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Tort--Automobiles--Recovery by Wife-Passenger Against Husband-Driver

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degree of danger and the risk of harm.³⁸ Professor Seavey takes a third view. Considering proximate cause theory as a mere legalism to indicate the presence or absence of liability,³⁹ he advocates the "risk theory" of negligence. Under this theory the sole question is whether the injury is within the risk,⁴⁰ meaning a foreseeable injury to a foreseeable plaintiff. If the court had applied the "risk theory" to the fact situation in the principal case, it probably would have permitted the plaintiff to recover.⁴¹

The rule adopted by the court in essence limits the manufacturer's liability to a duty to warn of defects, and if the purchaser or user has knowledge of these defects, the manufacturer's duty is terminated. If the court intends to use "proximate cause" in such a manner as to protect industry as a special class, it is not in line with present trends. Though knowledge of the danger or defect is an important factor in determining whether the manufacturer's negligence is the proximate cause of the injury, it should not be sufficient in itself under all situations to relieve the manufacturer from liability. Other factors also warrant the jury's consideration, such as: distance in space and time, foreseeableness of harm and intervening causes, the use to which the product is intended, the relationship of the user, the change in condition of the product since its purchase, and the utility of the product versus the burden of making it safe. The present case carries things too far, if the general law of negligence is to be applied. Under negligence principles the jury question should still be whether an unreasonable hazard is to be anticipated from use of the article, even though its dangerous condition has been drawn to the attention of the purchaser.⁴²

K. Sidney Neuman

TORT—AUTOMOBILES—RECOVERY BY WIFE-PASSENGER AGAINST HUSBAND-DRIVER—Shortly after the defendant-husband picked up his wife to take her home after work one evening, a freezing rain fell and the roads became slick. At approximately 2 a.m. on a "well shaded curve" the car slid off the highway and turned over. The plaintiff-wife testified that although the roads were hazardous, her husband, over her protests, drove at the rate of 50-55 m.p.h. After her repeated requests for him to

³⁸ *Id.* § 49, at 268.

³⁹ Seavey, *Cogitations on Torts* 32 (1954).

⁴⁰ *Ibid.*

⁴¹ This is clearly a foreseeable injury to a foreseeable plaintiff. Thus, the plaintiff could recover notwithstanding any possible intervening negligence of the owner of the automobile.

⁴² 2 Harper & James, *Torts* § 28.5, at 1542 (1956).

slow down, he slowed to 30-35 m.p.h., which she thought was still excessive under the circumstances. Her brother, also a passenger, supported her testimony. The defense presented a statement given by Mrs. Roberts in her husband's presence to his insurance agent about one month after the accident, in which she absolved him of all blame and said, *inter alia*, that he was exercising all reasonable care under the circumstances. From a verdict for the plaintiff, defendant appeals. *Held*: affirmed. *First*, the rule permitting suits in tort between husband and wife is reaffirmed. *Second*, the contradictory testimony of the wife merely affected her credibility as a witness, a question for the jury. *Third*, plaintiff was not contributorily negligent as a matter of law for failing to leave the automobile. She did not have a reasonable opportunity to leave after she protested since by so leaving she would have subjected herself to as great or greater hazards due to the weather, the time, and the location. *Roberts v. Roberts*, 310 S.W.2d 55 (Ky. 1958).

The reciprocal duties of the automobile driver and passenger are simply stated. Since Kentucky has no guest statute,¹ the driver is only required to exercise reasonable care in the operation of the automobile. Similarly, the guest or passenger is under the duty of exercising such ordinary care as will avoid injury to himself. Failure to fulfill this duty will completely bar the passenger's recovery, as Kentucky has no comparative negligence statute. In addition, voluntary assumption of risk will also prevent recovery. The difficulty arises when the court has to apply these simple rules to a concrete case, particularly where the wife-passenger sues the husband-driver, with insurance hovering, unmentioned, in the background.

