

Negligence--Municipal Corporations--Joint Enterprise--Liability of Public Servant for Negligent Death of Fellow Employee (Ottmann v. Village of Rockville Centre, 275 N.Y. 270 (1937))

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faithful to the trust imposed upon him by the owner, converts the car by going beyond the scope of the permission granted,⁷ yet the law is firm and settled in instances such as this: where all the elements necessary to hold the owner liable are present; and where a liberal construction of the implied permission clause of the statute will result in the fulfillment of the legislator's aims by placing the responsibility upon the owner of the vehicle. Although the statute is to be limited to those cases which fairly fall within the scope of its language, it must be given a construction which will result in the fulfillment of the purpose for which it was enacted.⁸

The border line between the implication of the owner's implied permission from the circumstances surrounding the changing of control over the vehicle, and the finding of a conversion on the other hand, thus relieving the owner of liability, is often so narrow that the danger in giving Section 59 a too narrow construction in regard to the implied permission clause becomes obvious.

There were sufficient facts surrounding the whole situation to warrant the jury's finding and to deny them the right to so find was error which the Court of Appeals was quick to remedy.⁹

L. I.

NEGLIGENCE—MUNICIPAL CORPORATIONS—JOINT ENTERPRISE
—LIABILITY OF PUBLIC SERVANT FOR NEGLIGENT DEATH OF FELLOW EMPLOYEE.—Plaintiff's intestate, a volunteer fireman, while riding on a fire truck driven by defendant, also a fireman, was killed due to latter's negligence. A judgment recovered against the village of Rockville Centre and the driver was reversed on the ground that the municipality was not liable.¹ On a reargument of the appeal as to the liability of the individual defendant, the Appellate Division dismissed the complaint holding that the intestate and the defendant, being employed in a public service, were engaged in a joint enterprise and each assumed the risk arising out of their relationship. On appeal, *held*, reversed. Individuals engaged in a public service are personally liable for their negligence resulting in injury to fellow employees. *Ottmann v. Village of Rockville Centre*, 275 N. Y. 270, 9 N. E. (2d) 862 (1937).*

⁷ *Nee v. Slaboda*, 270 N. Y. 571, 1 N. E. (2d) 335 (1936).

⁸ *Rolfe v. Hewitt*, 227 N. Y. 486, 125 N. E. 804 (1920); *Fleugal v. Coudert*, 244 N. Y. 393, 155 N. E. 683 (1927); *Katz v. Wolfe*, 129 Misc. 384, 221 N. Y. Supp. 476 (1927).

⁹ *Jorgenson v. Jaegers*, 257 N. Y. 171, 177 N. E. 410 (1931); *Zuckerman v. Parton*, 260 N. Y. 446, 184 N. E. 49 (1933).

* It should be noted that the sections of the General Municipal Law cited were enacted *after* this cause of action arose and are not controlling in this

At common law a municipal corporation was not liable for the torts of its servants committed in the exercise of "governmental functions."² Firemen were held to be engaged in such a capacity³ and the municipal corporation was not liable for their tortious acts.⁴ By statute,⁵ in New York, the municipal corporation has assumed liability for the negligent operation of its vehicles.⁶ On a previous appeal of the instant case, it was held that this statute only applied to individuals who were strangers to the immediate service then being rendered, and had no application to a fireman injured while performing a statutory duty.⁷

Regardless of the liability of the municipal corporation, however, the courts have consistently refused to exempt public officers and servants from the consequences of their negligent acts.⁸ In the instant case the defendant sought to make an exception to the above rule by raising as a defense the doctrine of joint enterprise,⁹ which, if applicable, would prevent a recovery by the plaintiff. Under that doctrine, where there are two or more co-participants acting together, each having a joint or equal right of control over the objects of the undertaking (operation of an automobile, rowing a boat, etc.), in a tort action by one of the co-participants against a negligent third party, the former will not be regarded as free from contributory negligence if his fellow worker has been guilty of negligence. In such a case, although the plaintiff, himself, is not at fault, the negligence of his

case. It would seem then that under GEN. MUN. L. § 50-C this action would not be maintainable.

¹ *Ottmann v. Village of Rockville Centre*, 273 N. Y. 205, 7 N. E. (2d) 102 (1937).

² *Borchard, Governmental Liability in Tort* (1924) 34 YALE L. J. 229, 239; *Hughes v. Auburn*, 161 N. Y. 96, 55 N. E. 389 (1899); *Wilcox v. City of Rochester*, 190 N. Y. 137, 82 N. E. 1119 (1907).

³ HARPER, LAW OF TORTS (1933) § 295; *Burrell v. Augusta*, 78 Me. 118, 3 Atl. 177 (1886).

