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Falling Asleep at the Wheel: Negligence, or Gross Negligence?

Hardly a mariner who has taken the wheel of a vessel can deny that at some point in their career they have fallen asleep, even for the briefest of moments. Many master's or mate's positions require long hours where sleep comes second to getting the job done. Even where sleep is a scheduled part of the job, favourable tides, port schedules, weather and emergencies sometime dictate that the crew skip their sleep. Pacing the wheelhouse, coffee in hand, is many a crewman's prescription for the dreaded head-bob astride the captain's chair.

A recent B.C. Supreme Court case considered whether a master who fell asleep at the wheel of his vessel was guilty of mere negligence, or the more significant, gross negligence. The difference between these two legal-wrongs is profound, with gross negligence possibly resulting in the loss of insurance coverage, exposing the mariner to claims from their employer, awards for punitive damages against them, and even criminal charges. To this end, it is wise for mariners and vessel owners to understand the legal significance of falling asleep at the wheel.

Between midnight and 2:00am in the early morning of August 13, 2003, a small passenger ferry collided with Nose Point on Salt Spring Island B.C. at a speed of 20 knots. When emergency crews arrived and found the engines running, the master, whose torso had deeply deformed the wheel, stated "I think I fell asleep". A guest who had been sleeping in an aft bunk had been thrown forward into a table and was badly injured. The guest, who was a friend of the master along for the ride, sued the owner and master for her injuries and the court considered whether the master and owner could limit their liability for her injuries to the $300,000 limit for passenger injuries set out in the *Canada Shipping Act 2001* and *Athens Passenger Convention* ("*CSA 2001*"). While the court did decide the $300,000 legislated limit was applicable because the vessel was being used for a commercial purpose at the time of the collision, the court had to consider whether the owner and master were disentitled to rely on the limit because of an exception in the *CSA 2001* to limiting liability, being that the master or owner had "*acted recklessly and with knowledge that [the guest's] injuries would probably result*".

The court ultimately rejected the claim that the master had "acted recklessly *and* with knowledge that the [guest's] injuries would probably result", citing in part insufficient evidence of what the master's knowledge was immediately prior to the collision, and allowed the master and owner to limit their liability to $300,000. However, in doing so the court considered the term "recklessly" as it related to falling asleep at the wheel and made the following points that will be important to future cases.

Firstly, the court adopted an earlier interpretation that acting "recklessly" in a marine context means the person was acting with "gross negligence". While simple negligence is acting or failing to act in a manner that a reasonably prudent person would act in the same circumstances, gross negligence is doing so with knowledge that a certain loss would probably result. Put another way, gross negligence is intentionally undertaking an unjustifiable risk. Quoting from a 1949 B.C. Supreme Court judgment involving a motorist falling asleep at the wheel, the court stated:

> *Sleep does not ordinarily fall upon one suddenly and if the defendant found that it was coming upon him he should have stopped and refreshed himself, for nothing is more dangerous than for a driver to fall asleep at the wheel – an accident is almost inevitable.*

In the marine context this means, for example, where a crewman has been up for many hours and takes the wheel understanding he will likely be unable to stay awake for a four hour wheel-turn, and appreciates the vessel may as a result run aground or collide with another vessel, the court may find him grossly negligent. This example may be more common than most would like to admit.

Secondly, the court considered the difference between whether the master had fallen asleep suddenly or gradually, and how this related to whether they were merely negligent, or whether they were grossly negligent. Although the court found there was insufficient evidence at trial to find whether the master had fallen asleep suddenly or gradually, the court did state:

> *The absence of scientific or other evidence [in this particular case] concerning how sleep may have come upon [the master] is important because if it was established that sleep did come on gradually, a stronger case could be made for a finding that [the master] ought to have taken some action to avoid what occurred. If sleep came on suddenly, he would have had no opportunity to do anything in anticipation of falling asleep and his conduct would be less blameworthy, constituting negligence, but not gross negligence.*

Said another way, the court found that where the circumstances are such that the crewman fell asleep gradually (such as doing the head-bob in the captain's chair for an hour before finally falling asleep) he may be grossly negligent, whereas falling asleep quickly or after having had rest earlier that day, would amount to only simple negligence. The distinction is somewhat grey, but nonetheless important, as a finding of gross negligence can have profound effects on a mariner's career. For example, mariners who are employed (as opposed to being contractors) cannot be sued by their employers for their workplace mistakes (such as property damage due to a collision). The exception to this rule, which would allow the employee to be sued, is where the employee was acting maliciously (with intention to harm) *or where they are grossly negligent*. Damages could easily result in the loss of all of the mariner's assets. Also, the same characteristics that make for grossly negligent conduct make for the crime of "criminal negligence" under the Criminal *Code*. For further discussion on employee's liability for workplace accidents, and criminally negligent operation of a vessel, see www.marinelaw.ca/publications. A final consideration is that many insurers will not provide coverage for losses that result from either gross negligence or criminal negligence.

There is no escaping the conclusion that if you fall asleep at the wheel you are negligent. The question is whether, in the circumstances, you are grossly negligent because you took the wheel knowing you were more likely than not to nod-off and an accident would result. This can only be determined on a case-by-case basis. Both crew who take wheel and may be sued by their employers, and owners/management who are responsible for putting them there and may lose their right to limit liability, ought to take this into account when considering work/sleep scheduling. While the limits of liability under the *Canada Shipping Act 2001* and the *Athens Passenger Convention* are often referred to as "unbreakable" because the two-part exception to this limited liability (that the master or owner acted recklessly **and** they knew the injuries would likely result) can be very difficult to prove, cases of falling asleep at the wheel (as opposed to more common accident caused by errors in navigation or machinery failure) provide unique circumstances where these limits are not as unbreakable as some people, particularly insurance companies, might like to believe. In as much as the case discussed above provides a blueprint for prosecuting or defending a claim for gross negligence, every mariner who takes the wheel exhausted after a long day, is well advised to bear it in mind.

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