Contributory Negligence

The court's benign rationalization in excusing Mrs. Roberts' failure to leave the automobile is not surprising when viewed in the light of the precedents. Generally, the court has been reluctant to hold automobile guests contributorily negligent as a matter of law; thus this question is ordinarily left to the jury, even in cases where the only smallest conflict in evidence is present.² Usually, this is where the de-

¹ Chapter 85 of the Acts of 1930 contained a statute prohibiting non-fare-paying guests from maintaining actions against drivers or owners of automobiles unless the accident was intentionally caused. This statute was declared unconstitutional in *Ludwig v. Johnson*, 243 Ky. 533, 49 S.W.2d 347 (1932) and *Van Galder v. Foster*, 243 Ky. 543, 49 S.W.2d 354 (1932) (decided same day).

² See, for example, *Arnett v. Arnett*, 293 S.W.2d 733 (Ky. 1956); *Richie v. Cheers*, 288 S.W.2d 660 (Ky. 1956) (reversing directed verdict for defendant driver); *Coy v. Hoover*, 272 S.W.2d 449 (Ky. 1954) (reversing directed verdict for plaintiff guest). In *Louisville Taxicab & Transfer Co. v. Barr*, 307 Ky. 23, 33, 209 S.W.2d 719, 722 (1948), the court said, "[I]n view of the testimony of plaintiffs that they had no knowledge of his [the driver's] intoxication—incredible though that may seem—we conclude that the case should have been submitted to the jury with a contributory negligence instruction."

termination belongs; it is a harsh rule to deprive an injured party of all redress even though he may have been slightly at fault himself. But where the plaintiff's fault is clearly established and was material in bringing about the injury, the court is rendering a disservice by permitting the jury to decide. In effect the jury is permitted to compare negligence, and it will normally find for the one least at fault. Jury verdicts notoriously tend to be for passengers.³

The passenger's obligations are not at all stringent, but sometimes a slight variation in the circumstances will attach culpability to a previously innocent passenger. Upon entering an automobile the passenger may assume that the driver will fulfill his duty even though he may be known by the passenger to be fast and reckless.⁴ However, entering into or continuing to ride in an automobile driven by one intoxicated is contributory negligence as a matter of law,⁵ although the jury determines whether the inebriation was sufficient to interfere with the safe conduct of the journey.⁶ Interference may also result from overcrowding or overloading. Operators are enjoined by statute from seating more than three passengers in the front seat and guests are similarly enjoined when such positioning will interfere with the operation of the car.⁷ Again, the jury determines if interference was present.⁸

³ For excellent illustrations of very lenient jury verdicts reversed on appeal, see *Kavanaugh v. Myers' Adm'x*, 246 S.W.2d 451 (Ky. 1952) and *Lewis v. Perkins*, 313 Ky. 847, 233 S.W.2d 984 (1950). Instances where the jury verdicts were affirmed are *Arnett v. Arnett*, supra note 2, and *Coy v. Hoover*, supra note 2.

⁴ *Coy v. Hoover*, supra note 2. Same result in *New York Indemnity Co. v. Ewen*, 221 Ky. 114, 298 S.W. 182 (1927).

⁵ *Smith's Adm'r v. Smith*, 269 S.W.2d 260 (Ky. 1954) (passenger asked driver to postpone trip because of apparent intoxication); *Kavanaugh v. Myers' Adm'x*, 246 S.W.2d 451 (Ky. 1952) (passenger and driver drinking together); *Lewis v. Perkins*, 313 Ky. 847, 233 S.W.2d 984 (1950) (passenger and driver drinking beer for four and one-half hours before accident); *Irby v. Williams*, 313 Ky. 353, 231 S.W.2d 1 (1950) (passenger acquiesced while driver consumed pint of whisky); *Spencer v. Boes*, 305 Ky. 573, 205 S.W.2d 150 (1947) (passenger had been with driver all evening and knew he had consumed several beers); *Spivey's Adm'r v. Hackworth*, 304 Ky. 141, 200 S.W.2d 131 (1947) (passenger knew the driver was drinking or drunk); *Rennolds' Adm'x v. Waggener*, 271 Ky. 300, 111 S.W.2d 647 (1937) (passenger knew driver had been drinking on entry); *Archer v. Bourne*, 222 Ky. 268, 300 S.W. 604 (1937) (woman passenger who entered taxi late at night acquiesced in drinking of driver and other passengers).

