



**ASLEEP AT THE WHEEL:
NIGHTMARE ON THE HIGHWAY**

by LAWRENCE E. SAVELL

You know it's happened to you. You've had a long day, and an equally long night, and you have to drive home. Or maybe you're in the middle or at the end of a long trip, and you want to get a few more miles under your belt or get the trip over at last. The situation calls to mind the words of the great American poet Robert Frost, who wrote in his "Stopping by Woods on a Snowy Evening" (1923):

The woods are lovely, dark and deep.
But I have promises to keep,
And miles to go before I sleep.

Tragically, these are some of the considerations that may lead a driver to exceed his physical limits, resulting in fatigue or, worse, sleeping at the wheel. The use of some medications, even common over-the-counter remedies, can increase such a risk. As if any more incentive than physical safety were necessary, the driver who allows himself to fall asleep while on the road may also face both criminal charges and civil liability to others as a result of his failure to heed the warning signs and pull over.

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Scope of the Problem

According to Dr. Merrill M. Mitler, clinical professor in the Department of Psychiatry at the University of California, San Diego, and a researcher in sleep disorders, sleeping at the wheel is nothing short of a "national nightmare." In correspondence with Dr. Mitler, he reports clinical data indicating that falling asleep at the wheel may be, second only to alcohol, the most common cause of one- and two-car accidents. Recognizing the magnitude of this problem, the United States Senate, in its report accompanying the 1986 appropriations bill for the Department of Transportation, recommended that the National Highway Traffic Safety Administration study the issue of falling asleep behind the wheel.

A Doze of Your Own Medicine?

Fatigue and exhaustion are not the sole causes of sleeping at the wheel. Scientific data indicates that many over-the-counter and prescription medications may cause or contribute to automobile accidents through their effects on operators. According to Dr. Mitler, between 10 and 20 million Americans use sleeping pills. Possibly unknown to the user, the effects of such medication can extend through the next day after they are taken.

A recent article in 'The Harvard Medical School Health Letter' further addressed this issue, noting that while virtually any drug can have dangerous effects on certain individuals, some medications are notorious, both for their widespread use and for their proven potential to cause reactions that might interfere with driving. The article listed three groups of drugs that merited "special attention":

1. **Tranquilizers.** These widely used drugs include such trademarked products as Valium and Librium. They may cause sleepiness and slowed reaction. So-called "major" tranquilizers such as the brand Thorazine can be even more potent. According to the article, it is safe to say that any medication characterized as "psychoactive" or "mind-altering" may produce dangerous side effects on drivers.
2. **Antihistamines.** Antihistamines are a common element in over-the-counter cold remedies, allergy preparations, and decongestants, although their presence may not be apparent unless you carefully read the list of ingredients on the package. According to the article, although it is clear that antihistamines will cause some degree of sleepiness in nearly all cases, the precise effect depends on the type of antihistamine taken and the particular individual taking it.
3. **Pain Medications.** Many so-called "minor" pain-killers obtained by prescription contain codeine, which may cause varying degrees of drowsiness in users. According to the article, stronger pain medications, such as the brand Demerol, typically produce greater degrees of sedation. →

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The article additionally noted that many other medications, including muscle relaxants and blood pressure medicines, can cause reduced alertness, light-headedness, or even dizziness. The bottom line of this review is that drivers should bluntly ask their prescribing physician or dispensing pharmacist whether the medication they are about to take can, and, if so, to what extent will, interfere with their ability to drive.

A State of Mind

Generally speaking, a criminal offense consists of an improper act (e.g., hitting someone) coupled with an improper "mental state" (e.g., intent). But how can it be proven that a driver who fell asleep possessed the requisite mental state?

On February 4, 1984, at approximately 3:35 a.m., Tab Rapp was driving his 1974 Nova west on highway 61, a two-lane road in Jackson, Missouri. Mr. Rapp and his three passengers were returning home from a fraternity party they had attended earlier that evening. While on routine patrol traveling east on highway 61, Sgt. Norman Tuschoff of the Jackson Police Department observed Mr. Rapp's automobile approaching his patrol car. The officer noticed that the right wheels of Mr. Rapp's vehicle were completely off the pavement, such that the vehicle straddled the shoulder of the road. Mr. Rapp's vehicle then left the shoulder and began to cross the center line of the highway. To avoid a collision, the officer had to pull his patrol car over to the right side of the pavement.

After Mr. Rapp's vehicle passed, the officer turned his patrol car around to follow it. As Mr. Rapp's vehicle approached the Goos Creek Bridge, it again veered off the traveled portion of the road, heading directly for the banister of the bridge. Just two car lengths away from the structure, Mr. Rapp's vehicle suddenly veered back into the driving lane, again crossing the center line. After Mr. Rapp's automobile wove over the dividing line a third time, the officer pulled the vehicle over.

