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That Jury Question, "Unconsciousness"

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NOTES AND COMMENT

THAT JURY QUESTION, "UNCONSCIOUSNESS"

One defense to imposed liability with which few are conversant is a "sudden unconsciousness on the part of an individual at the time when he is alleged to have been negligent." Should anyone occasion loss while suffering from an unforeseeable coma, belief by a jury in the truth of the evidence would excuse that defendant.[1] The law intends what is agreeable to reason—it does not suffer absurdity. No obligation demands performance of the impossible, and exemption from culpability extends to any species of a *vis major* in respect of which a person lacks a remedy.[2] Writers have classified as the *Act of God* events unable to be prevented despite an exercise of prudent care. Since that term encompasses all misfortunes which arise from inevitable necessity and which human intelligence cannot predict or escape,[3] it is understandable why irresistible loss of conscious power should preclude legal redress.

As we know, Negligence involves whatever improper acting infringes upon the rights of another and also the failure to do something which reasonable care dictates, whereby a plaintiff sustains special damage.[4] For recovery in Negligence, both Misfeasance and Nonfeasance apply the identical test in determining an omission to perform legal duty—which standard is represented by the "conduct of the average prudent man".[5] Liability is a question of fact depending upon the circumstances which surround the claimed action or nonaction,[6] although once Negligence is found to exist as a tort, incompetency furnishes no defense in law to exculpate responsibility therefor.[7]

Because, however, our "Jural Man" has but ordinary mental and physical capacity and but ordinary prudence, *extraordinary* conditions must be considered in passing judgment upon him.[8] New York courts usually restrict the *Act of God* to natural accidents which exclude all human agency of any degree—thus differentiating it from

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[1] Rasbach v. Cassidy, 263 App. Div. 1047, 33 N. Y. S. (2d) 762 (1942); Cohen v. Petty, 62 App. D. C. 187, 65 F. (2d) 820 (1933); Armstrong v. Cook, 250 Mich. 180, 229 N. W. 433 (1930).

[2] CLERK & LINDSELL, TORTS (7th ed. 1921) 453.

[3] SALMOND, TORTS (5th ed. 1920) 240.

[4] *See* 45 C. J. 637, Negligence § 15; 38 AM. JURIS. 643, Negligence § 2; 20 R. C. L. 26, Negligence § 19.

[5] 20 R. C. L. 20, Negligence § 14.

[6] See cases cited *supra* note 1.

[7] Williams v. Hays, 157 N. Y. 541, 52 N. E. 589 (1899); Williams v. Hays, 143 N. Y. 442, 38 N. E. 449 (1894); Sforza v. Green Bus Lines, 150 Misc. 180, 268 N. Y. Supp. 446 (1934).

[8] Williams v. Hays, 157 N. Y. 541, 52 N. E. 589 (1899), cited *supra* note 7.

an inevitable accident which no foresight or precaution can prevent.[9] In reference to damage caused by a sudden unpredictable absence of awareness, it is offered that such is best viewed as an unavoidable or "pure" accident. Moreover, the defense of instant unconsciousness is a jury problem,[10] and because it pertains to the essence of the *prima facie* cause, a complainant ever retains his burden of proving negligence by a defendant so stricken.[11]

In the case of *Williams v. Hays*,[12] the defense for a ship master's negligence was an alleged unconsciousness on account of sickness from a heavy dose of quinine. At the disposition of a former action,[13] a defense of insanity on his part was declared insufficient in law, so—upon retrial, the lower court had directed a verdict for the plaintiff, and had refused to permit jury deliberation as to whether the mental and physical condition might have resulted solely from efforts to save the ship during a storm. *Re* such defense of *mental and physical incompetence to care for and navigate the vessel, solely in consequence of efforts to save the vessel during the storm*—the judges remanded, indicating clearly that a question of claimed unconsciousness is one of fact for the jury. A crystallizaton of the logic in that conclusion illustrates the following:

(a) An insane person is liable for his torts the *same* as if sane. (The question of such liability is one of policy—namely, that the incompetent should not be supported at the expense of his neighbors or of the state.)

(b) For what in sane persons is willful or negligent conduct, the law finds responsibility. If then, the defendant's conduct would—in sane persons—have been willful or negligent, the master (despite incompetency) would be answerable therefor. But should his conduct, even in a sane person, be able to be determined *not willful* and *not negligent*,—then "a fortiori" this insane person will not be deemed liable if a jury considers his misfeasance to be not willful and not negligent.

(c) The standard of care *regardless* of a person's sanity or insanity is that of the "reasonably careful man".

