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Back Seat Driving Encouraged by the Supreme Court

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BACK SEAT DRIVING ENCOURAGED BY THE SUPREME COURT

In these days of accelerated transportation by automobile it has become a colloquial expression to refer to one as a "back seat driver" who advises the operator of an automobile, while driving with him, of impending or possible danger resulting from speeding or carelessness.

In the usual case it has been observed that the average, normal driver receives the well-meant cautions and remonstrances of the other occupants of the car with ill-grace.

However, it is interesting to note that not only is it sometimes the correct thing for the passenger to do, but it is a duty imposed upon him by the courts of many states, including those of Pennsylvania. It has been held in many cases that where an injury occurs to a passenger as a result of a collision between the car in which he is riding and another object, he is guilty of contributory negligence and cannot recover from the driver of the car for his negligence, if he failed in a proper case to warn the driver of the car of the impending danger which the driver failed to notice or was disregarding and the passenger, exercising ordinary care, reasonably should have noticed. A late Pennsylvania case which dogmatically laid down this rule is *Perry v. Ryback*.[1] The facts, briefly, were that the plaintiff's decedent was driving along the Roosevelt Boulevard in the defendant's (Ryback's) automobile. It was raining and Ryback was driving between 50 and 60 miles per hour when he attempted to go around an "S" curve. The car slid off the road, broke a telephone pole in half, turned over and killed Perry. The defendant contended that his negligence should be imputed to the deceased, since they both were engaged in a common or joint enterprise. The court held that each member of the joint enterprise was charged with the use of ordinary care to avoid injury. "Where the action is brought by one member of the enterprise against another, there is no place to apply the

[1]302 Pa. 559 (1930).

doctrine of imputed negligence. * * * * it will be treated as an ordinary action for injuries as the result of negligence."

"The owner of an automobile is liable to his guest or passenger if he negligently operates his car to the injury of his guest or passenger * * * * . It was the duty of the deceased, when he noticed Ryback driving at the rate of speed as here testified, to protest or warn him against it. If he failed to perform this duty, he was guilty of contributory negligence; the law would assume under such circumstances that he was satisfied with the operation of the car, and that he was willing to join Ryback in the hazard or in taking a chance in the result of fast driving."

The court under the authority in *Johnson v. Hetrick*[2] presumed that the "deceased used due care, that is, that he did protest or remonstrate with Ryback as to his fast driving, but held that the presumption was rebuttable by uncontrovertable physical facts, that is, such facts as a court will take judicial notice of."[3]

The very able opinion in the *Ryback Case*[4] was written by Justice Kephart and judgment rendered for the plaintiff in the absence of any evidence rebutting the presumption that the deceased used ordinary care.

It may be inquired as to whether there is a duty upon the passenger to be just as observant as the driver or whether he can doze or read or pay no attention to the road before them. A case decided last January[5] held that the passenger as an occupant was bound to exercise reasonable care for his own safety—but in the absence of any proof to the contrary, such exercise of reasonable care would be presumed. The reputation of the driver as a careful operator of an automobile and the passenger's knowledge of such reputation are matters relevant in determining whether the guest should have been alert.

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[2]300 Pa. 225 (1929).

[3]Patterson v. Pitts. Ry. Co., 210 Pa. 47 (1905); Unger v. P., B. and W. R. R. Co., 217 Pa. 106 (1907); Hartig v. Ice Co., 290 Pa. 21, 30, 31 (1927).

[4]302 Pa. 559 (1930).

[5]Simrill v. Eschenbach, 303 Pa. 156 (1931).

A passenger is only required to act in the presence of some threatened danger. The fact that she was dozing when the crash came did not necessarily convict her of negligence.

Where a passenger was reading a newspaper and hence equally inattentive to the operation of the automobile, the question of his contributory negligence was held to be for the jury.[6]

In *Azinger v. P. R. R. Co.*[7] the Chief Justice says, "The tendency of our decisions is to hold the passenger responsible for his actual negligence in joining with the driver in testing a danger he knows to exist, and not for the result of mere inaction in failing to discover dangers of which he was ignorant, but might have discovered had he been giving attention to the roadway ahead of them."

In the *Ryback Case,* supra, it was said "It was the duty of the deceased, *when he noticed* Ryback driving at the rate of speed as here testified, to protest or warn him against it."

