

Volume 9 | Issue 2

1958

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Recommended Citation

Christopher Nardi, *Liability of the Unconscious Driver*, 9 W. Res. L. Rev. 199 (1958)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol9/iss2/10>

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WESTERN RESERVE LAW REVIEW

Member of the National Conference of Law Reviews
 Published for THE FRANKLIN THOMAS BACKUS SCHOOL OF LAW
 by THE PRESS OF WESTERN RESERVE UNIVERSITY, Cleveland 6, Ohio

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NOTES

Liability of the Unconscious Driver

Today, liability of the insane driver for tortious conduct is no longer an open question. In recent years, the great majority of courts have imposed liability upon the insane individual despite lack of moral blame.¹ Certainly one would not deny that here we are imposing a form of strict liability.² In contrast to this responsibility, the courts, almost as one voice, have held that the unconscious driver is to be excused for his injury to the completely innocent plaintiff because it was "utterly without his fault."³ This contrast rings a dissonant bell. Legal reasoning which

¹ Williams v. Hays, 143 N.Y. 442, 38 N.E. 449 (1894) (ship captain); Sforza v. Green Bus Lines, 150 Misc. 180, 268 N.Y.S. 446 (1934); Leary v. Oates, 84 S.W.2d 486 (Tex. Civ. App. 1935); RESTATEMENT, TORTS § 283 (1948 Supp.); see Ellis v. Fixico, 174 Okla. 116, 50 P.2d 162 (1935); Parke v. Dennard, 218 Ala. 209, 118 So. 396 (1928) (dictum); cf. White v. White, 2 All E.R. 339 (1949) (dissenting opinion).

² "No statement has been found in any recent case decided on common law principles which even suggests that an insane person should not be liable for harm unintentionally inflicted by conduct which would be negligent in a normal adult. . . ." RESTATEMENT, TORTS § 283 (1948 Supp.).

³ Cohen v. Petty, 65 F.2d 820 (D.C.Cir. 1933); Waters v. Pacific Coast Dairy, 55 Cal. App. 2d 789, 131 P.2d 588 (1942); Soule v. Grimshaw, 266 Mich. 117, 253 N.W. 237 (1934); Lagasse v. LaPorte, 95 N.H. 92, 58 A.2d 312 (1948); Harrington v. H. D. Lee Mercantile Co., 97 Mont. 40, 33 P.2d 553 (1934); Lehman v. Hayman, 164 Ohio St. 595, 133 N.E.2d 97 (1956); Weldon Tool Co. v. Kelley, 81 Ohio App. 427, 76 N.E.2d 629 (1947); La Vigne v. La Vigne, 176 Ore. 634,

excuses the unconscious driver for his injury to the plaintiff simply because it was "utterly without his fault," and at the same time holds the lunatic liable, who is just as incapable of fault by the standards used, is obviously illogical.

The great reluctance of the courts to hold the unconscious driver liable can be attributed to a rebellion at any thought of an attack upon the "citadel of fault."⁴ Before the industrial revolution, liability was imposed without much regard to fault.⁵ The courts looked objectively to the wrongfulness of the act, rather than the actor.⁶ The coming of the Machine Age made it necessary to formulate new principals of tort law.⁷ Whereas prior to the industrial revolution, courts had said, "you are liable because you have breached a pre-existing legal duty," with the advent of that era they began to say, "you cannot be liable unless you have shown a lack of due care."⁸ However, liability without fault was not completely eradicated. It has persisted in the field of trover,⁹ trespass to land,¹⁰ in nuisance cases,¹¹ and cases in which the injury was caused by inherently dangerous instrumentalities.¹² The following is a discussion which will concern itself with a comparison of the liabilities of the insane motorist and the unconscious one, the problems and policies involved and a suggested solution.

