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in the possession of state-supported universities should not be subject to mandatory disclosure under the Act. In Oklahoma the media and the public should be forced to wait until the investigations are complete and the NCAA provides its news release before they can satisfy their thirst for this type of information.

Ryan S. Wilson

Torts: *Price v. Halstead*: Liability of a Guest Passenger for the Negligence of his Drunk Driver

Consider a not-so-uncommon situation: Two friends go to a party and begin drinking. They take some drugs and both become intoxicated. They decide to leave the party and go to a bar. On the way to the bar, the driver crosses the center line of the highway and crashes into another car. Can the passenger be held liable for the driver's negligent driving? Common sense would say the answer is no. However, if the passenger furnished the alcohol or drugs to the driver or encouraged the drive to take the wheel of the car while intoxicated, the question becomes more difficult to answer.

As a general rule, a guest passenger in a motor vehicle is not liable for injuries caused by its negligent operation.¹ Oklahoma follows this general rule of passenger nonliability.² However, this rule is not without exceptions. For example, liability can be imposed upon an automobile passenger if he is engaged in a joint enterprise or joint venture with the driver, if he commits an act or omission that constitutes negligence on his part, or if he assists or encourages the driver's negligent conduct.

The liability of a passenger engaged in a joint enterprise or joint venture is imputed to him because of the driver's negligent conduct. The rationale for holding a passenger liable under the theory of joint enterprise or joint venture relies upon the premise that an injury inflicted upon another by an instrumentality of the enterprise or venture should be borne upon the participants as a cost of the enterprise or venture.³ Before the negligence of a

1. *Olson v. Ische*, 343 N.W.2d 284 (Minn. 1984); *Cecil v. Hardin*, 575 S.W.2d 268 (Tenn. 1978). See also *infra* notes 33-42 and accompanying text.

2. See *Pridgin v. Wilkinson*, 296 F.2d 74, 75 (10th Cir. 1961) ("It is the well established general rule of law in Oklahoma that negligence on the part of the driver of an automobile is not imputed to a mere passenger.") See also *St. L. & S.F. Ry. v. Bell*, 58 Okla. 84, 159 P. 336, 339 (1916) ("[T]he great weight of authority is that the negligence of the driver of a private conveyance will not be imputed to a person riding with him but who has no authority or control over him, such as that of master and servant.").

3. See W. PROSSER, *TORTS* § 72, at 516 (5th ed. 1984) ("The doctrine of vicarious responsibility in connection with joint enterprise rests upon an analogy to the law of partnership.").

member of a joint enterprise can be imputed to another, however, both parties must have an equal right to control the instrument used in the enterprise.⁴ In addition, an agreement between the parties to travel together and a common purpose for the trip must exist to constitute a joint enterprise.⁵

While the liability of an automobile passenger as a member of a joint enterprise is imputed to him, liability for common law negligence is only imposed upon a passenger when *his own* act or omission causes an injury to another. He is not liable merely because the driver failed to exercise reasonable care in his operation of the vehicle.

Finally, liability for encouraging or assisting another's negligent conduct can be imposed upon an automobile passenger where the law regards the passenger as an accomplice of the negligent driver. The rationale behind this theory is that without the passenger's assistance or encouragement, the negligent act of the driver would not have occurred. That is, the passenger's assistance or encouragement was a proximate cause of the driver's negligent conduct.

In *Price v. Halstead*,⁶ the West Virginia Supreme Court recognized that liability may be imposed upon the guest passenger of a drunk driver on the ground that the passenger "substantially assisted or encouraged" the driver's negligent conduct. *Price* represents a departure from the general rule against holding anyone other than the driver liable for the driver's negligent conduct. This note will analyze *Price* and other recent cases discussing this issue to determine the appropriate standard that should be applied to this type of case. Particular attention will be given to pertinent Oklahoma cases involving the general rule.

Finally, this note will examine the difficulty parties injured by intoxicated drivers encounter when seeking redress from passengers of the intoxicated driver. This is due to the reluctance of most courts to hold that a guest passenger could substantially assist or encourage an intoxicated driver's negligent conduct. In addition, the theories of common law negligence and joint enterprise or joint venture are usually unavailable to such an injured party.

Price v. Halstead

Larry Halstead was one of the passengers in a car that struck a pickup truck after Stephen Garretson, the driver of the car, lost control of his vehicle. The injured truck passengers sued Halstead and the other passengers in the car.⁷ The plaintiffs alleged that both before and during the automobile trip, Garretson and his passengers had consumed alcohol and marijuana provided by the passengers, and that at the time of the accident, Garretson acted negligently by speeding and driving while intoxicated.⁸

4. See *infra* note 102 and accompanying text.

5. *Id.*

6. 355 S.E.2d 380 (W. Va. 1987).

7. Alex Price, the named plaintiff in the action, was the administrator of the estate of Kenneth Wall, the driver of the truck killed in the accident. *Id.* at 383.

8. *Id.*

The plaintiffs sued the passengers on several grounds. First, the passengers were involved in a joint venture with Garretson for the purpose of joy riding and consuming drugs. Second, they were also engaged in a joint enterprise. Third, they were negligent in failing to either restrain Garretson or to object to his driving while intoxicated. Finally, they substantially assisted or encouraged Garretson's tortious conduct by providing him alcohol and marijuana.⁹ Although the West Virginia Supreme Court affirmed a lower court's dismissal of the first three causes of action, it reversed the dismissal of the fourth claim.¹⁰ Because plaintiffs regularly allege the above-mentioned theories in passenger-liability cases, all of the allegations will be discussed.

*Joint Enterprise and Joint Venture:
The Problem of Common Right of Control*

Because the theories of joint enterprise and joint venture are often confused, the *Price* court began by distinguishing the two. A joint venture was defined as "an association of two or more persons to carry out a single business enterprise for profit, for which they combine their property, money, effects, skill, and knowledge."¹¹ A joint enterprise is an agreement to carry out a common purpose of two or more persons in which each person has an equal right to control the means or agency by which the purpose is carried out.¹² The difference between the two is that in a joint enterprise the parties lack the business motive essential to a joint venture.¹³

The parties in *Price* clearly were not engaged in a business transaction for profit. Therefore, the court upheld as a matter of law the dismissal of the cause of action based on the joint venture theory.¹⁴ Under the facts of *Price*, and similar cases involving social automobile trips, a joint venture will seldom be found because there is usually no business motive involved.

The *Price* court also refused to apply the joint enterprise theory. The critical element of a joint enterprise is a common right by the occupants of a vehicle to control the vehicle.¹⁵ A joint enterprise is not established merely by a driver and passenger riding together to the same destination for a common purpose. The passenger must have a voice in directing and controlling the operation of the automobile to establish the relationship of joint enterprise.¹⁶

The court reasoned that something more than an arrangement to travel together for merely social or recreational purposes is necessary to establish a common right of control.¹⁷ The purpose of the passengers and the driver was to go joy-riding and drinking; that is, the trip was merely for a social

9. *Id.*

10. *Id.* at 384-86, 389.

11. *Id.* at 384 (emphasis in original).