At trial, the officer testified that when he informed Mr. Rapp of the reason for the stop, Mr. Rapp commented that he must have been sleeping when his car approached the bridge. Mr. Rapp indicated that he had been alerted when one of the passengers yelled at him to wake up, allowing him to avoid colliding with the structure.

Mr. Rapp was charged with careless and reckless driving. He was found guilty, fined \$150.00, and sentenced to two days in the county jail.

Mr. Rapp chose to appeal. One of the arguments the Mr. Rapp raised in his appeal was that the city had failed to prove that he had possessed the "mental state" required to support a conviction for the offense of careless and reckless driving. Mr. Rapp argued that losing consciousness from the onset of sleep was an involuntary, unintentional act similar

to experiencing a heart attack or a seizure. On October 29, 1985, the Missouri Court of Appeals, Eastern District, in the case of *City of Jackson v. Rapp*, disagreed, and upheld the trial court's decision. According to the Court of Appeals, "defendant's loss of consciousness at the wheel was not the result of an uncontrollable physical malady, but the result of his own carelessness in driving an automobile in a state of voluntarily imposed exhaustion such that he fell asleep at the wheel." Thus, the Court reasoned, Mr. Rapp's conduct constituted careless and reckless driving in violation of the ordinance.

Some courts have essentially presumed the required mental state from the mere fact that a driver fell asleep behind the wheel. In its February 18, 1986 opinion in *Kennedy v. Commonwealth*, the Court of Appeals of Virginia expressed

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its displeasure with those who fall asleep at the wheel in no uncertain terms:

Anyone who falls asleep while operating an automobile on a public road is guilty of negligence exceeding lack of ordinary care. . . . To fall asleep while operating an automobile manifests a disregard by the driver for the consequences of his act and an indifference to life, limb or property sufficient to find the operator guilty of the offense of reckless driving.

It should be noted that the Kennedy court's view that a driver who falls asleep at the wheel will automatically be found to be negligent is one held by only a minority of American courts. The "majority view" is that falling asleep at the wheel, by itself (or "per se" to use lawyer's jargon), does not automatically constitute negligence. Among the additional factors that may support a finding of negligence are the driver's previous lack of sleep, the length of time he had been driving, the presence of warning symptoms of drowsiness such as yawning or napping, the use of intoxicating liquor, or the fact that the driver had engaged in strenuous and tiring activities before taking the wheel. Obviously, a careful driver will also be alert for and responsive to those same factors.

Proving the Act

In some cases, there is a question as to whether the driver did indeed fall asleep. In the Kennedy case, unlike the situation in the Rapp case, the driver did not admit to falling asleep behind the wheel. Nevertheless, the Virginia Court of Appeals ruled that sufficient evidence existed to allow the trial court to infer that Mr. Kennedy's van had run off the left side of the road in question as a result of his having nodded off while driving. First, prior to the 1:00 a.m. accident, Mr. Kennedy and his family had been on the road for eight hours, and he had been driving since dark. At the scene, Mr. Kennedy admitted to a state trooper that he had pulled into a rest stop fifteen minutes before the accident to take a nap because he was sleepy. No skid marks or other evidence of braking were found at the scene. Finally, neither Mr. Kennedy nor his wife could recall just what caused the van to go off the road.

A different result was obtained in the June 5, 1985 decision in *Johnson v. McAdoo*, a personal injury action brought by a passenger against the driver. In *Johnson*, the Court of Appeals of Oregon ruled that the evidence did not conclusively establish whether or not the defendant's falling asleep was the cause of the accident. Thus, the Court upheld as reasonable the jury's finding that the defendant had not been negligent.

The facts indicated that the driver, who had been up since early in the morning, had consumed some beer apparently without serious effect a few hours before taking part in an evening drive from Clackamas to Reno. The defendant be-

gan driving at about midnight, not feeling sleepy and appearing to be fine and driving carefully. Approximately two hours later, the vehicle went off the road and overturned. Just before the accident, the defendant had been driving cautiously at 40 miles per hour, because of frost on the roadway.

The defendant, like Mr. and Mrs. Kennedy, had no certain explanation for the accident. Although he testified at trial that he "guessed" that he had fallen asleep, he had also stated that he had no sensation of sleepiness before the accident. Indeed, the plaintiff herself testified that the defendant did not seem sleepy or tired while he was driving.

The Court of Appeals concluded that "no direct evidence" proved that the accident occurred as a result of the defendant falling asleep. Although such an explanation "could be inferred from the evidence," the same could be said for contrary theories such as that the accident was caused by the frost on the road.

Waking Up to the Problem

Of all the causes of automobile accidents, sleeping at the wheel is no doubt among the most preventable. Hopefully, a greater awareness of the factors contributing to falling asleep while driving will allow drivers to be more responsive to such signals. In part it is a question of mental attitude; despite busy schedules, deadlines, and appointments, on the road it is often better to put off for tomorrow morning what you cannot safely do tonight.

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