LEGAL NOTICES

Estate of Mae E. Klenzing, deceased, late of Borough of Chambersburg, Franklin County, Pennsylvania.
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08/21,08/28,09/04/98

Estate of Ann N. Rebert, deceased, late of Guilford, Franklin County, Pennsylvania.
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Estate of A. Pauline Stoner, deceased, late of Waynesboro, Franklin County, Pennsylvania.
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08/21,08/28,090/04/98

Estate of Kathryn Janet Van Sant, deceased, late of Waynesboro, Franklin County, Pennsylvania.
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LEGAL NOTICES

Attorney:
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10 East Main Street
Waynesboro, PA 17268
08/21,08/28,09/04/98

FICTITIOUS NAME NOTICES

NOTICE IS HEREBY GIVEN of the filing in the Office of the Secretary of the Commonwealth of Pennsylvania on July 24, 1998, an application for carrying on or conducting business under the assumed or fictitious name of J.A.R.S. HOMEBUILDERS, having its principal place of business at 522 Maple Street, P.O. Box 758, Waynesboro, Franklin County, PA 17268, and that the names and addresses of the individuals owning or interested in said business are: Reinhard P. Schneider and Jo Anna Schneider, 522 Maple Street, Waynesboro, PA 17268.
J. Dennis Guyer, Esq.
Wertime & Guyer
50 Eastern Avenue
Greencastle, PA 17225
09/04/98

COMMONWEALTH OF PENNSYLVANIA vs. JOHN J. KLING, Defendant, Fulton County Branch, Criminal Action No. 139 of 1996

Commonwealth v. Kling

third degree murder conviction for motor vehicle collision - sufficient evidence to support a finding of malice.

1. Third degree murder requires a finding of malice.

2. Malice exists where there is a wickedness of disposition, hardness of heart, cruelty or recklessness of consequences. Recklessness of consequences exists where the defendant has consciously disregarded an unjustified and extremely high risk that his action might cause death or serious bodily injury.

3. In this case, there was sufficient evidence for the jury to find the required malice; this was not a case where serendipity placed the victim's car in the path of defendant, but rather defendant consciously disregarded an unjustified and extremely high risk that he might cause the death or serious bodily injury of another, because he was racing another car at high speed on a steep and curvy section of Route 30 in Fulton County, he knew his manner of driving was dangerous because he almost ran someone else off the road just prior to the accident, he illegally passed two other cars, he entered into a 35 mph curve at a speed of 70 mph, and he knew the section of the road well

4. No error by the court for its failure to give jury instructions requested by defendant.

5. Presence of attorney for victim at prosecution's table not prejudicial where the attorney did not identify himself to the jury nor participate in the proceedings.

6. No error by the court for its refusal to allow defendant to present evidence of his own injuries incurred in the collision because such evidence was irrelevant.

Dwight C. Harvey, District Attorney
Joseph M.. Devecka, Esq., Counsel for Defendant

OPINION

Walker, P.J., July 16, 1998:

Factual and Procedural Background

On November 21, 1996, Appellant John J. Kling was charged with criminal homicide, two counts of aggravated assault, several counts of recklessly endangering another person, simple assault, homicide by vehicle, and some traffic and drug offenses. These charges stem from a fatal collision on Route 30 in Fulton County, Pennsylvania, on August 28, 1998. Appellant was driving his girlfriend home when he started racing with another car. He drove approximately 70 to 75 miles per hour on Route 30 westbound in a section known as Scrub Ridge. That section of

the road is very steep and curvy. Appellant almost ran one car off the road and he illegally passed two trucks at high speed in a non-passing zone. After having passed those trucks, he entered into a sharp curve at approximately 70 miles per hour. This curve had a posted cautionary speed sign of 35 miles per hour. In the bend of that curve, he collided with Helen Ditha Mellott, who was driving her ten year old son, Lance, to the Boy Scouts in McConnellsburg. Mrs. Mellott died in the car crash. Lance was severely injured but survived the collision.

A trial by jury, which had been selected in Somerset County, was held on December 16, and 17, 1997. The jury found appellant guilty of third degree murder, involuntary manslaughter, aggravated assault of both Mrs. Mellott and Lance Mellott, homicide by vehicle, three counts of recklessly endangering another person, and possession of marijuana. Appellant was sentenced to 96 to 240 months for the third degree murder conviction and to 48 to 120 months on the aggravated assault conviction, to be served consecutively.

On March 5, 1998, appellant filed a notice of appeal. He filed a statement of matters complained of on appeal on March 17, 1998, alleging four errors by this court which are the subject of this opinion.

Discussion

1. *Insufficient Evidence to Support a Finding of Malice*

The first issue appellant raises in his statement of matters complained of on appeal is whether there was sufficient evidence at trial to support a finding of malice necessary to convict him for third degree murder and aggravated assault.

Murder in the third degree is any killing with malice which is not first degree murder (committed by intentional killing) nor second degree murder (committed during the perpetration of a felony). Pa.S.S.J.I. (Crim.) 15.2502(C); 18 Pa.C.S.A. §2501(a). A person commits aggravated assault when he attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly, or recklessly under circumstances

manifesting extreme indifference to the value of human life. 18 Pa.C.S.A. § 2702(a)(1).

Both offenses require the existence of malice by the perpetrator. Malice exists where there is a wickedness of disposition, hardness of hear, cruelty, recklessness of consequences, and a mind regardless of social duty. *Commonwealth v. Scales*, 437 Pa. Super. 14, 18, 648 A.2d 1205 (1994), *alloc. denied*, 659 A.2d 559. Malice may also exist where "a reasonable principal acts in gross deviation from a standard of reasonable care, failing to perceive that such actions might create a substantial and unjustifiable risk of death or serious injury." *Scales*, 437 Pa. Super. at 18; *Commonwealth v. Hanlon*, 539 Pa. 478, 653 A.2d 616 (1995). A finding of malice based on "recklessness of consequences" exists where the defendant is "found to have consciously disregarded an unjustified and extremely high risk that his actions might cause death or serious bodily injury." *Scales*, at 18.

The standard to be applied in reviewing the question whether there was sufficient evidence to find that the required malice existed is whether, viewing all the evidence admitted at trial in the light most favorable to the Commonwealth as the verdict winner, there is sufficient evidence to enable the jury to find every element of the crime beyond a reasonable doubt. *Commonwealth v. Rolan*, 520 Pa. 1, 5, 549 A.2d 553 (1988).

