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Automobiles - Negligence - Strict Liability against the Sleeping Driver

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RECENT CASES

AUTOMOBILES—NEGLIGENCE—STRICT LIABILITY AGAINST THE SLEEPING DRIVER—In a guest-host action, the plaintiff sued to recover damages for personal injuries sustained in an automobile accident which occurred because the defendant driver had fallen asleep. The Supreme Court of Wisconsin, in a unanimous decision overruling all prior cases,[1] *held* that falling asleep at the wheel is negligence as a matter of law, and no facts can exist which will excuse such negligence. Once it is proven that the driver went to sleep, the defendant has the burden of showing that the driver's loss of consciousness was not due to that cause. *Theisen v. Milwaukee Auto. Mut. Ins. Co.*, 18 Wis. 2d 91, 118 N.W.2d 140 (1962).

Acts done while one is asleep are involuntary and in and of themselves do not constitute negligence.[2] The basis, however, for the liability of the driver is his negligence in falling asleep.[3] Since it is within the driver's control to either stay awake or cease driving, he has the duty to stay awake if he continues to drive.[4] This rule seems to be based upon the courts' recognition that the approach of sleep is usually indicated by certain premonitory symptoms. One does not fall asleep without warning and may be negligent in not heeding the indications of sleep's approach or the circumstances which may bring it about.[5]

The application of the basic concept that a sleeping driver is liable differs in various jurisdictions. A majority of states

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1. See, e.g., Krantz v. Krantz, 211 Wis. 249, 248 N.W. 155 (1933); Wisconsin Natural Gas Co. v. Employers Mut. Liability Ins. Co., 263 Wis. 633, 58 N.W.2d 424 (1953). The fact the driver of an automobile goes to sleep while driving is a proper basis for an inference of negligence sufficient to make a prima facie case and support a verdict for recovery if no circumstances tending to excuse such conduct are proven.
2. Stanley v. Burnside, 20 Misc. 2d 932, 192 N.Y.S.2d 452 (1959); State v. Olsen, 108 Utah 377, 160 P.2d 427, 429 (1945).
3. Whiddon v. Malone, 220 Ala. 220, 124 So. 516, 518 (1929); Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432, 434 (1925); Devlin v. Morse, 254 Mich. 113, 235 N.W. 812, 813 (1931); Steele v. Lackey, 107 Vt. 192, 177 Atl. 309, 311 (1935).
4. Whiddon v. Malone, 220 Ala. 220, 124 So. 516, 519 (1929); Diamond State Tel. Co. v. Hunter, 41 Del. 336, 21 A.2d 286 (1941); Stanley v. Burnside, 20 Misc. 2d 932, 192 N.Y.S.2d 452, 455 (1959).
5. Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432, 435 (1925); Diamond State Tel. Co. v. Hunter, 41 Del. 336, 21 A.2d 286, 288 (1941); Bernosky v. Greff, 350 Pa. 59, 38 A.2d 35, 36 (1944).

hold that falling asleep while driving is a proper basis for an inference of negligence. As such it is sufficient to make a prima facie case and support a verdict for recovery.[6] It is, however, possible for the defendant to rebut this presumption.[7] If he attempts to do so, he creates an issue of fact regarding due care. The question then becomes one of credibility for a jury properly charged that sleep does not come without warning.[8]

Defendants often argue that a driver goes to sleep unknowingly from physical exhaustion, which is a sudden unforeseen physical disability over which the driver has no control. However, the courts have consistently refused to consider such a defense.[9]

In a few cases it has been held that the doctrine of res ipsa loquitur was applicable to the sleeping driver.[10] Also he has been held grossly negligent[11] and guilty of reckless and wanton misconduct[12] under the various rules.

In this writer's opinion, the better rule is that falling asleep at the wheel is negligence as a matter of law. Any

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6. See, **e.g.**, Cooper v. Kellogg, 2 Cal. 2d 504, 42 P.2d 59 (1935); Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432 (1925); Richie v. Chears, 288 S.W.2d 660 (Ky. 1956); Gower v. Strain, 169 Miss. 344, 145 So. 244 (1933); Savard v. Randall, 103 N.H. 234, 169 A.2d 276, 278 (1961); Baird v. Baird, 223 N.C. 730, 28 S.E.2d 225 (1943); Bernosky v. Greff, 350 Pa. 59, 38 A.2d 35, 36 (1944); State v. Olsen, 108 Utah 377, 160 P.2d 427, 428 (1945); Jones v. Pasco, 179 Va. 7, 18 S.E.2d 258 (1942).