12. See *infra* note 86 and accompanying text.

13. 355 S.E.2d at 384.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 385.

or recreational purpose. Thus the court held that as a matter of law the dismissal of the plaintiffs' joint enterprise claim was correct.¹⁸

Negligence: The Duty Question

As a general rule, a passenger in a motor vehicle has a duty to exercise reasonable care for his own safety.¹⁹ If he does not and he is injured, then the passenger is guilty of contributory negligence and any recovery from the driver is either prevented or reduced.²⁰ By analogy, the plaintiffs in *Price* contended that automobile passengers have a duty to prevent the infliction of injury upon other motorists on the highway. However, the court held that the negligence claim was properly dismissed because "[t]his duty to exercise reasonable care for his own safety cannot be converted into a general duty on the part of a passenger to exercise reasonable care toward third parties."²¹ The fact that the passengers owed no duty to the plaintiffs is a generally accepted rule—passengers are not liable for the negligence of the driver in the absence of a special relationship between passenger and driver or between the passenger and another motorist.²²

*Substantial Assistance and Encouragement:
Expanding Guest Passengers' Liability*

The plaintiffs' fourth theory of recovery in *Price* was based upon the *Restatement (Second) of Torts* section 876(b), which provides: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he knows that the other's conduct constitutes a breach of duty and gives *substantial assistance or encouragement* to the other so as to conduct himself."²³ The plaintiffs alleged that the passengers gave substantial aid and encouragement to the driver in his negligent driving and, therefore, were jointly liable with the driver for the driver's negligence.²⁴

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Accord*, RESTATEMENT (SECOND) OF TORTS §§ 314, 315 (1966). Section 314 provides: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." Section 315 also provides:

There is no duty to control the conduct of a third person so as to prevent him from causing physical harm to another unless: (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection.

23. (Emphasis added). The rest of section 876 provides:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he: (a) does a tortious act in concert with the other or pursuant to a common design with him, or . . . (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty of the third person.

24. *Price*, 355 S.E.2d at 383.

This theory was somewhat related to a concept previously recognized by the West Virginia Supreme Court. The court had held that the employer of an automobile driver could be liable to a third party who was injured in an accident caused by the employee after he fell asleep and lost control of the automobile.²⁵ Liability was based on the fact that the employer had the employee work twenty-seven consecutive hours and then sent him home, which was fifty miles away.²⁶

The *Price* court stated that the passengers' actions were reprehensible because of their alleged participation in drinking and smoking marijuana and their encouragement of the driver to do the same when he was already visibly intoxicated.²⁷ Furthermore, the court stated that, as a matter of social policy, courts and legislatures have recognized the need to "stem the tide of injuries and deaths arising from driving under the influence of alcohol."²⁸ As a result, courts have been expanding tort liability to those dispensing alcohol to intoxicated individuals for injuries that the recipient of the alcohol inflicts on third persons.²⁹ Therefore, the court held that:

[A] passenger may be found liable for injuries to a third party caused by the intoxication of the driver of the vehicle in which he is riding, if the following conditions are met: (1) the driver was operating his vehicle under the influence of alcohol or drugs which proximately caused the accident resulting in the third party's injuries, and (2) the passenger's conduct substantially encouraged or assisted the driver's alcohol or drug impairment.³⁰

Because the complaint alleged that both of the above conditions were met, the dismissal of the plaintiffs' fourth cause of action was reversed.³¹

The remainder of this note will analyze the soundness of the *Price* decision. Because the factual circumstances surrounding claims against passengers are vital to the determination and imposition of liability, other factual situations will be examined. The treatment of the general rule of passenger nonliability by various jurisdictions, as well as its major exceptions, will also be examined in order to determine whether *Price's* rule of passenger liability will become a modern trend in tort law.³²

25. *Robertson v. LeMaster*, 301 S.E.2d 563 (W. Va. 1983). Since the employer's failure to offer the employee a ride home created a foreseeable risk of harm, the court reversed a directed verdict for the employer. Whether the employee's negligent driving was an intervening cause was a question of fact for the jury.

26. *Id.* at 568-69.

27. *Price*, 355 S.E.2d at 387.

28. *Id.*

29. The dissenting opinion in *Slicer v. Quigley*, 180 Conn. 252, 429 A.2d 855, 863 (1980), stated that "[m]ost . . . courts . . . [hold] that the furnishing of alcoholic beverages may be the proximate cause of injuries sustained by third person."

30. *Price*, 355 S.E.2d at 389.

31. *Id.*

32. Oklahoma has very few reported decisions involving a claim brought against a guest passenger for injuries caused by the vehicle in which the passenger was riding. In *Kenyon v.*

Principal Cases

The leading case in this area of tort law has been *Cecil v. Hardin*,³³ a decision with which the *Price* court expressly disagreed.³⁴ In *Cecil*, a bicyclist was killed when struck by an automobile in which Hardin was a passenger. Both Hardin and the driver of the automobile had been drinking beer and taking drugs. A wrongful death action was brought against Hardin, attempting to apply the three exceptions to the general rule of passenger nonliability.

Although Hardin knowingly allowed an intoxicated person to drive an automobile, he was not held liable for negligence because he had no right to control the automobile. The court held that "a passenger has no duty to the public to control or to attempt to control the operation of a vehicle where he has no right to do so, either as a result of his relationship to it or to the driver."³⁵

Furthermore, the driver's negligence could not be imputed to Hardin because the elements of a joint venture had not been met. "Liability predicated on a joint venture theory . . . is reserved . . . for cases in which the parties associate for business, or expense sharing, or some comparable arrangement."³⁶ Hardin and the driver were associating together for social purposes only.

Finally, Hardin escaped liability for aiding and abetting the driver's unlawful activities. Hardin was not involved with the drugs taken by the driver. In fact, he did not know the driver had taken them. With respect to the alcohol consumption, liability did not attach to Hardin for his failure to prevent the driver from becoming drunk or because he provided beer to the driver. The court stated that "[t]o impose liability on this basis would greatly expand the liability of those who provide alcohol to others in a social context, an expansion that we believe to be inappropriate. . . . While [Hardin's conduct] may be morally indefensible, it falls far short of the 'substantial assistance and encouragement' "³⁷ necessary to impose liability on Hardin.³⁸

A brief comparison of the facts of *Price* and *Cecil* is appropriate. In both

Perry, 113 Okla. 188, 240 P. 702 (1925), the Oklahoma Supreme Court upheld a district court's dismissal of such a claim. Thus it has long been established that Oklahoma follows the well-accepted rule of passenger nonliability. *But see* *Wagnon v. Carter*, 539 P.2d 735, 739 (Okla. 1975) ("When *the owner* of an automobile becomes a passenger therein he has the right, and duty, to prevent the driver from driving in a reckless or dangerous manner or in violation of the law.") (Emphasis added).

33. 575 S.W.2d 268 (Tenn. 1978).

34. *Price*, 355 S.E.2d at 389.

35. *Cecil*, 575 S.W.2d at 270.

36. *Id.* at 272.

37. *Id.* at 273.