The evidence in this case involved the conduct of the defendant over a 2.5 mile stretch of highway commencing west of McConnellsburg and ending near the bottom of Scrub Ridge. The evidence the jury heard started with Nicki Parson, a school teacher, as she was pulling out onto Route 30 off the Old U.S. Route 30, with appellant's red Conquest in front of her and a black Camaro right behind her,

> We pulled out, and the red car just shot off like -- I mean, he was going fast. Until I got the divider there on Route 30, he wasn't nowhere to be seen.

(Day 1, N.T. P. 30, line 11)

Nicki Parson continued:

As I got right past the [concrete] divider [on 30] he [the black Camaro] had enough room to go around me and off and then he just passed me and then he was gone too.

(Day 1, N.T. P.30, line 15).

Nicki Parson testified about the speed of the vehicles:

Q. Now, do you know what your speed was at this point after turning and making the turn there at the intersection?
A. Well, probably -- I was probably getting ready to go about 55, 60 something like that because I don't really drive too slow either, I mean...

Q. And that's when the red car pulled ahead of you?
A. Yeah.

Q. Can you estimate about how long it was before he was out of your sight there?
A. I don't even have a guess. It wasn't very long.

(Day 1, N.T. p.30, lines 20-25; p. 31, lines 1-2).

Nicki Parson stated when asked if she noticed anything else about the way the vehicles were being driven:

No, just that they were -- they were just going really fast.

(Day 1, N.T. p.32, line 2.)

Still on the east side of Scrub Ridge, Janet Hann, a woman who lived 3 miles west of McConnellsburg testified that as she was getting ready to cross Route 30 to check on her garden:

A. ...When I got to the highway I saw two cars coming up the road going west. So I just stood along the edge of the road, and they just went whizzing up the road.

Q. Okay. Did you make any estimate of how fast they were going?

A. Oh, I have no idea of speed, but I do know that they were going faster than a policeman or ambulance or something

usually goes past my house in 35 years. I've seen a lot of them.

(Day 1, N.T. P. 34, lines 18-25; p. 35, line 1)

Janet Hann continued:

Q. Could you tell us whether you saw them or heard them first?
A. Well, I looked down the road and saw them coming.

Q. Okay.
A. And it just -- the red one was really flying, and the black one seemed like, you know, he didn't have as much power as the red one. He was trying to keep up but he couldn't.

(Day 1, N.T. P. 36, lines 7-14).

The next party encountered by the red Conquest and black Camaro racing on Route 30 was Jean Pepple[1], a local resident of Harrisonville who was traveling east into the Borough of McConnellsburg, and she testified:

Q. And as you were coming into McConnellsburg, did anything happen while you were en route?
A. Yes, I started up the mountain, and when I got off to where the trucks pull off to the left and I was on the right side, the road has a tendency to lean a little bit and the state at that time had blacktopped over right against the bank. And when I got right in that little turn here come this red car on my side of the road.

Q. When you say it was on your side of the road, what do you mean?
A. He was over half of his car on my side of the road, and I go over against the bank as far as I could go and my little minivan just shook.

(Day 1, N.T. p. 45, lines 7-19).

Jean Pepple continued:

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[1] Jean Pepple is erroneously referred to as "Jean Pebble" in the trial transcript.

Q. You've been driving a good while and you seem to drive that stretch of road a good bit. Based on your observation of that vehicle driving past you, that red vehicle in particular driving past you, did you make any judgment about his ability to negotiate the roadway further on down as --

A. Mentally thinking I thought to myself, that red car is never going to make the mountain at that high rate of speed.

(Day 1, N.T. p.47, line 8-16).

Jean Pepple, upon learning from the gas station attendant that an accident had occurred on the Scrub Ridge Mountain, stated to him:

A. I said to the boy there, I said what happened, and he said there's a bad wreck on Scrub Ridge, and I said I'll bet you it's a red car and a black car and that's all I said.

(Day 1, N.T. p. 48, lines 3-6).

Jean Pepple continued:

Q. When this red vehicle came past you, was there any attempt on his part to slow down or evade you?

A. No. He went past me just like phew.

(Day 1, N.T. p. 49, lines 19 - 21).

The next witness observing the red vehicle was Fred Skiles, who was driving his pickup truck just before the accident scene. He testified:

Q. Okay, there's been some testimony that there's some swerves and straight stretch, do you remember what part of road --?

A. I was in the -- I was on the straight stretch.

Q. You looked up in your rearview mirror and saw?

A. Red car.

Q. Where was that red car?

A. It was coming around probably the last turn when I saw it. It was on the other side of the road a third of the way.

Q. When you say the other side, the wrong lane?

A. Yes.

Q. Do you know what speed you were going about that time?

A. Probably 50, 55.

Q. What did this red car do then as it was coming -- well, yeah, what did this red car do?

A. It was coming on -- when I seen it I told my cousin and stuff, I said there's a red car coming. He's coming pretty fast. About that time he come around us.

Q. When you say he came around us, what do you mean?

A. He passed us.

Q. Which side did he pass you on?

A. On the wrong side.

(Day 1, N.T. p. 54, lines 1-24).

Mr. Skiles continued:

Q. After he passed you what did he do?

A. He was going toward the turn. I saw him hit the brake lights, his brakes, and as he went in the turn I could see the car start to hip around the turn.

Q. Did you hear anything at that point?

A. I heard tires howling, and then I heard a crash.

(Day 1, N.T. p. 55, lines 18 - 23).

The next witness was Dwight Skiles, a passenger in Fred Skiles' pickup truck, which was passed by the appellant immediately before the accident, and he testified:

A. Well, we was going down the mountain and the black truck was behind us, then the red car and then the red car passed and then when it went into the turn and all I heard was bang.

Q. You actually saw it before it passed you?
A. Yeah, I looked in the mirror too because I was a passenger.

Q. Now, as it passed you, were you able to form an opinion as to the speed that it was going?
A. Yeah, probably about 7- - 75, 80.

Q. The vehicle passed you and pulled in in front of you?
A. Yeah.

Q. There was a curve ahead of you?
A. Yeah.

Q. Were you able to estimate how far was the curve ahead when this vehicle pulled in in front of you?
A. Probably about 35, 40 yards.

Q. Did you hear anything at that point?
A. Yeah, I heard a bang. I heard the wheels howling, see debris flying.

Q. Now, did you see all of that at one time or did you hear something first?
A. I heard the bang, and I heard the tires howling and then I got around the turn, saw the debris flying.