THE INSANE MOTORIST

In 1948, the Restatement of Torts indicated that there was then sufficient authority to enunciate a rule holding the insane person liable for conduct which would be tortious on the part of a sane person.¹³ One of

158 P.2d 557 (1945); *Driver v. Brooks*, 176 Va. 317, 10 S.E.2d 887 (1940); *Dishman v. Whitney*, 121 Wash. 157, 209 Pac. 12 (1922).

⁴ James, *Accident Liability: Some Wartime Developments*, 55 YALE L.J. 365 (1945-46).

⁵ 22 MINN. L. REV. 853 (1938).

⁶ Isaacs, *Fault and Liability*, 31 HARV. L. REV. 954 (1917-18); For a modern example of this concept see *United Electric Light Co. v. Deliso Constr. Co.*, 315 Mass. 313, 52 N.E.2d 553 (1943), a case in which the court said that the nature of the property had nothing to do with the concept that trespass inflicted absolute liability.

⁷ Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 441 (1893-94).

⁸ ELDREDGE, MODERN TORT PROBLEMS 32 (1941).

⁹ 22 MINN. L. REV. 863 (1938).

¹⁰ *Van Alstyne v. Rochester Tel. Corp.*, 163 Misc. 258, 296 N.Y.S. 726 (1937); 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 19 (1906).

¹¹ *Filtrol Corp. v. Hughes*, 199 Miss. 10, 23 So.2d 891 (1945); *Dixon v. New York Trap Rock Corp.* 293 N.Y. 509, 58 N.E.2d 517 (1944).

¹² For application of *Rylands v. Fletcher* in the U.S. see PROSSER, TORTS § 59 (2d ed. 1955).

¹³ RESTATEMENT, TORTS § 283 (1948 Supp.).

the cases which prompted the action of the Restatement was *Sforza v. Green Bus Lines*.¹⁴ In that case, the defendant suddenly became insane without any warning while operating a bus. The court said that it was better that he or his estate bear the expense rather than the completely innocent plaintiff.¹⁵

Most of our courts have used similar reasoning in forming a basis for liability in these cases. These decisions reflect a glimmer of the pre-industrial revolution concept that the basis of tortious liability should be compensation for the injured rather than culpability of the defendant. Another reason advanced is that public policy requires the enforcement of the liability in order that the relatives may be under an inducement to restrain him.¹⁶ Some of the later cases imposed liability on the ground that tortfeasors, if allowed this defense, might simulate or pretend insanity to obscure what actually were wrongful acts on their part.¹⁷ A reason somewhat related to this has been suggested by Dean Prosser, although it is unexpressed in the cases. He suggests that the decisions in this area may be the result of a fear on the part of the courts of introducing into tort law the confusing and unsatisfactory tests attending the proof of insanity in criminal cases.¹⁸ The courts ignore the anomaly in this situation and state simply: "The reason is because he that is damaged ought to be recompensed."¹⁹

THE UNCONSCIOUS DRIVER

As pointed out previously, the almost unanimous holding in the United States is that without anticipatory warning, the sleeping, unconscious or epileptic driver is not liable for his tortious conduct.²⁰ The courts have had notably little difficulty here since they apply the general rule that liability for unintentionally causing a physical injury can only be predicated upon a failure to live up to a social standard of due care.²¹

¹⁴ 150 Misc. 180, 268 N.Y.S. 446 (1934).

¹⁵ *Id.* at 182, 268 N.Y.S. at 448.

¹⁶ *Seals v. Snow*, 123 Kan. 88, 254 Pac. 348 (1927); *Williams v. Hays*, 143 N.Y. 442, 38 N.E. 449 (1894); see *Brinck v. Bradbury*, 179 Cal. 376, 176 Pac. 690 (1918).

¹⁷ *McIntyre v. Sholty*, 121 Ill. 660, 13 N.E. 239 (1887); *Sforza v. Green Bus Lines*, 150 Misc. 180, 268 N.Y.S. 446 (1934); see *Chesapeake & Ohio Ry. v. Francisco*, 149 Ky. 307, 148 S.W. 46 (1912).

