ed. 1955), at 363 states: "A joint enterprise is a relation analogous to a partnership, having a limited number of objectives, commercial or otherwise. Its existance requires:

a. A mutual right to control the management or operation of the enterprise.

b. In some jurisdictions, a common purpose, in which all persons involved have a mutual interest."

[6]United States v. One 1936 Model Ford V-8 De Luxe Coach, 307 U.S. 219, 237 (1939).

[7]104 F. Supp. 473 (S.D. Tex. 1952).

obtained his father's car, another purchased food, the third rented the rowboat and the fourth supplied his father's outboard motor and operated it throughout the trip. Although each boy acted as a lookout while the boat was underway, an inboard motor boat collided with them. The court found that the collision resulted from the failure of the occupants of the outboard motor boat to display proper running lights and that the boys were engaged in a joint enterprise and the negligence of one was imputable to all. It was clearly shown that each participant contributed to the cost of the venture and each, by assuming the duty of a lookout, exercised a right of control over the operator of the boat.

The California court in the case of *Shook v. Beals*[8] held that the members of a fishing party who rented a plane for transportation to the fishing grounds were engaged in a joint enterprise even though the pilot was the only member of the group who knew how to fly. Each of the four non-pilot members contributed one-fourth of the rental cost of the airplane, the pilot's share consisting of arranging for the rental of the plane and flying them to the desired location. The necessary control was found from the facts that the pilot landed at their direction at a particular airfield, that all members obtained information as to other airports and that all made the decision to land where the crash occurred.

In the case of *Gilreath v. Silverman*[9] it was held that three men who, after tuning up a motor boat, proceeded to operate it for the sole purpose of testing it, were engaged in a common or joint enterprise.

Several motor boat cases have held that the occupants were not engaged in a joint enterprise. Illustrative is *Monongahela River Consol. Coal & Coke Co. v. Schinnerer*,[10] where four men on a hunting trip used a motor boat owned and operated by one of the party for transportation to the hunting area. On the return trip the motor became inoperative and the boat drifted in front of a negligently operated steamer. The court found that whether the passengers were considered as guests or members of the crew, they had no duty to inspect the boat's equipment and any negligence of the owner-operator was not imputable to his passengers, even though they attempted to warn the steamer by shouting and burning newspaper. In *Ryan v. Dendinger, Inc.*[11] the deceased was asked by

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[8] 96 Cal. App. 2d 963, 217 P.2d 56 (1950).
[9] 245 N.C. 51, 95 S.E.2d 107 (1956).
[10] 196 Fed. 375 (9th Cir. 1912).
[11] 19 So. 2d 849 (La. App. 1942).

the father of the motor boat owner to go with the father and the owner to look for fishing grounds. The court found the owner was entirely in charge of the operation of the boat and therefore his negligence was not imputable to the deceased. No joint enterprise was found in *Petition of H & H Wheel Service, Inc.*,[12] where the owner-operator of a fourteen foot outboard motor boat had taken two other men on a fishing expedition. In regard to this venture, the court said: " . . . there was no testimony that the relationship of principal and agent or of equal right to direct and govern the conduct of each other existed; and that there was no evidence of common control of the small motorboat."

In a case where a husband and wife were invited by another couple to accompany them on a pleasure ride in their outboard motor boat, any negligence on the part of the owner of the boat was found not to be imputable to injured husband invitee.[13]

It has been held that when one is a passenger by invitation on a private yacht, the negligence of the navigator of the boat cannot be imputed to him.[14] However, in the later federal case of *Murphy v. Hutzel*[15] the court stated that the relation of an invited passenger to a boat owner was a peculiar one; the boat must be managed and if the guest were qualifield to act as a crew member, he was expected to do so. The court concluded that the host and the guest became common adventurers, " . . . much as if two or more together hire a boat."[16] The holding in this case is distinguishable from the case under consideration. The boat involved in the *Murphy* case was called a "gasoline launch."[17] No description or size is given, but a launch has been defined as "A boat of the largest size belonging to a ship of war; an open boat of large size used in any service; a lighter."[18] The plaintiffs' boat in the instant case is not described, but it can be assumed from common experience that the normal outboard motor boat used for fishing in the State of Kansas does not require more than a crew of one for its safe management and control.

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12219 F.2d 904, 912 (6th Cir. 1955).
13Moran v. The M/V Georgie May, 164 F. Supp. 881 (S.D. Fla. 1958).
14The Lafayette, 269 Fed. 917 (2d Cir. 1920). The court at page 926 said, "The doctrine of imputed negligence, by which a person in one ship, though not identified with its management or navigation, can be chargeable with the negligence of that ship, and deprived of any right to proceed against the other negligent vessel, is too unreasonable to command respect."
15Murphy v. Hutzel, 27 F. Supp. 473 (E.D. Pa. 1939).
16*Id.* at 475.
17*Id.* at 474.
18BLACK, LAW DICTIONARY (4th ed. 1951).

The New York court in an 1894 case[19] involving fishing from rowboat clearly shows that the act of fishing with another, not, of itself, sufficient to consitute a joint enterprise:

> It did not appear from the evidence who owned the boat, or whether it was hired, or how the men came together, or what part each took in the management of the boat, further than that the deceased was in the middle of the boat and did the rowing, Rahm dropped the anchor, and Riguet was told not to mind anything, and just to sit in the stern of the boat. The facts are insufficient to show that the deceased was in any way responsible for the conduct of his associates in the boat, and it is not, therefore, a proper case for the application of the rule of imputable negligence.[20]

No decisions have been found by this writer that would affirm the court's belief that fishing with others constitutes a joint enterprise. The court may have arrived at a desirable result. But, it is submitted that to arrive at this conclusion by labeling the act of fishing from a boat with others as a joint enterprise, without a further showing of the necessary elements required to prove joint enterprise,[21] represents an unwarranted extension of the doctrine of imputable negligence.

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[19]Reich v. Peck, 31 N.Y. Supp. 391 (Sup. Ct. 1894)
[20]*Id.* at 392.
[21]*Supra* note 5.

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