⁶ *Arnett v. Arnett*, 293 S.W.2d 733 (Ky. 1956); *Whitney v. Penick*, 281 Ky. 474, 136 S.W.2d 570 (1940); *Mahin's Adm'r v. McClellan*, 279 Ky. 595, 131 S.W.2d 478 (1939); *Toppass v. Perkins' Adm'x*, 263 Ky. 186, 104 S.W.2d 423 (1937); *Louisville Taxicab & Transfer Co. v. Barr*, 307 Ky. 28, 209 S.W.2d 719 (1948).

⁷ Ky. Rev. Stat. § 189.470 (1959).

⁸ *Price v. United States*, 50 F. Supp. 676 (E.D. Ky. 1943) held that under Kentucky law overcrowding the front seat of a taxicab was contributory negligence as a matter of law. But in *Coy v. Hoover*, 272 S.W.2d 449 (Ky. 1954), the court said it is a question for the jury whether overloading or overcrowding the front seat resulted in interference with the operation of the car as prohibited by Ky. Rev. Stat. § 189.470 (1) (1959). See also *Clark v. Finch's Adm'x*, 254 S.W.2d 934 (Ky. 1953).

A guest is not required to watch for *ordinary* dangers and warn the driver of *potential* disaster,⁹ but he may not ignore *obvious* dangers and remain oblivious to *certain* disaster.^{9a} If he does undertake to advise the driver of conditions ahead, and if such advice leads to the accident he cannot recover, even though the driver relied partly on his own observation.¹⁰ Recovery by a guest passenger is also prevented if he neglects his duty to protest the driver's negligent or unlawful acts¹¹ or if he does not leave the vehicle when a reasonable opportunity is presented.¹²

Voluntary Assumption of Risk

Although in most cases the passenger's contributory negligence is asserted to preclude recovery by him, on occasion the doctrine of assumption of risk has been invoked for this purpose. Authorities differ on the relationship between these doctrines both as to their limits and as to whether they are synonymous or distinctive. Some say they are distinct.¹³ Harper and James contended that those cases in which assumption of risk is used can be decided either as "no duty" cases or on the basis of contributory negligence.¹⁴ Prosser adds that assumption of risk points up the element of consent when it may be lacking in those two instances.¹⁵ Kentucky's rule is delineated in *Geller v. Geller*¹⁶ where the court said, "[Assumption of risk] only applies where: (1) a perilous situation exists, and (2) the plaintiff has, or should have,

⁹ *Carnes v. Day*, 309 Ky. 163, 216 S.W.2d 901 (1949); *Epperson v. Wright*, 277 Ky. 205, 126 S.W.2d 123 (1939).

^{9a} *Hinternisch v. Brewsbaugh*, 261 Ky. 432, 87 S.W.2d 934 (1935); *Stephenson's Adm'x v. Sharp's Ex'rs*, 22 Ky. 496, 1 S.W.2d 957 (1927). Cf. *Chambers v. Hawkins*, 233 Ky. 211, 25 S.W.2d 363 (1930).

¹⁰ *Donnell v. Pruitt*, 265 S.W.2d 784 (Ky. 1954).

¹¹ No case has been decided precisely on this point, but the rule has been repeated several times in dictum. See *Richie v. Cheers*, 288 S.W.2d 660 (Ky. 1956); *Coy v. Hoover* 272 S.W.2d 449 (Ky. 1954); *Louisville & Nashville Railway Co. v. Hadler's Adm'r*, 269 Ky. 115, 106 S.W.2d 106 (1937); *Chambers v. Hawkins*, 233 Ky. 211, 25 S.W.2d 363 (1930). *Ford v. McQueary*, 239 S.W.2d 486, 489 (Ky. 1951), states the rule, "A guest in an automobile knowingly may not permit his host to endanger his safety or his life and recover for injuries or render it possible for his administrator to recover for his death, unless, if time allows, he protests the negligence of his host."

¹² This is also mentioned frequently in connection with the passenger's duty to protest. See *Richie v. Cheers*, supra note 11; *Louisville Taxicab & Transfer Co. v. Barr*, 307 Ky. 28, 209 S.W.2d 719 (1948); *Hinternisch v. Brewsbaugh*, 261 Ky. 432, 87 S.W.2d 934 (1935); *Archer v. Bourne*, 222 Ky. 268, 300 S.W. 604 (1927).