¹⁸ PROSSER, TORTS § 108 (1941).

¹⁹ *Williams v. Hays*, 143 N.Y. 442, 38 N.E. 449 (1894); 1 COOLBY, TORTS § 65 (4th ed. 1932).

²⁰ Cases cited note 3 *supra*. For an excellent annotation on this subject containing most of the cases see 28 A.L.R.2d 1 (1953).

²¹ *Bohlen, Torts of Infants and Insane Persons*, 23 MICH. L. REV. 9 (1924).

A typical factual situation is presented by the leading case of *Slattery v. Haley*.²² The defendant, while driving his auto along a city street, suddenly was taken ill and rendered unconscious without any preliminary symptoms or warning. His car, without the guidance of a driver, ran up on the sidewalk and fatally injured a young boy. Plaintiff argued the doctrine of *Rylands v. Fletcher*²³ and also "that as between two innocent parties, plaintiff is the least guilty." The defendant escaped liability on the grounds that the act was not the conscious act of his volition and that such risks were assumed by the plaintiff as a necessary part of daily living. Subsequent American decisions have emphatically endorsed this reasoning.

The above doctrine leaves the plaintiff with the burden of proving fault on the part of the defendant under circumstances in which proof is virtually inaccessible to him. Ostensibly, courts alleviate the difficulty by shifting the burden of going forward to the defendant. The courts have held that the mere fact that the accident occurred in the manner in which it did will result in an inference,²⁴ presumption²⁵ or prima facie case²⁶ arising in plaintiff's favor. However, courts have been exceedingly generous with the defendant and in many instances have held that virtually any evidence at all will rebut the presumption. In some cases the presumption has been overcome solely by an assertion on the part of the defendant that he felt fine just prior to the collision.²⁷ A few courts have gone to an even greater extreme and stated that if the defendant testifies that he lost consciousness and the plaintiff fails to present any rebutting evidence, the defendant is entitled to a directed verdict.²⁸ A recent case held that knowledge on the part of the defendant that he suffered at least one black-out a month was, as a matter of law, not gross negligence.²⁹

²² 52 Ont. L.R. 95, 3 D.L.R. 156 (1922).

²³ L.R. 3 H.L. 330 (1868).

²⁴ *Druzanich v. Criley*, 19 Cal.2d 439, 122 P.2d 53 (1942); *Gendron v. Gendron*, 144 Me. 347, 69 A.2d 668 (1949); *Journey v. Zawish*, 11 N.J. Misc. 482, 167 Atl. 7 (1933).

²⁵ *Meyers v. Tri-State Auto Co.*, 121 Minn. 68, 140 N.W. 184 (1913); *Weldon Tool Co. v. Kelley*, 81 Ohio App. 427, 76 N.E.2d 629 (1947); accord *Waters v. Pacific Coast Dairy, Inc.*, 55 Cal.App. 2d 789, 131 P.2d 588 (1942); *Soule v. Grimshaw*, 266 Mich. 117, 253 N.W. 237 (1934).

²⁶ *Harrington v. H. D. Lee Mercantile Co.*, 97 Mont. 40, 33 P.2d 553 (1934); *Keller v. Wonn*, 140 W.Va. 860, 87 S.E.2d 453 (1955).

²⁷ *Diamond State Tel. Co. v. Hunter*, 41 Del. 336, 21 A.2d 286 (1941); *Covington v. Carley*, 197 Miss. 535, 19 So.2d 817 (1944); see *Collins v. McClure*, 143 Ohio St. 567, 56 N.E.2d 171 (1944).

²⁸ *Armstrong v. Cook*, 250 Mich. 180, 229 N.W. 433 (1930); see *Lagasse v. LaPorte*, 95 N.H. 92, 58 A.2d 312 (1948).

²⁹ *Espeland v. Green*, 74 S.D. 484, 54 N.W.2d 465 (1952).