38. The dissenting opinion criticized the majority for ignoring the case of *Eager v. State*, 205 Tenn. 156, 135 S.W.2d 815 (1959). In *Eager*, the court sustained a conviction for involuntary manslaughter against a passenger who was riding with a drunk driver. In *Cecil* the court said, "when one sits by the side of another and permits him without protest to operate the vehicle on a highway in a state of intoxication . . . , the one sitting by is as guilty as the man at the wheel." *Cecil*, 575 S.W.2d at 274-75 (quoting *Eager*, 325 S.W.2d at 821). Since, under *Eager*, Hardin could have been prosecuted for involuntary manslaughter, the dissent believed that to find him free of negligence was contrary to reason.

cases, an intoxicated driver caused an injury by negligently operating a motor vehicle. Furthermore, in each case, the passenger-defendant provided the intoxicants to the driver. The passenger could not be held liable to the injured party in either *Price* or *Cecil* under a common law negligence theory or under the theory of joint enterprise. The only difference between the two cases involved the section 876 (or aiding and abetting) claims. *Price* held that a passenger who provides an intoxicant to a driver and encourages him to consume it can be held liable. In contrast, *Cecil* held that such conduct by a passenger does not constitute substantial assistance or encouragement of the driver's negligence.

Another major case that rejected all three exceptions to the general rule of passenger nonliability is *Olson v. Ische*.³⁹ In *Olson* the driver of an automobile was injured in a collision caused by Ische, the drunk driver of an oncoming car. Ische and his passenger, Fritz, had been drinking with friends when they decided to return home in Ische's car. The evidence indicated that Fritz knew or should have known of Ische's intoxication. Olson sued both Fritz and Ische.

The lower court dismissed the negligence and joint enterprise claims against Fritz.⁴⁰ Also, recovery under a theory of "joint concerted tortious conduct" was denied.⁴¹ The court stated that Fritz's conduct did not amount to "the kind of 'substantial encouragement' by the passenger of the driver's conduct needed to impose joint tort liability. Fritz was with Ische, partying with others, . . . and Fritz voluntarily accompanied Ische on his return trip . . . in a guest-host driving situation."⁴²

Olson, like *Price* and *Cecil*, refused to impose liability upon the defendant-passengers under the theories of either negligence (no duty to control the driver's conduct) or joint enterprise (no legal right to control the vehicle). On the section 876 theory, *Olson* followed *Cecil* by refusing to impose liability upon the passenger. However, the facts in *Olson* are distinguishable from the two previously analyzed cases. The passenger in *Olson* did not provide the driver with alcohol or drugs but merely accompanied him on an automobile trip after the driver had become intoxicated.

Still, the *Olson* court probably would not have found the passenger liable under facts identical to *Price* because the foundation for the court's decision was that the driver had done his drinking "voluntarily." The court apparently reasoned that if an intoxicated individual had consumed alcohol voluntarily, then any assistance or encouragement by a passenger to drink and drive did not cause that individual's drunk driving. That is, the court reasoned that

39. 343 N.W.2d 284 (Minn. 1984).

40. The court held that a passenger has no duty to members of the public to control the operation of a motor vehicle by an intoxicated driver when there is no special relationship between driver and passenger. *Id.* at 288. Furthermore, the court found that the passenger had no legal right to exercise control over the operation of a driver's car. Thus, no joint enterprise existed. *Id.* at 288-89.

41. RESTATEMENT (SECOND) OF TORTS § 876 (1976).

42. *Olson*, 343 N.W.2d at 289.

because the driver became intoxicated on his own accord, any encouragement by the passenger was not "substantial," as required by section 876. *Price* made no such distinction between voluntary and involuntary consumption of alcohol or drugs.

Now that the facts of the three principal cases in this area of tort law have been examined and the conclusions of each court analyzed, each theory of passenger liability must be further explored. Section 876 of the *Restatement (Second) of Torts* must be analyzed at the outset to determine under what factual settings a passenger's conduct can be considered to constitute "substantial assistance or encouragement" of a drunk driver's negligent conduct.

Liability for Substantially Assisting or Encouraging an Intoxicated Driver's Negligent Conduct

To be held liable for an injury caused by tortious conduct, a person does not necessarily have to commit the tort himself. One can be liable for the tortious acts of another by providing substantial assistance or encouragement to the latter's wrongful activities.⁴³ However, knowledge that the other's conduct constituted a breach of duty is essential to establish such liability.⁴⁴

This theory goes by a variety of names: section 876 liability, aiding and abetting a tort,⁴⁵ concerted action, and joint tort. Prosser discusses this theory by noting: "The original meaning of a 'joint tort' was that of vicarious liability for concerted action. All persons who acted in concert to commit a trespass, in pursuance of a common design, were held liable for the entire result."⁴⁶ Prosser goes on to state that:

[T]his principle, somewhat extended beyond its original scope, is still law. [Thus], all those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or *who lend aid or encouragement to the wrongdoer*, or ratify and adopt the wrongdoer's acts done for their benefit, are equally liable Since there is ordinarily no duty to take affirmative steps to interfere, mere presence

43. Oklahoma recognizes liability for aiding and abetting another's tortious conduct. In *Keel v. Hainline*, 331 P.2d 397 (Okla. 1963), a student who aided or encouraged a fellow student to throw erasers and other objects across a schoolroom was held liable for an injury inflicted upon an innocent bystander. Liability was imposed upon the student even though he did not throw the eraser that injured the plaintiff. The student was merely retrieving the erasers and handing them to others for further throwing.

It should be noted that this case involved the assistance or encouragement of an intentional tort. No Oklahoma cases have involved the assistance or encouragement of negligent conduct of another.

44. RESTATEMENT (SECOND) OF TORTS § 876(b) (1976).

45. The aiding and abetting theory has frequently been used in cases involving secondary liability for violations of securities laws, often fraud. *See, e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976); *Woods v. Barnett Bank of Ft. Lauderdale*, 765 F.2d 1004 (11th Cir. 1985); *Woodward v. Metro Bank of Dallas*, 522 F.2d 84 (5th Cir. 1975); *Landy v. Federal Deposit Ins. Corp.*, 486 F.2d 139 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974).

46. W. PROSSER *supra* note 3, § 46, at 322.

at the commission of the wrong, or failure to object to it, is not enough to charge one with responsibility. It is, furthermore, essential that each particular defendant who is to be charged with responsibility shall be proceeding tortiously,⁴⁷ which is to say with the intent requisite to committing a tort, or with negligence.⁴⁸

Unlike Prosser, some courts have refused to recognize the extension of the joint tort theory beyond that of joint concerted action. In a Massachusetts case involving a section 876 claim, the court stated: "In the tort field, the doctrine appears to be reserved for application to facts which manifest a common plan to commit a tortious act where the participants know of the plan and its purpose and take affirmative steps to encourage the achievement of the result."⁴⁹ Prosser's discussion of joint tort liability for concerted action was cited as authority for this statement. However, liability for concerted action is not the complete extent of section 876. Thus the Massachusetts court, by applying a traditional joint tort analysis to an aiding and abetting claim, refused to accept the concept of imposing liability for the assistance or encouragement of tortious conduct.⁵⁰

Most states, including Oklahoma, have recognized the expansion of the scope of the joint tort doctrine to include liability for aiding and abetting the negligent conduct of another.⁵¹ Although courts may accept the theoretical possibility of imposing liability upon a passenger for encouraging or assisting a drunk driver's negligent conduct, only one court before *Price* was willing to hold the passenger of a drunk driver liable under the "assistance or encouragement" theory.⁵²

47. *Accord*, *Coffman v. Kennedy*, 74 Cal. App. 3d 28, 32, 141 Cal. Rptr. 267, 269 (1977), *rev'd on other grounds*. In *Coffman*, the plaintiff's complaint was insufficient to show tortious conduct of the passenger because it was not alleged that the passenger negligently furnished alcoholic beverages to a severely or obviously intoxicated person or to a minor.

