Joint Enterprise and Agency Between Occupants of Automobiles - in Wisconsin

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COMMENTS

JOINT ENTERPRISE AND AGENCY BETWEEN OCCUPANTS OF AUTOMOBILES — IN WISCONSIN

I. INTRODUCTION

When a driver and passenger are occupying a private automobile involved in an accident with another vehicle, and a law suit develops between the passenger and the third party, the Wisconsin Supreme Court may impute the driver’s negligence to his passenger by finding that the two were engaged in a joint enterprise or that the driver was acting as the passenger’s agent. This may result in either barring the passenger’s recovery as plaintiff against the third party or making him vicariously liable as defendant.

Until 1921, under the doctrine of Prideaux v. City of Mineral Point, the Wisconsin Court automatically imputed the negligence of the driver to his passenger in barring recovery by the passenger as plaintiff in suits against third parties.

In 1921, in the case of Reiter v. Grober, an attempt was made to use the doctrine to hold a passenger vicariously liable as a defendant in a suit brought by a third party. The Wisconsin Court refused an extension of the doctrine and made a distinction between a situation where a passenger trusts his safety to his driver to such an extent that the driver’s contributory negligence becomes his own as plaintiff, and a willingness on his part to become responsible to all others for his driver’s negligence. This would result in the passenger insuring all third persons against his driver’s negligence and becoming strictly liable therefore.

The extension was refused, and the Prideaux case was overruled, to bring Wisconsin into the majority fold which imputes the negligence of the driver to the passenger only in specific instances. The Court stated:

1 Puhr v. Chicago & N.W.R. Co., 171 Wis. 154, 176 N.W. 767 (1920), was the last Wisconsin decision to automatically impute the driver’s negligence to his passenger.
2 43 Wis. 513 (1878).
3 This was the minority rule in the United States which originated as a historical outgrowth of the Roman Law doctrine of identification; the English case of Thorogood v. Bryan, 8 C.B. 115, 137 Eng. Rep. 452 (1849), was the leading common-law case enumerating the principle. See Morris, Motor Vehicles-Imputed Negligence-The Doctrine of Principal and Agent as Applied to Driver-Passenger Relations-Liability and Defense Contrasted, 40 Wis. L. Rev. 135.
4 173 Wis. 493, 181 N.W. 739 (1921).
5 Id. at 495, 181 N.W. at 740.
6 5 A.M. Jur., Automobiles § 494 (1939): “Generally, negligence of the driver of an automobile is imputable to a passenger only where the driver is the agent or servant of the passenger at the time of the negligent act and the act is committed in the scope of the agent's or servant's employment, or when the
"Only so much of the Prideaux case is overruled as imputes the negligence of the driver to an occupant in a private conveyance who has no control over the driver; is not engaged in a joint undertaking with him; is guilty of no negligence himself; and stands in no other relation to him requiring his negligence to be imputed to the occupant."  

The Court declined to discuss under what facts and circumstances the passenger would be held to be engaged in a joint undertaking with the driver or stand in such other relation to him so as to require the imputation of negligence of the driver.

The present status of the law requires an analysis of the doctrine of joint enterprise and its relation to the law of agency. The pertinent Wisconsin decisions discussing both joint enterprise and agency will be classified in order to trace the development of the law since the Reiter case. Emphasis will be placed on the particular facts and circumstances in which the Wisconsin Court has imputed negligence between automobile occupants so that a comparison can be made of the elements required by the Courts for the establishment of both relationships.

II. MEANING OF TERMS

The doctrine of joint enterprise is one of the most confused areas of tort law; much of the confusion arises from the lack of adequate definitions. The courts talk of joint enterprise, joint adventure, joint venture, mutual agency, etc., without any clear differentiation in meaning. While the results reached in the cases may be correlated and conclusions arrived at, it is impossible to reconcile the language used by the courts. These relationships should be distinguished for an adequate understanding of the doctrine of joint enterprise: principal and agent; master and servant; partnership and joint adventure.

A. AGENCY:

The Restatement defines agency as:

"... the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."

The relationship of master-servant is a species of the relationship of principal-agent. The importance of distinguishing the two is that ordinarily a principal is not liable for the torts of his agents who are not servants, while a master is liable for the torts of his servants

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7 173 Wis. at 498, 181 N.W. at 740.
8 Rollison, The Joint Enterprise In The Law of Imputed Negligence, 6 NOTRE DAME LAW 172, at 187 (1930-31).
9 RESTATEMENT, AGENCY § 1 (1933).
10 Id. at §§2, comment a.
11 Id. at §250.
who are acting within the scope of their authority or employment.\textsuperscript{12} The two relations are to be identified to the extent that a master has a right to control the detailed or physical movement of the servant in the performance of the service,\textsuperscript{13} while an agent who is not a servant, although rendering service to the principal, and subject to his right of control,\textsuperscript{14} does retain control over the manner of performance.\textsuperscript{15} The agent represents the principal and acts in his place while the servant simply acts for the principal and usually according to his direction without discretion.\textsuperscript{16} It has been stated that the term servant is used only to distinguish a group of persons for whose physical conduct the master is responsible to third persons;\textsuperscript{17} and that, other than this, statements applicable to principal and agent are generally applicable to master and servant.\textsuperscript{18}

In most of the automobile cases where agency is alleged so as to impute negligence between the occupants, and there is no relationship of employer-employee so as to make the agency one of master and servant, the usual elements must be present, to wit: the alleged agent must be acting on behalf of the owner, and, he must be subject to his control.\textsuperscript{19}

Generally, the negligence of a servant is not to be imputed to the master automatically upon the finding of the relationship but depends upon whether the act is done within the scope of his employment,\textsuperscript{20} and the negligence of agents who are not servants is not ordinarily imputed to the principal.\textsuperscript{21} A contrary result is reached in automobile cases; if the court reaches the conclusion that an agency does exist between a driver and its occupant, the above distinctions are not attempted and negligence is imputed automatically.

