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Sleeping Drivers in Tort Law

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plaintiff examined when the court, in its discretion, considers this to be necessary.²⁷

While a few jurisdictions continue to deny courts the power to order the examination of a plaintiff in a personal injury action,²⁸ jurisdictions adhering to the majority view, have begun to extend the principle of granting the examination. The extent to which some jurisdictions have gone is illustrated in *Friedrichsen v. Niemothka*.²⁹ A father sued for medical expenses and loss of services of an infant injured in an automobile accident allegedly attributable to the defendant's negligence. The defendant moved for an order requiring the child to submit to a neurological examination. This motion was granted even though the infant was *not* a party to the action.

The rule denying courts the power to order a physical examination, though once considered sound,³⁰ is no longer tenable. The finder of fact, whether judge or jury, must determine the merits of the plaintiff's case and to do this the best evidence available should be put before it. Any competent evidence which will better apprise the court and the defendant of the nature and extent of the plaintiff's cause should be considered. The best evidence available is often that which is obtainable by physical examination of the plaintiff, and when such examination is deemed necessary courts should not be fettered by archaic theories which maintain that physical examination amounts to a trespass to the person.

RICHARD J. TAVSS

SLEEPING DRIVERS IN TORT LAW

Until the late 1962 decision of the Supreme Court of Wisconsin in *Theisen v. Milwaukee Auto. Mut. Ins. Co.*,¹ the rule had seemed to be well-settled that falling asleep at the wheel is sufficient evidence to establish a *prima facie* case of negligence.² *Theisen* went one step

²⁷*Virginia Linen Serv., Inc. v. Allen*, 198 Va. 700, 96 S.E.2d 86 (1957). The court added that it may require counsel to suggest or furnish a list of qualified physicians from which the court might choose one to perform the examination.

²⁸*Supra* note 7.

²⁹71 N.J. Super. 398, 177 A.2d 58 (1962).

³⁰*Supra* note 8.

¹18 Wisc. 2d 91, 118 N.W.2d 140 (1962).

²*Whiddon v. Malone*, 220 Ala. 220, 124 So. 516 (1929); *Pacific Employers Ins. Co. v. Morris*, 78 Ariz. 24, 275 P.2d 389 (1954); *Bushnell v. Bushnell*, 103 Conn. 583, 131 Atl. 432 (1925); *Gendron v. Gendron*, 144 Me. 347, 69 A.2d 668 (1949); *Cox v. Babington*, 166 Neb. 609, 90 N.W.2d 64 (1958); *Savard v. Randall*, 103 N.H.

further and held that falling asleep at the wheel constitutes negligence as a matter of law.

In this direct action against the insurance company, authorized by Wisconsin law, by a guest to recover damages for personal injuries caused by his host, the plaintiff established that the operator had fallen asleep at the wheel.³ The trial court excluded testimony relating to the driver's physical activities on the evening of the accident, which the defendant offered with a view to proving that the driver went to sleep, unintentionally, from physical exhaustion. After refusing the plaintiff's motion for a directed verdict on the issue of the driver's negligence, the trial court applied the prevailing doctrine and submitted the issue to the jury.

The jury found the driver causally negligent. On appeal the Supreme Court of Wisconsin held "that falling asleep at the wheel is negligence as a matter of law because no facts can exist which will justify, excuse, or exculpate such negligence"⁴ although the court reversed and remanded on another point.

There are two significant limitations on the scope of this decision: (1) The fact of falling asleep establishes only ordinary negligence as a matter of law. Gross or wanton negligence requires additional proof;⁵ (2) the decision does not cover loss of consciousness as distinguished from going to sleep. The court excluded from the "negligence as a matter of law" rule "those exceptional cases of loss of consciousness resulting from injury inflicted by an outside force or fainting or heart attack, . . . or other illness which suddenly incapacitates the driver of an automobile and when the occurrence of such disability is not attended with sufficient warning or should not have been reasonably foreseen."⁶

As stated previously, the generally accepted view in the United States⁷ is that the mere fact of going to sleep at the wheel justifies

234, 169 A.2d 276 (1961); *Baird v. Baird*, 223 N.C. 730, 28 S.E.2d 225 (1943); *Wisconsin Natural Gas Co. v. Employers Mut. Liab. Ins. Co.* 263 Wis. 633, 58 N.W.2d 424 (1953).

³There was no evidence that the driver had a fainting spell, epileptic seizure, or other unforeseeable attack which caused him to lose consciousness.

⁴118 N.W.2d at 144. A new trial was granted because of the trial court's improper instructions which cast the question of negligence in assumption of risk language and consequently could have confused the jury.

⁵See note 8, *infra*.

⁶118 N.W.2d at 144. According to the overwhelming weight of authority an operator is not, under these circumstances, liable for negligence. See *Shirks Motor Express v. Oxenham*, 204 Md. 626, 106 A.2d 46 (1954); *Holmes v. McNeil*, 356 Mo. 846, 204 S.W.2d 303 (1947); *Whelpley v. Frye*, 199 Ore. 263, 263 P.2d 295 (1953); *Keller v. Wonn*, 140 W.Va. 860, 87 S.E.2d 453 (1955).