California recognizes that a commercial vendor who furnishes alcoholic beverages to a visibly intoxicated person breaches a duty to a third person who is injured as a result of the intoxication. *Vesely v. Sager*, 5 Cal. 3d 153, 486 P. 2d 151, 159, 95 Cal. Rptr. 623 (1971). Furthermore, any person serving generous amounts of alcoholic beverages to a minor breaches a duty to anyone who is injured as a result of a minor's intoxication. *Brockett v. Kitchen Boyd Motor Co.*, 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972).

48. W. PROSSER, *supra* note 3, § 46, at 323-24 (emphasis added).

49. *Stock v. Fife*, 13 Mass. App. 75, 430 N.E.2d 845, 850 n.10 (1982).

50. *Id.*, 430 N.E.2d at 849-50.

51. Oklahoma recognizes joint torts despite the absence of concert of action. *See Cities Serv. Oil Co. v. Merritt*, 332 P.2d 677, 683 (Okla. 1958); *Harper-Turner Oil Co. v. Bridge*, 311 P.2d 947, 952 (Okla. 1957).

But see Radford-Shelton & Assoc. Dental Lab., Inc. v. St. Francis Hosp., 569 P.2d 506, 509 (Okla. 1976), which defined joint tortfeasors as "those who have acted intentionally or in concert to injure a third party." However, this distinction was made less important by the Oklahoma Supreme Court's definition of a concurrent tortfeasor as "those whose independent, negligent acts combined or concurred at one point in time to injure a third party." *Id.* at 509.

52. *Aebischer v. Reidt*, 74 Or. App. 692, 704 P.2d 531, *appeal denied*, 300 Or. 332, 710 P.2d 147 (1985). *Aebischer* was injured when the pickup he was driving was struck by a car driven by Smith. Reidt was a passenger in Smith's car. The evidence was most favorable to *Aebischer* and established that Smith, Reidt, and two teenage friends met after school and began

These cases turn on a factual determination of whether a person provided substantial assistance or encouragement to a negligent driver. If the assistance or encouragement given is a substantial factor in causing the resulting tort, the person giving it is responsible for the consequences of the actor's conduct. Courts construe the substantial assistance element of aiding and abetting as a legal causation requirement.⁵³ Therefore, a plaintiff must show that the passenger is connected with the driver's negligence by proximate cause. Stated differently, the driver's negligence must have been a foreseeable consequence of the passenger's conduct.

A Wisconsin case illustrates the principle that for aiding and abetting liability to attach to a guest passenger, his assistance or encouragement must have been a proximate cause of the driver's negligence.⁵⁴ The plaintiff was a bicyclist who was run over by an automobile on a trail reserved for bicycle use only. Recovery on an aiding and abetting claim against the automobile passengers was denied because the facts only raised an inference that the passengers agreed to accompany the driver on the bicycle trail.⁵⁵ There was no evidence that the defendants assisted or encouraged the driver's negligent conduct.⁵⁶

The cases that have recognized the aiding and abetting theory of joint torts also turn on whether the assistance or encouragement is substantial. Generally, federal courts have identified the following factors as being evidence of substantiality: (1) the nature of the act encouraged; (2) the amount of assistance given by the defendant; (3) the defendant's presence or absence at the time of the tort; (4) the defendant's relation to the other tortfeasor; (5) the defendant's state of mind; (6) the foreseeability of the harm that occurred; and (7) the duration of the assistance provided.⁵⁷ State courts have usually ignored the

drinking alcohol and smoking marijuana. "Smith consumed the most marijuana because, 'he kept grabbing the bong' from Reidt, who kept refilling it." 704 P.2d at 532. At the time of the accident, Smith was legally intoxicated and was driving in excess of the speed limit. The court held that the evidence was sufficient to present a jury question of whether Reidt was liable on the theory that Reidt gave substantial assistance to Smith's negligent conduct, while knowing that such conduct constituted a breach of duty. *Id.* at 533.

53. See generally *Edwards & Hanley v. Wells Fargo Securities Clearance Corp.*, 602 F.2d 478, 484 (2d Cir. 1979), cert. denied, 444 U.S. 1045 (1980); RESTATEMENT (SECOND) OF TORTS § 876, comment d (1976), which states, "In determining liability, the factors are the same as those used in determining the existence of *legal causation* when there has been negligence (see § 442) or recklessness (see § 501)." (Emphasis added).

54. *Winslow v. Brown*, 371 N.W.2d 417 (Wis. Ct. App. 1985).

55. *Id.* at 422-23. The court refused to apply section 876 of the RESTATEMENT. Instead, it applied the criminal law test of aiding and abetting, which was consistent with section 876.

56. 371 N.W.2d at 423. *Winslow* is distinguishable from *Price* because the passengers' conduct in *Winslow* could not be considered to have caused the driver's negligence. The driver made his own decision to drive on the bicycle path. He was not encouraged or assisted in his negligent driving. In *Price*, however, the driver's negligence was held to have been caused by the passenger's assistance or encouragement to drive while intoxicated.

57. See *Fassett v. Delta Kappa Epsilon* (New York), 807 F.2d 1150, 1163 (3d Cir. 1986); *Halberstam v. Welch*, 705 F.2d 472, 483-84 (D.C. Cir. 1983). See also RESTATEMENT (SECOND) OF TORTS § 876(b), comment d (1976), which provides:

Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance. If the encouragement

analysis that goes into determining substantiality and have bowed to precedent in declining to hold the passenger liable for substantial assistance or encouragement of a driver's negligent conduct.⁵⁸

Under the "nature of the act" criterion, the more reprehensible the act that a defendant encourages, the more likely his encouragement would be considered substantial. "[A] court might also apply a proportionality test to particularly bad . . . acts, i.e., a defendant's responsibility for the same amount of assistance increases with the blameworthiness of the tortious act or the seriousness of the foreseeable consequences."⁵⁹ In negligence cases involving drunk driving, the encouragement of a driver's consumption of intoxicating beverages or drugs probably would be considered sufficiently blameworthy to evidence substantiality.

Applying the "amount of assistance" criterion to situations similar to *Price*, the critical inquiry becomes the quantity of alcohol or drugs the passenger provided to the driver. Obviously, the greater the quantity provided to the driver, the greater the chances that the passenger's assistance is sufficiently "substantial." But this criterion is only a factor in determining substantiality. Therefore, no threshold level can be identified establishing a point to which a passenger may provide alcohol or drugs and yet maintain immunity from aiding and abetting liability.

The third criterion asks whether the defendant was present at the time of the accident. The reasoning is that a present defendant is more likely to influence an actor's conduct than an absent defendant. The very nature of the guest-passenger cases finds the defendant always present at the time of the driver's accident.

The "relation to the other tortfeasor" criterion pertains to how much influence the passenger had over the driver. For example, a group of passengers might have a greater influence than a single rider. Another point worth mentioning is that teenagers are generally more susceptible to peer pressure than adults. While the relation existing between the passenger and the driver is usually not one giving rise to a duty of the passenger to control the driver's conduct,⁶⁰ an examination of the closeness and the extent of the relationship is important.

or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act.