¹³ "The essence of contributory negligence is carelessness; of assumption of risk, venturousness. Thus an injured person may not have acted carelessly; in fact, may have exercised the utmost care, yet may have assumed, voluntarily, a known hazard." *Hunn v. Windsor Hotel Co.*, 119 W. Va. 215, 193 S.E. 57,58 (1937). For an excellent article on this distinction in passenger cases, see 37 *Marq. L. Rev.* 35 (1953).

¹⁴ 2 Harper & James, *Torts* 1162-92 (1956).

¹⁵ Prosser, *Torts* 303-05 (2d ed. 1955). Four uses for the term assumption of risk are given.

¹⁶ 314 Ky. 291, 234 S.W.2d 974 (1950).

knowledge of such situation."¹⁷ There, rain, causing the roads to be slick, was not such a perilous situation as to make the doctrine operative. In *Ford v. McQueary*¹⁸ the court held that a defective condition, made known to the guest on three occasions, created an inference that the guest assumed the risk that the condition would cause the accident upon entering the automobile. Beyond these two instances, the court has often held the guest's conduct to be so unreasonable as to have made him contributorily negligent; and as such, he "assumed the risk." Essentially, this is the position taken by the Restatement of Torts.¹⁹ In the principal case, contributory negligence is more apposite; therefore, it is submitted that the court correctly applied it to Mrs. Roberts' conduct.

Tort Suits Between Husband and Wife

The most acute problem in the case involved the circumstances under which Mrs. Roberts asserted her claim against her husband. In 1953, Kentucky permitted for the first time an action at tort between spouses.²⁰ Since then, the court has resolutely affirmed its position in the only two cases that have raised the issue.²¹ Any modification of the rule seems most unlikely. When it overruled the case which had established the immunity, the court evinced the faith that courts thereafter would ferret out and defeat those instances where an abuse of the privilege was present.²²

In his dissent in the instant case Judge Sims described this suit as a "palpable fraud."²³ He noted how Mrs. Roberts' testimony was flagrantly conflicting: how she voluntarily exonerated her husband a month after the accident, and yet from the witness stand her testimony was the antithesis of her own prior statements. Despite Judge Sims' disapprobation, Mrs. Roberts recovered.

Conclusion

Passenger cases always afford an excellent opportunity for collusion when more than one occupies the automobile. To recover, passengers must depict the driver as having been so negligent as to render him legally liable, but not so negligent as to attach to themselves the stigma of contributory negligence. Each has a distinct interest in the merits of the others' cases and the financial balm they contemplate for their

¹⁷ *Id.* at 293, 234 S.W.2d at 976.

¹⁸ 239 S.W.2d 486 (Ky. 1951).

¹⁹ Restatement, Torts § 466(a), comment (d) (1934).

²⁰ *Brown v. Gooser*, 262 S.W.2d 480 (Ky. 1953), 43 A.L.R.2d 626 (1953), 42 Ky. L. J. 497 (1954).

²¹ *Combs v. Combs*, 262 S.W.2d 821 (Ky. 1953) and the principal case, *Roberts v. Roberts*.

²² *Brown v. Gosser*, supra note 20 at 484.

²³ 310 S.W.2d at 57.

injuries could encourage collusion to construct the most favorable set of fiction. A fortiori the problem is most serious when the *defendant* has such a pecuniary interest in the plaintiff's case as might induce him to assist in the fabrication of the plaintiff's testimony in the action against himself.

The driver often has liability insurance, and ultimately insurance companies pay for these injuries. It may be argued that such a result is socially beneficial; that the burdensome cost of personal injury should not be borne so brutally by one individual. Is such a result desirable when just principles are flaunted simply because an injury has been suffered? As Judge Sims emphasized in his dissent:

If judgments like this are allowed to stand, they will soon become so numerous that one of three things will result: 1. insurance companies will have to insert a clause in their policies that a spouse is not covered; 2. or raise rates on policies covering a spouse; 3. or raise the rates on all automobile liability insurance, to the great detriment of the honest policyholders.²⁴

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²⁴ *Id.* at 58.