Q. When you say debris, do you remember what kind of things were flying around?
A. Just seen metal.

(Day 1, N.T. p. 60, lines 11 - 25; p. 61, lines 1 - 13).

Andrew Taylor was driving right behind Fred Skiles' pickup truck on Route 30, and he testified:

Q. Do you recall the straight stretch there between the curvy parts there close to Jack Strait's house on Route 30 west of McConnellsburg?
A. Yes.

Q. Can you tell us what happened there?
A. Well, I was following Ted down the mountain next thing I know'd the red car flew by us.

Q. How long have you been driving?
A. 14 years.

Q. Have you had a chance to observe traffic pass you at various speeds?
A. Yes. We travel interstate all the time.

Q. Matter of fact, where are you working at now?
A. We just came from Dulles Airport.

Q. So the traffic down there travels fairly high rates of speed?
A. Yes.

Q. Vehicles pass you at those speeds?
A. Yes.

Q. Based on your experience driving and particularly in that kind of traffic, were you able to -- well, first of all, do you know how fast you were going?
A. Yeah, I -- 50,55 mile an hour.

Q. The vehicle that passed you, the red vehicle, did you form an opinion as to what speed he was going?
A. If I had to estimate I would say 70 to 80 mile an hour.

Q. Can you tell us about that? You were traveling down the road and this red car came up. Can you tell us what happened from that point on?
A. Well, it flew by, passed me and Ted and we went into the turn and I seen the car up on the guardrail, and you know, and Ted went on through and I seen debris flying. I seen his car drifting backward in our lane and I proceeded out around. I had to go to the left lane to get around.

(Day 1, N.T.P. 63, lines 4 - 25; p. 64, lines 1 - 14).

Mr. Taylor continued:

A. Well, when we came on the wreck we really slowed down, and the first thing I did was look in my mirror to make sure nobody was going to hit me.

Q. Did you see anything?
A. A. black Camaro.

Q. About how far back?
A. Three to four car lengths.

(Day 1, N.T. P. 65, lines 3 - 9).

Larry Seville, the driver of the black Camaro involved in this incident, testified:

Q. Which direction did you go?
A. Out on Route 30 to new Route 30.

Q. You went out Old Route 30 to new Rout 30?
A. Yes.

Q. Now, there's an intersection there then?
A. Yes.

Q. What did you do at the intersection?
A. I made a right on to new Route 30.

Q. There was a vehicle in front of you?
A. Yes.

Q. What did you do with that vehicle there?
A. I passed that vehicle after --

Q. Was there another vehicle in front of that?
A. Yes.

Q. Did you know who that vehicle was?
A. At the time, no.

Q. And you say did you have any idea of who it was?
A. Yes.

Q. Okay. Going up Scrub Ridge -- you would have then gone up Scrub Ridge?
A. Yes.

Q. Now going up Scrub Ridge do you remember what your speed was?

A. Probably close to 80 mile per hour.

Q. Now, this red vehicle?
A. Yeah.

Q. What was it doing?
A. It was ahead of me.

Q. It stayed ahead of you?
A. Yes.

Q. You crested the hill at Scrub Ridge?
A. Yes.

Q. What happened to the red car?
A. He was down through the turns or blind spots. You can't see the whole way down through here.

Q. So he was down through those curves, you didn't see him at that moment he went past?
A. Not after I crested the top, no.

Q. When did you next see him?
A. Where the straight stretch is where the two pickup trucks were.

Q. As that red vehicle approached those pickup trucks, did you see what he did?
A. Yeah, he proceeded to pass it.

Q. Did he make any attempt to slow down?
A. No.

Q. Just went on right past?
A. Yes.

Q. Did you have an estimate of his speed at that time?
A. No.

Q. Did you pass the trucks?
A. No.

Q. Why not?

A. Because there's a sharp turn right after the straight stretch.

Q. Okay, but why not, he did it? Why not, why didn't you do it?
A. You wouldn't take the turn.

Q. When you say you wouldn't make the turn, what would happen in your estimation?
A. At that rate of speed the turn is too sharp. The car wouldn't make it.

(Day 1, N.T. p. 69, lines 3 - 25; p. 70; and p. 71, lines 1 - 15).

Brooke Berkstresser, appellant's girlfriend who was riding with him as a passenger, testified:

Q. Where do you live? At that time where did you live?
A. Clear at the bottom of Scrub Ridge was a dirt road on the left. You could see it from where the accident happened. You can see the house up to the left.

Q. So it's clear down at the bottom of the Scrub Ridge on the left side and then you take a road back?
A. Yes.

(Day 1, N.T. P. 77, lines 18 - 25).

Brooke Berkstresser continued:

Q. At that time how long had you known Mr. Kling?
A. A year and a half.

Q. Were there other times he had taken you home?
A. Yes.

Q. Over Route 30?
A. Yes.

Q. Can you tell us about how many times a week while you were in school?
A. Two or three times a week.

Q. Two or three times a week. And that would be over Route 30 that he would take you?
A. Yes.

Q. Had he driven you in that red car before?
A. Yes.

(Day 1, N.T. p. 78, lines 7 - 20).

Corporal Benson, a corporal with the Pennsylvania State Police, was the investigating officer of this tragic incident and he testified that in the course of his investigation he personally measured the distance from where the appellant entered new Route 30 and the scene of the accident as being approximately two and one-half miles:

Q. For example, there's an intersection with Old Route 30 and by-pass 30 where there was an orange cone placed during our view today. Did you measure the distance from that point to the point of the collision?
A. Yes.

Q. What did you determine that was?
A. Two and one half miles.

(Day 1, N.T. p. 102, lines 5 - 11).

Corporal Benson further testified:

Q. Do you know how many curves there are from the top of Scrub Ridge down to the point of the collision?
A. Eight curves.

Q. From the top of Scrub Ridge do you know how far it is from the point where the collision occurred.
A. I do. I wrote it down here. Approximately just about a mile, one mile.

Q. You had said there were eight curves. What kind of signs are there regarding those curves or at the time when you did the investigation what kind of signs were there regarding those curves?
A. There are speed advisory signs. Also there's arrows pointing there's a sharp curve ahead

Q. The cautionary signs, do you remember what the speeds were for those curves?
A. Yes. There's five cautionary signs including one at the top of the mountain at the Scrub Ridge Diner. There were -- there are two 30 mile an hour cautionary signs, two 35 and one 40 mile an hour. There's also an eight percent grade sign for the next mile and a half going down the mountain.