It is to be noted that the words, “master-servant,” connote a relationship of employment,\textsuperscript{22} while the broader category of principal-agent, while usually supported by a consideration, need not be, and can be gratuitous.\textsuperscript{23} This appears to be the pivot upon which the use of the terms, principal-agent or master-servant, depends. If the necessary benefit and the right to control the physical movements is found,\textsuperscript{24}

\textsuperscript{12}Id. at §§219 & 228; Conduct of a servant is within the scope of employment if, but only if: a) it is of the kind he is employed to perform, b) it occurs substantially within the authorized time and space limits, and c) it is actuated at least in part by a purpose to serve the master.
\textsuperscript{13}Id. at §220, comment a.
\textsuperscript{14}Id. at §14.
\textsuperscript{15}Id. at §220, comment c.
\textsuperscript{16}2 Am. Jur., Agency §7 (1939).
\textsuperscript{17}Restatement, Agency §2, comment b (1933).
\textsuperscript{18}Id. at comment a.
\textsuperscript{19}See note 9 supra.
\textsuperscript{20}See note 12 supra.
\textsuperscript{21}See note 11 supra.
\textsuperscript{22}Nardone, Doctrine of Imputed Negligence, 33 B. U. L. Rev. 90, at 94 (1953).
\textsuperscript{23}Restatement, Agency §16 (1933).
\textsuperscript{24}See note 9 supra.
which of the terms will be used depends upon whether consideration is present or not.

Contrary to the general rule, once the relationship is found, the negligence of the agent, using the term in the broad sense, is imputed without any discussion of whether the act is within the scope of his authority. Automobile cases seem to be an exception to this requirement, or at least a modification. Perhaps the lack of any discussion of the question can be explained in the fact that the act of driving the automobile by the agent is the only conduct of the agent ever under consideration; and once the agency relationship is established between driver and passenger the authority of the driver to act for the passenger in driving the car is also found. Any question of scope of authority would be superfluous since authority of the agent would arise upon the finding of the agency.

B. PARTNERSHIP:

A partnership is defined by the Uniform Partnership Act as an association of two or more persons to carry on as co-owners a business for profit. The determination of when a partnership exists is beyond the scope of this paper, but once this business relationship is established an agency then arises between its members making each partner liable for the tortious acts of the other partners within the scope of the partnership business.

If one partner is negligent in operating a vehicle and the vehicle is being used for a purpose within the scope of the partnership, the tortfeasor's partners would be liable on the theory of a mutual agency arising from the establishment of the partnership.

C. JOINT ADVENTURE:

The terms joint venture, joint adventure and joint enterprise are all used synonymously, but joint adventure is the term most often used to describe a business relationship similar to a partnership. A joint adventure is defined as:

"... a special combination of two or more persons where, in some specific venture, a profit is jointly sought without any actual partnership or corporate designation."

While a joint adventure is not identical with a partnership it is so similar that the rights between the joint adventurers are governed

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25 See note 12 supra.
26 RESTATEMENT, AGENCY §7 (1933).
27 UNIFORM PARTNERSHIP ACT §6; Wis Stats. §123.03 (1955).
28 See id. at §7; Wis. Stats. §123.04 (1955) for rules to apply in determining when a partnership exists.
29 Id. at §9(1); Wis. Stats. §123.06(1) (1955).
30 See note 22 supra, at 96.
31 48 C.J.S., Joint Adventures §§1, 13 (1947).
32 Annot, 63 A.L.R. 910 (1929).
essentially by the same rules that are applicable to partnerships. Generally, the main distinction between a joint adventure and a partnership is that the former relates to a single transaction while the latter relates to a general business of a particular kind. The Wisconsin Supreme Court has said that a joint adventure is in the nature of a partnership, but more limited and confined in its scope. The courts, however, have not established any fixed or certain boundaries in determining when a joint adventure exists, but decide each case according to its facts.

While the rights and liabilities of joint adventures are very similar to those of a partnership it is generally understood that they are not identical therewith. Like a partnership however, a mutual relationship of principal-agent arises from a joint adventure, and since a mutual agency exists, each has the right of control over the other; it follows that each joint adventurer may be liable for the negligence of his associate if the negligent conduct is within the scope of the joint undertaking.

It should be noted that the nature of the joint adventure or joint venture is strictly a business relationship entered into for the realization of profit. Such a relationship cannot exist unless this element is present.

Liability for negligent conduct of one joint adventurer for the tortious acts of his associates is based on the fact that the conduct took place during a time when the tortfeasor was acting within the scope of the undertaking. This is analogous to the principles applicable to partnership and agency, and it is to be remembered that a principal is not liable for tortious acts of his agent unless they took place within the scope of his employment. To impute negligence between occupants of automobiles on the theory of agency arising from a joint adventure, the trip must be a part of the joint adventure itself, so as to make the driver's conduct within the scope of the undertaking.

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34 Id. at 1060.
35 Barry v. Kern, 184 Wis. 266, 199 N.W. 77 (1924).
36 The elements necessary to establish the relation are: 1) intent of the parties; 2) a contract either express or inferred; 3) each must combine their property, money, efforts, skill or knowledge in some common undertaking—there must be some contribution by each co-adventurer of something promotive of the enterprise; 4) a joint proprietary interest and a mutual right of control over the subject matter of the enterprise or over the property engaged therein; 5) an agreement, express or implied for the sharing of profits: See 30 Am. Jur., Joint Adventures §§8-12 (1940).
37 Id. at §5.
38 Annot., 80 A.L.R. 314 (1932).
39 See note 31 supra, §5c.
40 Id. at §14e.
41 See note 32 supra.
42 See note 31 supra, at §14a.
43 See note 12 supra.
44 RESTATEMENT, Torts §491, comment e (1934).
trip has no relation to the purpose of the joint adventure and is no part of it, then negligence should not be imputed to his associates.45

D. JOINT ENTERPRISE:

Much confusion could be spared if the term joint enterprise would not be used as a synonym for the term joint adventure discussed in the preceding section. Some authorities have suggested using the term joint enterprise strictly for the automobile cases of a non-business nature.46 The Wisconsin Court, unfortunately, uses joint enterprise interchangeably with joint adventure in discussing automobile cases. This causes confusion for the reader who tries to reconcile the definition of a business joint adventure with the Court's findings in a non-business automobile case.