⁷See cases cited note 2, *supra*.

an inference of ordinary negligence⁸ sufficient to establish a prima facie⁹ case. The prima facie rule is well-established in Virginia.¹⁰ Such negligence is predicated on the failure of the driver to conform to a socially acceptable standard of due care,¹¹ and although the language of the opinions varies somewhat, the holdings are the same. When an automobile operator falls asleep at the wheel, some courts speak in terms of "inference" or "permissible inference" of negligence;¹² other courts speak of a rebuttable presumption¹³ of negligence.¹⁴ Initially, the plaintiff has the burden of producing some evidence that the driver fell asleep. If the evidence, whether direct or by permissible inference, tends to establish that fact, such evidence, if unrebutted, justifies a verdict for the plaintiff.¹⁵ Some jurisdictions will apply the evidence rule of *res ipsa loquitur*¹⁶ when plaintiff cannot prove the fact of the driver's falling asleep, even by permissible inference, and

⁸Both the "inference" rule and the matter of law rule apply only to ordinary, as distinguished from gross or wanton, negligence. *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (Sup. Ct. 1955); *Bryan v. Bryan*, 59 So. 2d 513 (Fla. 1952); *Ansback v. Greenberg*, 256 S.W.2d 1 (Ky. 1952); *Belletete v. Morin*, 322 Mass. 214, 76 N.E.2d 660 (1948); *Butine v. Stevens*, 319 Mich. 176, 29 N.W.2d 325 (1947).

⁹The term 'prima facie evidence' or 'prima facie case' is used in two senses, and it is often difficult to detect which of these is intended in the judicial passage in hand." 9 Wigmore, Evidence § 2494 (3d ed. 1940). The phrase may indicate the point at which the opponent will have a verdict directed against him if he does not discharge the duty of producing evidence which has shifted to him. Acting in this fashion the term is used as equivalent to the notion of a presumption. In the other sense in which it is used the phrase means that the proponent has introduced evidence sufficient to justify an inference of negligence by the jury. *Id.* § 2494. 33 Words and Phrases 543-556 (Perm. ed. 1940) contains an excellent examination of both usages.

¹⁰*Newell v. Riggins*, 197 Va. 490, 90 S.E.2d 150 (1955); *Lipscomb v. O'Brien*, 181 Va. 471, 25 S.E.2d 261 (1943); *Jones v. Pasco*, 179 Va. 7, 18 S.W.2d 258 (1942); *Lee v. Moore*, 168 Va. 278, 191 S.E. 589 (1937).

¹¹*Prosser, Torts* § 32 (2d ed. 1955); 6 U. Pitt. L. Rev. 308 (1940); *Annot.*, 28 A.L.R.2d 12 (1950).

¹²Note 2 *supra*. See also *Annot.*, 28 A.L.R. 2d 12 (1950); *Annot.*, 138 A.L.R. 1385 (1942).

¹³*Diamond State Tel. Co. v. Hunter*, 41 Del. 336, 21 A.2d 286 (1941).

¹⁴This rule is based on the fact that "in a normal human being sleep does not come without warning. Before sleep there is drowsiness and before drowsiness there is usually great fatigue or at least a desire to sleep." *Bernosky v. Greff*, 350 Pa. 59, 38 A.2d 35, 36 (1944). For the best discussion of the medical basis for this rule see *Bushnell v. Bushnell*, *supra* note 2, and *Kaufman & Kantrowitz, The Case of the Sleeping Motorist*, 25 N.Y.U.L. Rev. 362 (1950); In addition see *Kaplan v. Kaplan*, 213 Iowa 646, 239 N.W. 682 (1931); *Paulson v. Hanson*, 226 Iowa 858, 285 N.W. 189 (1939); *Rice-Stix Dry Goods Co. v. Self.*, 20 Tenn. App. 498, 101 S.W.2d 132 (1935).

¹⁵*Brownell v. Freedman*, 39 Ariz. 385, 6 P.2d 1115 (1935); *Krantz v. Krantz*, 211 Wis. 249, 248 N.W. 155 (1933). See also note 2 *supra*.

¹⁶*Harper, Torts* § 77 (1933); *Prosser, Torts* § 42 (2d ed. 1955).

when the accident-causing instrumentality is within the exclusive control of the defendant, and the accident is of such a nature that it would not occur in the ordinary course of events if proper care were used.¹⁷ So in such a jurisdiction an inference of negligence can be drawn by the jury without plaintiff's proving, or even alleging, that the operator fell asleep.