From these opinions, therefore, we may fairly infer that a passenger in a private automobile is not under the same duty as the driver to watch the roadway ahead of them; but he may occupy himself with other diversions, depending on the skill of the driver to steer clear of harm unless he is aware of the lack of skill of the driver. If he observes any impending or threatened danger, in order to relieve himself of being guilty of contributory negligence he must remonstrate or warn the driver; and he is always guilty of contributory negligence when he joins with the driver "in testing the danger which he knows exists."

This is the law in Pennsylvania, wise or unwise. Whether it is wise or unwise depends largely on the temperament of the driver of the vehicle in each particular case as well as upon the excitable natures of passengers. Constant warnings or remonstrances on the part of a passenger may indirectly precipitate an accident, due to his erroneous and unwarranted fears. Thus, the more the strain upon the

[6]Kilpatrick v. P. R. T. Co., 290 Pa. 288 (1927).
[7]262 Pa. 242 (1918).

driver's nervous system created by the passenger's continuous outbursts and exclamations on account of his misapprehensions for fear of an accident, the less the likelihood that the law will find him guilty of contributory negligence.

Of course in some cases such warnings are given quite appropriately and, as a consequence, do prevent a collision; but the courts, as shown above, in creating law by using the yardstick of human natures, their tendencies and failings, as they always do, have decided that "back seat" driving for reasons of policy in more to be encouraged than prohibited.

There are cases admitting that sometimes it is better for a passenger to say nothing than to warn the driver. In *Vocca v. Pa. R. R.*[8] Justice Stewart approvingly cites part of the opinion of *Hermann v. R. I. Co.*[9] "It cannot be said as a matter of law that such a guest or passenger is guilty of negligence because he has done nothing. In many such cases the right degree of caution may consist of inaction. In situations of great and sudden peril, meddlesome interference with those having control either by physical acts or by disturbing suggestions and needless warnings, may be exceedingly disastrous in results. While it is the duty of such guest or passenger not to submit himself and his safety solely to the prudence of the driver of the vehicle, and that he must himself use ordinary care for his own safety, nevertheless he should not in any case be held guilty of contributory negligence merely because he has done nothing." This opinion is followed in many later decisions.[10]

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[8]259 Pa. 42 (1917).

[9]36 R. I. 447.

[10]Carbaugh v. Phila. and R. Ry. Co., 262 Pa. 27 (1918); Azinger v. Pa. R. R. Co., 262 Pa. 251 (1918); Jerko v. Buffalo, R. and Pitts. Ry. Co., 275 Pa. 462 (1923); Kilpatrick v. P. R. T. Co., 290 Pa. 21 (1927); Schlosstein v. Bernstein, 293 Pa. 250 (1928); Simrell v. Eschenback, 303 Pa. 156 (1931).

Other states whose courts have held substantially as our Supreme Court are Delaware, Iowa, Maryland, Missouri, New York, Washington and Wisconsin.[11]

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CONTROL OF AUTOMOBILE WITHIN RANGE OF HEADLIGHTS

The case of *Simrell v. Eschenbach*[1] decided recently by the Pennsylvania Supreme Court reiterates the now well established Pennsylvania rule that a driver of a motor vehicle must have it under such control as to be able to stop within the range of its headlights.

In this case the facts show that the defendant's truck was standing on the right side of the Lackawanna Trail at four o'clock A. M. There was no red light or other warning on the rear of the truck. Doctor Simrell drove his car in which his wife was a passenger in such a manner as to collide with the rear end of the truck. Although there was a moon, the early morning was dark and cloudy. On the stand the doctor testified that he could see the truck only when within twenty feet of it and not in time to stop or turn aside, since he was travelling at a speed of about twenty-five or thirty miles per hour. The court held the doctor guilty of contributory negligence, thus defeating his right of recovery but not that of his wife. In the words of Mr. Justice Walling "one reason urged for his inability to have a longer range of vision was a bend in the road south of the point of accident; but after passing this he had a straight range for over sixty feet before coming to the truck."[2]

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[11]Poynter v. Townsend, 130 A. 678 (Dela.) (1924); Hubbard v. Bartholemew, 163 Iowa 58, 144 N. W. 13 (1913); Lavine v. Abramson, 142 Md. 222, 120 A. 523 (1923); Irwin v. McDougal, 217 Mo. App. 645, 274 S. W. 923 (1925); Klauber v. Jackson, 209 N. Y. S. 209 (1925); Bauer v. Tongaw, 128 Wash. 654, 224 P. 20 (1924); Howe v. Carey, 172 Wis. 537, 179 N. W. 791 (1920).

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[1]303 Pa. 156, 154 Atl. 369 (1931).

[2]Ibid. p. 159.