There seems to be little relation between the factual elements necessary to the establishment of a business joint adventure and an automobile joint enterprise, but the intermingling of the terminology seems to be too established by precedent ever to be changed. The adoption of a new term such as "automobile venture," for example, in lieu of the old terms of joint adventure and joint enterprise, in the relatively new non-commercial situations would bring a welcome definiteness to an area of the law marred by flagrant inconsistencies.

Although joint enterprise is also used to describe business joint adventures, it does seem to be used most often in the automobile non-business cases and it will be used in this sense throughout this article.

The rules for finding a joint enterprise as stated by the authorities are clear, in the abstract. The difficulty comes when they are applied by the various courts, and in the language used. The test of whether two occupants are engaged in a joint enterprise is stated as follows:

"In order to constitute a joint enterprise so that the negligence of the driver of an automobile may be imputed to an occupant of the car, it is generally held that there must be a common purpose and a community of interest in the object of the enterprise and an equal right to direct and control the conduct of each other with respect thereto."47

Similar to a joint adventure, once the relationship is established a mutual agency arises between the members of the enterprise. Like the relationship of agency as applied in automobile cases,48 there is no question of scope of authority or employment in determining whether

45 See Schleicker v. Krier, 218 Wis. 376, 261 N.W. 413 (1935), where a collision occurred when a tenant farmer and son-in-law of the owner of the farm was driving his father-in-law's car to the store to purchase groceries. Negligence of the son-in-law was not imputed because a joint adventure was held not to exist between the two.
46 See note 22 supra, at 98; PROSSER, HORNBOOK ON TORTS 363 (2d ed. 1955).
47 5 AM. JUR., AUTOMOBILES §501 (1936).
48 See note 26 supra.
negligence should be imputed, but once the relation is found to exist such a step is automatically taken.

Although the doctrine of joint enterprise is commonly said to rest upon the relationship of agency of one for the other,\(^49\) one writer has said that it is not exactly a true agency for if an actual agency did exist there would be no need to resort to any other theory than respon- deat superior to obtain the desired result.\(^50\) Perhaps, however, joint enterprise can be classed as a species of agency, like master-servant. The two main elements of a joint enterprise are a common purpose and a mutual right of control.\(^51\) The basic elements for the establish- ment of an agency are benefit to the principal and a right of control.\(^52\) It is quite rare when two persons in an automobile cannot be found to have a common purpose in the trip. Once a common purpose is est- ablished, it is also established that the trip is a benefit to each of the oc- cupants. A right of control is common to the creation of both agency and joint enterprise.\(^53\) Joint enterprise seems to be a true type of agency: a special class invented for non-commercial relationships be- tween occupants of automobiles where the circumstances are such that the driver is not acting solely as the agent of the passenger, but the driver and the passenger are acting as mutual agents for each other with equal right to control the other's conduct in the operation and management of the automobile\(^54\) and yet no business joint adventure or partnership exists.

Once the common purpose is found the circumstances that will tend to establish a right of control are: 1) a substantial sharing of expenses;\(^55\) 2) power to determine the route by mutual agreement;\(^56\) 3) agreement to alternate in the driving.\(^57\) None of the foregoing are necessarily conclusive.\(^58\)

The fact that the occupants are related by blood or marriage,\(^59\) or that they are fellow servants of the same principal\(^60\) does not make them participants in a joint enterprise.

If the car in which the occupants are riding is owned jointly, this

\(^{49}\) 35 AM. JUR., Negligence §238 (1941).
\(^{50}\) Weintraub, The Joint Enterprise Doctrine In Automobile Law, 16 CORNELL L. Q. 320, at 322 (1931).
\(^{51}\) See note 49 supra.
\(^{52}\) See note 9 supra.
\(^{53}\) For an authority which denies that there is a mutual right of control in a joint enterprise, see 5 BERRY, LAW OF AUTOMOBILES 208 (7th ed. 1935).
\(^{54}\) For a criticism of the element of right of control as applied to the doctrine of joint enterprise in terms of accident prevention, see note 50 supra, at 334; see also note 38 YALE L. J. 810, at 812 (1928-29); Fleming, Vicarious Liabil-
\(^{55}\) ity, 28 TUL. L. REV. 161, at 210 (1954).
\(^{56}\) RESTATEMENT, TORTS §491, comment g (1934).
\(^{57}\) Ibid.
\(^{58}\) Ibid.
\(^{59}\) For a criticism of the element of right of control as applied to the doctrine of joint enterprise in terms of accident prevention, see note 50 supra, at 334; see also note 38 YALE L. J. 810, at 812 (1928-29); Fleming, Vicarious Liabil-
\(^{57}\) ity, 28 TUL. L. REV. 161, at 210 (1954).
\(^{56}\) Ibid.
\(^{55}\) Ibid.
\(^{50}\) Note, 48 MICH. L. REV. 372, 373 (1950).
\(^{59}\) Ibid.
\(^{60}\) RESTATEMENT, TORTS §491, comment d (1934).
is held to establish the necessary right of control and has sometimes been given as the classic example of a joint enterprise.

III. WISCONSIN LAW

The turning point on whether or not a joint enterprise or agency is found seems to be the element of control. A joint enterprise will be found when the facts and circumstances establish the necessary right of control, and yet the situation is such as not to fit adequately into a principal-agent situation and is non-commercial, so as not to impute negligence on the basis of agency arising from a joint adventure or partnership. It is imperative that the Wisconsin cases concerning joint enterprise be analyzed to see what the Court deems necessary to find the element of control; and then the agency cases must be examined to see if there are any differences to be noted.