The assistance of or participation by the defendant may be so slight that he is not liable for the act of the other. In determining this, the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other, and his state of mind are all considered. Likewise, although a person who encourages another to commit a tortious act may be responsible for other acts by the other, ordinarily he is not liable for other acts that, although done in connection with the intended tortious act, were not foreseeable by him. (References to illustrations omitted).

58. See, e.g., *Olson v. Ische*, 343 N.W.2d 284, 289 (Minn. 1984); *Cully v. Bianca*, 186 Cal. App. 3d 1174, 231 Cal. Rptr. 279, 281-82 (1986); *Winslow v. Brown*, 371 N.W.2d 417, 423 (Wis. Ct. App. 1985); *Stock v. Fife*, 13 Mass. App. Ct. 75, 420 N.E.2d 845, 849-50 n.10 (1982).

59. *Halberstam v. Welch*, 705 F.2d at 484 n.13.

60. If it was such a relationship, the injured party would simply bring a suit against the passenger for common law negligence.

The passenger's state of mind is also important because it shows whether he knowingly gave the assistance or encouragement. In most of the cases examined, the passenger, along with the driver, has been intoxicated. This would seem to reduce the chances of the passenger being held to have knowingly given substantial assistance or encouragement. However, an individual probably will not escape liability by showing that his intoxication prevented him from giving knowing assistance or encouragement.⁶¹ If the passenger was not intoxicated, then the facts would have to be examined to determine whether he knew that he was assisting or encouraging the driver to breach his duty of care to the public.

The "foreseeability" criterion will almost always be met in drunk-driving accident cases. By allowing an intoxicated person to drive, a passenger is obviously subjecting the public to a high risk of harm, both in terms of the likelihood of its occurrence and in the severity of its consequences.

The "duration of the assistance" criterion differs in almost every case.⁶² In some cases the passenger and the driver had spent many hours together becoming intoxicated.⁶³ In another case, the two spent a short period of time together.⁶⁴ However, logic suggests that the more time the passenger and driver have spent together, the higher the probability that the passenger will be held to have given substantial assistance.

In choosing not to apply the seven criteria established by the federal courts, most state courts have disagreed with *Price* and have refused to impose section 876 liability under similar facts. Proof that a passenger encouraged a driver to drive while intoxicated has been held to "fall short of establishing the 'substantial assistance or encouragement' required by . . . section 876," based upon a legislative mandate.⁶⁵

Another court held that purchasing and furnishing beer to a driver is not sufficient in itself to prove substantial encouragement or assistance to drive

61. For example, in both *Price*, 355 S.E.2d 380 (W. Va. 1987), and *Aebischer*, 74 Or. App. 692, 704 P.2d 531 (1985), a defendant-passenger was subject to liability despite the fact that the passengers in both cases had been consuming alcohol and drugs. While neither court expressly held that proof of the passengers' intoxication would not negate a finding of knowing assistance or encouragement, this notion seems implicit in the courts' decisions.

62. This criteria was suggested in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), where the live-in companion of a burglar was liable for a murder committed by the burglar during the commission of the crime. The companion was held to have aided and abetted the burglar even though she was not present at the time of the burglary. The liability was based on the fact that she knowingly and substantially assisted the burglar in the performance of his wrongful act by performing various services in support of the burglar's illegal activities. *Id.* at 488.

63. See *VanHaverbeke v. Bernhard*, 654 F. Supp. 255, 257 (S.D. Ohio 1986) (parties attended a wedding and a party together); *Slicer v. Quigley*, 180 Conn. 252, 429 A.2d 855, 857 (1980) (parties spent four hours together); *Stock v. Fife*, 13 Mass. App. Ct. 75, 430 N.E.2d 845, 846-47 (1982) (parties spent approximately four or five hours together); *Olson v. Ische*, 343 N.W.2d 284, 286 (Minn. 1984) (parties spent the afternoon together drinking).

64. *Cully v. Bianca*, 186 Cal. App. 3d 1172, 231 Cal. Rptr. 279, 280 (1986) (accident occurred "a short time" after the parties bought a bottle of tequila).

65. *Id.*, 231 Cal. Rptr. at 282 (The California legislature "has decided to insulate from civil liability virtually all persons who provide alcohol to persons who thereafter drive while intoxicated.").

while intoxicated.⁶⁶ However, this result might have been a product of that particular state's reluctance to hold anyone other than the drunk driver of a motor vehicle liable for an injury caused by that driver's intoxication.⁶⁷ Likewise, another opinion held that passing alcohol around for the occupants of an automobile to consume is insufficient by itself to create a question of substantial assistance or encouragement.⁶⁸ In that case, the driver had purchased his own alcohol, and the court reasoned that for liability based on a substantial encouragement theory to exist, the driver and passenger must not appear to be "doing [their] own drinking voluntarily."⁶⁹

Liability Under Section 876

A diversity of opinion exists on what constitutes substantial assistance or encouragement of a drunk driver's negligent conduct.⁷⁰ With almost no agreement on what facts are sufficient to impose liability upon a guest passenger, determining the elements necessary for section 876 liability will provide some guidelines.

To begin, under section 876, the plaintiff's injury must have been received in an accident caused by the driver's negligent conduct, i.e., drunk driving.⁷¹ Furthermore, the passenger must have given *substantial* assistance or encouragement to the driver to drive while intoxicated.⁷² Also, the passenger's conduct must have proximately caused the driver to act negligently.⁷³ That is, if the driver would have driven while intoxicated, regardless of the passenger's conduct, then section 876 liability will not attach to the passenger. Finally, the passenger must have known that he was assisting or encouraging the driver to act negligently.⁷⁴

66. *Slicer v. Quigley*, 180 Conn. 252, 429 A.2d 855, 859 (1980).

67. The dissent in *Slicer* stated: "In upholding the court's charge, Connecticut will stand virtually alone . . . in its unquestioning acceptance of the old common-law rule that the person who furnishes alcoholic beverages to another can never be held liable for a third person's injuries that were caused by the intoxicated person." *Id.*, 429 A.2d at 863.

68. *Collopy v. Gardiner*, No. CA85-08-057 (Clermont County App. Ct., Ohio, Apr. 7, 1986) (WESTLAW, 1986 WL 4234). The result of this case disregarded the fact that the passengers were aware that the driver was extremely intoxicated. Shortly before the accident, the driver has passed out while at the wheel.

69. *Id.* at 6. *Collopy* was followed in *VanHaverbeke v. Bernhard*, 654 F. Supp. 255, 262 (S.D. Ohio 1986), a federal case applying Ohio law to an aiding and abetting claim against an automobile passenger. The court sustained the dismissal of the substantial assistance or encouragement claim. It held that the fact the driver and co-passenger had been drinking and riding together did not constitute substantial encouragement. *Id.*

70. While *Cecil* held that furnishing alcohol or drugs to an intoxicated driver is insufficient for liability to attach to the provider of the drugs or alcohol, *Price* expressly disagreed with that opinion. *Aebischer* also found furnishing drugs to the driver a sufficient basis for liability. *Olson* and *Collopy* asked whether the driver was doing his drinking "voluntarily." *Slicer* and *Cully* refused to find substantial assistance or encouragement on the basis that a passenger furnished alcohol to his driver. But those states absolve almost every other person from liability for the acts of a drunk driver except the driver himself.

