5.30E EFFECT OF BLACK OUT (Approved before 1984)

The fact that the automobile operated by defendant left the highway (or crossed the center line of a two way road, etc.) is evidence from which you may infer that the accident was brought about by the negligence of the defendant and calls upon him/her for an explanation of the reason for the unusual course of the vehicle.

Defendant's explanation is that immediately before the occurrence, he/she became unconscious (had a heart attack, *etc.*). He/She contends that he/she was not negligent because in his/her then condition he/she could not control the automobile and the period of unconsciousness came on suddenly without fault on his/her part.

It is not negligence to lose control of an automobile by reason of sudden unconsciousness (heart attack, etc.). A person who causes an accident by reason of such an attack is not held responsible for that which is not of his/her doing and is beyond his/her control.

However, where a person is suffering from a disease or condition which he/she knows, or which a reasonable person in his/her position should know, makes him/her subject to fainting or weak spells or seizures of a kind which may imperil his/her control of the vehicle, it may indicate lack of due care for such a person to drive on a public highway.

Evidence that defendant has previously suffered from a similar attack or attacks may be considered by you in determining whether defendant had such warning that an ordinarily prudent person in his/her position should have foreseen the danger and, in the exercise of reasonable care, should have refrained from operating an automobile or taken other precautions.

Taking into consideration all of the credible evidence with respect to the manner in which defendant operated his/her automobile, with respect to the defendant's alleged blackout (or other seizure) just before the accident, and with respect to defendant's prior knowledge of his/her own condition and his/her susceptibility to blackout, the plaintiff has the burden of establishing by the preponderance of the evidence that the defendant was negligent and that his/her negligence brought about the accident.

Cases:

Res Ipsa Loquitur: *Bevilacqua v. Sutter*, 26 *N.J. Super*. 394, (App. Div. 1953) (crossing highway and striking pole); *Spill v. Stoeckert*, 125 *N.J.L*. 382, (E. & A. 1940) (leaving pavement and overturning); *Smith v. Kirby*, 115 *N.J.L*. 225, (*E. & A.* 1935) (leaving highway and striking tree).

Burden of explanation, not exculpation, is on defendant: *Kahalili v. Rosecliff Realty, Inc*., 26 *N.J*. 595, 66 *A.L.R.* 2*d* 680 (1958).

Sudden unconsciousness is not negligence: *Prosser, Law of Torts*, 2*nd ed*., (1955) *p.* 117 *note* 12; *State v. Shiren*, 15 *N.J. Super*. 440 (App. Div. 1951) (blackout caused by illness negates criminal negligence) Annotation 28 *A.L.R.* 2*d* (1953) at *p*. 35, *et seq*.

Driving after warning of susceptibility to blackout may be negligence: *In re Lewis*, 11 *N.J*. 217 (1953) (Criminal negligence); *Kreis v. Owens*, 38 *N.J. Super*. 148 (App. Div. 1955) (Civil negligence).

Burden of proof: "Unavoidable accident" is not an affirmative defense. It amounts to a denial of negligence. *Cohen v. Kaminetsky*, 36 *N.J*. 276 (1961).

Res Ipsa Loquitur does not shift burden of proof: 65 *C.J.S.* "*Negligence*," Sec. 220 (9) (b); *Bornstein v. Metropolitan Bottling Co*., 26 *N.J*. 263 (1958); *Kahalili v. Rosecliff Realty, Inc*., 26 *N.J*. 595, 66 *A.L.R. 2d* 680 (1958).