A. JOINT ENTERPRISE NOT FOUND:

The first Wisconsin case to discuss joint enterprise was Brubaker v. Iowa County. Like the majority of cases where joint enterprise is alleged the defendant pleaded it as an affirmative defense so as to impute the driver's contributory negligence and bar the plaintiff, passenger, from recovery against him. In that case the plaintiff and her husband were traveling in the husband's car with the husband driving. They were changing their place of residence from one city to another. The car hit a culvert in the road and plaintiff was thrown out of the car and injured. The Wisconsin Court said that the mere relationship of husband and wife without more did not establish a joint enterprise. Since there was no financial undertaking there could be no imputation on the basis of a joint adventure.

In Krause v. Hall the plaintiff and her boy friend, the defendant, went to a dance in defendant's automobile. On the way back the defendant in an intoxicated condition crashed the car into a freight train injuring plaintiff. In a suit by the plaintiff a joint enterprise was alleged, but such an issue was immaterial since the majority rule holds that a joint enterprise in suits between its members has no effect. At the time of this case the doctrine was in its earliest stages and there had been no decision on the question in Wisconsin. More significantly, however, the Court used the following language in denying the existence of a joint enterprise:

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61 Id. at comment f.
62 Fleming, op. cit. supra at 214.
63 174 Wis. 574, 183 N.W. 690 (1921).
64 Weintraub, op. cit supra at 323.
65 This is the majority view, see note 59 supra.
66 174 Wis. at 578, 183 N.W. at 692.
67 195 Wis. 555, 217 N.W. 290 (1928).
68 5 AM. JUR., Automobiles §502 (1939); Note, 13 TEXAS L. REV. 161, at 163 (1935); Berry, op. cit. supra, at 227.
"The relation of joint adventurers is generally contractual in its nature. We have been referred to no case in which it has been held to grow out of social relations.\(^6\)

The Court, in this strictly social relation, failed to make any distinction between joint adventure and joint enterprise setting a precedent for future decisions.

This view was further emphasized in *Sommerfield v. Flury\(^7\)* where again a joint enterprise was denied. In that case a threshing crew was assembled at a farm and a telephone message was received that there was a fire close by. Krueger, a member of the threshing crew, jumped into his car to respond to the call for assistance, and without any invitation the plaintiffs also got into the car for the same purpose. The car collided with the defendant Flury's truck, and plaintiffs were injured. There was clearly a common purpose here, essential to finding of a joint enterprise, but right of control was lacking.

The Wisconsin Supreme Court in the *Sommerfield* case, as it indicated in the *Krause* case, seemed to say that it would find a joint undertaking only where there was a business joint adventure:

"Our attention has been called to a few scattering cases where courts have considered relations purely social in their nature as giving rise to a joint undertaking. We believe such conclusions were reached without giving due consideration to the true character of a joint enterprise, as the same is known in the law. We have said in *Krause v. Hall*, 195 Wis. 565, that the relations of joint adventurers do not arise out of social relations. We are still of that opinion."\(^7\)

In the same year as the *Sommerfield* case the case of *Kurz v. Kuhn\(^7\)* dismissed the contention of joint enterprise by merely citing the *Sommerfield* case and holding the relation that of host and guest. In 1934 and 1936 joint enterprise was denied in two cases, *Hahn v. Smith,\(^7\)* and *Canzoneri v. Hecker,\(^7\)* on the same basis and citing the *Sommerfield* case that joint adventures do not arise out of social situations.\(^7\)

If the Wisconsin Court, by saying that joint adventures do not usually arise out of social situations, meant also to include the relationship of joint enterprise within the term joint adventures, it would seem that it would never find the existence of a joint enterprise in a social situation. But other cases decided by our Supreme Court tend to discuss the orthodox elements for finding joint enterprise.\(^7\)

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\(^6\) 195 Wis. at 571, 217 N.W. at 292.
\(^7\) 198 Wis. 163, 223 N.W. 408 (1929).
\(^7\) Id. at 166, 223 N.W. at 410.
\(^7\) 198 Wis. 172, 223 N.W. 412 (1929).
\(^7\) 215 Wis. 277, 254 N.W. 750 (1934).
\(^7\) 223 Wis. 25, 269 N.W. 716 (1936).
\(^7\) 215 Wis. at 281, 254 N.W. at 752; 223 Wis. at 30, 269 N.W. at 718.
\(^7\) See note 47 supra.
In *Fishback v. Wanta*\textsuperscript{77} the plaintiff and two others were members of the board of directors of a building and loan association. They were members of a committee appointed to appraise the value of real property offered as security. The three usually rode in defendant Wanta's car, but they were not required to be together while inspecting or going to the property and were not even required to file a joint report. A collision occurred while the three were on such a trip. The Court denied the existence of a joint enterprise and like the Sommerfield case emphasized the lack of financial interest, but also said that each was acting individually as an officer of the association and that their duties and responsibilities were several and not joint. This was clearly a discussion of the element of a common purpose. The Court also emphasized that Wanta determined in what order the properties were to be visited and the route to be taken. If the facts had shown that the passengers had some voice in these matters it would have tended to show a mutual right of control. Whether a joint enterprise would have been found if the three had been required to be together, giving rise to a common purpose plus the right of each to be heard in the selection of the route and order of visiting the properties, is purely a matter of speculation in view of the strong language of the Sommerfield case.

The case of *Van Gilder v. Gugel*\textsuperscript{78} is similar in its facts and decision. The two alleged joint members had each acquired a wood lot to cut wood for his own use and benefit. On the day of the trip each was to help the other saw wood in his lot, but neither was to acquire any interest in the wood of the other. A collision occurred on the way home. The Court said that the car was solely under the driver's control and the trip did not involve a joint financial interest nor the performance of any joint duty even though each had a similar purpose.