Q. And the curve where the collision occurred, doe you remember what the cautionary sign indicated at that point?
A. The speed would have been 35 miles per hour.

Q. Was there a cautionary sign on the curve where the truck run-off is that Jean Pebble [sic] testified about?
A. Yes.

Q. Do you know what that said?
A. I believe it's 30 mile an hour, sir.

Q. And at that point on that curve where the truck run-off is that Jean Pebble [sic] testified, did you measure that distance from the point of the crash?
A. Yes.

(Day 1, N.T. p. 103, lines 8 - 25; p. 104, lines 1 - 14).

Corporal Benson also testified that his investigation revealed that the appellant was in the deceased's lane of travel on the curve.

THE COURT: Corporal Benson, one question. Mr. Kling's vehicle, was it in Mellott's lane of travel at the time of the accident or not?
A. Yes.

(Day 1, N.T. P. 115, lines 5 - 8).

Corporal Benson also testified that defendant passed the two vehicles in a no passing zone:

A. I assume you were talking about the straight-away where the defendant passed the Skiles vehicle it's a no passing zone.

(Day 1, N.T. p. 118, lines 1 - 3).

Corporal Benson further testified as to the motor vehicle violations that he charged the appellant with:

Q. Can you tell us what vehicle code violations were cited?
A. Homicide by vehicle, racing on highways, driving vehicle at safe speed, reckless driving, careless driving, no passing zones, limitations on driving on the left side of the roadway, driving on roadways laned for traffic, limitations on overtaking on the left.

(Day 1, N.T. p. 121, lines 23 - 25; p. 122, lines 1 - 4).

Corporal Benson also testified that approximately eleven days after the accident he charged the appellant with all the charges included in this case and that the appellant made a statement at the State Police Barracks. Corporal Benson read from his notes what defendant had said to him:

THE WITNESS: Okay. I was going too fast. He shifted back into fourth gear. Then it was done. Treated at Harrisburg General for concussion on Monday prior to accident. He was not scared of Seville. I knew him. I just was racing. He stated he can't remember anything after the accident. It says gas pedal did not stick to the floor. He said speedometer was broken since he bought the car. He bought the car on June 5, 1996 and he stated I was going at least 75 miles per hour.

(Day 1, N.T. p. 167, line 25; p. 168, lines 1- 8).

Corporal Hockenberry, an accident reconstructionist, testified he investigated the accident scene and that it was his opinion that appellant impacted the deceased in her lane of travel, and that he was traveling 69.77 miles per hour as he rounded the curve. (Day 2, N.T. p. 45 - p. 55). Corporal Hockenberry also testified that there were cautionary signs in the 2.5 miles of straight away preceding this curve, limiting the speed to 35 miles per hour.
(Day 2, N.T. p. 49, lines 24 - 25; p. 50, lines 1 50).

Lastly, Appellant Kling, who had some memory difficulties at trial, admitted that he had made the statement to Corporal Benson that he had been racing Seville, the driver of the black Camaro, immediately prior to this tragic incident:

Q. Now, you also told Corporal Benson that as you started up the mountain you looked back and saw a car and you told Brooke to hang on, didn't you tell him that?
A. Oh, yes.

Q. And then you told him you went down over the mountain and you also told him that you were not scared of Seville, you knew him, you were just racing? Didn't you tell him that.
A. If it's wrote on the paper I did.

Q. Okay, so what was written on the paper and you initialed it?
A. Yes.

Q. The piece of paper that Corporal Benson and what was written on that paper was what you had told him?
A. Yes, it was.

(Day 2, N.T. p. 94, lines 5 - 19).

He also testified that he had been driving at least 75 mph when he passed the two pickup trucks, but that he had slowed down prior to the sharp curve where the collision took place:

Q. And then you pulled around into the left lane and passed those two trucks?
A. Yes, I did.

Q. And about 75 -- at about 75 miles an hour?
A. I was overtaking the trucks, yes.

...

Q. What did you do after passing the trucks?
A. I passed the trucks and pulled back into the right lane and applied the brakes, and I applied the brakes pretty hard

actually and then left up on them again and I assumed that I could negotiate the turn.

(Day 2, N.T. p. 93, lines 6 - 10; lines 21 - 25).

In support of his argument that there was insufficient evidence to show that he possessed the required malice, appellant in his brief cites the case of *Commonwealth v. Hanlon*, 539 Pa. 478, 653 A.2d 616 (1995), where an intoxicated driver ran a red light, struck another vehicle and seriously injured a person I that vehicle. The Pennsylvania Supreme Court held that only serendipity, not intention, placed the victim in the path of the intoxicated driver. The Court found that it is necessary that the offensive act is performed under circumstances which almost assure that injury or death will ensue. *Id*, at 482. Because such circumstances did not exist in *Hanlon*, the Court held that there was not the malice required for aggravated assault. *Hanlon*, 539 Pa. at 483.

This court distinguishes the underlying case in that the *Hanlon* case involved the defendant's momentary reckless conduct by running one red light. In the underlying case, however, appellant was racing another car, thereby vastly exceeding the 55 mile per hour speed limit going up and down the mountain while encountering eight curves. Approximately eight-tenths of a mile before the accident scene, he ran Ms. Pepple's car off the side of the road by having half his car in her lane of travel. Even after this incident, which appellant testified that he does not recall, he chose to continue racing at excessive speed when he was only one mile from his girlfriend's home. Then he attempted to pass two pickup trucks on a quarter mile straight stretch of road in a no-passing zone just prior to turning into a severe curve with a cautionary sign indicating a maximum speed of 35 miles per hour. Whether you accept appellant's testimony that he was doing 70 - 75 miles per hour only when he passed the operators of the pickup trucks (but that he had slowed down just prior to the curve) or Corporal Benson's testimony that appellant's speed had been 69.77 miles per hour when he entered the curve, it is apparent that the appellant was acting and driving in a reckless and gross manner. Defense counsel made a big point of the fact that appellant applied his brakes just prior to entering the sharp curve.

However, the jury had to consider that this was a severe downhill slope, and that appellant had passed tow vehicles which were doing 55 miles per hour in a quarter mile stretch. The jury therefore could have properly concluded that appellant really did not have time to bring his vehicle under control prior to entering the curve. This was also established by the testimony of Corporal Benson, who investigated the accident scene and who testified that appellant was in the victim's lane of travel when the collision occurred.