71. See *supra* note 30 and accompanying text.

72. *Id.*

73. *Id.*

74. See *supra* note 44 and accompanying text.

But these generalizations still fail to answer the inquiry as to the elements of "substantiality." Obviously, this is a factual determination that differs in every circumstance. No precise line may be drawn beyond which conduct may be labeled as "substantial assistance or encouragement," just as no line exists to distinguish the exercise of reasonable care from negligent conduct.

The *Restatement* itself suggests guidelines to determine substantiality, but courts are often remiss in applying them.⁷⁵ The following factors are met by the very nature of the social drinking and driving situation examined: (1) the nature of the act encouraged; (3) the defendant's presence at the tort; and (6) the foreseeability of harm. Common sense suggests that proof of these three factors would provide very persuasive evidence of substantiality. Other factors that seem especially relevant are the amount of assistance and the duration of assistance. While these measuring factors are often very unequal in situations similar to *Price*, they may be the deciding pieces of evidence necessary to determine substantiality. Therefore, a logical interpretation of the *Restatement*, and the cases applying it, suggests that for section 876 liability to attach to a guest passenger, a plaintiff must prove that the passenger provided alcohol or drugs to a driver in substantial quantity or potency and/or over a substantial period of time.

Common Law Negligence Claims Against Guest Passengers

Fundamental tort law requires three elements for actionable negligence: a duty to use reasonable care, a breach of that duty, and the breach as the proximate cause of the plaintiff's injury. However, attempts to hold automobile passengers liable in negligence for acts of the driver have consistently failed to establish a duty. Most authorities hold that a passenger generally has no duty to control the conduct of the driver.⁷⁶ The *Restatement* provides:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless: a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or a special relation exists between the actor and the other which gives rise to the other a right to protection.⁷⁷

The special relations referred to in the first instance are parent-child,⁷⁸ master-servant,⁷⁹ land possessor,⁸⁰ and custodian of a person with dangerous

75. No case involving liability under section 876 has discussed these factors in detail.

76. *Price v. Halstead*, 355 S.E.2d 380, 385 (W. Va. 1987); *Olson v. Ische*, 343 N.W.2d 284, 288 (Minn. 1984); *Cecil v. Hardin*, 575 S.W.2d 268, 270 (Tenn. 1978); *Fugate v. Galvin*, 84 Ill. App. 3d 573, 406 N.E.2d 19, 20 (1980).

77. RESTATEMENT (SECOND) OF TORTS § 315 (1976). Note, however, that if a guest passenger should actively interfere with the management and control of the vehicle, he may be held liable to those injured as a result of his interference. *Delmore v. Automobile Family Mut. Ins. Co.*, 348 N.W.2d 151 (Wis. 1984).

78. RESTATEMENT (SECOND) OF TORTS § 316 (1976).

79. *Id.* § 317.

80. *Id.* § 318.

propensities.⁸¹ The special relations between the actor and the injured party are common carrier-passenger, innkeeper-guest, landowner-invitee, and the custodianship of another in circumstances depriving the other of normal opportunities for protection.⁸²

In the absence of one of these special relations, a passenger is not subject to liability if he fails, either intentionally or negligently, to control the conduct of his driver in order to protect others from harm.⁸³ This is true although the passenger realizes that, with little or no inconvenience or effort, he could control the driver's conduct.⁸⁴

Courts readily follow the *Restatement's* "special relations" requirement when determining the existence of a duty to control the conduct of an intoxicated driver. Although a passenger in one case knew that the driver was intoxicated, he nevertheless asked to be taken home, only to have the driver run down a pedestrian.⁸⁵ The court refused to hold the passenger liable. He and the driver were merely friends, a relationship that does not give rise to a recognized duty owed to a pedestrian.⁸⁶

Duty is used to determine whether a defendant is legally obligated to exercise reasonable care under the circumstances in order to prevent harm to the particular plaintiff. No recognized test exists to determine whether a duty to exercise reasonable care exists. According to Prosser, "'duty' is not sacrosanct in itself, but it is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protec-

81. *Id.* § 319.

82. *Id.* § 314A.

83. *See, e.g.,* *Danos v. St. Pierre*, 383 So. 2d 1019, 1022 (La. Ct. App. 1980) ("Mere knowledge or awareness of the intoxicated condition of the driver, alone, does not create a *relationship which imposes a duty upon a guest passenger* to protect against the particular risk involved.") (emphasis added).

84. RESTATEMENT (SECOND) OF TORTS § 315 (1976), comment a. Oklahoma case law is in accord. In *Sidwell v. McVay*, 282 P.2d 756, 759 (Okla. 1955), the Oklahoma Supreme Court held that "[a]s a general rule, the law imposes no duty on one person actively to assist in the preservation of the person or property of another from injury, even though the means by which harm can be averted are in his possession."

85. *Fugate v. Galvin*, 84 Ill. App. 3d 573, 406 N.E.2d 19, 20 (1980).

86. *Id.*, 406 N.E.2d at 21. *Accord, Akins v. Hamblin*, 237 Kan. 742, 703 P.2d 771 (1985). There, the defendant-passenger and the driver of an automobile had been drinking before picking up Akins, the plaintiff-passenger. They continued drinking, and it was apparent that the driver was intoxicated. However, at no time did any passenger ask the driver to either slow down or drive more carefully. The Kansas Supreme Court stated that although a passenger owes a duty of care to himself, he owes no duty of care to other passengers or third persons unless some special relationship exists which creates such a duty. *Id.*, 703 P.2d at 773.

The plaintiff in *Akins* also tried a novel approach to this type of litigation. She argued that if a court finds that a passenger owes a duty of care to herself, but not to others, then the equal protection guaranty of the Constitution is violated. She argued that this result creates an impermissible classification. The court rejected this argument, stating there was no classification in this case because all third persons are denied recovery from passengers. *Id.*, 703 P.2d at 777.

See also Hulse v. Driver, 11 Wash. App. 509, 524 P.2d 255, 258 (1974) (stating in dicta that liquor furnished to one in violation of a criminal prohibition does not by itself impose civil liability on the furnisher).

tion."⁸⁷ Therefore, the question of whether one owes a duty to another is to be decided on a case-by-case basis.⁸⁸

Because the existence of a duty to exercise reasonable care depends primarily upon a court's determination of the policy reasons for and against the imposition of a duty on an automobile passenger, these policy considerations must be considered. Courts recognize that a drunk driver puts other members of the public in serious danger and that the policy interests in curbing drunk driving are legitimate.⁸⁹ By imposing a duty upon passengers to prevent an intoxicated person in the automobile from driving, courts might reduce the extreme danger to which other motorists are exposed. However, courts are extremely reluctant to put any person under a duty to prevent another person from acting tortiously.⁹⁰

Courts have recognized that, traditionally, the liability of the driver has been considered adequate compensation for persons injured by the driver's negligence. One court reasoned that "while creating a new duty would assist injured plaintiffs by spreading the loss among a new class of defendants, . . . the policy of requiring individuals to take responsibility for their own acts militates against the creation of a new duty."⁹¹

A question exists whether courts could in fact reduce the danger to the public by imposing a duty upon passengers to police their driver's sobriety. More than one court has doubted that a passenger, by insisting that his intoxicated driver refrain from driving, could actually keep the driver off the roads.⁹²

87. W. PROSSER, *supra* note 3, § 53, at 356-57.

88. Duty is a question of law to be decided by the court. *Id.*, § 37, at 236; *Johnson v. Johnson*, 171 So. 2d 710 (La. Ct. App. 1965).