These two cases indicate the Wisconsin Court's insistence on the precedent set down by the Sommerfield case of the necessity of a business relationship. Not only will the right of control necessary to a joint enterprise be difficult to find unless the relationship is a commercial venture; but even if the passengers have a similar purpose in occupying the automobile, it will not be enough to establish a joint enterprise, unless this similar purpose involves a joint undertaking for profit common to both occupants.

Our Court since the *Krause* case has not drawn any distinction between a joint adventure in the business sense of the term and a joint enterprise; in discussing the doctrine of joint enterprise in non-business cases it carries over the characteristics of the joint adventure, and will refuse to find a common purpose or mutual right of control

\textsuperscript{77}212 Wis. 638, 250 N.W. 387 (1933).

\textsuperscript{78}220 Wis. 612, 265 N.W. 706 (1936).
unless there is this business characteristic. This, in effect means that a joint enterprise in a strictly social situation is rarely, if ever, to be found in Wisconsin except for the special situation noted later in the article where the occupants are joint owners of the vehicle.

The confusion which can develop in automobile cases from a failure to differentiate between a trip as a part of a joint adventure and a joint enterprise is aptly illustrated by *Klas v. Fenske* where the Court discusses the element of right of control without making it clear whether it refers solely to the automobile trip or to the general relationship of the parties. Gehring, the defendant, was driving and plaintiff, Klas, was on the right side of the front seat returning from the inspection of a piece of property when the collision occurred with defendant Fenske. Fenske pleaded as a defense that Klas and Gehring were engaged in a joint enterprise. Gehring had procured a real estate salesman’s license under Klas, but he ran his own business and did not operate as a salesman or employee of Klas. They were associated only in single transactions. Gehring had an option on a farm and if Klas purchased it Gehring was to resell it for Klas and to get one half of any profit made as his commission. The Court denied the existence of a joint enterprise using languages applicable to a discussion of joint adventurers:

"... there was no agreement to share the losses. Each transaction stood upon its own basis and neither party to it had any authority to bind or control the conduct of the other."

The Court also used language strictly applicable to a finding of the right of control of the car in a non-business situation:

"... Gehring and Klas were not engaged in a joint enterprise for the reason that Klas had no control or right of control over the Gehring car, under the circumstances of this case."

This case also shows that even if there exists some financial relationship between the parties there is no guarantee that a joint undertaking will be found by our Court.

In a 1953 case, *Lind v. Lund* and a 1954 case, *Schweidler v. Caruso* the Court was confronted with two situations involving purely social relations and asked to decide whether a joint enterprise existed.

In the *Lind* case a nephew who was driving and his aunt who was a passenger were traveling to Chicago in a car belonging to the driver’s mother. A collision occurred and the third party pleaded joint enterprise as a defense. The Court held that no joint enterprise existed, that the aunt exercised no control over her nephew and also that no common purpose existed:

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79 248 Wis. 534, at 544, 22 N.W. 2d 596, at 601 (1945).
80 266 Wis. 232, 63 N.W. 2d 313 (1953).
81 269 Wis. 438, 69 N.W. 2d 611 (1954).
"She desired to go to Chicago and so did he, but she was going for her own purpose in which he had no interest and he was going for his own purpose in which she had no interest. He would have gone to Chicago with the automobile, irrespective of whether or not she became an occupant of the car." Even if the two had a common purpose in going to Chicago a joint enterprise probably would not have been found because of the Court's insistence of a business purpose common to both.

The Schweidler case, the latest Wisconsin decision to discuss the doctrine comes the closest in its facts to supplying circumstances which have been held in other jurisdictions to supply the necessary right of control. Schweidler and Earl were on a trip to Canada to go fishing when the vehicle collided with a car driven by Caruso. The car was owned by Schweidler. The trip was purely a pleasure trip for the sole purpose of fishing. There had been no prior arrangement for the sharing of expenses. Schweidler testified that he did not expect Earl to pay any car expense. Earl testified that he expected that the expenses would be "Dutch treat." No plans had been made regarding the driving, but after the trip started they decided to "change off" and Earl, the non-owner of the car was driving at the time of the collision. The third party, Caruso, alleged a joint enterprise and cited the Restatement. The occupants alternated in the driving but the Court did not consider this fact as creating a right of control. There was no prearrangement between the parties for the sharing of expenses, a fact sometimes held to establish the right of control, but its absence was only briefly noted in the opinion. The Court cited the Sommerfield, Krause, and Van Gilder cases and again held that the relationship of joint adventurers does not arise out of social relations but grows out of financial enterprises.

B. Joint Enterprise Found:

Of the five cases where joint enterprise has been found in Wisconsin the case of Howard v. Riley shows that when the automobile trip is itself a part of a business joint adventure in which the occupants are engaged the negligence of the driver will be imputed. Here, the two occupants, husband and wife, were held to be engaged in a joint adventure in the construction of a motel and the accident occurred

\[\text{References:}\]

82 266 Wis. at 238, 63 N.W. 2d at 316.
83 See notes 55, 56, 57 supra.
84 Restatement, Torts §491 (1934).
85 See note 57 supra.
86 See note 55 supra.
87 This is an excellent example of a situation where a new term such as "automobile venture" would be applicable. The use of the term joint adventure with its business connotation seems totally out of place.
88 257 Wis. 594, 44 N.W. 2d 552 (1950).
while they were in the automobile going to the highway so as to better observe a portion of the construction of the motel.

The remaining four cases where joint enterprise has been found in Wisconsin are very similar.

In *Archer v. Chicago, M., St. P. & P. R. Co.* the plaintiff and her husband, who was driving, were on their way back from a visit to a married daughter when the accident occurred. The car was owned jointly by the plaintiff and her husband, and both were designated as the insured in their liability insurance policy. The evidence showed that sometimes plaintiff would drive the car for her husband and at other times he would drive. The Court held that they were engaged in a joint enterprise in that they were involved in an undertaking in which they were jointly interested or in other words a common purpose, and because they owned the car jointly, there was a mutual right of control.

