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## Torts: Insanity as a Defense

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**Torts: Insanity as a Defense.** The majority rule states that an insane person is liable for his torts, unless he is incapable of entertaining a requisite specific intent.<sup>1</sup> The Restatement (Second) of Torts sets forth this rule in the following terms:

Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances.<sup>2</sup>

This insanity rule had its conception in the dictum of an early English case, *Weaver v. Ward*.<sup>3</sup> Even though insanity was not alleged as a defense in that action for assault and battery, the court stated: "[I]f a lunatick hurt a man, he shall be answerable in trespass."<sup>4</sup> This principle was adopted in the case of *Williams v. Hays*,<sup>5</sup> which was considered by at least one court<sup>6</sup> as the leading case on the subject. The *Williams* case was an action to recover for the loss of a ship alleged to have been destroyed due to the negligence of its captain. In rejecting the captain's defense of temporary insanity the court said: "The law looks to the person damaged by another, and seeks to make him whole, without reference to the purpose or the condition, mental or physical, of the person causing the damage."<sup>7</sup> Quoting from *Cooley on Torts*,<sup>8</sup> the court continued:

Undoubtedly, there is some appearance of hardship, even of injustice, in compelling one to respond for that which, for want of control of reason, he was unable to avoid; that it is imposing upon a person already visited with the inexpressible calamity of mental obscurity to observe the same care and precaution respecting the rights of others that the law demands of one in the full possession of his faculties. But the question of liability in these cases, as well as in others is a question of policy.<sup>9</sup>

<sup>1</sup> Annot., 51 A.L.R. 833 (1927); Annot., 89 A.L.R. 476 (1934); 44 C.J.S. *Insane Persons* § 122 (1945); RESTATEMENT (SECOND) OF TORTS § 283B, and Appendix (1966) and cases cited therein; *Weaver v. Ward*, Hob. 134, 80 Eng. Rep. 284 (1616); *McIntyre v. Sholty*, 121 Ill. 660, 13 N.E. 239 (1887); *Seals v. Snow*, 123 Kan. 88, 254 P. 348 (1927); *Cross v. Kent*, 32 Md. 581 (1870); *Williams v. Hays*, 143 N.Y. 442, 38 N.E. 449 (1894), *qualified in* 157 N.Y. 541, 52 N.E. 589 (1899); *Guardianship of Meyer*, 218 Wis. 381, 261 N.W. 211 (1935); *Kuhn v. Zabotsky*, 9 Ohio St. 2d 129, 244 N.E.2d 137 (1967); *Paxton v. Paxton*, 222 So. 2d 834 (Miss. 1969); *Burrows v. Hawaiian Trust Company*, 49 Hawaii 351, 417 P.2d 816 (1966); *Filip v. Gagne*, 104 N.H. 14, 177 A.2d 509 (1962).

<sup>2</sup> RESTATEMENT (SECOND) OF TORTS § 283B.

<sup>3</sup> Hob. 134, 80 Eng. Rep. 284 (1616).

<sup>4</sup> *Id.*

<sup>5</sup> 143 N.Y. 442, 38 N.Y. 449 (1894), *qualified in* 157 N.Y. 541, 52 N.E. 589 (1899).

<sup>6</sup> *Seals v. Snow*, 123 Kan. 88, 254 P. 348 (1927).

<sup>7</sup> *Williams v. Hays*, 143 N.Y. 442, 38 N.E. 449 (1894), *qualified in* 157 N.Y. 541, 52 N.E. 589 (1899).

<sup>8</sup> COOLEY ON TORTS (1880) at 100.

<sup>9</sup> *Williams v. Hays*, 143 N.Y. 442, 38 N.E. 449 at 450 (1894).