Appellant argues, in his brief in support of his statement of matters complained of on appeal, that it is insufficient to base a finding of malice simply on the fact that appellant must have known that other cars traveled on Route 30. Appellant argues that in "modern cases," a finding of malice to support a finding of third degree murder in motor vehicle cases has been found only where a driver has been warned to stop driving. In support of this argument, appellant cites several cases. For example, in *Commonwealth v. Scales,* 437 Pa. Super. 14, 648 A.2d 1205 (1994), the defendant was speeding and ignored a stop sign, then almost collided with another vehicle in the intersection. A witness told defendant to slow down, but he told her to "shut up." *Scales,* Pa. Super. at 19. He kept going, then hit another vehicle and swerved onto the curb. Without slowing down, he then ran into some children on the sidewalk. *Id.* at 20. The court noted that "[w]hile the victims could not be foretold with certainty, the likelihood that someone would be injured or killed was highly predictable and certain. This was not a case where it can be said the appellant unintentionally caused the death of another person while violating the law." *Id.* The court found that Scales' behavior was so focused and deviant that malice could be implied. *Id,* at 22. The Superior Court furthermore made the following statement:

> When the actor so far crosses the line of reasonableness, concern for the safety of others and refuses to heed cautionary calls to desist, malice must be implied. Any person who attempts to emulate the driving patterns exhibited in any of the "French Connection," "Smokey and the Bandit" or "Beverly Hills Cops" films on city street crowded with children and others, the predictable victims of the irrational behavior, cannot escape having

> malice implied to his actions. Motor vehicles still outdistance firearms as the most dangerous instrumentality in the hands of irresponsible persons in our society today. *Id.*

Similarly, in *Commonwealth v. Pigg,* 391 Pa. Super. 418, 571 A.2d 438 (1990), *alloc. denied,* 581 A.2d 571, an intoxicated driver of a tractor-trailer was completely in the opposite lane and almost ran a car in that lane off the road, then ran over a curb and hit a pole. When he stopped, a witness asked him not to continue, but he did anyway and caused a fatal collision. *Pigg,* 391 Pa. Super. at 421-422. The court found that "[p]rior to the fatal accident, Pigg drove several other vehicles off the road and ignored a fellow driver's plea to stop driving. On these facts, there can be no question that Pigg knew the danger he posed to others, yet wilfully pursued a course of conduct that continued to subject them to that danger...Accordingly, we find that the evidence of Pigg's conduct was sufficient to demonstrate the wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty that constitute the required element of malice." *Id,* at 428.

In the underlying case, neither Brooke Berkstresser, the passenger in appellant's car, nor anyone else told appellant to slow down or to stop driving. However, that fact alone does not mean that malice did not exist. In both *Scales* and *Pigg,* the importance of a warning to stop driving lies in the fact that such warning gave the driver notice of his bad driving behavior. Yet in both cases, the driver continued on, despite such knowledge. On that basis, the courts found that malice existed.

In the underlying case, no one may have told appellant to slow down, but there were other factors which put appellant on notice that he was driving too fast and dangerously. He almost ran someone off the road by driving in the wrong lane. This alone put appellant on notice that he was driving too fast to safely negotiate the stretch of road he was driving on. Furthermore, appellant was very familiar with the road, because he had driven his girlfriend home on that road at least two or three times a week, and he knew that a sharp turn was coming up. He nevertheless continued racing, and vastly exceeded the posted speed limit of 55 miles per hour to pass two other vehicles in a no-passing zone. He entered

into the turn at almost 70 miles per hour even though it had a posted sign for 35 miles per hour. These facts show that appellant knew the danger he posed to others, yet he wilfully continued the course of conduct that subjected others to that danger.

As the court said in *Scales,* it could not be said with certainty who appellant's victims would be, but the likelihood that someone would be injured or killed was highly predictable and certain. this was not a case where it can be said that appellant unintentionally caused the death of another person while violating the law. Appellant was driving his girlfriend home, which was only a mile away from the accident scene. This was simply not a situation where there was an emergency or a momentary violation of the traffic laws. Instead, appellant engaged in a course of conduct of excessive speed and dangerous passing maneuvers over a 2.5 mile stretch of road which he knew to be steep and curvy, even after he almost ran someone off the road. As in *Scales,* appellant's behavior in the underlying case was so deviant and he crossed so far over the line of reasonableness and concern for the safety of others that the jury could properly find that appellant possessed the wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty necessary to find the existence of malice. because he continued his reckless driving, appellant consciously disregarded an unjustified and extremely high risk that his actions might cause death or serious bodily injury to someone else on the road. Therefore, it is this court's opinion that there was sufficient evidence to enable the jury to find that malice existed and to rightfully convict appellant of third degree murder and aggravated assault.

2. *Failure to Give Requested Jury Instructions*

Secondly, appellant alleges that this court erred by failing to give his requested jury instructions numbers 6, 7,8, 9 and 10. Appellant argues that this court should have allowed the jury to hear all of the facts surrounding this case, including the fact that appellant himself as well as his passenger also might have been killed in the collision. Appellant argues that his requested jury

instructions would have asked the jury to consider each of the surrounding circumstances of the fatal accident.

a. *Requested Charge No. 6*

Appellant's requested jury charge No. 6 states as follows:

THIRD DEGREE MURDER

1. You may find John Kling guilty of third degree murder if you are satisfied that the following three elements have been proven beyond a reasonable doubt:

First, that Helen Mellott is dead;
Second, that John Kling killed her; and
Third, that the killing was with malice.

2. The word *malice* as I am using it has a special legal meaning. It does not mean simply hatred, spite or ill-will. Malice is a shorthand way of referring to three different states that the law regards as being bad enough to make a killing murder. Thus a killing is with malice if John Kling acts with first, an intent to kill or second, an intent to inflict serious bodily harm or third, a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences and a mind regardless of social duty, indicating an unjustified disregard for the probability of death or great bodily harm and an extreme indifference to the value of human life.

3. To be reckless the offensive act must be performed under circumstances which almost assure that injury or death will ensue. The recklessness must, therefore, be such that life-threatening injury is essentially certain to occur. This state of mind is, accordingly, equivalent to that which seeks to cause injury.

4. To be provided after the Commonwealth provides the Commonwealth's Case In Chief.

5. You must examine these facts and circumstances to determine if John Kling consciously disregarded an

unjustified and extremely high risk that his actions would essentially be certain to cause a life-threatening injury or death.