In *Paine v. Chicago & Northwestern Railway Co.* where the husband and wife were also joint owners of the automobile, the Court held that the facts were ruled by the *Archer* case and that a mutual agency existed requiring the imputation of negligence.

A joint enterprise was held to exist in *Emerich v. Bigsby* between a mother and daughter who jointly owned the car and were returning to their home from Appleton where they had been visiting relatives. The Court held that the facts were ruled by the *Archer* and *Paine* cases. The fact of joint ownership was again held sufficient to supply the mutual right of control even though the mother could not drive a car at all.

In *Johnson v. Pierce* where the plaintiff and her son were making a trip to Biloxi, Mississippi to bring home another of plaintiffs' sons and an accident occurred, the Wisconsin Court held, relying on the earlier cases, that the joint ownership of the automobile supplied the necessary right of control and that they were engaged in a joint enterprise as a matter of law.

It is to be noted that where a joint ownership of the automobile is present a mutual right of control is established solely because of the joint ownership; a common purpose of a financial, commercial nature is not required by the Court. This is in direct contrast to the non-

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89 215 Wis. 509, 255 N.W. 67 (1934).
90 217 Wis. 601, 258 N.W. 846 (1935).
91 231 Wis. 473, 286 N.W. 51 (1939).
92 The court said the fact that the mother could not drive made the agency of the daughter more apparent. However, joint enterprise is said to be a mutual agency. The agency of the mother for the daughter is difficult to find.
93 262 Wis. 367, 55 N.W. 2d 394 (1952).
94 See notes 89, 90, 91 supra.
95 The court used the term joint adventure rather than joint enterprise. This is another case where a new term to describe only a social situation would be desirable.
ownership cases where its absence is fatal to the establishment of a joint enterprise.

An interesting comparison can be made between the four Wisconsin cases where joint enterprise was predicted upon the joint ownership of the car and the case of Fox v. Kaminsky where the wife owned the car but her husband kept up the payments and habitually used the car. On the day of the collision the husband was driving the car and invited his wife to take a trip to a lake to see whether conditions were favorable for duck hunting. The Court held that the wife was a guest in her own automobile; that there was no common purpose because the husband took the trip for an enterprise of his own and that he had full control of the route, directions and all details of the trip. If the car had been owned jointly or even registered in both names the probability is great that the result would be different in view of the Archer,97 Paine,98 Emerich,99 and Johnson100 cases.

IV. WISCONSIN CASES ON AGENCY BETWEEN OCCUPANTS

As was stated earlier joint enterprise is a type of agency; a right of control is essential to each. Several cases discuss both relationships.101 Since a joint ownership is held to establish a joint enterprise the question arises as to the effect ownership of the car will have in establishing an agency where the owner is present in the car as a passenger.

The Reiter case102 involved a son as driver and his father and brother as passengers. There was much evidence as to the ownership of the car but it was decided that the driver and not his father was the owner. The Court stated however, that even if the father was the owner, a man could be a guest in his own automobile and under the circumstances of the case he would have to be classed as a guest.

Generally the owner's presence in his car while being driven by another gives rise to an inference that it was being driven by his agent and that he has a right of control over its operation.103 This inference varies, being strongest when it is operated by a member of his family.104 Wisconsin has held that ownership of a car is prima facie evidence that the driver is acting as the owner's agent in driving it.105 But unlike the joint ownership which seems to conclusively establish a joint enter-

96 239 Wis. 559, 2 N.W. 2d 199 (1942).
97 See note 89 supra.
98 See note 90 supra.
99 See note 91 supra.
100 See note 93 supra.
101 See notes 73, 80 supra.
102 See note 4 supra.
103 Annot., 2 A.L.R. 888 (1919).
105 Enea v. Pfister, 180 Wis. 329, 192 N.W. 1018 (1923); Edward v. Kohn, 207 Wis. 381, 241 N.W. 331 (1922).
prise in Wisconsin, the fact of ownership creates only a rebuttable presumption of agency which will disappear if evidence to the contrary is presented.  

In two Wisconsin cases, *Wilcott v. Ley* and *Schmidt v. Leary* an agency was found on the basis of ownership of the car by the passenger, and resulted in the driver's negligence being imputed to the passenger barring his recovery as plaintiff against a negligent third party.

In the *Wilcott* case the plaintiff and his wife were returning from a dance in plaintiff's car. His wife was driving at his request when the collision occurred injuring plaintiff. The Court held there was an agency imputing the wife's negligence to her husband because of his ownership of the car and the rendering of a service beneficial to him.

The *Schmidt* case involved a plaintiff wife's car which was being driven by her husband on a trip to visit friends. The Court held an agency existed requiring the husband's negligence to be imputed to the wife because of her ownership of the car which was purchased for use in her business, and because at the time it was being used for her pleasure.

These two cases found the necessary right of control in the ownership of the car along with the benefit to the principal to find an agency and impute the negligence where the passenger was the plaintiff.

Four cases; *Gehloff v. Kandler*, *Sevey v. Jones*, *Powel v. Ginsberg*, and *Lott v. Grant* found an agency and imputed the negligence to the owner-passenger to make him vicariously liable as defendant in a suit by a third party.

In the *Gehloff* case the defendant, who was unable to drive, borrowed her son's car and asked her friend, Mrs. De Marce, to drive her. Defendant owned a car but her son was using it at the time and she borrowed his. Through Mrs. De Marce's negligence plaintiffs were injured and defendant sought to avoid liability. The Court found an agency: ownership of the car created a prima facie case, Mrs. De Marce drove at defendant's request, in her interest, and subject to her right of control and direction.