The defense of insanity also proved unsuccessful in *Cross v. Kent*,<sup>10</sup> an action for trespass in which it was alleged that the defendant set fire to the plaintiff's barn. The court distinguished between the applicability of insanity as a material issue in civil actions as opposed to criminal proceedings:

The distinction between the liability of a lunatic or insane person in civil actions for torts committed by him, and in criminal prosecutions, is well defined, and it has always been held, and upon sound reason, that though not punishable criminally, he is liable to a civil action for any tort he may commit.<sup>11</sup>

The arguments which are usually advanced in support of the insanity rule were summarized in *Seals v. Snow*.<sup>12</sup> This was an action for the recovery of damages resulting from the shooting death of the plaintiff's husband. The court, in dealing with the finding that the defendant was insane at the time of the shooting, stated:

It is conceded that the great weight of authority is that an insane person is civilly liable for his torts. This liability has been based on a number of grounds, one that where one of two innocent persons must suffer a loss, it should be borne by the one who occasioned it. Another, that public policy requires the enforcement of such liability in order that relatives of the insane person shall be led to restrain him and that tort-feasors shall not simulate or pretend insanity to defend their wrongful acts causing damage to others, and that if he was not liable there would be no redress for injuries, and we might have the anomaly of an insane person having abundant wealth depriving another of his rights without compensation.<sup>13</sup>

In light of these arguments and the long line of decisions holding that insanity is not a defense in a tort action, it is interesting to note the decision of the Wisconsin Supreme Court in *Breunig v. American Family Ins. Co.*<sup>14</sup> It was alleged that, as a result of her temporary insanity, the defendant believed that her car could fly. Her failure to clear an oncoming vehicle resulted in a head-on collision.

In reviewing the case, the court stated that insanity *could* be a defense in certain situations:

We think the statement that insanity is no defense is too broad when it is applied to a negligence case where the driver is *suddenly overcome without forewarning by a mental disability or disorder* which incapacitates him from conforming his conduct to the standards of a reasonable man under like circumstances. These are rare cases indeed, but their rarity is no reason for overlooking their existence and the justification which is the basis of

<sup>10</sup> 32 Md. 581 (1870).

<sup>11</sup> *Id.* at 583.

<sup>12</sup> 123 Kan. 88, 254 P. 348 (1927).

<sup>13</sup> *Id.*, 254 P. at 349.

<sup>14</sup> 45 Wis. 2d 536, 173 N.W.2d 619 (1969).

the whole doctrine of liability for negligence, *i.e.*, that it is unjust to hold a man responsible for his conduct which he is incapable of avoiding and which incapacity was *unknown to him prior to the accident*. . . . All we hold is that a sudden mental incapacity equivalent in its effect to such physical causes as a sudden heart attack, epileptic seizure, stroke, or fainting should be treated alike and not under the general rule of insanity.<sup>15</sup> (emphasis added)

Since the court found that there was evidence to support the jury's finding that the defendant's insanity was foreseeable, it affirmed the verdict for the plaintiff.<sup>16</sup>

The court reached its conclusion that a sudden, unforeseen mental incapacity could be a valid defense to a charge of negligence through an analysis of *Theisen v. Milwaukee Automobile Mut. Ins. Co.*<sup>17</sup> That case held that falling asleep while driving constituted negligence as a matter of law.<sup>18</sup> The court in *Theisen* expressly excluded from the holding a loss of consciousness caused by a sudden, unforeseen, incapacitating "outside force or fainting or heart attack, epileptic seizure, 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."<sup>19</sup>

The court in *Breunig* noted that the cases which dealt with insanity as a defense had generally involved situations in which the defendant had exhibited a pre-existing mental disorder of a permanent nature. The question of a sudden, unforeseen mental disability, as alleged by the defendant in *Breunig*, apparently had never been discussed nor decided in this country.<sup>20</sup> Nevertheless, the court concluded that a sudden, unforeseen mental incapacity should be dealt with in the same manner as those incapacities which are marked by more readily recognizable physical characteristics.

In support of its decision, the court cited the Canadian case of *Buckley & Toronto Transportation Comm. v. Smith Transport*,<sup>21</sup> which is very similar in its facts to *Breunig*. In *Buckley*, the court failed to find

<sup>15</sup> *Id.* at 543, 544, 173 N.W.2d at 624.

<sup>16</sup> *Id.* at 545, 173 N.W.2d at 625.

<sup>17</sup> 18 Wis. 2d 91, 118 N.W.2d 140 (1962).