Thus, the real burden is on the plaintiff and he must establish his case by a preponderance of the evidence.

It appears inevitable that the courts, by the present standards, have allowed many blameworthy drivers to escape liability.³⁰ The availability of unconsciousness as a valid defense is undoubtedly a reason for the increase in this class of cases in recent years.³¹ Although many courts have imposed greater burdens upon the defendant, the plaintiff's problem of proof is still prodigious and an unfavorable result is a distinct likelihood. It seems inconceivable that the condition of the defendant at the time of the accident could be determined upon a subsequent medical examination. The driver himself may be unable to disclose what actually did occur; he "may remember driving along, lights flickering, and waking up in the hospital."³² Often, the effect of the impact upon the driver will render his testimony even less reliable. It appears unjust to allow a completely innocent plaintiff to go without remedy simply because a defendant who has occasioned the loss has created a situation whereby the plaintiff is deprived of any means of proving his right to compensation.

Much of the reasoning behind the majority of American cases in the unconscious area can be attributed to a misapplication of the leading authority in this field. In *Slattery v. Haley*³³ the court was obsessed with the idea that there could be no liability without fault and limited itself to predicating responsibility either upon a willful act or a negligent one.³⁴ The opinion clearly expressed displeasure with a trend which indicated that the insane were being held liable for their torts. Desiring to reverse this trend because of the absence of fault, the court overlooked all of the policy reasons involved. A rather recent court of appeals case in Canada bears out this position.³⁵ In this case, the driver suddenly suffered a delusion that his vehicle was under the remote control of his employer. The court, following *Slattery v. Haley*, ruled that insane persons were not liable for their torts. These cases involve an automatic application of the "no liability without fault" concept and fail to consider upon whom the risk of loss *should* fall.³⁶

³⁰ "We are sure that the availability of non-culpable sleep as a defense has swelled the case load." Kaufman and Kantrowitz, *The Case of the Sleeping Motorist*, 25 N.Y.U.L. Rev. 362 (1950).

³¹ "We have found one reported decision considering the liability of the unconscious driver from 1900 to 1919, seven from 1920 through 1929, forty-nine from 1930 through 1939, and forty from 1940 to 1949." *Ibid.*

³² Appleman, *Sleeping at the Wheel*, 22 IOWA L. REV. 525, 530 (1937).

³³ 52 Ont. L.R. 95, 3 D.L.R. 156 (1922).

³⁴ *Id.* at 99, 3 D.L.R. at 158.

³⁵ *Buckley & Toronto Transp. Comm'n v. Smith Transp. Ltd.*, Ont. 798 (1946), 4 D.L.R. 721 (1946).

³⁶ See 6 U. PITT. L. REV. 308 (1940).

A small minority have held the unconscious driver liable for the plaintiff's injuries. These courts have reasoned that since the insane driver would be liable under similar circumstances, there is no valid reason for exempting the unconscious driver from liability. A Texas case³⁷ involved a defendant who had fainted without any warning, his car crossed to the opposite side of the road, collided with plaintiff's car and caused plaintiff injury. The court held that even if the defendant had been suddenly rendered unconscious without any negligence on his part he would still be liable. A Georgia case³⁸ involved a suit for compensatory damages for injuries incurred when defendant committed an assault and battery upon the plaintiff during an epileptic seizure. The court drew the very relevant analogy to an insane person in holding defendant liable. The court went on to say that, "It is clearly agreed that, if one who wants discretion commits a trespass against the person or possessions of another, he shall be compelled in a civil action to give satisfaction for the damage."³⁹ In 1948, the Restatement cited the Texas case as a persuasive factor in the decision that there was then sufficient authority to hold the insane liable.