The *Sevey* case involved a man and woman who had been "keeping

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106 Zurn v. Whatley, 213 Wis. 365, at 370, 251 N.W. 435, at 440 (1933).
107 205 Wis. 155, 236 N.W. 593 (1931).
108 213 Wis. 587, 252 N.W. 151 (1934).
109 See note 9 supra.
110 204 Wis. 464, 234 N.W. 717 (1931).
111 235 Wis. 109, 292 N.W. 436 (1943).
112 245 Wis. 45, 13 N.W. 2d 448 (1944).
113 198 Wis. 291, 223 N.W. 2d 846 (1929).
114 Technically the defendant was not the owner of the car here since she had lent her car to her son and borrowed his.
company.” The man frequently took his girl for rides. On the trip in question, she took over driving after a time to gain some experience so as to get a driver’s license and a collision occurred. The Court held there was some element of mutual pleasure present and that he exercised the right of control over her. It is questionable as to how much benefit the defendant actually received by her driving, but the Court affirmed the trial court’s finding that the evidence was insufficient to rebut the prima facie case of agency established by his ownership.

The defendant in the Powels case went in his car, with his brother, to a restaurant where he was to meet his wife. The brother asked to drive because the car was new and he wanted to see how it handled. When they arrived at their destination the brother opened the door on the left side hitting plaintiff who was passing on his bicycle. Defendant was held vicariously liable because he had control in determining when and where the car should be driven and the purpose of the trip remained his.

These cases, with the exception of Lott v. Grant, which involved a prospective buyer of a car taking a demonstration ride with the owner, a second hand auto dealer, were strictly non-business and gratuitous, as were the two cases where agency was imputed as plaintiff. All these cases which found an agency in non-commercial social situations are to be compared and contrasted to the language used in the case of Hynek v. Milwaukee Automobile Insurance Co. where the court said that agency should be usually limited to business situations:

“While the Flury case, involved the element of joint enterprise, it bears strongly upon the question of gratuitous agency because the relationship arising out of a joint enterprise that would operate to impute the negligence of one enterpriser to his associates would necessarily be grounded upon principles of agency. If joint enterprises do not frequently or ever arise out of purely social relationships, neither do relationships of agency ordinarily so arise.

In two other Wisconsin cases, Hahn v. Smith and Smally v. Simkins, where agency was alleged and the owner was a passenger in the car, agency was not found.

The Hahn case involved an owner and driver of the car who were father and son respectively. The father had loaned the car to his son so that he could pick up his stepson who had been visiting a few days on a farm. The Court held that there was no agency requiring the son’s negligence to be imputed to the father making him vicariously liable

115 243 Wis. 591, 11 N.W. 2d 352 (1943).
116 Id. at 595, 11 N.W. 2d at 354.
117 See note 73 supra.
118 194 Wis. 12, 215 N.W. 450 (1927).
because the trip was not taken for any purpose or business of the father, so there was no benefit to him.\(^{119}\)

The Smally case is very similar in its facts to Schweidler v. Caruso\(^{120}\) although it discusses only agency and not joint enterprise. The plaintiff, Mrs. Smally, her husband the defendant Frank Smally, and Simkins, the owner of the car were friends and drove to Chicago together in Simkin's car. Each of the men were to alternate in the driving and at the time of the collision Smally was driving; Simkins, the owner, was riding in the front seat. Mrs. Simkins sued both her husband and Simkins. The Court held that no agency existed between the two defendants requiring Mr. Smally's negligence to be imputed to Simkins making him vicariously liable. The Court further held that the fact of ownership of the car by Simkins was not sufficient to create liability.

In four Wisconsin cases; Bennet v. Nebel,\(^{121}\) Renich v. Klein,\(^{122}\) Hynek v. Milwaukee Auto Insurance Co.,\(^{123}\) and Lind v. Lund;\(^{124}\) where agency was considered between occupants of automobiles in social situations, ownership of the car was not an issue, and all four cases failed to find an agency because of the lack of right of control by the alleged principal.

The issue of imputed negligence in the Bennet case was a minor one. The Court by obiter dicta did state, pursuant to the facts of the case, that because a passenger requests the driver to go to a certain destination, even indicating the route, it is not enough to warrant imputing the negligence of the driver to the passenger.

An unusual fact situation was involved in the Renich case. Flentz, a boy of nineteen, was in the cab of a truck waiting for his employer who had gone into a store soliciting business, when Giesing, an old man, without invitation, entered and asked to be driven to the corner to catch a bus. Flentz did this, but the bus left before he could reach it. He continued after it for about half a mile but then decided to quit and told Giesing who said nothing. Then the truck skidded, hit plaintiff's car and Giesing was killed. The plaintiffs alleged agency in order to impute Flentz's negligence to Giesing holding his estate vicariously liable. The Court reversed the trial court and held that Giesing had no right of control over Flentz, that the relation was that of host

\(^{119}\) Note that agency and joint enterprise may be pleaded in the same case. The Hahn case found neither. See Fox v. Kaminsky, note 96 supra, where the wife was the owner-passenger. Only joint enterprise was alleged. Even if agency had been pleaded, it seems likely that the clear benefit to the husband would have rebutted the presumption of agency arising from the wife's ownership.

\(^{120}\) See note 81 supra.

\(^{121}\) 199 Wis. 334, 226 N.W. 395 (1929).

\(^{122}\) 230 Wis. 123, 283 N.W. 288 (1939).

\(^{123}\) See note 115 supra.

\(^{124}\) See note 80 supra.
and guest, and that Flentz's act was only an act of friendly courtesy. The fact that Giesing requested the courtesy was considered of no great importance.

The fact that agency was attempted here for purposes of liability instead of defense may have influenced the Court in denying an agency since courts are reluctant to find an agency where there is an attempt to impose liability.\(^2\) Our Court however, has not had any hesitancy in holding a passenger liable by agency where he was the owner of the vehicle.\(^3\)

In the *Hynek* case, the defendant, Degener, called at plaintiff-Hynek's, home to get his wife who was visiting there. Hynek told Degener that his father had died and he was going to a friend's home to borrow his automobile. Degener volunteered to drive him there and a collision occurred shortly after. The Court classed the case with the *Flury*\(^4\) and *Renich* cases, that this was a mere social courtesy.