This court denied the requested charge and instead gave the standard charge for third degree murder, as provided under Pa.S.S.J.I. (Crim.) 15.2502C. (*See* Day 2, N.T. p. 156 - '57). This charge is substantially the same as appellant's requested charge. The only difference lies in paragraph (3) of the requested charge, which includes language about the recklessness required to find malice. Appellant wished to have included language that the "offensive act must be performed under circumstances which almost assure that injury or death will ensue" and that the recklessness must be such that "life-threatening injury is essentially certain to occur." Appellant bases the inclusion of this language on *Commonwealth v. Hanlon, supra.* In *Hanlon,* the Pennsylvania Supreme Court specifically noted that mere recklessness is not sufficient to support a conviction for aggravated assault. *Hanlon,* 539 Pa. at 482. The court then continued to explain that a finding of recklessness requires that the offensive act must be performed under circumstances which almost assure that injury or death will ensue. *Id.* However, the Supreme Court used this language merely to explain the concept of "recklessness" and did not in any way deviate or change its accepted meaning. This court finds that the standard charge sufficiently explained to the jury what constitutes recklessness under the governing law in the following language:

> A finding of malice based on a recklessness of consequence requires the defendant be found to have consciously disregarded an unjustified and extremely high risk that his actions might cause death or serious bodily injury. Mere recklessness is not sufficient to establish the requisite malice for third degree murder.

(Day 2, N.T. p. 157).

Therefore, the additional language requested by appellant was unnecessary.

As far as appellant's claim that the jury was not instructed to consider all the circumstances surrounding the fatal collision, this is simply not true. This court instructed the jury "[m]alice may

be inferred from considering the totality of the circumstances." (Day 2, N.T. p. 157).

b. *Requested Charge No. 7*

Appellant's requested charge No. 7 provides as follows:

AGGRAVATED ASSAULT-CAUSING SERIOUS BODILY INJURY

The defendant has been charged with the crime of aggravated assault. In order to find the defendant guilty of aggravated assault you must find that each of the elements of the crime has been established beyond a reasonable doubt. There are three elements:

1. That the defendant caused serious bodily injury to Helen Ditha Mellott as to Count No. 2.

2. That the defendant acted intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life. A person acts *intentionally* with respect to serious bodily injury when it is his conscience [sic] object or purpose to cause such injury. A person acts *knowingly* with respect to serious bodily injury when he is aware that it is practically certain that his conduct will cause such a result. A person acts *recklessly* with respect to serious bodily injury under circumstances manifesting an extreme indifference to the value of human life when he can reasonably anticipate that serious bodily injury or death will be the likely and logical consequence of his actions. A person acts recklessly when he acts under circumstances which almost assure that serious bodily injury or death will occur. The recklessness must, therefore, be such that life threatening injury is essentially certain to occur. This state of mind is, accordingly, equivalent to that which seeks to cause injury. There must be an element of deliberation or conscious disregard of a threat necessarily pose to human life by his conduct.

If, after considering all of the evidence you find that the Commonwealth has established each of these elements

beyond a reasonable doubt, then you should find the defendant guilty of aggravated assault. Otherwise, you must find the defendant not guilty of aggravated assault.

This court gave the jury standard jury instruction 15.2702B. (Day 2, N.T. p. 157-159). The language of the standard charge is virtually identical to appellant's requested charge. There is a slight difference between the standard charge and the instruction actually given by this court in the language dealing with recklessness. (Day 2, N.T. p. 158, lines 16 - 25; p. 159, lines 1-3). However, the language of the instruction actually given on recklessness closely follows and is virtually identical to the language requested by appellant in instruction On. 7.

Furthermore, this court did instruct the jury to consider all the circumstances when it told the jury "[i]f, after considering all the evidence you find the Commonwealth has established each of these elements beyond a reasonable doubt, you should find the defendant guilty of aggravated assault, otherwise, you must find the defendant not guilty of aggravated assault." (Day 2, N.T. p. 159). Because this court gave a jury instruction substantially the same as appellant's requested charge, his argument is without merit.

c. *Requested Charge No. 8*

Appellant's requested point for charge No. 8 states the following:

AGGRAVATED ASSAULT-CAUSING SERIOUS BODILY INJURY

The defendant has been charged with the crime of aggravated assault. In order to find the defendant guilty of aggravated assault you must find that each of the elements of the crime has been established beyond a reasonable doubt. There are three elements:

1. That the defendant caused serious bodily injury to Lance Mellott as to Count No. 3.

2. That the defendant acted intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life. A person acts *intentionally* with respect to serious bodily injury when it is his conscience [sic] object or purpose to cause such injury. a person acts *knowingly* with respect to serious bodily injury when he is aware that it is practically certain that his conduct will cause such a result. A person acts *recklessly* with respect to serious bodily injury under circumstances manifesting an extreme indifference to the value of human life when he can reasonably anticipate that serious bodily injury or death will be the likely and logical consequence of his actions. A person acts recklessly when he acts under circumstances which almost assure that serious bodily injury or death will occur. The recklessness must, therefore, be such that life threatening injury is essentially certain to occur. This state of mind is, accordingly, equivalent to that which seeks to cause injury. There must be an element of deliberation or conscious disregard of a threat necessarily pose to human life by his conduct.

If, after considering all of the evidence you find that the Commonwealth has established each of these elements beyond a reasonable doubt, then you should find the defendant guilty of aggravated assault. Otherwise, you must find the defendant not guilty of aggravated assault.

This charge is identical to appellant's requested point for charge No. 7, except that it applies to Lance Mellott rather than Helen Mellott. This court gave one instruction on aggravated assault, inserting the names of both Helen and Lance Mellott. (Day 2, N.T. p. 158, line 2-3). This court did not want to add any confusion to the jury's comprehension of the already lengthy jury instructions by giving them two identical instructions for two different victims. As for the contents of the instruction, the court's basis for it refusal to give appellant's requested charge No. 8 is the same as stated above for requested charge no. 7.

Therefore, this court finds appellant's argument to be without merit.

d. *Requested Charge No. 9*

Appellant's requested charge No. 9 provides as follows:

INVOLUNTARY MANSLAUGHTER

1. A defendant commits involuntary manslaughter when he directly causes the death of another person by reckless or grossly negligent conduct.