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[9] Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292 (1864). *But cf.* Beiner v. Nassau Electric Ry., 191 App. Div. 371, 181 N. Y. Supp. 628 (1920), cited *infra* note 31.

[10] Jernigen v. Jernigen, 207 N. C. 851, 175 S. E. 713 (1934); Myers v. Tri-State Automobile Co., 121 Minn. 68, 140 N. W. 184 (1913); *cf.* cases cited *supra* notes 1, 6.

[11] Under N. Y. CIV. PRAC. ACT § 242 an unusual defense may be affirmatively pleaded to prevent surprising an opponent—but this alone never serves to shift the plaintiff's "Burden of Proof".

[12] Williams v. Hays, 157 N. Y. 541, 52 N. E. 589 (1899), cited *supra* notes 7, 8.

[13] Williams v. Hays, 143 N. Y. 442, 38 N. E. 449 (1894), cited *supra* note 7.

(d) However, an IMPOSSIBILITY TO USE DUE CARE, if existence of such can be found from the facts, will be permitted to excuse a defendant for failure to exercise that duty of care.

(e) Dissociating, therefore, the defense of the master's unconsciousness from the defense of his insanity, the Court of Appeals demonstrated that alleged unconsciousness is a valid defense and a question for the jury.

The liability of insane persons *upon proof of existence of their negligence,* has been urged on grounds of Public Welfare. The general rule holds incompetents just as responsible for torts as sane persons, and applies similarly to all wrongs except those in which intent is a necessary ingredient. To justify enforcement of this harsh doctrine, two arguments are offered, to wit: that relatives of a lunatic be induced to restrain him, and secondly so that tortfeasors may not "simulate or pretend insanity" in explaining their acts which cause damage to others.[14] Professor Burdick has opined that Inevitable Accident decisions indicate a lurking suspicion as to the soundness of the Insanity Rule.[15] Regardless, however, of repudiation of liability without culpability in respect to incapacitated persons, sudden improbable unconsciousness—if bona fide—will exculpate a defendant. *Rasbach v. Cassidy*[16] exhibited that same ultimatum in submission to the jury of an automobilist's asserted unconsciousness under instructions that its existence in fact would negate any negligence.

An analysis of the theory throughout various jurisdictions reveals situations where unconsciousness caused by fainting was successful to defend culpability for injury to guests in vehicles.[17] Illness void of pre-accident warning and attributable to a seizure of cramps, has likewise excused a defendant from liability to a guest,[18] while a momentary loss of mental control which ends in a collision, can procure a release from blame when the ascertained facts convince a jury.[19] Dozing off, on the other hand, where a defendant continued to drive after realizing that he was tired, was regarded in Connecticut as no defense in law[20]—but, negligence in "simply falling asleep" has been deemed a jury question.[21] If Trespass is the issue contested, liability

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[14] *Id.* at 447, 38 N. E. at 450.

[15] BURDICK, LAW OF TORTS (4th ed. 1926) 94, 95.

[16] Rasbach v. Cassidy, 263 App. Div. 1047, 33 N. Y. S. (2d) 762 (1942), cited *supra* notes 1, 6, 10.

[17] Cohen v. Petty, 62 App. D. C. 187, 65 F. (2d) 820 (1933); Armstrong v. Cook, 250 Mich. 180, 229 N. W. 433 (1930), both cited *supra* notes 1, 6, 10.

[18] Armstrong v. City of Detroit, 286 Mich. 273, 282 N. W. 145 (1938).

[19] Harrington v. H. D. Lee Mercantile Co., 97 Mont. 40, 33 P. (2d) 553 (1934).

[20] Potz v. Williams, 113 Conn. 278, 155 Atl. 211 (1931).

[21] Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432 (1925).

cannot be found unless an act has been consciously done, and prerequisite to any recovery, alleged intent must be proved.[22]

Re tort liability for damage to persons not guests, numerous decisions demonstrate that temporary impotence to regulate one's motions will constitute a bar to redress if the factual evidence supports its contentions.[23] Canadian authority [24] completely released a defendant who, upon becoming abruptly ill, lost control of his motor car and killed an infant pedestrian. The action had been brought under a statute [25] which conferred rights to sue for death caused by "wrongful act, default, or neglect." Pursuant to that language, the negligence required in the case—a conscious act of the defendant's volition—was only what would accord with the wording, since such imported intention and inferred a similar standard of care in testing both civil and criminal blame. Nevertheless, the court elaborated in ascribing the sickness to an *Act of God,* and in definitely stipulating that such an unfortunate seizure would exculpate responsibility. The exact opposite was held concerning acute indigestion when a Texas court was led astray by adhering to the insanity rulings.[26] It should always be remembered that our later *Williams* opinion [27] would have permitted a jury to allow an impossibility to use due care in excusing any unconscious defendant from exercising that duty of care.