7. Diamond State Tel. Co. v. Hunter, 41 Del. 336, 21 A.2d 286, 288 (1941). If the driver can establish that he had a normally sufficient amount of rest; that he was mentally alert and physically fit immediately prior to falling asleep; that he had not been driving for such a period as to induce fatigue; that no warning drowsiness preceded the accident; and that he had not taken any alcoholic liquors or drugs, he successfully rebuts the presumption of negligence.

8. Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432, 435 (1925); Kaplan v. Kaplan, 213 Iowa 646, 239 N.W. 682, 685 (1931); Stanley v. Burnside, 20 Misc. 2d 932, 192 N.Y.S.2d 452, 455 (1959).

9. See Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432 (1925); Kaplan v. Kaplan, 213 Iowa 646, 239 N.W. 682, 685 (1931); Devlin v. Morse, 254 Mich. 113, 235 N.W. 812, 813 (1931); Theisen v. Milwaukee Auto. Mut. Ins. Co., 18 Wis. 2d 91, 118 N.W.2d 140 (1962). The courts hold that sleep is usually attended by premonitory warnings, and going to sleep at the wheel is negligence in failing to heed the warning. Therefore, the driver does have control, as he can cease driving. If while driving a car one is in such a state of exhaustion that he falls asleep without any premonitory warning, he is chargeable with the knowledge of any ordinarily prudent man that such exhaustion is reasonably likely to cause sleep, and he should cease driving.

10. Thompson v. Kost, 298 Ky. 32, 181 S.W.2d 445 (1944); Levy v. Indemnity Ins. Co., 8 So. 2d 774 (La. 1942); Collins v. McClure, 143 Ohio St. 569, 56 N.E.2d 171 (1944); Gendron v. Gendron, 144 Me. 347, 69 A.2d 668 (1949). There is an inference that the accident was due to the negligence of the one having possession and control of the automobile which caused the injury where, in the absence of an explanation, such seems to be the only fair and reasonable conclusion.

11. Blood v. Adams, 269 Mass. 480, 169 N.E. 412 (1929); Steele v. Lackey, 107 Vt. 192, 177 Atl. 309 (1935).

12. Kuharski v. Somers Motor Lines, 132 Conn. 269, 43 A.2d 777 (1945); Marks v. Marks, 308 Ill. App. 276, 31 N.E.2d 399 (1941).

driver who does so transforms his automobile into a dangerous undirected mechanism. Realistically no circumstances or excuses should justify such conduct when one considers the duty of care imposed upon every driver. When one is under a duty to use care not to injure another, he cannot fulfill that duty by falling asleep. The above stated rule acts as a much greater deterent force and allows the aggrieved parties a sounder remedy.[13] Therefore such conduct should not be excusable.

Although there is no North Dakota case law exactly in point, it is submitted that the courts of this state should follow the view expressed in the instant case.

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CONSTITUTIONAL LAW—DUE PROCESS—RIGHT TO COUNSEL —Petitioner was charged in a Flordia state court with having broken and entered a poolroom with intent to commit a misdemeanor. This offense is a felony under Florida law. The court denied petitioner's request for a court-appointed counsel. Being without funds he was forced to conduct his own defense. He was found guilty and sentenced to five years in the state prison. On the grounds that the court's refusal to appoint him counsel denied him constitutional rights, the petitioner filed for a writ of habeas corpus in the Florida Supreme Court. All relief was denied. The United States Supreme Court granted certiorari, and the judgment was reversed and the cause remanded to the Supreme Court of Florida. *Gideon v. Wainwright*, 83 Sup. Ct. 792 (1963).

At common law a person charged with treason or a felony had no right to counsel; in fact, counsel was not allowed for such crimes. Strange as it may seem, counsel was allowed, indeed, even required in most misdemeanor cases.[1] In this country twelve of the original thirteen colonies guaranteed the right to counsel either in their constitu-

13. Once the plaintiff has proven that the driver fell asleep, the driver cannot excuse or justify his conduct.

1. I STEPHAN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 341 (1883); I ARCHBOLD'S CRIMINAL PRACTICE AND PLEADING 54 (8th ed. 1880).