⁴ *Borchard, Governmental Liability in Tort* (1924) 34 YALE L. J. 229, 243; 2 COOLEY, TORTS (3d ed. 1906) 1013; *Stoddard v. Village of Saratoga Springs*, 127 N. Y. 261, 27 N. E. 1030 (1891).

⁵ N. Y. GEN. MUN. LAW (1936) § 50-b (formerly 282-g of the Highway Law, repealed L. 1936, c. 63, § 353).

⁶ *Miller v. New York*, 235 App. Div. 259, 257 N. Y. Supp. 33 (2d Dept. 1932); *Rosenthal v. Hastings-on-Hudson*, 241 App. Div. 890, 272 N. Y. Supp. 1 (2d Dept. 1934).

⁷ *Ottmann v. Village of Rockville Centre*, 273 N. Y. 205, 7 N. E. (2d) 102 (1937).

⁸ *Bailey v. New York*, 3 Hill 531 (N. Y. 1842); *Rowley v. City of Cedar Rapids and Kennedy*, 203 Iowa 1245, 212 N. W. 158 (1927); *Moynihan v. Todd*, 188 Mass. 301, 74 N. E. 367 (1905); *Florio v. Jersey City*, 101 N. J. L. 535, 129 Atl. 470 (1925).

⁹ *St. Louis & S. F. Ry. v. Bell*, 58 Okla. 84, 159 Pac. 336 (1916) (the doctrine of joint enterprise has been defined as " * * * a community of interests in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in the control and management").

co-participant will be imputed to him, thereby barring recovery.¹⁰ The mere fact that the parties are fellow servants acting within the scope of their authority does not, of itself, make them co-participants in a joint enterprise,¹¹ unless there is, in addition, the equal right of control, which in the instant case was lacking. Furthermore, the courts have limited the application of joint enterprise to actions against third parties,¹² so that it is not applicable in a suit brought by one of the co-participants against the other. In the latter event the negligence of the driver is not imputed to the occupant.¹³

J. L. C.

NEGLIGENCE—THEATRES—FIRE—QUESTION FOR JURY.—Plaintiffs sue to recover for personal injuries sustained in a fire at defendant's theatre. Two employees of defendant, upon discovering the fire, did not use the extinguishers at hand, but ran up the aisles in an attempt to reassure the panic-stricken patrons. While the fire spread, the theatre was lighted and the doors were thrown open. The suit was based solely upon the failure to use the extinguishers and supervise the exit of the patrons. Defendant contended that in the light of the emergency this was not evidence of negligence. Over his objection, the trial court submitted the question of negligence to the jury. On appeal from a judgment in favor of plaintiff, *held*, affirmed. It was for the jury to ascertain what was negligence and whether it was proved. *Tapley v. Ross Theatre Corp.*, 275 N. Y. 144, 9 N. E. (2d) 812 (1937).

The degree of care required of theatre and movie houses is the same as that required of amusement places in general.¹ Such places are not insurers of the safety of their patrons,² nor are they held to the strict accountability of common carriers of passengers.³ They

¹⁰ *Harris v. Uebelhoefer*, 76 N. Y. 169 (1879); *Donnelly v. Brooklyn City R. R.*, 109 N. Y. 16, 15 N. E. 733 (1888).

¹¹ RESTATEMENT, TORTS (1934) § 491, comment d.

¹² HARPER, LAW OF TORTS (1933) § 148; *O'Brien v. Woldson*, 149 Wash. 192, 270 Pac. 304 (1929); (1929) 13 MINN. L. REV. 71.

¹³ *Bailey v. Jourdan*, 18 App. Div. 387, 46 N. Y. Supp. 399 (2d Dept. 1897); *Geary v. Metropolitan St. Ry.*, 84 App. Div. 514, 82 N. Y. Supp. 1016 (1st Dept. 1903), *aff'd*, 177 N. Y. 535, 69 N. E. 1123 (1903).

¹ *Grand Morgan Theatre Co. v. Kearney*, 40 F. (2d) 235 (C. C. A. 8th, 1930); *Seabridge v. Poli*, 98 Conn. 297, 119 Atl. 214 (1922); *Bennetts v. Silver Bow Amusement Co.*, 65 Mont. 340, 211 Pac. 33 (1922).

² *Ingersoll v. Onondaga Hockey Club*, 245 App. Div. 137, 281 N. Y. Supp. 505 (3d Dept. 1935); *Rich v. Madison Square Garden Corp.*, 149 Misc. 123, 266 N. Y. Supp. 288 (1933).

³ *Firszt v. Capitol Park Realty Co.*, 98 Conn. 627, 120 Atl. 300 (1922); *Williams v. Mineral City Park Ass'n.*, 128 Iowa 32, 102 N. W. 783 (1905).