It should be noted that the same rationale which sustains holding the driver liable who suddenly becomes insane, can also be applied to the unconscious driver. Certainly it will be conceded that in this situation the plaintiff did not occasion the loss. Furthermore, since courts hold insane persons liable for fear that if they allow them to escape responsibility many will feign insanity, a fortiori they should hold the unconscious liable, since it is much easier to simulate this particular mental incapacity. An even more compelling reason is the virtually insurmountable task of proving defendant's culpability which is put upon the plaintiff.

INSANITY RULE APPLIED TO THE UNCONSCIOUS DRIVER

Liability of the unconscious driver can be predicated upon various concepts, none of which are meant to imply that there should be absolute liability in all motor-collision cases.⁴⁰ Two analogous areas in addition to the insanity rule support this liability. Some writers would impose liability on the theory that an ultrahazardous activity is here involved.

³⁷ Leary v. Oates, 84 S.W.2d 486 (Tex. Civ. App. 1935).

³⁸ Sayers v. Sack, 34 Ga. App. 748, 131 S.E. 98 (1925).

³⁹ *Id.* at 749, 131 S.E. at 99.

⁴⁰ ". . . [I]s the motor-car to be placed in the list of things dangerous in themselves and be classified in the future in law within the doctrine of Rylands v. Fletcher? The answer to that is 'yes' and it is a fact which is overdue for recognition." W.J. Sim, *The Principle of Absolute Liability in Motor-Collision Cases*, 14 N.Z.L.J. 124, 125 (1938).

There are in use today few instrumentalities so fraught with danger to life as an automobile on a busy highway without the guidance of a driver. The dangerous "activity" here is "not that of driving . . . but that of remaining constantly capable of driving."⁴¹ This is a necessary delimitation since if we were to say that "driving" is the dangerous activity we would impose absolute liability in all cases and it appears that our negligence law would prohibit any such far-reaching change at the present time.

Another analogy is that existing between a wild animal and the modern automobile. If the owner of a vicious dog allows him to escape from his leash, he is held absolutely liable for any damage done, regardless of how innocent the owner's conduct may have been.⁴² The basis of liability here is said to be the possession and control of the animal.⁴³ In the case of animals *mansuete naturae*, injury which results from a dangerous propensity in the animal which was known to the keeper will result in absolute liability.⁴⁴ The driver of an automobile knows that if he loses control, the heretofore "domesticated" engine becomes a "wild" one, likely to do considerable harm.

CONCLUSION

An extension of liability to the unconscious driver would not be repugnant to our tort law. The great reluctance to impose liability in this situation can be attributed to those who would make all liability in tort depend on blameworthiness. "The courts came to feel that the negligence concept was a universal concept permeating all tort law."⁴⁵ Indeed, Justice Field, in *The Nitroglycerine Case*⁴⁶ said, "No case or principal can be found . . . subjecting an individual to liability for an act done without fault on his part."⁴⁷ But the fault doctrine is an illusion. "It may be questioned whether 'fault,' with its popular connotation of personal guilt and moral blame, and its . . . arbitrary legal meaning, which will vary with the requirements of social conduct imposed by the law, is of any real assistance . . . , except perhaps as a descriptive term."⁴⁸ Granted that in these situations the defendant is guilty of no "legal fault." But his action has harmed someone and the question remains whether justice to

⁴¹ Kaufman and Kantrowitz, *supra* note 30, at 368.

⁴² Perkins v. Drury, 57 N.M. 269, 258 P.2d 379 (1953); see McNeely, *A Footnote on Dangerous Animals*, 37 MICH. L. REV. 1181 (1939).

⁴³ PROSSER, TORTS § 57 (2d ed. 1955).

⁴⁴ MCNEELY, *supra* note 42.

⁴⁵ ELDREDGE, MODERN TORT PROBLEMS 32 (1941).

⁴⁶ Parrott v. Wells, 82 U.S. (15 Wall.) 524 (1872).

⁴⁷ *Id.* at 539.

⁴⁸ PROSSER, TORTS § 56 (2d ed. 1955).