At this point the two views— *res ipsa loquitur* and "inference" of negligence—become identical. The burden of producing evidence shifts to the defendant, and if he attempts in any way to exonerate himself, the jury must determine whether the inference of negligence has been sufficiently rebutted.¹⁸

Although the "inference" rule has predominated in the courts, some writers have concluded that the unconscious driver should be absolutely liable,¹⁹ and "must, at [his] . . . peril, stay sane and conscious . . ." ²⁰ "There is then, an ultra-hazardous activity—not that of driving an automobile, but that of remaining constantly capable of driving."²¹ To substantiate this contention one writer had made an analogy to a wild animal whose owner is absolutely liable for any damage it may do. Following this analogy, "the driver of an automobile knows that if he loses control, the heretofore 'domesticated' engine becomes a 'wild' one, likely to do considerable harm."²²

Where sleeping drivers are involved the ultrahazardous activity view and the "negligence as a matter of law rule" would be coincident. But the pervasiveness of the ultrahazardous doctrine would include within its scope any unconscious driver even though his unconsciousness may be the result of a heart attack or fainting, etc.²³

¹⁷*Druzanich v. Criley*, 19 Cal. 2d 439, 122 P.2d 53 (1942); *Thompson v. Kost*, 298 Ky. 32, 181 S.W.2d 445 (1944); *Collins v. McClure*, 143 Ohio St. 569, 56 N.E.2d 171 (1944).

¹⁸If the defendant makes no effort to introduce some evidence of due care and the only legitimate inference to be drawn is that the operator was overcome by sleep, some courts, instead of submitting the issue of negligence to the jury, will direct a verdict for the plaintiff. *Tennes v. Tennes*, 320 Ill. App. 19, 50 N.E.2d 132 (1943); *Hendler v. Meadows*, 13 N.J. Misc. 684, 180 Atl. 399 (Sup. Ct. 1935).

¹⁹"Perhaps it would have been for the best had our courts recognized the risk of injury or death both to motorists and to other travellers, which experience has shown to be inseparable from even careful driving, as sufficient to require of those who use this new means of transportation, the burden of answering for even unavoidable accidents." *Bohlen*, *Fifty Years of Torts*, 50 Harv. L. Rev. 725, 727 (1937). See also *Kaufman & Kantrowitz*, *supra* note 13; note 9 *W. Res. L. Rev.* 199 (1958).

²⁰*Kaufman & Kantrowitz*, *supra* note 14 at 368.

²¹*Ibid.*

²²Note, 9 *W. Res. L. Rev.* 199, 205 (1958).

²³See notes 19 through 22, *supra*.

Because of what the courts consider to be the harshness of this approach, the ultrahazardous activity view has remained almost entirely within the province of the writers.²⁴ Even under the *Theisen* decision liability would be predicated on the presence of negligence on the part of the vehicle's operator, and therefore, he would not be held liable for damages caused by circumstances beyond his control.

Although the *Theisen* decision appears to be the first to promulgate the "negligence as a matter of law" doctrine in clear and unequivocal terms, the language in several Michigan cases foreshadowed such a rule.²⁵ The Supreme Court of Michigan used more limited language,²⁶ and cited as authority previous decisions that had applied the "inference" doctrine,²⁷ as though no extension was intended. The "inference" rule is based on the tacit assumption that under certain circumstances a driver could conceivably fall asleep without prior warning of the impending drowsiness and consequently, be absolved of negligence.²⁸ But in practice, the only successful rebuttal to this inference of negligence has been proof that the driver's unconscious condition was the result, not of sleep, but of some unforeseeable extraneous circumstances. The Supreme Court of Wisconsin has now boldly declared that nonculpable dozing simply does not exist. The "inference" doctrine in reality relates to the unconscious, as distinguished from the sleeping driver. The "negligence as a matter of law" rule removes from the jury the issue of negligence where drivers fall asleep.

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²⁴The only instance in which the courts have adopted absolute liability where an unconscious driver has been involved is *Leary v. Oates*, 84 S.W.2d 486 (Tex. Civ. App. 1935).

²⁵*Trafamczak v. Anys*, 320 Mich. 653, 31 N.W.2d 832 (1948); *Reetz v. Schemansky*, 278 Mich. 626, 260 N.W. 811 (1937); *Perkins v. Roberts*, 272 Mich. 545, 262 N.W. 305 (1935); *Boos v. Sauer*, 266 Mich. 230, 253 N.W. 278 (1934); *Davlin v. Morse*, 254 Mich. 114, 235 N.W. 812 (1931).

²⁶"Sauer, then, was guilty of at least ordinary negligence." *Boos v. Sauer*, Id. at 279. "Defendant was guilty of negligence." *Perkins v. Roberts*, Id. at 306.

²⁷See *Bushnell v. Bushnell and Whiddon v. Malone*, supra note 2.

²⁸"Sleep does not ordinarily come without some warning of its approach." 179 Va. at 10, 18 S.E.2d at 259. "In any ordinary case, one cannot go to sleep while driving an automobile without having relaxed the vigilance which the law requires, without having been negligent." *Bushnell v. Bushnell*, supra note 2 at 435.