<sup>18</sup> *Id.* at 98, 118 N.W.2d at 143. See *Eleason v. Western Casualty & Surety Co.*, 254 Wis. 134, 135 N.W.2d 301 (1948); *Wisconsin Natural Gas Co. v. Employers Mut. Liability Ins. Co.*, 263 Wis. 633, 58 N.W.2d 424 (1953).

<sup>19</sup> 18 Wis. 2d at 99, 118 N.W.2d at 144 (1962). See also, for cases holding that an incapacitation caused by a sudden, unforeseen physical cause is a defense to a negligence action, the following: *Annot.*, 28 A.L.R.2d 12 (1953); *Cohen v. Petty*, 65 F.2d 820 (D.C. Cir. 1933); *Watts v. Smith*, 226 A.2d 160 (D.C. App. 1967); *Armstrong v. Cook*, 250 Mich. 180, 229 N.W. 433 (1935); *McClean v. Chicago Great Western Ry. Co.*, 3 Ill. App. 2d 235, 121 N.E.2d 337; *Reeg v. Hodgson*, 1 Ohio App. 2d 272, 202 N.E.2d 310 (1964); *Burdette v. Phillips*, 76 So. 2d 805 (Fla. 1954); *Baker v. Hausman*, 68 So. 2d 572 (Fla. 1953).

<sup>20</sup> 45 Wis. 2d at 543, 173 N.W.2d at 624. Note, however, that *Williams v. Hays*, 143 N.Y. 442, 38 N.E. 449 (1894) involved a plea of temporary insanity.

<sup>21</sup> 1946 Ont. Rep. 798, 4 Dom. L. Rep. 721 (1946).

a truck driver negligent who was suddenly overcome by a delusion that his truck was being operated by the remote control of his employer, such that he consequently collided with another vehicle.<sup>22</sup> However, in so holding, the Canadian court, as opposed to the Wisconsin court in *Breunig*, considered the extent of the defendant's insanity rather than its foreseeability as being the decisive factor in determining liability:

If I have correctly stated the law, as I think I have, then the question is: What was the extent of [the defendant's] insanity? Did he understand the duty to take care, and was he, by reason of his mental disease, unable to discharge that duty?<sup>23</sup>

Therefore, it would appear that the *Buckley* case lends more support to excusing the liability of all "sufficiently deranged defendants" than does the *Breunig* decision.

In view of the Wisconsin Supreme Court's conclusion that a sudden, unforeseen mental incapacity should be treated in the same manner as a similar physical incapacity, it becomes clear that the court did not view its holding as an *exception* to the insanity rule, but rather as an *extension* of another rule, *i.e.*, the "unavoidable accident" rule. The Restatement (Second) of Torts states the rule on physical disability as follows:

If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent, is that of a reasonable man under like disability..<sup>24</sup>

This is explained, in part, by an example in the comments to the section:

[A]n automobile driver who suddenly and quite unexpectedly suffers a heart attack does not become negligent when he loses control of his car and drives it in a manner which would otherwise be unreasonable; but one who knows that he is subject to such attacks may be negligent in driving at all.<sup>25</sup>

The rule, as applied to automobile operators, has also been stated as follows:

By the great weight of authority, an operator of a motor vehicle who, while driving, becomes suddenly stricken by a fainting spell or loses consciousness from an unforeseen cause, and is unable to control the vehicle, is not chargeable with negligence or gross negligence. Stated differently, fainting or momentary loss of consciousness while driving is a complete defense to an action based on negligence . . . if such loss of consciousness was not foreseeable.<sup>26</sup>

Thus, through the *Breunig* decision, Wisconsin has extended the defense of "unavoidable accident" to include not only sudden and unex-

<sup>22</sup> 4 Dom. L. Rep. at 729.

<sup>23</sup> *Id.*, at 728.

<sup>24</sup> RESTATEMENT (SECOND) OF TORTS § 283C.

<sup>25</sup> *Id.*, Comment c.

<sup>26</sup> Annot., 28 A.L.R.2d 12, 35 (1953).

pected physical incapacities, but also unforeseeable attacks which incapacitate one's mental faculties.