89. [T]he catastrophes associated with drunk driving, the tragic loss of life and the permanent debilitating injuries that can result have reached nearly epidemic proportions across the nation. This has prompted aggressive and positive steps to combat this carnage by volunteer groups and the private sector as well as various states legislatures.

City of Columbia v. Adams, 10 Ohio St. 3d 57, 461 N.E.2d 887, 890 (1984).

Indeed, in *VanHaverbeke v. Bernhard*, 654 F. Supp. 255 (S.D. Ohio 1986), a federal district court (interpreting Ohio law) imposed a duty of care upon an automobile passenger. It based its decision upon the overwhelming increase in public awareness of the dangers of drunk driving and upon the Ohio Supreme Court's recent expansion of the rights of plaintiffs. However, the passenger's duty was not to control the conduct of the drunk driver. Rather, the duty was to warn the co-passenger that the driver had been drinking and was potentially intoxicated. Because the passenger had invited the co-passenger into the automobile, he had obligations to her as her host.

But see Akins v. Hamblin, 237 Kan. 742, 703 P.2d 771 (1985), for a contrary result under similar circumstances.

90. *See* cases cited *supra* note 76.

91. *Fugate v. Hamblin*, 84 Ill. App. 3d 573, 406 N.E.2d 22 (1980).

92. *Id.*, 406 N.E.2d at 22. ("The decision to take to the road in an intoxicated condition is the driver's alone."). *See also DeSuza v. Andersack*, 63 Cal. App. 3d 691, 133 Cal. Rptr. 920, 927 (1976) (Although the social interest in curbing drunk driving is great, a duty was not imposed upon a passenger under facts similar to *Price* because it could not be inferred that the driver would have kept off the road had the passenger protested as to the driver's condition.). *Sloan v. Flack*, 150 So. 2d 646, 648 (La. Ct. App. 1963) ("Where the passenger does not own the car, . . . the final decision to permit the intoxicated driver to take the car upon the road is never the passenger's, and so there can be no duty on him."); *Hulse v. Driver*, 11 Wash.

Policy considerations are not solely determinative of whether a person owes a duty to another. Another consideration in establishing the element of duty is the foreseeability of harm to another. A foreseeable risk must be avoided or protected against.⁹³

Although the injury drunk drivers may inflict on others is easily foreseeable, this high degree of foreseeability is not by itself enough to impose a duty of care upon a passenger.⁹⁴ Thus, although both public policy and foreseeability of harm may favor the creation of a new duty, courts continue to follow *Restatement* sections 314 and 315 in refusing to recognize such a duty in the absence of one of the "special relations."⁹⁵ Texas is the only state that imposes a duty on guest passengers to protect others from harm caused by the automobile in which the passenger is riding.⁹⁶

This discussion has focused on the duty element of negligence and has not addressed the elements of breach of duty and proximate cause. While a plaintiff in a case similar to *Price* might have trouble proving proximate cause, the absence of a duty owed by a defendant-passenger eliminates the necessity of a proximate cause analysis. Likewise, to establish a breach of duty, a plaintiff would be required to prove that the passenger failed to exercise reasonable care under the circumstances. Because courts that have examined a common law negligence claim against a guest passenger (for failure to control his intoxicated driver) have consistently held that the passenger was under no duty to control his driver, there is little discussion on what constitutes a breach of duty.⁹⁷

App. 509, 524 P.2d 255, 259 (1974) (The doctrine of negligent entrustment could not be used to render passengers liable for the owner's negligent driving. When the owner demanded return of the automobile, the passengers had no legal basis upon which to deny him control of the car.).

93. D. BLASHFIELD, *AUTOMOBILE LAW AND PRACTICE* § 1.02[2][a], at 32 (3d ed. 1969). Specifically, the author stated that "[t]he duty owed is defined by the circumstances surrounding the incident. The mere possibility of an unusual occurrence does not require that the risk be avoided. But if the risk reasonably can be foreseen, it must be avoided or protected against."

94. *DeSuza v. Andersack*, 63 Cal. App. 3d 691, 133 Cal. Rptr. 920 (1976), held that even though it was foreseeable that a collision might be the result of the driver's drinking, common law negligence could not be used to impose liability on the defendant because the passenger owed no duty to the injured party to prevent his injuries. There was no duty upon the passenger because none of the special relations previously mentioned were present.

95. See cases cited *supra* note 76.

96. See *Adams v. Morris*, 584 S.W.2d 712 (Tex. Civ. App. 1979), where a collision occurred after a passenger had diverted the driver's attention from the road. The court held that "[w]hether or not a passenger's conduct, which is measured by the same standard of care as that of the driver, a standard of ordinary care, constituted negligence is a question of fact for the jury." *Id.* at 717. Because the passenger knew that the driver's attention was diverted, the passenger's failure to keep a lookout and his failure to request the driver to slow down or stop imposed a duty upon the passenger to third parties injured by the driver of the automobile. *Id.* at 716-17.

But see Galvan v. Sisk, 526 S.W.2d 717 (Tex. Civ. App. 1975), where the plaintiff alleged that the passenger was himself negligent for failing to warn the driver that an oncoming car was approaching. The claim was disposed of because there were no exceptional circumstances that would impose a duty on the passenger to keep a lookout or to warn of the approach of an oncoming car.

97. However, it should be noted that in *Adams*, 584 S.W.2d 712 (Tex. Civ. App. 1979),

*Joint Enterprise and Joint Venture Claims
in Guest Passenger Situations*

A passenger engaged in a joint enterprise or a joint venture with the driver of a motor vehicle can be held liable for the driver's negligence.⁹⁸ The rationale for imputing liability to the members of a joint enterprise is based upon an analogy to the law of partnership.⁹⁹ A joint enterprise, being analogous to a partnership, spreads the liability for injuries caused by a member of the enterprise to every member of the enterprise, just as every member of a partnership bears the liability of the partnership.

The theory of joint enterprise is used almost exclusively in cases involving traffic accidents to impute the negligence of an automobile driver to the passenger. Generally, this theory is used defensively by the driver of the other vehicle involved in the accident. It acts to prevent or reduce recovery by the passenger from the driver of the other vehicle by holding the passenger contributorily negligent. However, plaintiffs occasionally have attempted to use the theory of joint enterprise offensively to hold the passengers directly liable by imputing to them the negligence of their driver.¹⁰⁰

Prosser noted that passengers have rarely been held liable by the offensive use of the joint enterprise doctrine. He concludes that perhaps "with a financially responsible defendant available in the negligent driver, [plaintiffs have] not thought it desirable to complicate matters by joining one who is personally innocent."¹⁰¹

The courts have commonly recognized three elements of a joint enterprise: (1) an agreement between the driver and the passenger to travel together; (2) a common purpose for the trip; and (3) an equal right of control between the parties.¹⁰² Some courts require an additional element—a common business or pecuniary purpose for the trip.¹⁰³ The justification for this position may be that such a financial venture involves a closer analogy to the law of partnership and affords more reason for regarding the risk as properly charged against all those engaged in it. This additional element turns the joint enterprise into a joint venture. Oklahoma recognizes the theory of joint enterprise

discussed *supra* note 96, the Texas Court of Civil Appeals required that a passenger protest his driver's negligent driving if it appeared that such driving is endangering the public.