Viewing the outlook from the angle of *foreseeability,* unconsciousness on the part of an intoxicated plaintiff has been held merely a remote cause, and not such contributory negligence as would exempt recovery where the tortfeasor failed to utilize a "Last Clear Chance" in avoiding the injury.[28] But when a defendant victim of vertigo disregarded the probable consequences, intentionally ran his car at high speed, and was stricken with a sudden attack whereby third parties were hurt—that driver was found criminally responsible after determination by a jury of presence of the required *mens rea.*[29] An extension of the doctrine of forseeability was seen by the finding of a valid cause against a father who, knowing his son to be an epileptic, furnished him with an automobile, following which a fit terminated in harm to guests of the vehicle.[30] During an earlier litigation, coma

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[22] Lobert v. Pack, 337 Pa. 106, 9 A. (2d) 365 (1939).

[23] Waters *et al.* v. Pacific Coast Dairy *et al.,* 131 P. (2d) 588 (Calif. 1942); Driver v. Brooks, 176 Va. 317, 10 S. E. (2d) 887 (1940); Soule v. Grimshaw, 266 Mich. 117, 253 N. W. 237 (1934); Dishman v. Whitney, 121 Wash. 157, 209 Pac. 12 (1922); *accord,* Jernigen v. Jernigen and Myers v. Tri-State Automobile Co., both *supra* note 10.

[24] Slattery v. Haley, 52 Ont. L. Rep. 95, 11 B. R. C. 1036, 3 Dom. L. Rep. (N.S.) 156 (1923).

[25] FATAL ACCIDENTS ACT (R. S. O. 1914) c. 151.

[26] Leary v. Oates, 84 S. W. (2d) 486 (Tex. 1935). *But see* cases cited *supra* notes 10, 23.

[27] *Supra* note 8.

[28] Herrick v. Washington Power Co., 75 Wash. 149, 134 Pac. 934 (1913).

[29] Tift v. State, 17 Ga. App. 663, 88 S. E. 41 (1916).

[30] Golembe v. Blumberg, 262 App. Div. 759, 27 N. Y. S. (2d) 692 (1941).

in a trolley motorman could excuse the defendant carrier from liability in the absence of negligence on its part.[31]

As precipitant senselessness requires a jury trial, evidence of an inducing affliction and its source supported by the reasons such attack is unexpected, will constitute a valid defense. It would be neither feasible nor advisable that existence of certain facts, as matter of law, should spell out blame therefor. Since the facts must lead us to a finding of negligence, and then the tort of negligence to a conclusion of liability, any permission of facts to immediately determine liability would be to ignore the meaning of Negligence. Our standard of care is that of the "Jural Man of ordinary mental and physical capacity and of ordinary prudence"—that is—whether or not any conduct may be called willful or negligent. Further extensions of the law of Negligence would be unreasonable and abhorrent to all principles of equity and justice. The fallacy of contrary reasoning is apparent and cannot and ought not to be sustained.[32] Where there has been no lack of proper precautionary prudence nor normal probability of resulting damage—any "sudden unforeseeable unconsciousness" should rightly excuse a defendant.

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ADMISSIBILITY OF BILLS AS EVIDENCE OF VALUE

Among the items of damages, which a plaintiff in a personal injury or property damage suit seeks to recover, are the expenses for his medical and hospital treatment and for the repair of his property. Almost invariably the plaintiff will have bills for these expenses, receipted if paid. Let us consider the admissibility of these bills in such negligence litigation.

Fundamentally, the liability of a negligent tort feasor to one damaged in property or injured in person through the tort, is limited to those damages which are the proximate [1] consequences of the negligent act. They include the necessary repairs to, or replacement of, the property, and the treatment of the person, computed as to cost by the standard of reasonable value.[2] This standard of limiting the amount of the items of damage to their reasonable value is understood by considering the development of the present day negligence action from trespass-on-the-case and *indebitatus assumpsit,* in which

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[31] Beiner v. Nassau Electric Ry., 191 App. Div. 371, 181 N. Y. Supp. 628 (1920), cited *supra* note 9.

[32] Williams v. Hays, 157 N. Y. 541, 548, 52 N. E. 589, 592 (1899), cited *supra* notes 7, 8, 12, 27.

[1] Statler v. Ray, 195 N. Y. 478, 88 N. E. 1063 (1908).

[2] Gumb v. Twenty-third Street Ry., 114 N. Y. 411, 21 N. E. 933 (1899).