2. You may find the defendant guilty of involuntary manslaughter if you are satisfied that the following three elements have been proven beyond a reasonable doubt:

First, that Helen Mellott is dead;
Second, that the defendant's conduct was a direct cause of her death; and
Third, that the defendant's conduct was reckless or grossly negligent.

3. A defendant's conduct is reckless when he is aware of an consciously disregards a substantial and unjustifiable risk that death will result from his conduct, the nature and degree of the risk being such that it is grossly unreasonable for him to disregard it. A defendant's conduct is grossly negligent when he should be aware of a substantial and unjustifiable risk that death will result from his conduct, the nature and degree of the risk being such that it is grossly unreasonable for him to fail to recognize the risk. In deciding whether the defendant's conduct was reckless or grossly negligent you should consider all relevant facts and circumstances including the nature and intent of the defendant's conduct and the circumstances known to him. The defendant was not intoxicated or under the influence of a controlled substance at the time of the accident nor has it been shown that in the present case you

may find malice beyond a reasonable doubt but you must consider all the evidence regarding his words, conduct and the attending circumstances that may show his state of mind including the manner in which his car was driven over a sustained period of time, whether or not John Kling was told to slow down, whether or not John Kling was legally intoxicated at the time of the accident, whether or not John Kling was able to know his exact speed, whether or not John Kling assumed he or his passenger would not be seriously injured in any collision that may take place, and whether or not John Kling knew that there was a car coming up the mountain in that fatal curve when he entered the fatal curve from his end.

4. As the definitions I just gave you indicate, the recklessness or gross negligence required for involuntary manslaughter is a great departure from the standard of ordinary care. It is a departure which shows a disregard for human life or an indifference to the possible consequences of one's conduct.

5. Compared with recklessness and gross negligence, the malice required for third degree murder is a more blameworthy state of mind. The essence of malice is an extreme indifference to the value of human life.

6. The evidence you should consider when deciding whether the defendant is guilty of involuntary manslaughter includes [sic]

This court gave the jury the standard charge on involuntary manslaughter as provided for in Pa.S.S.J.I. (Crim.) 15.2504. (Day 2, N.T. p. 159-161). This standard instruction is virtually identical to appellant's requested instruction, except for the language in paragraph 3 regarding the specific circumstances the jury should consider in determining appellant's state of mind, such as his intoxication, whether or not he was able to know his exact speed, and whether he assumed that appellant himself and

his passenger would be seriously injured[2]. This requested language does not appear in the standard instruction, and appellant did not provide any authority for the inclusion of this language in his requested instructions. Furthermore, this court found the language to be redundant, because the jury was instructed to consider all the circumstances of the case in the following language:

> In deciding the defendant's conduct was reckless or grossly negligent you should consider all relevant facts and circumstances including the nature and intent of the defendant's conduct and the circumstances known to him.

(Day 2, N.T. p. 160, line 20 -24).

Thus, this argument is also without merit.

e. *Requested Charge No. 10*

Appellant's requested point for charge No. 10 states the following:

VEHICULAR HOMICIDE

1. The defendant is charged with vehicular homicide while engaged in violating Section 3306, 3309 (1) or 3361 of the Vehicle Code.

Section 3306 of the Vehicle Code provides that no vehicle shall be driven on the left side of the roadway when approaching a curve or upon a curve in the highway where the driver's view is obstructed within such distance as to create a hazard in the event another vehicle might approach from the opposite direction.

Section 3309(1) of the Vehicle Code provides that, whenever any roadway has been divided into two or more clearly marked lanes for traffic, then a

[2] This court will specifically deal with the circumstance regarding whether appellant himself could have been injured or killed hereafter under subsection L, as appellant seems to have raised this separately.

vehicle shall be driven as nearly as practicable entirely within a single lane, and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety.

Section 3361 of the Vehicle Code provides that not person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing, nor at a speed greater than will permit the driver to bring his vehicle to a stop within the assured clear distance ahead. Consistent with the foregoing, every person shall drive at a safe and appropriate speed when approaching and going around a curve, when traveling upon any narrow or winding roadway, and when special hazards exist by reason of weather or highway conditions.

2. In order to find the defendant guilty of vehicular homicide you must be satisfied that the following four elements have been proven beyond a reasonable doubt:

First, that the defendant committed a violation of Section 3309(1) or 3361 upon a (highway) or (traffic way),

Second, that, under the circumstances, the defendant acted recklessly or with gross negligence, by driving in a manner that violated Section 3309(1) or 3361;

Third, that Helen Ditha Mellott is dead; and

Fourth, that the defendant's violation of Section 3309(1) or 3361 was a direct cause of death.

3. A defendant acts "recklessly" by driving in a manner that violated the Vehicle Code when he consciously disregards a substantial and unjustifiable risk that his driving will cause death, the nature and degree of the risk being such that it is grossly unreasonable for him to disregard it.

4. A defendant acts " with gross negligence" by driving in a manner that violated the Vehicle Code when he should be aware of a substantial and unjustifiable risk that his driving will cause death, the nature and the degree of risk being such that it is grossly unreasonable for him to fail to recognize the risk. In deciding whether the defendant's driving was reckless or grossly negligent you should consider all relevant facts and circumstances, including the nature and intent of the defendant's driving and the circumstances known to him.

5. The Crime of vehicular homicide also requires that the violation of the Vehicle Code be at least part of what makes the defendant's driving reckless or grossly negligent and dangerous to human life and that the violation be a direct cause of death.

6. You must agree that the same motor vehicle violation was the direct cause of death.

This court gave the jury the standard instruction on vehicular homicide. Pa.S.S.J.I. (Crim) 17.3732; Day 2, N.T. p. 161-163. Paragraphs 1 through 5 of appellant's requested charge No. 10 are identical to the standard instruction. Paragraph 6 of appellant's requested charge No. 10 is the only language not included in the standard charge and not given by this court. This court did not include that language because it was redundant. Paragraph 6 states that "[y]ou must all agree that the same motor vehicle violation was the direct cause of death." This instruction is adequately covered in paragraph 2 of the given instruction, which provided that the jury had to find that "the defendant's violation of Section 3309 (1) or 3361 was a direct cause of her death." (Day 2, N.T. p. 162, lines 43-45). Thus, appellant's argument that this court erred in failing to give his requested charge is without merit.

f. *Error Because Jury Did Not Hear Evidence or Was Instructed on Appellant's Injuries*

As to appellant's argument in his brief that this court should have allowed the jury to hear all the facts surrounding this case, including the fact that appellant himself as well as his passenger also might have been killed, this court is uncertain what appellant is referring to. Because appellant makes this argument as part of his challenge to the trial court's failure to give his requested points for charge, this court believes appellant is referring to the portion of appellant's requested point of charge No. 9, which would have instructed the jury that in determining whether malice existed, the jury had to consider, as one of the factors, whether or not appellant assumed he or his passenger would not be seriously injured. However, it is also possible that appellant is referring to the fact that this court would not admit evidence regarding the extent of appellant's injuries. Appellant's counsel sought to introduce this evidence to show that appellant's recklessness was "reduced" by the fact that appellant, and his girlfriend, could have been killed themselves. (Day 2, N.T. p. 29, lines 21 - 25).

