72.03 Negligence of Driver Not Attributable To Passenger

If you find that there was negligence on the part of the driver of the vehicle in which the plaintiff was riding, then the driver's negligence cannot be charged to the plaintiff. The care required of the plaintiff in this case is that which a reasonably careful person riding as apassenger would use under similar circumstances.

Comment revised February 2023.

Notes on Use

This instruction may not be given when the plaintiff is either the driver's employer, principal, partner or joint venturer.

This instruction should not be given where there is a dispute as to who was driving the vehicle.

Comment

Generally, the negligence of a driver may not be imputed to a passenger. *Milis v. Chicago Transit Authority*, 1 Ill.App.2d 236, 117 N.E.2d 401 (1st Dist.1954) (negligence of taxicab driver not imputable to passengers); *Ohlweiler v. Central Engineering Co.*, 348 Ill.App. 246, 109 N.E.2d 232 (2d Dist.1952) (error to refuse instruction to this effect in action by guest passenger against driver and highway contractor who failed to erect warning signs on road construction); *Buehler v. White*, 337 Ill.App. 18, 85 N.E.2d 203 (3d Dist.1949) (negligence of husband in parking at highway edge to adjust mechanical difficulty not imputable to plaintiff wife); *Walsh v.Murray*, 315 Ill.App. 664, 43 N.E.2d 562 (2d Dist.1942) (action for wrongful death of minor child of plaintiff; held: misconduct of driver could not be imputed to plaintiff because there was no evidence that driver had been appointed plaintiff's agent to bring minor child home).

An apparent exception to the foregoing rule is *Opp v. Pryor*, 294 Ill. 538, 547; 128 N.E. 580, 584 (1920), where, to sustain her burden of proof that she was in the exercise of ordinary care at the time of the incident, plaintiff relied upon the testimony of the driver and another passenger, the latter sitting in the rear seat while plaintiff occupied the front seat with the driver, as to what they could see. The court held it was erroneous to instruct that if the plaintiff was a guest, had no authority to control the operation of the automobile, and was in the exercise of due care for her own safety, then the negligence of the driver could not be imputed to her. Actually, the reasoning of the court indicates that, under such circumstances, the instruction is confusing because the only evidence from which due care on the part of the plaintiff could be inferred was the testimony of the driver as to her own care in the management of the automobile.

A difficult problem is presented where the owner is a passenger.

In *Palmer v. Miller*, 380 Ill. 256, 43 N.E.2d 973 (1942) a guest sued the son of the car owner for injuries received when the son's friend negligently drove the car in which the three were riding into a tree. The Supreme Court held that there could be no agency between the driverand the son because of the son's minority; that the negligence of the driver could not be imputed to the son, and that any liability of the son had to rest on his own negligence in failing to control the driving of the car.

In *Rigdon v. Crosby*, 328 Ill.App. 399, 66 N.E.2d 190 (2d Dist.1946) (abstract), it was held error to instruct that the plaintiff could recover if the injuries were caused by the defendant'snegligence and if the plaintiff was exercising due care, because it omitted the question of the due care of the driver of the car where plaintiff owned the car and had a duty to control the driver.

In *Koch v. Lemmerman*, 12 Ill.App.2d 237, 139 N.E.2d 806 (4th Dist.1956), the defendant owner was a passenger in the rear seat and his son was driving. Noting that there was evidence of wilful and wanton misconduct and that the owner had the right to control the manner in which the car was driven and had a duty to control the driver, the court sustained a recoveryby another passenger against the owner. *See also Staken v. Shanle*, 23 Ill.App.2d 269, 162N.E.2d 604 (3d Dist.1959); *Simaitis v. Thrash*, 25 Ill.App.2d 340, 166 N.E.2d 306, 311 (2d Dist.1960).

IPI 72.03 was held proper under the facts of the case. *Butler v. Chicago Transit Authority*, 38 Ill.2d 361, 367-368; 231 N.E.2d 429, 432-433 (1967).

It was held in *Dooley v. Darling*, 26 Ill.App.3d 342, 324 N.E.2d 684 (5th Dist.1975), that the use of IPI 72.03 is not precluded in owner-passenger cases. However, the court ruled that it may have been desirable and appropriate to temper the instruction in view of the plaintiff's de facto ownership powers over the use of the automobile. In this case, the plaintiff (passenger- owner's administrator) made a claim against his driver and the driver of the other car involved.

In *Bauer v. Johnson*, 79 Ill.2d 324, 403 N.E.2d 237, 38 Ill.Dec. 149 (1980), the Illinois Supreme Court reviewed the current cases and settled the law regarding the obligation of the owner-passenger. The court held an owner-passenger-plaintiff can be contributorily negligent in failing to control the conduct of the driver:

> The passenger's ownership of the car is relevant only insofar as it is a circumstance whichgives the passenger reason to believe that his or her advice, directions or warnings would be heeded. (Restatement (Second) of Torts §495, comment *e* (1965).) But no passenger has a duty to keep a lookout or to control the driver unless the plaintiff knows or should know that such actions are essential to his or her safety. Restatement (Second) of Torts
> §495, comments *c* and *d* (1965).

Id. at 332, 403 N.E.2d at 241, 38 Ill.Dec. at 153.