The *Lind* case discussed earlier,\(^5\) which refused to find a joint enterprise, also refused an agency because of lack of right of control.

In only one case, *Georgeson v. Nielson*,\(^6\) where ownership of the car was not a factor, has agency been found between occupants of an automobile resulting in imputing of negligence. In that case, the plaintiff, Georgeson, had borrowed a trailer for the purpose of transporting cattle. Plaintiff did not have a hitch on his car to attach it, so Dennis offered to pull the trailer with his car. On the way back, a collision occurred. Dennis's negligence was imputed to Georgeson barring his recovery. The Court held that there was the necessary benefit to Georgeson, and while Dennis was transporting the cattle he was subject to his control.

The Court felt this was more like a business relationship than a situation where an ordinary social courtesy is offered,\(^7\) but whether a trip to transport cows is more of a business transaction than taking someone to a bus stop, as in the *Renich* case, or to a friend's house, as in the *Hynek* case, is debatable.\(^8\)

The *Georgeson* case was undoubtedly applying the business relationship emphasis running throughout the Wisconsin decisions, but its result does seem out of line when compared factually with the other cases.\(^9\) The fact that the *Renich* case was an attempt to impose lia-

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\(^{125}\) Morris, *supra*, note 3, at 138.

\(^{126}\) See notes 110, 111, 112, 113 *supra*.

\(^{127}\) See note 80 *supra*.

\(^{128}\) See notes 110, 111, 112, 113 *supra*.

\(^{129}\) 214 Wis. 191, 252 N.W. 576 (1934).

\(^{130}\) See note 70 *supra*.

\(^{131}\) See note 80 *supra*.

\(^{132}\) Compare especially with *Klas v. Fenske*, 248 Wis. 534, 22 N.W. 2d 596 (1945), where a business relationship was held insufficient to establish a joint enterprise even though one was to resell a piece of property for another at a commission.
bility may have influenced the Court in denying an agency and can possibly be distinguished from the Georgeson case on that ground; but in the Hynek case agency was pleaded as a defense like the Georgeson case, and whether the facts in the two cases are so dissimilar so as to class one as a business relation and one as only a social courtesy is questionable.

The high standard of business relationship necessary to the establishment of a joint enterprise in Wisconsin is in contrast to the Georgeson case. The cases where joint enterprise was denied might have found agency if it had been alleged, since the test of a business relation necessary to find the right of control appears less stringently applied in agency cases in view of the Georgeson case.134

V. SUMMARY

A. JOINT ENTERPRISE:

1) It appears that if an automobile trip is a part of a general business relationship between the occupants, either a partnership or joint adventure, negligence of the driver will be imputed in suits between an occupant and third parties and called either joint enterprise or joint adventure by the Wisconsin Supreme Court.

2) If no commercial relationship exists between the occupants and there is no joint ownership, it is doubtful if our Court will ever establish a joint enterprise.

3) The Wisconsin Court insists on a business common purpose; that is, a joint financial undertaking to find the mutual right of control to establish a joint enterprise; a social common purpose is insufficient. The exact nature of this business relationship which will be held adequate to establish a joint enterprise is not made clear by the decisions. Any commercial adventure is not sufficient; it must approach or even be a joint adventure. As yet no Wisconsin case has reached this standard.

4) While other jurisdictions have retreated from establishing a joint enterprise on the technical joint ownership of the automobile, Wisconsin will substitute this element for the presence of a business relationship as establishing a right of control and has found a joint enterprise solely on this basis. If it is sound to limit the doctrine of imputed negligence to business relationships where it is somewhat expected and can be insured against as the Wisconsin Court has done, it seems a harsh rule to establish an identical result on the basis of tech-

133 The Georgeson case was argued by counsel in the Renich case, but it was not even mentioned in the opinion.
134 Compare the Georgeson case with Van Gilder v. Gugel, see note 78 supra, where joint enterprise was denied. Agency might have been pleaded successfully.
135 Fleming, supra note 54, at 213.
nical ownership of the car in a social situation to bar an innocent passenger from recovering for his injuries.

B. AGENCY:

1) Where Passenger is Owner:
   a) Ownership of the car by the passenger in the establishment of an agency is not conclusive as mutual ownership seems to be in the joint enterprise cases. It is a strong fact to arrive at the necessary right of control and establishes a prima facie case of agency in Wisconsin. If it can be shown that the trip was not beneficial to the owner-passenger or if other facts rebut the inference of control arising from ownership, agency will be denied by the Court.
   b) Whether agency is pleaded as a defense or to hold the passenger vicariously liable in this type of case seems to have little influence in deciding whether an agency exists or not.

2) Where Ownership Is Not a Factor:
   a) A mere request by the passenger to go to a certain destination without more, is not enough to establish an agency in Wisconsin.
   b) The absence of ownership by the passenger shifts the Court’s emphasis back to a business relationship to find the necessary right of control. Whether any given case is classed as a mere social courtesy or a business relationship giving rise to agency depends on the facts. The tendency does seem more toward the denial of agency than its establishment since only the Georgeson case was found to have the necessary business relationship.
   c) Whether the Wisconsin Court is influenced by the fact that agency is pleaded for the purpose of holding the passenger vicariously liable rather than for purposes of defense by the third party is not clear. Only one case, Renich v. Klein, has been decided in Wisconsin where agency was attempted to hold the non-owner passenger vicariously liable. Whether this fact influenced the Court to deny agency is debatable. The Court may have disregarded this and merely felt that the facts fell into the social category rather than a business relationship.

VI. CONCLUSION

The Wisconsin Court has been fairly consistent in its discussion of joint enterprise whether or not one agrees with its restricted view of the elements necessary for its existence. Where Wisconsin law is applicable, attorneys should be able to predict with some degree of accuracy the outcome of their joint enterprise cases.

To adequately predict the outcome of an agency case presents a more difficult problem. The state of the law now is highly inconsistent. It is hoped that this review of the decided cases and conclusions drawn from them will be of some assistance.

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