A comparison of the rule announced in *Breunig* with the insanity rule and the justifications behind it reveals some noteworthy contrasts.

As noted above, the rule that insanity is not a defense in tort actions can be traced back to the dictum of *Weaver v. Ward*. However, that case espoused the doctrine of "no liability without fault," by stating that "no man shall be excused of a trespass except that it be judged utterly without his fault."<sup>27</sup> The inconsistency in this case lies in the fact that it is difficult to imagine one who could be more "utterly without fault" than an insane person who does not realize the nature or consequences of his actions.<sup>28</sup>

The court in *Breunig* recognized the injustice of holding a man liable "for his conduct which he is incapable of avoiding and which incapability was unknown to him prior to the accident."<sup>29</sup> Consequently, for those defendants who unexpectedly experience their first incapacitating mental breakdown, the *Breunig* decision affords a defense. This accords with the principle of "no liability without fault," since, absent a "notice or forewarning," such a defendant is "utterly without fault."

However, those defendants who have "notice or forewarning" of their susceptibility to such mental disorders will find little comfort in the *Breunig* decision. In that opinion the court followed the two-part test embodied in the "unavoidable accident" rule: 1) The actor must be incapable of governing his conduct, and 2) He must have no notice of his susceptibility to the incapacity. This test seems to presume that knowledge of his susceptibility should enable the actor to avoid situations in which his incapacity could produce harm to others. However, one may wonder whether notice of susceptibility to attacks of disabling delusions would enable a mentally disturbed person to avoid all accident-producing situations.

One of the most frequently quoted justifications of the insanity rule is "where one of two innocent persons must suffer a loss, it should be borne by the one who occasioned it."<sup>30</sup> Contrary to this reasoning is the *Breunig* rule, which relieves a person from liability for damages caused by him when mental disorder strikes without prior warning, thereby forcing the plaintiff to bear his own loss. This "injustice," however, is not new, since the "unavoidable accident" rule has long produced the same result.<sup>31</sup>

<sup>27</sup> Hob. 134, 80 Eng. Rep. 284 (1616).

<sup>28</sup> 60 DICK. L. REV. 211 (1955-56) discusses not only this particular point, but also gives a well-written discussion of the liability of insane persons in tort actions.

<sup>29</sup> 45 Wis. 2d 543, 544, 173 N.W.2d 624 (1969).

<sup>30</sup> *Seals v. Snow*, 123 Kan. 88, 254 P. 348, 349 (1927).

<sup>31</sup> See cases cited in Annot., 28 A.L.R.2d 12 (1953).

The *Breunig* rule also seems to ignore the threat that tort feasers might "simulate or pretend insanity to defend their wrongful acts."<sup>32</sup> Yet, such a possibility may easily be over-emphasized. First, it would appear unlikely that anyone would plead insanity as a defense in any but the most extreme cases. Secondly, courts have recognized the ability of psychiatrists to detect false claims of mental disturbance, such as in cases of intentional infliction of emotional distress.<sup>33</sup> Therefore, the argument that false claims of insanity might be raised does not appear to be a strong one.

While the *Breunig* decision makes a half-successful effort to comply with the important principle of "no liability without fault," the fact remains that under the insanity rule some defendants who are "utterly without fault" because of their mental disability will be found liable for negligence. Perhaps some time in the future the supreme court will completely abrogate the insanity rule, as did the court in *Buckley*. A rule which followed the "no liability without fault" principle to the letter would hold a defendant not liable for negligence if his mind were too deranged for him to understand and discharge his duty of care. As the late Justice Holmes said:

There is no doubt that in many cases a man may be insane and yet perfectly capable of taking the precautions and of being influenced by the motives which the circumstances demand. But if insanity of a pronounced type exist, manifestly incapacitating the sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse.<sup>34</sup>

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<sup>32</sup> *Seals v. Snow*, 123 Kan. 88, 254 P. 348, 349 (1927).

<sup>33</sup> Annot., 64 A.L.R.2d 100 (1959).

<sup>34</sup> *THE COMMON LAW* (1881) at 109.