Either way, this court finds appellant's argument to be without merit. Appellant has not provided any authority, neither at trial nor in his brief, for the proposition that where a perpetrator of an offense risks injury or death to himself, he therefor could not have had the required malice. To the contrary, in the *Scales* and *Pigg* cases cited above, the court found that malice existed in the defendants' conduct, even through their manner of driving was such that they could have easily been hurt or killed themselves.

Because this court found the fact that appellant could have been injured or killed himself to be irrelevant to the question of whether appellant possessed the required malice at the time of the offense, this court did not admit the evidence regarding his own injuries, nor instruct the jury on this point. For these reasons, this court finds appellant's argument to be without merit.

3. *Presence of Victim's Attorney at the Prosecution's Table*

Appellant's third argument is that this court erred in allowing an attorney hired by the family of the victims, the Mellotts, to sit at the Commonwealth's table. appellant argues that this raises an issue of illegal prosecution by a civilian who is not bound by the same ethical requirements as a prosecutor under the Rules of

Professional Responsibility, that it "smacks of ill-will of the Mellott family," and that it is "sure that the Trial Court and Commonwealth were aware of a fact not known to John Kling."

First of all, appellant candidly admits that there is no case law on point for this issue. Without any further authority to rely on, this court does not see what error has been made by allowing the victims' attorney to sit at the prosecution's table. The victims' attorney did not, at any time, ask any questions or participate in the trial or other proceedings. Thus, the accusation of improper prosecution by a civilian is without merit. furthermore, at no time did the attorney make his identity known to the jury, no did the jury, which was brought in from Somerset County, know who he was. This court therefore does not see how this "smacked of ill-will" by the Mellott family, or how it had any prejudicial effect on the trial proceedings. Appellant furthermore has not alleged how he was prejudiced by allowing the victims' attorney to be present and to sit at the Commonwealth's table, nor has this court upon independent review found any prejudice to appellant. Lastly, this court does not know what appellant is referring to with his statement that "it is sure that the Trial Court and Commonwealth were aware of a fact not known to John Kling." Any inference that this court had knowledge of facts which were not disclosed to appellant is preposterous and unfounded. Therefore, this argument is without merit.

4. *Refusal to Allow Appellant to Present Evidence of His Own Medical Condition*

Lastly, appellant argues that this court erred by sustaining the Commonwealth's objection to appellant's attempt to introduce evidence about his own injuries and hospitalization on the ground that appellant was merely attempting to gain the jury's sympathy.

This alleged error is apparently based upon the following testimony given at trial:

Q. The day after you were in the Franklin County Prison were you still in your wheelchair?
A. Yes.

Q. That next day, September 19, were you taken out of Franklin County Prison?
A. Yes, I was.

Q. How?
A. By ambulance.

Q. Where were you taken by ambulance?
A. Conemaugh Valley Hospital

Q. Did they take you back by ambulance at Franklin County Prison after you were at Conemaugh?
A. Yes

Q. The same day?
A. Same day, yes.

Q. Did Franklin County authorities ever take you to the hospital again?
A. Yes, they did.

Q. How was that done?
A. Sheriff's automobile, car.

Q. What seat were you in?
A. Back seat.

Q. And how was that trip?
MR. HARVEY: I'm going to object

THE COURT: How's this relevant?

MR. HARVEY: This is just for sympathy, Your Honor.

THE COURT: How's it relevant?

MR. DEVECKA: The relevance is to show the bias of the Commonwealth in leaving him in the Franklin County Prison in a wheelchair.

THE COURT: Objection sustained. The jury is instructed to disregard what his trip to Conemaugh and so forth does not have anything to do directly with what caused this accident.

(Day 2, N.T. p. 81-82).

In support of his argument that this court erred in sustaining the Commonwealth's objection, appellant summarily refers in his brief to *Commonwealth v. Green*, 251 Pa. Super. 318, 380 A.2d 798 (1977). However, after having read that case, this court finds that it is absolutely not on point on this issue. *Green* deals with the question of whether a portion of a medical report in a rape case should have been excluded because it constituted a medical opinion rather than merely evidence of the fact that hospitalization had taken place, what treatment has been prescribed and what symptoms existed. *Green*, 251 Pa. Super. at 322. This was a question to be decided under the Uniform Business Records as Evidence Act, which deals with the evidentiary issue of whether certain records may be admitted into evidence as business records. 42 Pa.C.S.A. §6108 *et seq.* In the underlying case, there is no evidentiary issue of whether appellant could introduce a hospital record to show his hospitalization under the business records rule. Appellant's reliance on the *Green* case to support his argument that testimony about his hospitalization is admissible is clearly mistaken.

Additionally, before any evidence may be admitted, it must be relevant. Relevant evidence has been defined as evidence which tends to establish some fact material to the case, or which tends to make a fact at issue more or less probable. *Commonwealth v. Scott*, 480 Pa. 50, 389 A.2d 79 (1978). Appellant in his brief has not provided any argument as to shy the evidence regarding appellant's hospitalization is relevant to a fact material to the case. This court can therefore rely only on the reason given by appellant's counsel at the time the objection was made by the Commonwealth, namely to show the bias of the Commonwealth in leaving him in Franklin County Prison in a wheelchair. This court found this not to be relevant to establish any fact material to the case, not to make a fact at issue more or less probable. Because appellant has not provided this court with any other authority to decide otherwise, this court stands on its ruling that the testimony was irrelevant and therefore properly excluded.

A copy of the presentence report is attached to this opinion and made a part of the record.

Wherefore, it appears to this court that all matters complained of on appeal are entirely without merit, and therefore this court respectfully request the Superior Court to dismiss the appeal.