98. Price v. Halstead, 355 S.E.2d 380, 384 (W. Va. 1987).

99. See *supra* note 3.

100. See Stock v. Fife, 13 Mass. App. 75, 430 N.E.2d 845, 847 n.5 (1982).

101. W. PROSSER, *supra* note 3, § 72, at 517-18.

102. Olson v. Ische, 343 N.W.2d 284, 288 (Minn. 1984); Cecil v. Hardin, 575 S.W.2d 268, 271 (Tenn. 1978).

103. DeSuza v. Andersack, 63 Cal. App. 3d 691, 702, 133 Cal. Rptr. 920, 925 (1976) (business, financial, or pecuniary interest essential to a joint venture); Fugate v. Galvin, 84 Ill. App. 3d 573, 406 N.E.2d 19, 22 (1980) (mutual business purpose necessary to a joint venture); Stock v. Fife, 13 Mass. App. 75, 430 N.E.2d 845, 847 (1982) (recognizing RESTATEMENT (SECOND) OF TORTS § 491, comment c, requiring a pecuniary interest to constitute a joint enterprise); Cecil v. Hardin, 575 S.W.2d 268, 272 (Tenn. 1978) (joint venture requires business arrangement or expense sharing).

without requiring the existence of a "pecuniary purpose" for the trip.¹⁰⁴

As stated in *Price*, a joint venture is merely a joint enterprise with a business profit for an objective. The cases on which this note has focused have involved social trips. Under these facts, a joint venture seldom, if ever, exists.

The "equal right of control" element is difficult for plaintiffs to prove when attempting to hold a passenger liable for a joint enterprise with the driver.¹⁰⁵ In the "social drinking and driving" factual situations examined by this note, both an agreement between the passenger and the driver to travel together *and* a common purpose for the trip usually exist. However, the following cases will illustrate that the driver and passenger rarely share an equal right of control over the automobile.

The right of control must be over the operation of the vehicle. The passenger does not necessarily have to exercise his right of control by taking the wheel himself.¹⁰⁶ He must, however, have equal authority to dictate how the automobile is operated.¹⁰⁷ In other words, there must be

an equal right in the passenger to be heard as to the manner in which it is driven. It is not the fact that he does not give directions which is important in itself, but rather the understanding between the parties that he has the right to have his wishes respected, to the same extent as the driver.¹⁰⁸

In the absence of such an understanding, companions on an automobile trip taken for social purposes are not members of a joint enterprise. The fact that a passenger, at the driver's suggestion, drove the automobile during a portion of the journey does not give rise to an inference that the passenger

104. Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there [is] a community of interest 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, and unless each has the same voice and right to be heard in its control or management.

Danner v. Chandler, 204 Okla. 693, 233 P.2d 953 (1951); *St. L. & S.F. Ry. v. Bell*, 58 Okla. 84, 159 P. 336 (1916).

In *Wilkinson v. Chicago, R.I. & P. R.R.*, 420 P.2d 914 (Okla. 1966), the negligence of a driver was imputed to the passenger on the basis of joint enterprise. The driver was the passenger's daughter, and the two were driving to inspect houses for the family to purchase. The mother was in the habit of correcting the daughter's driving mistakes. Therefore, there was a common interest and an equal right to direct and govern the driving of the automobile.

105. [T]o rule that joint control is not a necessary element of joint enterprise would mean that passengers of virtually any group engaged in a pleasure trip would be liable for the negligence of the driver's irrespective of their ability to control or insure against the driver's actions. A deluge of lawsuits inviting unpredictable results would surely follow.

Collopy v. Gardiner, No. CA85-08-057 (Clermont County App. Ct., Ohio, Apr. 7, 1986) (WESTLAW, 1986 WL 4234), at 9.

106. See *Wilkinson v. Chicago, R.I. & P. R.R.*, 420 P.2d 914 (Okla. 1966).

107. See *Stock v. Fife*, 13 Mass. App. Ct. 75, 430 N.E.2d 845, 848 (1982).

108. W. POSSER, *supra* note 3, § 72, at 519.

was jointly in control of the vehicle for the rest of the trip.¹⁰⁹ In one case, a court refused to infer that a driver relinquished his exclusive right of control over a vehicle by a passenger's paying for the automobile's gas.¹¹⁰ Furthermore, an equal right of control is not established by the mere fact that the passenger requested the driver to take him to the destination of the trip.¹¹¹ Finally, neither a mere suggestion as to the route that the driver takes, nor a warning to the driver of some unknown danger, constitute equal control by the passenger giving the suggestion or warning.¹¹²

The joint enterprise doctrine is narrowly defined and applied. Liability cannot be imputed to the passengers of an automobile under the joint enterprise theory unless there exists, among other things, an equal right of each passenger to direct and control the operation of the automobile. The overwhelming majority of courts that have considered a joint enterprise claim have refused to find the necessary right of control in the social driving situations that are the topic of this note.¹¹³ In the absence of circumstances that show a joint enterprise, the negligence of a driver cannot be imputed to his guest passengers.¹¹⁴

Conclusion

Of the three exceptions to the general rule of passenger nonliability, two appear fully developed. First, a passenger is unlikely to be held liable in negligence for failing to control the conduct of a drunk driver unless a relation exists between the passenger and the driver, or between the passenger and the injured party. This rule appears inflexible in most states. Therefore, injured parties have almost no recourse against a passenger in negligence.

The second exception, joint enterprise, is also well defined. When available, it is used to impute the negligence of the intoxicated driver to his passenger, thus holding the passenger liable for a third person's injuries. In social driving situations involving an intoxicated driver, an agreement and a common purpose for the trip often exists. However, an equal right of control of the vehicle rarely exists. In the absence of an equal right of control, an intoxicated driver's negligence cannot be imputed to the passenger.

The final and most disputed exception to the general rule of passenger nonliability is liability for substantial assistance or encouragement to the negligent driver. The theory revolves around what constitutes substantiality. The federal courts, which are more liberal in construing substantiality, focus on the factors listed in the *Restatement* to determine substantiality. However,

109. *Collopy*, (WESTLAW, 1986 WL 4234) at 8-9.

110. *Galvan v. Sisk*, 526 S.W.2d 717, 719 (Tex. Civ. App. 1975).

111. *Fugate v. Galvin*, 84 Ill. App. 3d 573, 406 N.E.2d 19, 22 (1980).

112. *St. L. & S.F. Ry. v. Bell*, 58 Okla. 84, 159 P.2d 336, 339 (1916).

113. See e.g., *supra* notes 109-111 and accompanying text.

114. It should be noted that if the passenger had sufficient control over the driver, the doctrine of respondeat superior could apply, and the driver's negligence could be imputed to the passenger.

state courts, which are very reluctant to find sufficient substantiality, often ignore those factors.

As drunk driving has become increasingly socially repugnant, courts have cited policy as a reason for liberally imposing liability upon a passenger for injuries caused by a person's drunk driving. Courts are painfully aware of the devastating toll that drunk drivers take on innocent persons using the highways. Therefore, courts may be becoming less hesitant to extend liability to passengers for drunk drivers. So, while the rule laid down by *Price v. Halstead* has not been accepted by most courts that have decided the question, perhaps it signifies a new method of this nation's courts to combat drunk driving, or at least to allocate the liability for injuries caused by drunk drivers.

Brian Shipp

